THE SEPARATION OF POWERS DOCTRINE: A VIABLE CHALLENGE TO THE NEBRASKA HABITUAL CRIMINAL STATUTE?

INTRODUCTION

An habitual criminal statute authorizes a sentencing court to impose a heavier penalty for repetitious criminal conduct. Ordinarily, evidence of prior criminal convictions is presented to a court and upon substantiation of the identity of the individual as a prior offender, the sentencing court is authorized, and in some cases, is required, to impose an additional sentence.

Generally, the constitutionality of imposing an enhanced sentence for repetitious criminal conduct is no longer seriously questioned. Indeed, as early as 1912, Mr. Justice Hughes, writing for a unanimous United States Supreme Court said that the propriety of such punishment was well established in the United States. Specifically, habitual criminal statutes have been held not to subject an offender to double jeopardy or cruel and unusual punishment. Similarly, equal protection and due process arguments have not been favorably received by the courts. The rationale sustaining the statutes' constitutionality focuses on the notion that no new offense is charged. Instead, an allega-

---

1. See Graham v. West Virginia, 224 U.S. 616, 623 (1912); McDonald v. Massachusetts, 180 U.S. 311, 312 (1901).
2. E.g., NEB. REV. STAT. § 29-2221 (Reissue 1975). See note 100 and text accompanying notes 98-103 infra. See also Graham v. West Virginia, 224 U.S. 616, 624-25 (1911).
4. Graham v. West Virginia, 224 U.S. 616 (1912). The Court stated: The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. . . . Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts of similar import in many states. This legislation has uniformly been sustained in the state courts.
5. Id. at 623.
7. See notes 16-54 and accompanying text infra.
tion of prior convictions merely affects the punishment and therefore, the question of guilt of the prior offenses is not re-litigated. Only one issue must be decided with respect to the habitual criminal charge; that is, whether the individual before the court can be identified as the prior offender.

While many constitutional aspects of the habitual criminal statute have been settled, there is one issue that has eluded scrutiny. The unresolved question is whether an habitual criminal statute, which delegates to the prosecutor the discretion to decide whether to file an habitual criminal charge, offends the doctrine of separation of powers as an unconstitutional delegation of legislative power to the executive. Illustrative of the problem is the Nebraska Habitual Criminal Statute. Under this statute, the sentencing court is precluded from considering prior criminal convictions as a factor in sentencing, unless the prosecutor has included an habitual criminal charge with the charge of the substantive offense. The prosecutor's charging decision, however, is not guided by any standards nor criteria within the habitual criminal statute. The delegation of this discretion to the prosecutor to determine what behavior constitutes habitual criminality presents the unresolved issue of whether the Nebraska legislature has violated the separation of powers doctrine by delegating to the prosecutor its legislative responsibility of defining criminal conduct under the habitual criminal statute.

Since neither the United States Supreme Court, nor the Nebraska Supreme Court, have directly addressed this ques-

---

10. Id.
11. Id.
13. The statute provides in pertinent part: "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. . . ." Id. (emphasis added).
14. The statute merely defines habitual criminal without further elaboration. See note 100 infra.
15. For a more detailed explanation of the separation of powers problem, see notes 132-143 and accompanying text infra.
tion, it remains unsettled. A review of past constitutional challenges to habitual criminal statutes, and of the delegation of power issue as it has been decided in other contexts, provides some assistance in examining the constitutionality of the Nebraska Habitual Criminal Statute with respect to the issue of delegation of power.

PAST CHALLENGER

EQUAL PROTECTION

The equal protection clause of the fourteenth amendment to the United States Constitution guarantees that persons similarly situated will receive equal treatment under the law. In Yick Wo v. Hopkins, the United States Supreme Court enunciated the basic requirements for the application of the equal protection doctrine. That case involved an ordinance which, while fair on its face, was allegedly being applied in a discriminatory fashion. Writing for a unanimous Court, Mr. Justice Matthews noted that fundamental rights of the individual can only be secured by just and equal laws that leave no room for personal and arbitrary power. Therefore, the law, although fair on its face, violated equal protection if it was unequally administered so as to discriminate illegally between persons in similar circumstances. Accordingly, the ordinance was struck down as a denial of equal protection.

Further elaboration by the United States Supreme Court of

---

16. After exhaustive research, the author was unable to locate any cases of the United States Supreme Court or of the Nebraska Supreme Court, in which the delegation of power issue was raised or addressed. Cf. Brown v. Parratt, 560 F.2d 303 (8th Cir. 1977) (Heaney, J., concurring) (question of lawfulness of recidivist statutes as they relate to unreviewability of prosecutorial sentencing discretion has not been settled by the United States Supreme Court).

17. U.S. CONST. amend. XIV, § 1. See Ughbanks v. Armstrong, 208 U.S. 481 (1908), where the Court said: "[N]o state can deprive particular persons or classes of persons of equal and impartial justice under the law." Id. at 487.

18. 118 U.S. 356 (1886).

19. Id. at 373-74. The ordinance in question prohibited the operation, without a permit, of laundries in buildings constructed of materials other than brick or stone. A board of supervisors was empowered to issue the permits. After being denied a permit, the petitioner, a native of China, produced evidence that the statute had been discriminatorily applied. Of the 320 laundries in the city, 310 were constructed of wood. Although 240 laundries were Chinese-owned, the petitioner and 200 of his countrymen were denied permits. However, all but one non Chinese application for permits were granted. Id. at 358-59.

20. Id. at 369-70.

21. Id. at 373-74.

22. Id. at 374.
the equal protection test, specifically with an habitual criminal statute, was contained in the relatively recent case of Oyler v. Boles. It was argued that the selective enforcement of the West Virginia Habitual Criminal Statute violated the equal protection clause. There the Court held that mere proof of selective enforcement was not sufficient. Instead, only when that selective enforcement was deliberately based upon an unjustifiable standard, such as race or religion, would the Constitution be offended. In Oyler, the petitioner failed to state that the selective enforcement of the statute was the result of intentional discrimination, and therefore failed to sufficiently allege an equal protection violation.

After Oyler, it was clear that a petitioner seeking to have an habitual criminal statute declared unconstitutional on equal protection grounds had to sustain a heavy burden of proof. Unequal application of the statute would offend equal protection only if a petitioner could prove that it was the result of intentional discrimination. This burden of proof has been very difficult to sustain. According to the Oregon Supreme Court in State v. Hicks, even deliberate disregard of the mandatory terms of the habitual criminal statute was not enough to indicate a violation of equal protection. Among the evidence before that court were instances in other proceedings in which the Oregon Habitual Criminal Statute clearly required that the prosecutor make an investigation to discover whether prior offenses existed. If that investigation had been made and prior offenses had been disclosed, the prosecutor, the court noted, would have been required by the statute to file an habitual criminal charge.

---

24. 368 U.S. 448 at 454-55. The petitioner alleged that the habitual criminal statute had been invoked against only some of the persons who were within its terms. Thus, he argued that its enforcement against him denied him equal protection of the law. Id.
26. 368 U.S. at 456.
27. See State v. Nixon, 10 Wash. App. 355, —, 517 P.2d 212, 215 (1973). "Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard . . . ."
29. Id. at —, 325 P.2d at 802. The statute provided in part: "If at any time within two years after conviction, the district attorney . . . has reason to believe that the convicted person has previously been convicted . . . of any felony, he shall immediately investigate." Or. Rev. Stat. § 168.940 (repealed 1961). (emphasis added). The statute further states that, if upon investigation, previous
glected, through laxity, to comply with these statutory duties.\textsuperscript{30} However, because the petitioner in \textit{Hicks} failed to prove a discriminatory purpose in the administration of the statute, the Oregon court concluded that the laxity in enforcement of the statute did not offend equal protection.\textsuperscript{31}

When the attention of courts has been directed to the language of a statute, rather than to its application, equal protection challenges have been more willingly sustained. An earlier version of the Oregon Habitual Criminal Statute was successfully challenged in this manner in \textit{State v. Cory}.\textsuperscript{32} The statute in question required the prosecutor in cases of violent crimes to file an habitual criminal charge, in addition to the current charge, in all instances where the accused had been previously convicted of a violent crime. In all other cases, however, the decision to file was left to the prosecutor's discretion.\textsuperscript{33} Because the statute did not contain any "yardstick or semblance of classification which would enable the district attorney to determine under what circumstances an information should be filed," the court held that the statute vested unbridled discretion in the prosecutor.\textsuperscript{34} Therefore, he could, conceivably, proceed upon "whim and caprice", a result which is repugnant to the equal protection clause of the fourteenth amendment.\textsuperscript{35} Thus, the Oregon court sustained the facial attack on the statute.

Interestingly enough, support for the \textit{Cory} decision can be

\begin{itemize}
\item \textsuperscript{30} 213 Or. at 5-6, 325 P.2d at 802.
\item \textsuperscript{31} \textit{Id.} at 802-04. The court found that there had been laxity in enforcement: "We do find that there has been laxity in the enforcement of the Habitual Criminal Law but mere laxity is not and cannot be held to be a denial of the equal protection of the law." \textit{Id.} at 802. The court's refusal to find an equal protection violation was due to the petitioner's failure to allege and present evidence of intentional discrimination. Quoting from the trial court opinion, the court stated, "There has been no showing of any collusion between District Attorneys...." \textit{Id.} at 803.
\item \textsuperscript{32} 204 Or. 235, 282 P.2d 1054 (1955).
\item \textsuperscript{33} The statute provided in part: "If, upon investigation, it is determined by competent evidence that the person has been so previously convicted, the district attorney, in cases of crimes involving violence or threat of violence to person, shall, and in other cases, may, immediately file an information...." OR. REV. STAT. § 168.040 (repealed 1961).
\item \textsuperscript{34} 204 Or. at 5-6, 282 P.2d at 1056. The court stated further that "[t]he exercise of an absolute discretion is vested in the district attorney in such a circumstance. In other words, the fate of persons,... who have committed the same acts under the same circumstances and in like situations is determined by the whim and caprice of the district attorney." \textit{Id.}
\item \textsuperscript{35} \textit{Id.}
\end{itemize}
found in *Yick Wo v. Hopkins*,36 wherein the United States Supreme Court discussed with approval *Baltimore v. Radecke*.37 In this Maryland case, a licensing ordinance had been declared void as a violation of equal protection.38 Because the ordinance did not contain "[any] rules by which its impartial execution . . . [could] be secured," the Maryland Supreme Court held that it offended equal protection.39 Its decision, like that of the *Cory* court,40 rested upon the potential for abusive or unequal application of the ordinance which existed due to the lack of standards within it.41 The United States Supreme Court in *Yick Wo* discussed the Maryland court’s rationale, concluding that the Justices were, unlike the *Radecke* court, not obliged “to reason from the probable to the actual”. The *Yick Wo* ordinance had actually been applied unequally. Thus, while implicitly sanctioning the reasoning and result in *Radecke*, the Supreme Court was able to rest its invalidation of the *Yick Wo* ordinance on the basis of its actual operation.

**Due Process**

Notice and the opportunity to be heard are the fundamental requirements of fourteenth amendment procedural due process:42 Most importantly, the opportunity to be heard must be granted at a meaningful time in a meaningful manner.43 “Opportunity to be heard” was construed in the habitual criminal context by the United States Supreme Court in *Graham v. West Virginia*.44 The Court held that the question of guilt or validity of the prior convictions should not be relitigated.45 It is sufficient to satisfy due process if there is an opportunity for the accused to meet the allegation of the existence of the former conviction.46

37. 49 Md. 217, 231 (1878).
38. Id. at 230-31.
39. Id. at 230. See text accompanying notes 32-33 supra.
40. 49 Md. at 230-31.
41. 118 U.S. at 373. “It becomes unnecessary to suggest to or comment upon the injustice capable of being wrought under cover of such a power.” Id.
42. U.S. Const. amend. XIV, § 1.
44. 224 U.S. 616 (1912).
45. Id. at 624-25.
46. Id. at 625. The Court noted:
Full opportunity was accorded to the prisoner to meet the allegation of former conviction. Plainly, the statute contemplated a valid conviction which had not been set aside or the consequences of which had not been removed by absolute pardon. No question as to this can be raised here, for the prisoner in no way sought to control the validity or unimpaired
In a general context, a statute fails to give adequate notice if it does not give an individual fair warning that his conduct is forbidden, or if it fails to prescribe standards to govern the exercise of discretion by an enforcing agency. The latter flaw encourages arbitrary and erratic enforcement of the law contrary to the notions of due process. Notice, according to Mr. Justice Clark's majority opinion, in *Oyler v. Boles*, requires that the defendant receive reasonable notice of the habitual criminal charge. However, the defendant is not entitled to receive such notice prior to the trial on the merits.

Substantive due process protects an individual from unequal and arbitrary exercises of power. Development of this test has paralleled that of equal protection. In addition to violating the equal protection doctrine, the arbitrary and personal exercise of power violates due process. However, as in equal protection challenges, an allegation of selective enforcement alone is not enough. Such enforcement must be the result of willful and intentional discrimination or capriciousness. Thus, it is clear that a petitioner's burden under due process is almost identical to that under equal protection. Indeed, the two clauses are often discussed together with reference to prosecutorial discretion.

character of the former judgments, but pleaded that he was not the person who had thus been convicted. On this issue he had due hearing before a jury.

Id.
48. *Id.* at 170.
49. *Id.* at 170-71. The Court noted:

Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."

*Id.* at 170.

50. 368 U.S. 448 (1962) See notes 21-23 and accompanying text *supra*.
51. 368 U.S. at 452.
53. *Schlesinger v. Ballard*, 419 U.S. 498, 507-08 (1975). Although the case involved a due process challenge to a statute, the Court's analysis was based on the equal protection standard of *Reed v. Reed*, 404 U.S. 71 (1971). In a footnote to his majority opinion, Mr. Justice Stewart reiterated that "[a]lthough it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is "so unjustifiable as to be violative of due process.""

*Id.* at 500 n.3.
55. *Id*.
56. *See, e.g.*, *Newman v. United States*, 382 F.2d 479, 480-81 (D.C. Cir. 1967),
SEPARATION AND DELEGATION OF POWERS

The separation of the powers of government among three distinct branches "preclude[s] a commingling of . . . essentially different powers of government in the same hands."\(^57\) Congress is therefore prohibited from abdicating or delegating its essential functions to other branches.\(^58\) However, it may delegate some traditional legislative functions to another branch, if it limits the exercise of that power and establishes standards to guide its execution:

The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.\(^59\)

Because it would be impossible for Congress to anticipate every contingency, the exercise of some discretion by the enforcing agency is unavoidable.\(^60\) It is sufficient then "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."\(^61\) Thus, a statute which lacks standards and limits on the exercise of discretion may offend separation of powers as an unlawful delegation of power.

A congressional delegation of power to the President of the

---

57. O’Donoghue v. United States, 289 U.S. 516, 530 (1933) (citing Springer v. Philippine Islands, 277 U.S. 189, 201-02 (1928)): "The Constitution, in distributing the powers of government, creates three distinct and separate departments. . . . This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital . . . namely, to preclude a commingling of these essentially different powers in same hands." 289 U.S. at 530.


59. Id. at 421 (emphasis added).

60. See American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946), where the Court said:

The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules . . . .

Id.

61. Id.
United States was reviewed by the United States Supreme Court in *Panama Refining Co. v. Ryan*. There, section 9(c) of the National Industrial Relief Act was declared to be an unconstitutional delegation of legislative power. The statute did not indicate in what circumstances the President was to exercise his discretion. Accordingly, the Court held that the separation of powers doctrine had been violated, because "[s]o far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to [exercise his discretion] . . . as he may see fit." Under that statute, the President's ability to exercise discretion without making any findings constituted a delegation of legislative power.

**Prosecutorial Discretion**

While the courts have been willing to review the discretion exercised by executive agents, historically, they have been reluctant to conduct a like examination of prosecutorial discretion. One commentator concludes that this reluctance is the result of a deeply rooted belief that prosecutorial discretion is necessary in our criminal justice system. Indeed, it is generally recognized that some discretion is inevitable because of the limited resources of our criminal justice system and the desirability of maintaining flexibility. Furthermore, it has been

---

63. Id. at 433. Section 9(c) provided in pertinent part: "The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount to be produced or withdrawn from storage by any state law . . . ." 15 U.S.C. § 709(c) (1933).
64. 293 U.S. at 415. "Section 9(c) does not state whether, or in what circumstances, or under what conditions, the President is to [act]. . . . It establishes no criterion to guide the President's course." Id.
65. Id.
66. Id. at 431-32.
69. Id. at 192.
71. See Breitel, *Control in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427, 435 (1960). Discretion, according to Breitel, is exercised at every stage of a criminal matter from the arrest decision to the parole decision. The prosecutor's
noted that the powers and rights of prosecutors are derived from common law and have not been judicially or legislatively limited.\textsuperscript{72} As one judge has noted, many courts did not believe, therefore, that it was within their power to review exercises of prosecutorial discretion.\textsuperscript{73} The safeguard, upon which they relied to prevent abuse of such broad discretion, was the assumption that the prosecutor would exercise his discretionary powers judiciously and honestly.\textsuperscript{74} Criminal prosecution or removal from office are the only available avenues to remedy an abuse of prosecutorial discretion.\textsuperscript{75}

Advocates for review of prosecutorial discretion do not decry all exercise of discretion; they concede the desirability of a flexible criminal system which can respond sensitively to varying situations.\textsuperscript{76} It is uncontrolled discretion which is objectionable. Discretion is initially exercised when he decides whether or not to file a charge. If a grand jury has indicted an individual, the prosecutor has discretion to prosecute the indictment, accept a lesser plea, or not to prosecute as to some or all of the counts. Thus, "[t]here is more recognizable discretion in the field of crime control... than in any other field in which law regulates conduct." Breitel concludes, however, that some discretion is inevitable in the field of crime control because it is an administrative problem and "[t]he core of administration is flexible discretion." Moreover, some discretion is desirable because it permits "the reason of the law [to operate]... sensitively in the 'clutch of circumstance.'" \textit{Id.} at 428, 435.

\textsuperscript{72} See United States v. Brokaw, 60 F. Supp. 100, 102 (S.D. Ill. 1945).


\textsuperscript{74} 382 F.2d at 482. See People v. Eboli, 34 N.Y. 2d 281, 313 N.E.2d 746, 357 N.Y.S.2d 435 (1974). That court stated: "[T]he irreducible fact is that society is presently relying upon the good judgment of its prosecuting attorneys to charge crimes fairly." \textit{Id.} at —. 313 N.E.2d at 750, 357 N.Y.S.2d at 441. \textit{Contra}, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935): "The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good." 293 U.S. at 420.

For an extreme example of judicial reluctance to review exercises of prosecutorial discretion, see United States v. Woody, 2 F.2d 262 (D. Mont. 1924). The prosecutor moved to dismiss embezzlement charges against several locally prominent individuals. His reasons for seeking dismissal were that the money had been paid back and, more significantly, that his prosecution of the case would spoil his career. While the trial court labeled such disparity in treatment a "pernicious evil, and abhorrent to justice", it nevertheless "reluctantly" granted the motion to dismiss. It felt bound to defer to the prosecutor's absolute power in prosecutorial matters. \textit{Id.} at 262-63.

\textsuperscript{75} United States v. Brokaw, 60 F. Supp. 100 (S.D. Ill. 1945). The court said that "[i]f he [the prosecutor] from a corrupt motive prosecutes or refuses to prosecute, he is subject to removal from office and criminal prosecution, and that is the only remedy given to this court." \textit{Id.} at 103.

\textsuperscript{76} \textit{See, e.g.}, Breitel, \textit{supra} note 72.
SEPARATION OF POWERS

able. Mr. Justice Brennan described uncontrolled discretion as "the law of tyrants" because it is exercised differently by different people and is influenced by emotions. "In the best," he concluded, "it is oftentimes caprice: In the worst it is every vice, folly, and passion, to which human nature is liable." It has been suggested that adequate controls may help to assure soundness and honesty in the exercise of discretion.

Judicial review and control of prosecutorial discretion were implicitly sanctioned by the United States Supreme Court in *Hurtado v. California*. Mr. Justice Matthews, writing for the majority, addressed the meaning of "due process of law" and concluded that arbitrary power is not the law. Therefore, limitations on the exercise of discretionary power are "essential to the preservation of public and private rights. . . ." Enforcement of limitations, he concluded, lies within the power of the judiciary.

Five United States Supreme Court Justices have, at one time or another, expressly sanctioned judicial review of prosecutorial discretion. A powerful argument for limitation of prosecutorial discretion was presented by Mr. Justice Black in his dissenting opinion in *Berra v. United States*. The Court had reviewed federal legislation which delegated the discretion

---

77. *Id.*
79. 402 U.S. at 285.
81. 110 U.S. 516 (1884).
82. *Id.* at 536. He noted that "[a]rbitrary power . . . is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude." *Id.*
83. *Id.*
84. *Id.* Mr. Justice Matthews observed:
The enforcement of these limitations by judicial process is the device of self governing communities to protect the rights of individuals and minorities . . . as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

*Id.* *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (statute delegating power to the president failed to provide adequate limitations on its exercise notwithstanding the petitioner's argument that an assumption of the president's good faith exercise of power could overcome constitutional objections).
86. 351 U.S. 131, 135-40 (1956).
to the prosecutor to choose between two equally applicable statutes with vastly different consequences.\textsuperscript{87} The majority merely decided the case on the narrow grounds of the propriety of the jury instructions.\textsuperscript{88} Mr. Justice Black, on the other hand, felt that the majority had not addressed a more significant issue in the case. He was disturbed by the discretion given to the prosecutor.\textsuperscript{89} Under our judicial system, he observed, the judge and jury determine how much punishment is warranted.\textsuperscript{90} Therefore, the power of the prosecutor to determine under identical circumstances which conduct would merit a felony charge and which a misdemeanor charge raised serious constitutional questions.\textsuperscript{91} The arbitrariness that could be exercised by the prosecutor under this statute destroyed, he believed, the great protection of individual rights that lies in the impartial administration of the law.\textsuperscript{92} Mr. Justice Black's argument has not been well received by some courts\textsuperscript{93} and was, in fact, flatly rejected by the Fifth Circuit Court of Appeals.\textsuperscript{94}

Prosecutorial discretion in habitual criminal statutes has been very rarely addressed in the courts.\textsuperscript{95} On two occasions, courts have been presented with arguments alleging that prosecutorial discretion under an habitual criminal type of statute

\begin{itemize}
\item \textsuperscript{87} Id. at 139 (Black, J., dissenting).
\item \textsuperscript{88} Id. at 135.
\item \textsuperscript{89} Id. at 137-38 (Black, J., dissenting).
\item \textsuperscript{90} Id. at 140.
\item \textsuperscript{91} Mr. Justice Black continued:
\begin{quote}
The Government's whole argument rests on the stark premise that Congress has left to the district attorney the power to say whether the judge and jury must punish identical conduct as a felony or as a misdemeanor.
\end{quote}
\begin{quote}
A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney. . . .
\end{quote}
\begin{quote}
A congressional delegation of such vast power to the prosecuting department would raise serious constitutional questions. . . .
\end{quote}
\textsuperscript{Id. at 139-40 (footnotes omitted).}
\item \textsuperscript{92} Id.
\item \textsuperscript{94} United States v. Escobar, 410 F.2d 748, 749 (5th Cir. 1969); Black v. United States, 405 F.2d 187, 188 (5th Cir. 1968), cert. denied, 394 U.S. 990 (1969). In Black, the Court stated that "[t]he argument for reversal largely rests upon the dissent of Mr. Justice Black . . . in Berra v. United States . . . We decline to be beguiled by an appealing argument . . . ." \textsuperscript{Id. at 188.}
\item \textsuperscript{95} People v. Birmingham, 13 Mich. App. 402, --, 164 N.W.2d 561, 564 (1968).
was an unconstitutional delegation of power. Not only was this contention rejected by both courts, but it was also dismissed without discussion by one court as being "so patently untenable as to merit no further discussion." Furthermore, it was rejected without discussion by the second court which relied upon the first decision. Thus, there is very little language from which principles or rules of law can be drawn in this specific area.

NEBRASKA LAW

Enacted in 1921, the Nebraska Habitual Criminal Statute requires a sentencing court to impose an enhanced penalty upon a prior offender. It does not define a distinct crime but merely justifies the imposition of a heavier penalty for repetitious criminal conduct. In order for the sentencing court to be able to address the question of prior offenses, an habitual crimi-

96. See People v. Hanke, 389 Ill. 602, 605, 60 N.E.2d 395, 397 (1945) (the petitioner argued that the power vested in the state's attorney to determine in his discretion whether an individual would be charged as an habitual criminal was unconstitutional); People v. Mock Don Yuen, 67 Cal. App. 597, 227 P. 948, 949 (1924) (it was argued that the discretion delegated to the prosecutor to charge or not to charge as an habitual criminal was an unconstitutional delegation of legislative power).

98. 389 Ill. at 605, 60 N.E.2d at 397.
100. NEB. REV. STAT. § 29-2221 (reissue 1975) provides in part:
(1) Whoever has been twice convicted of a 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.
(2) 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 to whether such person has been previously convicted of prior felonies. The court shall fix a time for the hearing and notice thereof shall be given to the accused at least three days prior thereto. At the hearing, if the court shall find from the evidence submitted that the accused has been convicted two or more times of felonies and sentences imposed therefore by the courts of this or any other state, or by the United States, the court shall sentence such person so convicted as an habitual criminal. (emphasis added).
nal charge must be included in the indictment or information charging the substantive offense. Therefore, unless the prosecutor charges an individual as an habitual criminal, that individual does not risk the imposition of an increased sentence under the Habitual Criminal Statute. The prosecutor's decision is discretionary.

Like the Oregon statute which was invalidated in State v. Cory, the Nebraska statute provides no standards, criteria, or guidelines to guide the prosecutor's charging decision. He has neither the duty to investigate nor to determine whether the accused has been convicted of other felonies, nor does he have a duty to file the habitual criminal charge when former offenses are brought to his attention. The similar provisions of the Oregon statute in Cory were held to offend the equal protection clause of the fourteenth amendment. However, Nebraska's habitual criminal statute has withstood numerous constitutional attacks, including equal protection and due process, cruel and unusual punishment, and double jeopardy challenges. Whether the statutory language constitutes an unconstitutional delegation to the prosecutor of the legislature's power of defining criminal offenses is an issue which has not been decided by the Nebraska Supreme Court. Thus, while it remains to be

103. State v. Martin, 190 Neb. 212, 215, 206 N.W.2d 856, 858 (1973); State v. Reed, 187 Neb. 792, 793, 194 N.W.2d 179, 180 (1972). See State v. Gamron, 186 Neb. 249, 251, 182 N.W.2d 425, 426 (1970), wherein the court impliedly acknowledged the discretionary nature of the prosecutor's charging decision under the statute. "It is clear that defendant was within the scope of the habitual criminal statute although he was not so charged."
104. See notes 31-34 and accompanying text supra.
106. Id.
107. See note 34 supra.
108. See notes 113-131 and accompanying text infra.
109. State v. Graham, 192 Neb. 196, 219 N.W.2d 723 (1974). It was stated that "[t]he fact that the county attorney is permitted a certain discretion and does not use the habitual criminal act in every instance does not make the act itself or its application unconstitutional as imposing cruel and unusual punishment." Id. at 200, 219 N.W.2d at 725. See also State v. Goodloe, 197 Neb. 632, 637, 250 N.W.2d 606, 610-11 (1977); State v. Martin, 190 Neb. 212, 216, 206 N.W.2d 856, 858 (1973).
110. See State v. Goodloe, 197 Neb. 632, 637, 250 N.W.2d 606, 611 (1977), in which it was stated: "Sentencing the defendant under the habitual criminal statute does not subject the defendant to double jeopardy. The defendant is not being punished again for past offenses. . . . The previous convictions, however, operated to increase the penalty for the last offense." Id. at 637, 250 N.W.2d at 611. See also Poppe v. State, 155 Neb. 527, 535, 52 N.W.2d 422, 426-27 (1952).
111. Exhaustive research by the author failed to disclose any cases in which the Nebraska Supreme Court has addressed itself to the delegation of power in the Nebraska Habitual Criminal Statute.
seen whether the Nebraska statute could withstand separation of powers scrutiny, similar delegations of power to other branches have been reviewed and some standards established.

**EQUAL PROTECTION AND DUE PROCESS**

Generally, equal protection and due process tests, as developed in Nebraska case law, tend to overlap considerably in both language and content. Some standards, however, clearly emerge. Nebraska case law, in accord with the United States Supreme Court, has held that the right of equal protection prohibits the exercise of intentional and arbitrary discrimination by the state. It may also be offended by the express terms of the statute, or by improper execution of statutes. Similarly, the right to due process, according to Nebraska courts, clearly requires that notice and an opportunity to be heard precede any taking of life, liberty, or property by the state.

In an early Nebraska case, both due process and equal protection were discussed with reference to a statute which granted discretionary power to the executive. The statute granted authority to the Department of Trade and Commerce to regulate the transaction of business in Nebraska by permit, and a Minnesota corporation was denied a permit to trade in Nebraska. The corporation then brought an action charging that the statute violated the fourteenth amendment to the United States Constitution and section 3, article 1 of the Nebraska Constitution. It contended that the statute vested unregulated, undefined, and absolute discretion in the board, with no standards or tests to guide the board’s decisions. While the Nebraska Supreme Court concluded that the statute did contain adequate standards, it agreed that a statute as described by the petitioner would, on the authority of the United States Supreme Court decision in *Yick Wo v. Hopkins*, violate equal protection and due process.

---

112. See notes 16-24 and accompanying text supra.
114. Id. at 435, 243 N.W.2d at 763.
117. Id. at 817, 205 N.W. at 294.
118. Id.
119. Id. at 818-19, 205 N.W. at 295.
120. See notes 16-21 and accompanying text supra.
121. 113 Neb. at 819, 205 N.W. at 295.
Further clarification of the equal protection test, with regard to the legislative delegation of discretionary power, came in Knoefler Honey Farms v. County of Sherman. In that case a revenue statute had been enforced by officials of Sherman County, Nebraska, against only one taxpayer in the county. This unequal application of the statute, the court held, was arbitrary and discriminatory because it had not been applied against other taxpayers owning property of the same class. Although Oyler v. Boles was not cited by the court, intentional discrimination was required as an element of the Nebraska Supreme Court’s equal protection analysis.

Equal protection and due process challenges to the Nebraska Habitual Criminal Statute have also been uniformly rejected. Unfortunately, most of the opinions failed to discuss either issue in detail. The Nebraska Supreme Court has apparently preferred to rely on the decisions of the Supreme Court of the United States without specifically applying the principles established in those cases to the Nebraska statute.

The attention of the Nebraska Supreme Court was directed to the fourteenth amendment in Poppe v. State and Rains v. State. In both cases, the court dismissed the equal protection challenges to the Nebraska Habitual Criminal Statute without discussion. In Rains, the court followed its discussion of double jeopardy and cruel and unusual punishment with this terse conclusion: “It is . . . clear that the habitual criminal law does not contravene other sections of the [Nebraska] Constitution. . . . Neither does it infringe upon any section of the Constitution of the United States to which our attention has been directed.” In Poppe, the court cited the United States Supreme Court case of Graham v. West Virginia and stated simply that all questions regarding the constitutionality of the statute which had been raised had been decided adversely to the petitioner by the United States Supreme Court.

---

123. Id. at 439, 243 N.W.2d at 763.
124. Id. at 440, 243 N.W.2d at 763.
125. See notes 22-25 and accompanying text supra.
126. 196 Neb. at 439, 243 N.W.2d at 763. “The purpose . . . of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination. . . .” Id. (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923)).
127. See notes 127-131 and accompanying text infra.
128. 155 Neb. 527, 52 N.W.2d 422 (1952).
129. 142 Neb. 284, 5 N.W.2d 887 (1942).
130. Id. at 288-89, 5 N.W.2d at 890.
131. 224 U.S. 616 (1912). See notes 4-6 and accompanying text supra.
Thus, in the absence of amplification of due process and equal protection challenges to the Nebraska statute, reference must be made to the uses developed in the United States Supreme Court. In any event, it seems clear that the posture of the Nebraska Supreme Court is that such questions are settled and no longer open to debate.

SEPARATION OF POWERS

Article II, section I of the Nebraska Constitution divides the power of the Nebraska government among the legislative, judicial, and executive departments. That section absolutely prohibits the exercise of executive, legislative, and judicial powers by the same individual. Therefore, the Nebraska legislature may not delegate to the executive or judicial departments, duties which belong to the legislature. However, this proscription is not absolute. Indeed, it is constitutionally proper for the legislature to delegate discretionary power to another branch of government, provided that the delegation imposes limitations, standards, and criteria to guide the exercise of the delegated discretion. As stated by the Nebraska Supreme Court, "the granting of administrative discretion is not an unconstitutional delegation of a legislative function, where adequate standards to guide the exercise of such discretion are provided for by the statute authorizing it." Furthermore, the expressed legislative purpose and the prescribed standards for administration will limit and guide the exercise of the power granted to the administrative agency.

The power to define crimes and prescribe punishment is vested in the legislature. Although it may not delegate this function to another branch, the method and manner of enforcing the law may be left to the discretion of the administrative agency. An act, which vests in an agency the discretion to

133. NEB. CONST. art. II, § 1 provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Id.
135. 132 Neb. at 121, 271 N.W. at 356.
139. Bartlett v. State Real Estate Comm'n, 188 Neb. 828, 831, 199 N.W.2d 709,
determine what is the law, delegates too much legislative authority; likewise, the discretion of an agency to apply a statute to one person and refuse its application to another in like circumstances is void as a delegation of legislative power. Unlike those courts which have professed their reliance upon the good faith exercise of discretion by administrative officers, Nebraska has held that this presumption cannot sustain a delegation of power which lacks rules of limitation. Adequate limitation of discretionary power occurs when the legislature defines the crime, prescribes the punishment, and provides standards to guide administrative officials in its enforcement.

The legislature's failure to include adequate standards to guide the exercise of administrative discretion led the Nebraska Supreme Court to declare a statute unconstitutional in Smithberger v. Banning. An emergency relief measure, enacted by the Nebraska Legislature, created a state assistance committee to distribute emergency funds to the needy. Because the legislation included no limitations, standards, or criteria to guide the committee's allocation of funds, the Nebraska Legislature had, according to the Nebraska Supreme Court, abdicated its law-making function. The court found that a grant of such unrea-
strained discretion constituted an impermissible delegation of legislative power.\textsuperscript{147}

Delegation of power to the prosecutor in the Nebraska Habitual Criminal Statute was examined and validated, under a due process challenge, by the United States District Court for the District of Nebraska and upheld by the Eighth Circuit Court of Appeals in Martin v. Parratt.\textsuperscript{148} The district court rejected the petitioner's argument that the statute was void because it lacked sufficient standards or "adequate procedural safeguards."\textsuperscript{149}

In reviewing a cruel and unusual punishment challenge, the Nebraska Supreme Court only held that the Habitual Criminal Statute vested discretion in the prosecutor.\textsuperscript{150} However the federal district court looked to a Nebraska statute, which provided for judicial review of a prosecutor's charging decision not to file an information. It interpreted that statute to encompass the prosecutor's charging decision under the Habitual Criminal Statute.\textsuperscript{151} Thus, it held the prosecutor's discretion was reviewable and therefore not unbridled.\textsuperscript{152} Affirming the lower federal court, the Eighth Circuit Court of Appeals rejected the fourteenth amendment challenge.\textsuperscript{153}

The Nebraska Supreme Court's interpretation of this re-should be made. . . . This constitutes a delegation of legislative function to an administrative board.

\textit{Id.} at 660, 262 N.W. at 497.
\textsuperscript{147} \textit{Id.} at 660, 665-66, 262 N.W. at 497, 500.
\textsuperscript{150} 190 Neb. 212, 215-16, 206 N.W.2d 856, 858 (1973).
\textsuperscript{151} 412 F. Supp. at 549.
\textsuperscript{152} \textit{Id.} The statute interpreted by the court to provide it with the power to review the prosecutor's charging decisions under the Nebraska Habitual Criminal Statute was Neb. Rev. Stat. § 29-1606. It provides \textit{inter alia}:

It shall be the duty of the county attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case on preliminary examination, as provided by law, touching the commission of any offense wherein the offender shall be committed to jail, or become recognized or held to bail. If the prosecuting attorney shall determine in \textit{any such case} that an information ought not to be filed, he shall make, subscribe, and file with the clerk of the court a statement in writing, containing his reasons, in fact and in law, for not filing an information in such case; . . . provided, in such case such court may examine the statement, together with the evidence filed in the case, and if, upon such examination, the court shall not be satisfied with the statement, the county attorney shall be directed by the court to file the proper information and bring the case to trial. (emphasis added).

\textsuperscript{153} 549 F.2d 50, 52 (8th Cir. 1977). The court stated that "[a]t the outset, we note that the prosecutor's discretion in Nebraska is not unreviewable, despite petitioner's assertions to the contrary. See Neb. Rev. Stat. § 29-1606." \textit{Id.}
view statute, however, has been more conservative. The court has interpreted it simply to require judicial review of a prosecutorial decision to dismiss an information.\textsuperscript{154} In addition, the review statute explicitly refers to "offenses."\textsuperscript{155} It has been well-established that habitual criminality does not constitute an offense, but is rather a "state" affecting punishment of the substantive offense.\textsuperscript{156} This would seem to remove the Nebraska Habitual Criminal Statute from the purview of required judicial review despite interpretations to the contrary.\textsuperscript{157} Thus, the constitutionality of the legislative delegation of power to the prosecutor in the Habitual Criminal Statute remains unsettled.

**ANALYSIS**

It is clear that the Nebraska Habitual Criminal Statute is virtually immune from constitutional attack based upon the equal protection and due process clauses of the United States and Nebraska Constitutions. However, it is not clear that the statute in its present form satisfies the mandates of separation of powers. The Nebraska Legislature may delegate its duties to another branch of government if it limits the power delegated to an expressed legislative purpose and contains sufficient standards to guide its exercise.\textsuperscript{158}

The definition of criminal offenses is a legislative function which may not be delegated to another branch of government.\textsuperscript{159} Indeed, enactment of an habitual criminal statute falls well within the ambit of the legislature.\textsuperscript{160} The Nebraska Habitual Criminal Statute, however, lacks standards and criteria to limit the discretion which it delegates to the prosecutor. Therefore, it is the prosecutor who determines what behavior and


\textsuperscript{155} See Neb. Rev. Stat. § 29-1606 at note 151 supra.


\textsuperscript{157} See Brown v. Parratt, 560 F.2d 303 (8th Cir. 1977). (Heaney, J., concurring). Judge Heaney stated that it was his opinion that Martin v. Parratt had been wrongly decided.

\textsuperscript{158} See text accompanying notes 134-47 supra.

\textsuperscript{159} Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 782-83, 104 N.W.2d 227, 231 (1960).

\textsuperscript{160} Davis v. O'Grady, 137 Neb. 708, 291 N.W. 82 (1940).
circumstances will trigger imposition of the statute. There is nothing in the language of the statute itself to prevent a prosecutor from treating identical behavior in identical situations entirely differently. A delegation of such vast power was condemned by the United States Supreme Court in *Panama Refining Co. v. Ryan.*

In *Martin v. Parratt*, the United States District Court in the District of Nebraska, and the Eighth Circuit Court of Appeals found that the Nebraska statutes contained a mechanism for judicial review. Extension of the review statute by the Nebraska Supreme Court to prosecutorial decisions under the Nebraska Habitual Criminal Statute would not, in any event, resolve the delegation of power problem. As long as the statute lacks sufficient limitation of the power it delegates, it will constitute an impermissible delegation of power and a violation of separation of powers regardless of the branch to which the power is delegated.

**CONCLUSION**

While the Nebraska Habitual Criminal Statute has withstood many constitutional challenges, the precise issue of the constitutionality of the legislative delegation of power therein has not been decided. Decisions by the United States Supreme Court and the Supreme Court of Nebraska have established constitutional requirements for delegations of legislative power to other branches. Such delegations must contain standards and criteria which limit the power granted in accordance with an expressed legislative purpose. The Nebraska Habitual Criminal Statute does not contain such limitations on the power it delegates to the prosecutor. It therefore does not satisfy the requirements established as a condition of the constitutionality of a delegated legislative power.

Mary M. McHugh—'79

161. See notes 60-64 and accompanying text *supra.*
162. See notes 147-51 and accompanying text *supra.*