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THREE STRIKES LEGISLATION AND
A SINKING FUND PROPOSAL

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Over the last two years, roughly twenty state legislatures have enacted into sentencing law a rule of baseball: "Three strikes and you're out."¹ Another group of states are actively considering similar legislation.² The new statutes imprison for life offenders convicted of a third felony of a designated type, usually a violent or "serious" felony.

States administering three strikes laws will ultimately need to build more prisons and operate extra prison beds, requiring more dollars from the state budget. But the remoteness in time of the costs of Three Strikes laws gives legislators a powerful reason to discount those costs. In most places, Three Strikes legislation will affect state corrections budgets only after many years have passed. The long time frame makes the cost seem politically irrelevant and easy to ignore.

Those who hope that legislatures will appreciate the full impact of their choices must search for a way to prevent them from ignoring future costs. This article suggests that states create a long-term savings fund in budgets devoted to prison construction and operation. The fund would be analogous to the "sinking funds" that state and local governments use to retire public debt from bond issues. The principle should be that whenever a legislature commits itself to a punishment policy with a budgetary impact that is certain but distant, it should simultaneously create a long-term plan for paying for the needed resources. The financial plan should reach beyond the typical budget cycle to prepare for the effects of today's choices on tomorrow's taxpayers.

1. Three Strikes Proposals Frame Issues to De-emphasize Prison Costs

Resource constraints have become a powerful force in setting state sentencing policy over the last ten years. Major restructuring of state sentencing laws during the late '70s and early '80s attempted to control the growth of corrections budgets, but that was only one goal among several, including, most prominently, the elimination of disparate sentences.³ Since the mid-'80s, the goal of curbing the growth of prison spending has come to dominate state sentencing reform movements.⁴

The same has been true at times during the past two years' debates on Three Strikes bills. The costs of prison construction and operation have convinced legislators in some states to abandon the Three Strikes concept, and in a few others to scale back the proposals.

Most sentencing commissions have opposed the enactment of Three Strikes laws or have tried to convince the legislature to make the long-term fiscal impact part of the political discussion. These efforts have met with mixed success. In some states, such as Minnesota, general assemblies have not yet adopted Three Strikes proposals.⁵ In part, this is because of cost projections and alternative guideline amendments that commissions submitted. In a few states the intervention of sentencing commissions caused the legislature to modify the breadth of Three Strikes laws.

Overall, commissions cannot do much more than provide data. Their projections may carry weight with the legislature if they have established a good track record of forecasting resource needs.⁶ But the terms of the political debate over Three Strikes laws have made it difficult for lawmakers to respond to what they learn about corrections costs.

Like a mandatory minimum penalty statute, the rhetorical appeal of a Three Strikes law is its absolute clarity. The maximum number of felonies necessary to trigger the extra punishment is seldom up for debate. "Four strikes" would never do.⁷ The same is true for the amount of extra punishment. Once an offender has accumulated the third strike, the rhetoric demands an "out." The offender must serve a life term; it is deflating, and politically foolhardy, to speak of adding only a few years to a prison term, or worse yet, to speak of "increasing the offense level by two levels."⁸ Finally, the rhetoric of Three Strikes makes it difficult for lawmakers to give judges discretion over whether to impose the enhanced penalty.⁹ Surely an umpire has no choice but to call the batter out after he is caught swinging three times.

2. Several Variables Are Available to Reduce the Scope of Three Strikes Laws

If legislators hope to refine a Three Strikes law to match a chosen set of prison cost estimates, they have a few variables with which to work. Consistent with the rhetoric, drafters might experiment with the time relationship between the three relevant felonies. For instance, a statute might include *any* three convictions, or it might target only those felonies committed as part of different "transactions."¹⁰ A few current statutes count felonies as separate strikes only if they resulted in separate terms of imprisonment.¹¹ For even narrower coverage, the statute might count as the second and third strikes only those felonies committed *after conviction* for each previous strike felony.¹²

Drafters might also give the prosecutor the choice of whether to file a separate charge to invoke the Three Strikes penalty.¹³ Unfortunately, because the charging habits of prosecutors are difficult to predict,¹⁴ this mechanism is not very helpful when trying to match a bill with a selected level of prison costs.

The statutory variable that will most often

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determine the scope and cost of a Three Strikes bill will be the list of felonies that count as the first, second and third strikes. For instance, the large number of felonies qualifying as "strikes" under the California statute make it the most sweeping Three Strikes law in the nation.¹⁵ California's law counts any felony as a third strike, while the first and second must be a "serious" or "violent" felony.¹⁶ Most legislatures limit all three strikes to "serious" or "violent" felonies, but these parameters still leave choices. Perhaps the most important is whether the statute should cover or exclude burglaries or drug trafficking offenses,¹⁷ because such a large number of felony cases involve these charges.¹⁸

A legislator who considers this last option for reducing the scope of a three strikes bill stands in an uncomfortable position. He or she might be perceived to say that burglary or drug trafficking cases are not serious. There are, of course, eloquent victims who can testify that the crimes are sometimes very serious and violent. A legislator facing this predicament would need an immediate and irrefutable reason for refusing to increase penalties. While in some settings the costs of corrections provide that immediate and powerful reason, it is less likely to carry the day in the context of Three Strikes laws.

3. Prison Costs Under Three Strikes Laws Are Remote But Certain

The time lag before the system begins incurring the corrections costs from Three Strikes has often not been considered in political debates. Many states have no commitment at all to plan for the future financial impact of current choices about sentencing policy.¹⁹ And states that have committed, by statute or by legislative practice, to provide resources tend to plan for a relatively short time horizon: e.g. a five to ten year period at most.²⁰

Five to ten years, however, is not the relevant time horizon for Three Strikes. These laws increase the prison terms of offenders who were already likely under existing law to spend more than a few years in prison. This is particularly true in states with sentencing guidelines, which usually increase the chances that serious and violent felons will serve the longest prison terms.

Because the costs of Three Strikes laws start to accumulate after the customary end of the planning period for corrections, legislators can more easily waive them aside. This occurred, for instance, in South Carolina during the 1995 legislative debate leading to the passage of a Three Strikes law.²¹ The legislators initially included only a small group of violent felonies in the list of crimes qualifying as "strikes." Because of concern about the racial impact of that list (offenders convicted of those crimes were disproportionately African-American males), the legislature expanded the list to cover many five-year and ten-year felonies. The staff of the South Carolina

Sentencing Commission ultimately convinced the legislature to remove the five-year felonies because of their high cost. However, many of the ten-year felonies remained. Those costs seemed irrelevant to the legislators.

A comparable story developed in North Carolina, during 1994 debate. The staff of the Sentencing Commission carefully explained to legislators the costs of different versions of Three Strikes bills. The Commission projected costs on a yearly basis for the first ten years, and then in ten-year increments out to fifty years after enactment. The projections indicated, appropriately, that the short-term estimates of necessary prison beds were more reliable than the long-term estimates.

In the end, the legislature passed one of the most modest Three Strikes proposals. The bills it rejected had significant, and sometimes eye-popping, costs over the first ten years.²² But the statute that did pass, even though it increased the necessary prison beds very little over the first ten years—a projected 125 beds—committed the state to a more serious increase over a fifty-year period (2887 extra beds by the year 2044). Despite the near certainty of increased growth rates beyond the first ten years, the law contained no long-term plan to finance the necessary facilities.

4. The Sinking Fund Solution

Prisons are not the only long-term financial obligations that states incur. Governments commit to make retirement payments to their own employees, and assistance payments to older citizens generally. The federal government has established "trust funds" for Social Security and Medicare, to keep tabs on the money necessary to meet future obligations.²³ State governments make long-term plans to finance highway construction. Some states create a special "trust fund" for highways. Many of these funds are financed with proceeds from special sources of revenue, such as a state gasoline tax.²⁴

Similarly, when a state or local government floats a bond issue, it creates a debt payable in an exact amount at a set time. It will typically begin immediately to put aside funds from general revenue sources to retire the debt on time. The money thus saved goes into a "sinking fund." When the time arrives to repay bond holders, there is no undue hardship on the taxpayers because of the long-term financing plan.²⁵

A comparable financing plan would be prudent whenever a legislature commits the government to significant future increases in prison construction and operation costs, even if the increases become effective more than ten years from the date of passage. A responsible legislature, when passing a sentencing law that commits future citizens to sizable expenses, should have a specific plan for gradually putting aside the necessary tax revenues.

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Some might object that prison costs are different from government bonds because the amount of the future obligation is less certain. Indeed, there are countless future operating costs of government that go unnoticed in statutes voted upon each year. There is some truth in this objection, for projections of the prison beds depend on less-than-precise predictions about numbers of crimes, arrests and convictions. There is also uncertainty about how to translate the anticipated number of prison beds into future costs of construction and operation.

These variables make the prediction of extra prison costs less certain than the prediction of bond repayment costs. Nonetheless, a state could use conservative growth and cost estimates for each of the uncertain items, and still be in a better position than a state that made no future cost plans. Further, a state with a determinate sentencing structure makes a clear declaration of its plans to use prison space far into the future.

Determinate sentencing structures make it possible to obtain more reliable estimates of prison population in the short run. When coupled with conservative estimates of growth and cost, they can also improve long-term financial planning.

5. A Sinking Fund Addresses Only One Set of Obstacles

The "sinking fund" could give sentencing commissions a way to discourage legislatures from discounting the real budgetary impact of a Three Strikes law. Advocates of long-term financial planning would complement those who provide estimates of short-term impact on prison population.

But I do not wish to claim too much for this technique. There are many reasons why legislators ignore relevant information about Three Strikes. Creating a mechanism for long-term financing addresses only one type of problem—the short time horizon of most legislative budget decisions.

This planning could make a difference even in a state where the legislature delegates the decision to a voter referendum, but only if voters are required to pass a bond initiative when they vote for longer sentences. Voters have recently endorsed a Three Strikes policy in Oregon, Washington, and California. In each case, costs figured in the debate, but not as part and parcel of the decision framed on the ballot. Surely voters would vote for more schools, new sports stadiums and more police if there were no specific price tags attached to those votes. The choice should be the same for expensive punishment policies.

The sinking fund proposal may be less helpful in states with no existing commitment to planning for any corrections costs, even in the short run. The sinking fund can refine a pre-existing habit of legislators to consider corrections costs, but it cannot refine what does not exist. In a state such as Califor-

nia, where legislators often separate the questions of supply and demand for prison space, there is no reason to hope for a longer time horizon for planning. The same could be said of states where the legislature has no internal rules or statutes to assure that sentencing proposals contain impact statements.²⁶

Finally, this proposal focuses only on money in the state budget, not on the human costs of extra crimes committed, or years wasted in prison for unnecessary and unjustly long prison terms. Legislators will surely remind policy analysts that crime policy is no technocratic exercise in finance. Not every consideration that might move them to act will yield itself to measurement, however wisely one might construct the measuring instrument. And the legislators will be right. Ultimately a responsible and well informed legislature, or a commission acting under legislative authority, needs to make a principled decision about the social function of imprisonment.

FOOTNOTES

¹ See Cal. Penal Code §§ 667(e)(2), 667.5, 1192.7; Colo. Rev. Stat. §§ 16-13-101(1), 16-13-101(1.5); Conn. Gen. Stat. § 53a-40(f); Ga. Code Ann. § 17-10-7(b); Ind. Code § 35-50-2-8(f); La. Rev. Stat. Ann. § 15:529.1A(1)(b)(ii); Md. Code Ann. Art. 27, § 643B(b), (c); N.M. Stat. Ann. § 31-18-23; N.C. Gen. Stat. § 14-7.12; Tenn. Code Ann. § 40-35-120; Va. Code Ann. § 19.2-297.1; Wash. Rev. Code § 9.94A.120(4), .030(25), (21); Wis. Stat. § 939.62. Similar legislation has also passed in Arkansas, Delaware, Florida, Kansas, New Jersey, Oregon, Pennsylvania, South Carolina, Texas, the federal system, and elsewhere.

² See Arlene Levinson, *State three strikes laws swing, miss at deterring criminals*, Houston Chronicle, October 1, 1995, at 20.

³ See Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Guidelines*, 64 Univ. Colo. L. Rev. 679 (1993); Albert W. Alschuler, *Monarch, Lackey, or Judge*, 64 Univ. Colo. L. Rev. 723 (1993).

⁴ See Okla. Code Ann. tit. 22, § 1501; David Diroll, *Ohio Adopts Determinate Sentencing*, 6 Overcrowded Times No. 4 (August 1995); Richard J. Oldroyd, *Utah's Conjoint Guidelines for Sentencing and Parole*, 5 Overcrowded Times No. 1 (Feb. 1994); Stan C. Proband, *Rhode Island Enacts Crowding Legislation*, 4 Overcrowded Times No. 4 (August 1993); Laird Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model*, 25 U.C. Davis. L. Rev. 695 (1992).

⁵ The Minnesota legislature did create the possibility of enhanced penalties for habitual felons, but it did so by removing the power of judges to depart downward from guideline sentences for habitual felons. Minn. Stat. § 609.152(2a).

⁶ For instance, the estimated \$118 million cost of extra prisons in Pennsylvania did not make the vote close on Pennsylvania's new Three Strikes law. The cost estimates of the commission did, however, convince some legislators to abandon more ambitious proposals. *Ridge signs variation of*

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"three strikes" law, Pittsburgh Post-Gazette, October 12, 1995 at C2.

⁷ On the other hand, legislatures have been willing to alter the rules of baseball if the rule change works against repeat felons. A few states have passed "two strikes" laws. Ga. Code Ann. § 17-10-7(b). Others have provided for some serious penalty enhancement (but less than a life term) for those committing a second "strike" felony. See Cal. Penal Code § 667(e)(1); Conn. Gen. Stat. § 53a-40(f); Tenn. Code Ann. § 40-35-120.

⁸ Although a number of habitual felon statutes passed in the last two years do not enhance penalties to become an automatic life term, they tend to apply to offenders with only one prior felony, or they work in conjunction with a life-term enhancement and apply to less serious crimes. See, e.g., La. Code Ann. § 15:529.1A(1)(b)(i) (sentence increased to two thirds of maximum; applies to broader range of felonies than statute creating enhancement to life term).

⁹ There are exceptions that prove this rule. Conn. Gen. Stat. § 53a-40(f); Ind. Code Ann. § 35-50-2-8 to 8.5 (judge has discretion for some but not all covered felonies).

¹⁰ Colo. Rev. Stat. §§ 16-13-101(1); Ind. Code § 35-50-2-8(f); N.M. Stat. Ann. § 31-18-23.

¹¹ Md. Code Ann. Art. 27, § 643B(b), (c); Tenn. Code Ann. § 40-35-120.

¹² Conn. Gen. Stat. § 53a-40(f); Ga. Code Ann. § 17-10-7(b); N.C. Gen. Stat. § 14-7.12.

¹³ Although it is more common to make the penalty enhancement automatic after the prosecutor files the third relevant felony charge, a handful of states allow the prosecutor to make separate decisions about filing a third felony charge and a habitual felon charge. Cal. Penal Code §§ 667(e)(2), 667.5, 1192.7; Ind. Code § 35-50-2-8(f); La. Rev. Stat. Ann. § 15:529.1A(1)(b)(ii); N.C. Gen. Stat. § 14-7.12; Va. Code Ann. § 19.2-297.1.

¹⁴ For a description of office policies on charging under Three Strikes laws, see Susan Freinkel, *Strike Zone*, American Lawyer (July/August 1995); Arlene Levinson, *State three*

strikes laws swing, miss at deterring criminals, Houston Chronicle, October 1, 1995, at 20.

¹⁵ Cal. Penal Code § 667(e)(2), 667.5, 1192.7

¹⁶ Cal. Penal Code § 665(e)(2).

¹⁷ Cal. Penal Code § 1192.7(c)(18), (24).

¹⁸ Drug traffickers made up 17.6% of the state prison admissions in 1992 and a higher proportion of the federal admissions. Burglary made up 15.4% of the 1992 state prison admissions. No other category of crime accounted for as large a share of prison admissions. See Craig Perkins, National Corrections Reporting Program, 1992 13 (1994) (Table 1-5, NCJ-145862); Sourcebook of Criminal Justice Statistics—1993 524 (1994) (Table 5.45).

¹⁹ The states with no statute requiring the legislature to consider estimates of the impact of proposed sentencing statutes on correctional resources include some of the most prominent and active states in sentencing reform, such as Washington, Oregon, Missouri, Massachusetts, and Delaware. See also 19 U.S.C. § 4047(a) (estimates of impact for proposals originating from sources other than Congress itself).

²⁰ E.g., Ark. Code Ann. § 16-90-802(d)(6); N.C. Gen. Stat. § 120-36.7(c); Ohio Code Ann. § 181.25(C).

²¹ S.C. Code Ann. § 17-25-45.

²² One of the bills would have committed the state to using 17,617 extra prison beds over its first ten years of operation. The entire North Carolina state prison system at the time of the debates in 1994 housed roughly 24,000 inmates.

²³ 42 U.S.C. § 401.

²⁴ See, e.g., N.C. Gen. Stat. § 105-445.

²⁵ See generally M. David Gelfand, ed., *State and Local Government Debt Financing* (1986).

²⁶ Florida is an example of a state legislature that has committed itself to consider the fiscal impact of any new sentencing laws. See Fla. Code Ann. § 921.001(9). Pennsylvania is one among the many states with no comparable statute.