Three Strikes Legislation and Sentencing Commission Objectives

RONALD F. WRIGHT

Between 1993 and 1997, state legislatures across the country passed legislation popularly known as "three strikes and you’re out" laws. These laws appeared at a time when sentencing commissions existed in many states, and the commissions were involved in the legislative debates leading to the votes on three strikes laws. Thus, the passage of three strikes laws can shed light on one type of interaction between sentencing commissions and legislatures. This article posits a variety of objectives for sentencing commissions during three strikes debates, each a response to the recurring "pathologies" that appear when legislative, judicial, and executive branch officials create sentencing policy. A survey of states that have passed three strikes laws indicates that sentencing commissions have not made any systematic difference in the legislative debates on these statutes. Commissions have little reason to oppose these laws absolutely, and could lose political credibility by doing so. Commissions have incentives instead to argue for limiting the scope of these statutes. Where commissions have been involved in the debates about habitual felon legislation, they have emphasized limits on judicial discretion, focused on the quality of legislative deliberations rather than on legislative outcomes, and devoted little attention to prosecutorial charging decisions.

1. INTRODUCTION

Nothing grabs a legislator’s attention like crime. Every year, in every legislative assembly in the nation, the lawmakers consider new responses to crime. The choices that legislators make about crime have a big impact, an impact that is growing all the time. There is honest disagreement about how much it is possible to reduce crime rates through criminal law enforcement, but it is beyond question that criminal law enforcement and punishment have a larger fiscal impact on state government every year (U.S. Department of Justice 1995: 85; U.S. Department of Justice 1991: 108; Miller 1997: 127). This is a big-ticket item for the states and their legislatures.

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With the stakes as high as they are, legislative mistakes matter. These mistakes have many origins; one is a failure to find and use relevant information. Where there is relevant information on a subject like crime, such as the prevalence of a particular type of crime, or the cost of a selected sanction or enforcement technique, we might hope that the legislature will learn about it and respond to it.

In an effort to find and use such information, many state legislatures over the past ten to fifteen years have enlisted the help of a new institution in criminal justice: the sentencing commission. Over twenty legislatures have created these full-time expert agencies to help orchestrate the development of criminal sentencing policy. One of the functions of many sentencing commissions is to advise the legislature about any proposed changes to criminal statutes that would affect the sentencing of offenders and the use of correctional resources.

Sentencing commissions attract the most attention during times when they create sentencing guidelines. Analysts have tried to measure the quality of guidelines and to predict their impact (see generally Tonry 1996; U.S. Department of Justice 1996). But the role of the sentencing commission in shaping legislative debates on discrete sentencing laws (as opposed to comprehensive sentencing reform packages) has not been examined in any depth. Whatever their other strengths or weaknesses, is it realistic to expect sentencing commissions to improve crime legislation? Is it plausible to believe that sentencing commissions will have any impact at all on the legislative process, putting aside any questions about the quality of the final product?

The answers to these questions will not be the same everywhere, for different sentencing commissions operate on the basis of different statutory authority and in different political environments. Nevertheless, this article is a search for some common threads in experiences from around the country. It will evaluate the interaction of legislatures and sentencing commissions in this country in connection with one highly visible type of crime legislation. Between 1993 and 1997, state legislatures all over the country enacted into sentencing law a rule of baseball: "Three strikes and you're out" (Clark, Austin & Henry 1997: 6–9; Turner, et al. 1995: 16; Vitiello 1997: 395). The new statutes imprison for long periods (usually for life) some offenders convicted of committing a third felony of a designated type (often a violent or "serious" felony).

These laws make a promising subject of study because they came to a vote during roughly the same period in many states. Three strikes legislation passed in a variety of states, some with sentencing commissions and others without commissions. Thus, three strikes laws offer a nationwide inquiry -- albeit in a limited context -- into the interaction between sentencing commissions and legislatures during the early years of the commissions. These laws are atypical sentencing laws in some respects because of the intensity of the political scrutiny they receive. But most sentencing laws, like three
strikes bills, propose highly popular and piecemeal changes to current sentencing practices rather than a systematic overhaul of an entire sentencing system. Three strikes legislation offers some of the best evidence to date on the power of sentencing commissions to influence high-visibility and nonsystematic crime legislation.

Good news is a rare commodity in the world of criminal justice, and this survey offers little. Sentencing commissions have made hardly any traceable difference in habitual felon laws over the last five years. The commissions have not often blocked the passage of three strikes legislation; states with commissions are just as likely to pass such laws as states without commissions. Furthermore, assuming that commissions in this setting have aimed for outcomes more limited than outright blockage of the legislation, sentencing commission states do not accomplish these limited goals more often than noncommission states, either. Sentencing commissions sometimes have convinced legislatures to pass statutes more affordable and limited in coverage than their original proposed bills. Nevertheless, noncommission states are just as likely to place similar limits on the scope of these laws. In only a few cases did legislatures in commission states integrate the problem of repeat violent felons into the more ordinary and consistent method of sentencing in those states, or leave the problem for the sentencing commission itself to resolve. In sum, when it comes to three strikes laws, jurisdictions with sentencing commissions do not look systematically different from noncommission states.

This article highlights one crucial respect in which commission jurisdictions resemble noncommission states. The habitual felon laws that have appeared in the mid-1990s have restricted judicial choices and corrections release decisions more than prosecutorial power to affect sentences. The limits that appear most often in three strikes laws perpetuate an old pattern in the work of sentencing commissions: the laws devote far more effort to controlling judicial discretion than to prosecutorial discretion. This is one characteristic of habitual felon laws that might start to change more quickly in commission states than elsewhere. In the future, commissions could treat prosecutorial discretion as a higher priority during legislative debates about habitual felon laws.

If this discussion offers a general lesson, it suggests that commissions have scant influence in their reactive role as legislative advisors. When it comes to discrete pieces of crime legislation rather than integrated reform packages, sentencing commissions do not—and perhaps cannot—redirect or transform popular debate. Sentencing commissions have received the most attention thus far for their work during times of systemwide restructuring. This focus is easy to understand in light of the very modest impact that commissions have had on three strikes legislation. During the ordinary politics of crime and punishment, commissions so far have accomplished little that is worth studying.
II. INSTITUTIONAL PATHOLOGIES IN SENTENCING

Legislatures, judges, and executive branch officials have often failed over the years when they have tried to change or administer sentencing policy. They have failed in recognizable and predictable patterns. This article will refer to these patterns of institutional failure as "pathologies." They are deviations from the more ordinary and effective functions of these governmental institutions, deviations that (we might optimistically assume) are capable of study and prevention. Although this discussion recasts many of the traditional arguments about sentencing institutions in an effort to throw new light on them, readers already familiar with the rationales for sentencing commissions may wish to move ahead to Part III.

A. JUDICIAL PATHOLOGIES

Sentencing is, by tradition, a judicial function (Stith & Cabranes 1998; Tonry 1996; ABA 1994: 5–7; U.S. Congress 1983: 159). When sentences start to function poorly, it stands to reason that judges collectively could be doing something wrong. The explanation of what sentencing judges do wrong has become a familiar part of the case for sentencing reform over the last generation (Robinson 1987: 18, 121; Frankel 1973; Tonry 1993).

Judges create two sorts of difficulties in the sentencing system. Both problems arise because judges sentence individually rather than as a coordinated group. Political and economic theory would predict that these sorts of obstacles would confront a group finding it difficult to act collectively (see generally Olson 1982).

First, different judges sometimes give disparate sentences to offenders who, in every relevant sense, seem to be alike (U.S. Department of Justice 1996: 82–98; Weisburd 1992; Blumstein, et al. 1983: chap. 2; Partridge & Eskridge 1974). The reasons for this disparity are difficult to isolate, and the extent of the problem is hard to judge (Ostrom, et al. 1997: 22–27; Stith & Cabranes 1998: 104–42). Nevertheless, in each of the states that have created sentencing commissions and guidelines over the last generation, undue disparity in sentencing was among the problems the legislature addressed. The problem has been a particular priority for those convinced that judges have unconsciously allowed race or social status to influence their discretion (Blumstein 1993: 750–54; Dailey 1993: 761; McDonald & Carlson 1993).

The second coordination difficulty that sentencing judges create is their overuse of scarce corrections resources. There are a fixed number of prison beds and slots in corrections programs. Each judge has an incentive to use more than her proportional share of this "public good." If the judge believes that a particular defendant deserves a longer than average prison term, she need not pay the price — a reduction in the term of some other defendant she has sentenced. During the 1980s, a great many states, such as Florida and
North Carolina, experienced a quickly widening gap between the announced sentence and the sentence served as judges attempted to manipulate parole rules to increase the time served by defendants they sentenced (Handberg & Holten 1993: 53; Wright & Ellis 1993: 421).

A sentencing commission is one potential solution to both of these coordination problems among sentencing judges. Some mechanism is necessary to convey information to the judges and to coordinate their decisions. A commission could reduce disparity by designating, within narrow boundaries, the "ordinary" sentences for particular types of offenses and offenders. Judges might find it difficult to depart often from these designated sentences, whether because of personal restraint and peer opinion, or because of legal provisions making unusual sentences easier to overturn on appeal or, in states where parole exists, during parole review (Ark Code Ann § 16-90-804(c); Reitz 1997: 1457–88).

A commission could also address the problem of judicial overuse of resources and the resulting "untruthful" sentences. It could set the designated ordinary sentences at a level not likely to overburden the corrections system: computer projections make this task possible, although not fool-proof.3

B. EXECUTIVE PATHOLOGIES

The executive branch, like the judicial branch, fails to consider systemic implications when it comes to sentencing policy. Executive branch pathologies can appear either in prosecutorial decisions about the people entering the corrections system, or in release decisions about those exiting the system. Unlike judicial failures in sentencing, executive pathologies have rarely prompted the creation of a sentencing commission and guidelines.

1. Release Decisions

Some executive branch pathologies in sentencing are possible because release decisions are not easily visible to the public. In a jurisdiction with an indeterminate sentencing system, after the judge imposes a sentence within the outer bounds that the legislature specifies, the executive (either a parole or corrections authority) must decide how much of the announced sentence the offender actually will serve. The statutes typically do give the judge some power to constrain the choice of release dates. For instance, statutes may require an offender to serve at least one-third of the announced sentence before being eligible for parole release. But most states leave the executive with considerable discretion about the release date. This decision is ordinarily made months or years after the judge imposes a sentence, and tends to receive less attention than the sentence itself. It is made by an executive official who, unlike many state court judges, is not directly accountable to the voters (Knapp 1993: 689; Coffee 1978). The difficulties
with low-visibility release decisions are the classic objections to all low-visibility discretionary decisions: they may not be based on consistent or proper reasons. The release date may depend on no articulable principles at all, or release may depend on the personal views of the executive officer involved, rather than principles that the public endorses.

Even though it is possible to provide consistent and publicly acceptable reasons for release decisions, executives often do not have the incentive or the luxury to provide such reasons. They have little incentive to provide reasons because there is no real constituency favoring early declarations of release dates and rationales in normal cases. In states with no parole guidelines, the release decision receives public scrutiny only when a victim, an especially committed prosecutor, or an advocacy group shines a spotlight on an unusual case.

Officials making release decisions also must work periodically in crisis conditions that do not allow them the luxury to give reasons or to follow their stated purposes consistently. Consider, for example, the release decisions made in Florida during the 1980s and early 1990s. The state's prison system did not have the capacity to hold the number of new admissions without granting wholesale reductions in sentences to many offenders currently in prison. Some inmates in the system had to be released early. For some time, corrections officials used a computer program to select the people to release, based on a few variables such as the amount of time remaining on the sentence and the crime of conviction. After persons released under this system committed several widely publicized violent crimes, the state created the Control Release Authority to make release decisions based on more thorough review of the relevant files (Olinger 1993: 1D).

During the early 1990s, administrators at this small agency made all the important release decisions for all inmates except for murderers, sex offenders, habitual offenders, those convicted of assault against police officers, and those serving mandatory minimum terms for drug trafficking. The seven appointed commissioners asked their administrative assistants (one for each commissioner) to make recommendations about which offenders to release early, processing about 700 files per week. The administrators reviewed court records, criminal histories, juvenile records, and other documents, attempting to predict which defendants had the least chance of committing further violent acts. They took into account the views of crime victims, prosecutors, or others who showed interest in a particular case. The authority released as many as 25,000 offenders per year from a prison system that at the time had a capacity of about 50,000 (Hogenmüller 1998). The decisions were based in part on the crime of conviction (because state law made persons convicted of some crimes ineligible for early release), the intensity of public interest in the case, and indicators of potential violence that happened to appear in the records (Barstow 1993: 1A). It would be an exaggeration to call this an unprincipled system, but the volume of cases and

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the uneven amount of scrutiny each case received made it inconsistent, mostly unexplained, and at times arbitrary.

Sentencing commissions offer one method to make release decisions more visible and more consistent. Under some guideline systems, there is no executive official who can change the sentence markedly once the judge has announced the sentence under the guidelines. The release date turns on principles adopted through a public process, as applied and announced by a publicly accountable government official, the judge. In other states, such as Pennsylvania, sentencing guidelines coexist with parole release. The sentencing guidelines in such jurisdictions set only the minimum or the maximum sentence to be served, and the parole authority still determines the exact release date within boundaries the judge imposes. But the sentence that the judge imposes under the guidelines constrains the release dates available to the parole authority, and the judge chooses those limits according to principles of law.

2. Entry Decisions

The other major executive branch influence over sentences is the entry decision. What charges will the prosecutor file, and what sentence will the prosecutor seek at the point of entry into the system? As with release decisions, the potential problems with these entry decisions are the lack of articulated standards and the concomitant risk of capricious decisions not subject to public control (see generally Davis 1969: 3–26). Such capricious decisions might be based on personal favors or prejudices, or on tactical considerations such as “overcharging” a case to pressure a defendant into a guilty plea on a lesser charge, or “undercharging” a case to speed up the flow of cases or to avoid losses at trial in close cases.4

Sentencing commissions can respond to prosecutorial discretion by making certain charging choices less profitable. For instance, guidelines might instruct the judge in some circumstances to look beyond the charge of conviction and to make independent findings about the facts surrounding the crime. Legislatures have from time to time experimented with limits on plea bargaining, by limiting the size of the “discount” a prosecutor can offer to a defendant, or by banning plea bargains for specific crimes or in some courts (Calif Penal Code § 1192.7; N.Y. Crim Proc Law § 220.10). A sentencing commission could adopt similar strategies, and could adjust more quickly than a legislature to changing prosecutorial practices.

For reasons that are easy to understand, commissions have not pursued these possibilities. Over the last two decades, sentencing commissions have been reluctant to address prosecutorial entry decisions. All but two jurisdictions with guidelines have left prosecutorial charging decisions untouched (Boerner 1995: 198; Tonry 1993: 721). The difficulty of monitoring the true “worth” of a case based on limited records makes it virtually impossible to tell whether prosecutors are selecting appropriate charges
(Nagel & Schulhofer 1992), and the political influence of prosecutors makes it very costly to seek limits on prosecutorial discretion.

C. LEGISLATIVE PATHOLOGIES

Legislators make their own pathological contributions to sentencing policy. But the accounts of exactly how they do so are not altogether consistent. According to some accounts, legislatures need to delegate sentencing authority to a permanent commission because they do not have enough time or expertise to make proper changes in sentencing laws (Frankel & Orland 1984; ABA 1994: 2–3, 147–73). Because of the number of important issues competing for limited time on the legislative agenda, a legislature cannot devote adequate attention to an initial set of changes, and certainly cannot return to the problem often enough to address the changes necessary in a dynamic system. The complexity of sentencing issues makes it difficult, during the limited time available, for the legislators and their staffs to acquire the necessary information to make wise choices. These problems would be especially pronounced in state legislatures, which do not meet year-round and have more limited staffs. The legislatures’ lack of time and expertise are two time-honored reasons for delegating complicated questions of all sorts to full-time administrators. These practical advantages of full-time agencies have been central to the justification for the broad delegations of authority that have become acceptable under federal and state constitutions since the New Deal (see generally Landis 1938; Mashaw 1985; Schoenbrod 1993).

Other critics of the legislative role in sentencing argue that legislatures spend far too much time dealing with sentencing. Legislators, according to this view, pander to the perceived passions and frustrations of their constituents about crime and pass laws designed to make the legislators appear both tough on criminals and concerned for crime victims. Very often these laws prove later to be expensive, ineffectual, and cruel. Even if the state begins with a coherent set of sentencing rules, periodic tinkering by the legislature could create an inconsistent sentencing scheme, riddled with the exceptions accumulated during legislative sessions over the years. According to these critics, legislatures have more difficulty dealing rationally with crime than with most other subjects. The more the legislature dwells on sentencing, the more irrational sentencing policy becomes (Zimring 1996: 243; cf. Dripps 1993: 1079).

Both of these explanations for legislative pathologies in making sentencing policy have important elements of truth in them. Political theory explains the incentives that lead legislators to deal with criminal sentencing in both of these ways simultaneously. According to the “public choice” account of legislative work, legislators tend to vote for measures that increase their chances for reelection. Legislators wish to take credit and avoid blame with the voters. To that end, they can produce statutes that declare support for

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attractive principles, such as punishment for harmful acts – in other words, a declaration of the “winners.” Self-interested legislators will be more reluctant to draft a statute that balances the attractive value to be vindicated in the new statute against competing values (protection from arbitrary enforcement decisions), or a statute that declares exactly who will pay for the new value – in other words, a declaration of the “losers” (see generally Mayhew 1974; Farber & Frickey 1991). The unappealing job of getting more specific, and thus declaring the costs and the losers, is left to an administrative agency or to a court (Schoenbrod 1993: 9–12).

When it comes to statutes involving criminal punishments, legislators have every incentive to announce more punishment rather than less. Legislative debates are dominated by the most aggravated examples of the crimes in question, and severe punishments may be appropriate for these extreme cases. Further, the legislators will gravitate towards general language when they define the conduct subject to the new criminal sanction, because of the concern that people will commit acts similar to, and just as blameworthy as, those that the legislators have anticipated. A wide definition of the crime will capture both the imagined and the as-yet unimagined evils.

On the other hand, it is quite easy for legislators to avoid blame for criminal punishments. The human costs of unnecessarily strong punishments go unnoticed, or legislators might leave it to prosecutors to decline prosecution when justice requires it. The fiscal costs of increased corrections, judicial, prosecutorial, and defense resources are rarely traced to particular statutes. Even when they are, there is usually a long time lag between the passage of the punishment statute and the need to expand prisons or to create other resources to carry out the punishments. By that time, most of the legislators who voted for the original punishment statute are long gone (Wright 1995: 81).

These incentives affect not only the amount of criminal punishments that legislators promise to the public; they also influence the type of punishments that the legislators promise. Legislatures predictably favor prison over other custodial and noncustodial sanctions. Active prison terms have the clearest impact at the moment of sentencing and require no public involvement in dealing with the offender. With a prison sentence, there is no need to tolerate the risks of leaving the offender in a community sanctions program, where the state offers something less than full-time control of the offender. The prison sentence removes the offender from the community and is therefore less of a risk to public safety, at least in the short run.

Legislatures recognize some of these pathologies in the way they deal with criminal sentencing policy, and they design sentencing commissions to counteract them (much as a legislature might pass a balanced budget law or adopt some other budget process rules to address its own repeated failures). Just as the descriptions of legislative pathologies are not entirely consistent, the prescriptions for a commission’s proper response to the legislative pathologies are in some tension with one another. Under one model, the
ideal commission strategy is to minimize legislative involvement in criminal punishment issues. The commission should design the system to meet the basic specifications of the legislature (who will choose the first principles of the system, such as the purposes of sentencing), and then monitor and revise it without an ongoing legislative presence (Von Hirsch 1987). A successful system, in this view, will reduce the legislators’ opportunities to interfere with the judgment of the expert members and staff of the commission. It will anticipate and deal with any criminal justice crises, such as apparent upsurges in particular types of crime, that could provoke the legislature to take action.

This role as an independent system operator is difficult for sentencing commissions to carry out. Legislators themselves do not often share the enthusiasm of academics and others for minimizing their influence in sentencing policy. The ideal of limiting legislative involvement in criminal justice is also difficult to justify as a matter of democratic theory, given the vital public values at stake in criminal justice (Pillsbury 1995: 314–16).

Under a second model, the sentencing commission attempts to improve legislative deliberation about criminal legislation, but does not oppose legislation on substantive grounds. The commission can inform the legislators about the consequences (especially the fiscal consequences) of different bills. It might even promote more careful attention to nonprison sanctions when they seem most cost-effective, humane, and the best way to promote crime control (Parent, et al. 1997: 5). The commission could also become an advocate for consistency and rationality in sentencing. For instance, the commission might argue against “cliffs” (that is, major discontinuities in the treatment of offenders who are similar but not identical, such as major increases in the punishment of drug offenders who possess slightly different amounts of the illegal narcotic). As we will see below, this deliberative model best describes the work of sentencing commissions when legislatures have debated three strikes legislation.

III. THREE STRIKES LEGISLATION AND SENTENCING PATHOLOGIES

Three strikes laws provide a setting for many of the legislative and executive pathologies in sentencing policy to progress. Can sentencing commissions, designed to improve sentencing policy, have some impact on the scope and passage of these statutes?

The effort to pinpoint the effects of sentencing commissions on the passage of three strikes statutes begins with an inventory. Table 1 identifies those states that have created commissions with the potential to influence legislation of this sort, and Table 2 gathers those states where the legislature passed new habitual felon statutes in recent years. The following discussion suggests the reasons a commission may, in theory, wish to oppose or moderate this legislation.

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A. COMMISSION STATES

Sentencing commissions take different forms, and they have different powers and responsibilities from jurisdiction to jurisdiction. Even the apparently simple task of counting the commission states can become complicated, for the total number of qualifying states depends on which institutional features are important to the tally. Because this article focuses on the interactions between commissions and legislatures, the relevant “commission states” are not simply those states that have produced the quintessential work product of a commission-sentencing guidelines. Instead, Table 1 looks to a larger set of commissions – some that have created guidelines and some that have not – designed to exercise an ongoing influence over new sentencing policies. The table includes all states that have created a permanent government body, with full-time staff, charged with monitoring sentencing practices and either changing sentencing rules on its own initiative or recommending sentencing changes to the legislature.

<table>
<thead>
<tr>
<th>State</th>
<th>Amendment Power</th>
<th>Impact Statements</th>
<th>Commission Created</th>
</tr>
</thead>
<tbody>
<tr>
<td>AR</td>
<td>Y, § 16-90-802</td>
<td>Y, § 16-90-802(d)(6)</td>
<td>1993</td>
</tr>
<tr>
<td>DE</td>
<td>Y, tit. 11, § 6581(a)</td>
<td>N</td>
<td>1983</td>
</tr>
<tr>
<td>FL</td>
<td>N, § 921.001(4)(c)</td>
<td>Y, § 921.001(9)</td>
<td>1982 (abolished 1997)</td>
</tr>
<tr>
<td>KA</td>
<td>N, § 21-4725</td>
<td>By request of legislator, § 74-910</td>
<td>1989</td>
</tr>
<tr>
<td>LA</td>
<td>Y, § 15:326(D)</td>
<td>Part of annual review, § 15:329</td>
<td>1987</td>
</tr>
<tr>
<td>MA</td>
<td>N, 279 App § 1-3(g)</td>
<td>N</td>
<td>1994</td>
</tr>
<tr>
<td>MD</td>
<td>N</td>
<td>N</td>
<td>1996</td>
</tr>
<tr>
<td>MI</td>
<td>Y, § 28.1097(3.3)</td>
<td>N</td>
<td>1994</td>
</tr>
<tr>
<td>MN</td>
<td>Y, § 244.09(11)</td>
<td>Part of annual review, § 244.09(13)</td>
<td>1978</td>
</tr>
<tr>
<td>MO</td>
<td>Y, § 558.019(6)(4)</td>
<td>N</td>
<td>1994</td>
</tr>
<tr>
<td>MT</td>
<td>N</td>
<td>N</td>
<td>1995 (abolished 1997)</td>
</tr>
<tr>
<td>NV</td>
<td>N</td>
<td>N</td>
<td>1995</td>
</tr>
<tr>
<td>NC</td>
<td>N, §§ 164-36, 164-43</td>
<td>Y, § 120-36.7(c)</td>
<td>1990</td>
</tr>
<tr>
<td>OH</td>
<td>N, § 181.25(D)</td>
<td>Y, § 181.25(C)</td>
<td>1991</td>
</tr>
<tr>
<td>OK</td>
<td>N</td>
<td>N</td>
<td>1994, 1997</td>
</tr>
<tr>
<td>OR</td>
<td>N, § 137.667(1)</td>
<td>N</td>
<td>1985, 1995</td>
</tr>
<tr>
<td>PA</td>
<td>Y, tit. 42, § 2155(c)</td>
<td>N</td>
<td>1978</td>
</tr>
<tr>
<td>SC</td>
<td>N, § 24-26-40</td>
<td>N</td>
<td>1989</td>
</tr>
<tr>
<td>TX</td>
<td>N</td>
<td>N</td>
<td>1991</td>
</tr>
<tr>
<td>UT</td>
<td>N, § 63-89-4</td>
<td>N</td>
<td>1979, 1993</td>
</tr>
<tr>
<td>VA</td>
<td>Y, § 17-238</td>
<td>N</td>
<td>1995</td>
</tr>
<tr>
<td>WA</td>
<td>N, § 9.94A.040(7),(8)</td>
<td>N</td>
<td>1981</td>
</tr>
<tr>
<td>WI</td>
<td>Y, §§ 973.01(b), .011</td>
<td>N</td>
<td>1983 (abolished 1995)</td>
</tr>
</tbody>
</table>
For each state, the table indicates three features that potentially could affect the ability of a commission to influence the legislature. The first of these features is the commission’s power to amend sentencing rules independently of the legislature. The amendment column ascribes amendment power to all commissions with the authority to change sentencing rules without any need for a vote of approval from the legislature. A commission with strong amendment powers has a structural advantage over a commission with no such powers, because it can make nonstatutory changes in sentencing law to preempt the legislature from reacting to a perceived crisis.

Despite these reasons to believe that the commissions with amendment power will tend to have more influence over sentencing policy than those without amendment power, this power does not in the end make any sentencing commissions more influential during legislative debates over three strikes laws. As we will see in Part IV, states granting their sentencing commissions the amendment power are just as likely as other states to pass these laws and tend to place similar limitations on their scope. As a 1994 analysis suggested, other factors in the structure and environment of a sentencing commission appear to be far more important than the amendment power in predicting a commission’s influence with the legislature (Wright 1994: 59).

Table 1 also indicates whether the legislature must obtain estimates from the sentencing commission (as opposed to some general-purpose office for fiscal analysis) about the impact of proposed crime legislation on correctional resources. The statutes in “annual review” states instruct the commission to review annually the impact of all existing legislation (not just the guidelines) on sentencing patterns. While a commission can always provide this information on its own initiative, the legislators might listen more carefully to the message if they are legally bound to request the information themselves.

Finally, Table 1 shows the year the current commission was created. Why does the commission’s date of creation matter? In some cases (such as Nevada, Virginia, and Montana), the commission did not exist at all during the time when the legislature considered habitual felon laws. Obviously those commissions had no opportunity to influence the legislative outcome.

Even for commissions that existed during the pertinent time frame, their creation dates have a bearing on their potential influence. Years ago, political scientist Marver Bernstein argued that administrative agencies all have common experiences that “can be generalized into a rhythm of regulation whose repetition suggest that there is a natural life cycle” for an agency (Bernstein, 1955: 74–95; see also Galbraith 1955: 71). The life cycle includes a gestation phase, when the legislature creates the agency; a youthful phase, when the agency brings ambition and imagination to the task of formulating its major policies, and encounters a hostile and resourceful regulated industry and a waning public interest in the subject; a
phase of maturity, when the agency adjusts to conflict among the interested parties and to a lack of public support, and relies more on settled procedures; and a phase of old age and decline, when the agency is no longer capable of responding to change and spends all its energy on self-preservation.

It seems plausible that the age of a sentencing commission would affect its relationship with the legislature, just as Bernstein argued that age would affect its relationship with regulated parties. But it is not obvious whether a sentencing commission’s influence should wax or wane over time. Should one expect the newest commissions to have the most influence with their legislatures, because of lingering enthusiasm about the commission’s reform agenda? Perhaps older commissions lose influence as they complete the focused task of creating sentencing guidelines and begin the more amorphous job of administering and monitoring the guidelines.

On the other hand, commission influence might grow over time as the commission develops stronger expertise and relationships with key legislators. Given the public’s recurring interest in crime legislation, a sentencing commission probably has no trouble generating legislative interest in its agenda. Experience and relationships with legislators are likely to be more important to a sentencing commission; this suggests that newer sentencing commissions will tend to have less influence with the legislature.

While there are arguments favoring both the newer and the older commissions, there are also random factors that can confound the influence of commission age. Personnel on the commission and its staff changes over time, and the changes could give the commission either more or less enthusiasm and expertise for the work at hand. The political environment can also change over time: a new political party might gain a majority in the legislature, or a new governor might take office. The new policymakers will have to create new relationships with the sentencing commission. The analysis in Part IV will ask whether it is possible to see through all these confounding factors to answer the question of whether experienced commissions have an influence different from the inexperienced commissions during legislative debates on three strikes laws.

B. THREE STRIKES JURISDICTIONS

The popular movement to punish felons more severely after “three strikes” builds on time-honored practices in criminal sentencing. The prior criminal record of offenders has, throughout this century, influenced the sentence a court would impose. As early as the 1790s, American legislatures passed “habitual felon” or “repeat offender” statutes telling judges to increase a sentence by a particular amount if the offender had prior felony convictions (Tonry 1996: 142–44). A wave of such statutes in the 1920s and 1930s left virtually every state with an habitual felon law (Zimring & Hawkins 1995: 22–38).
But the three strikes movement of the mid-1990s was more than a continuation of past practices. First, these statutes greatly increased the typical size of the sentence enhancement that would attach to a prior record. A typical old-style habitual felon enhancement might add five or ten years to the sentence of the offender. The three strikes statutes of the 1990s, however, most often provided for a life term in prison, without possibility of parole (see Colo Rev Stat Ann § 16-13-101(1)).

The newer three strikes laws also provided less flexibility for judges to avoid the additional sentence in cases they felt were improper (Mont Code Ann § 46-18-219(1)(b)). The older habitual felon laws would occasionally make the additional sentence mandatory, but they would leave judges with the ability to avoid the sentence more frequently than the current crop of statutes would allow.

The three strikes generation of habitual felon laws also expanded the list of felonies sufficient to invoke the longer prison terms. Some of the laws passed in the 1990s extended to nonviolent but “serious” felonies. States such as Louisiana and Illinois, which already punished certain habitual felons with life imprisonment without parole, extended their laws during the 1990s to cover a larger group of felonies.

Perhaps the greatest innovation of the three strikes movement, however, was to create a political vocabulary that focused public attention on an issue and on a particular response to a problem. The baseball vocabulary pointed toward a particular outcome, a particular way to respond to repeat felons. It left legislators with less freedom to adjust the major features of a bill, even after deliberation. To suggest “four strikes,” or to argue for a ten-year enhancement rather than a life term, would appear to violate the rules of the game.

A list of the states where legislatures have recently passed three strikes legislation reveals the breadth of the movement. Table 2 indicates twenty-five jurisdictions that have passed statutes since 1993 to enhance a sentence based on the prior criminal convictions of the offender. It lists separately for each state the different habitual felon laws passed during the period, including some requiring a total of two or four strikes rather than three.

The table highlights several features of the three strikes statutes that tell us something about their scope and flexibility. The types of felonies that qualify as “strikes” could have a great effect on the number of felons who will receive the enhancement. Table 2 contains a number of columns addressing this feature of the statutes. The “Prior Violent” column shows in particular whether the habitual felon law applies to robbery (or aggravated robbery) and assault (or aggravated assault). All but one of the jurisdictions in Table 2 have statutes applying to one or more of the assault and robbery crimes. These crimes receive special attention in the table because they account for the largest number of prison admissions among the various categories of violent crime. In 1994, prisoners convicted of robbery made up 9 percent of all admissions to state prisons, and assault offenders constituted
8 percent of the admissions. Rape and other violent sexual assaults comprised just under 4 percent of the prison sentences imposed in 1994 (Langan & Brown 1997: 3; Clark, Austin & Henry 1997: 6). Again, twenty-four of the twenty-five jurisdictions in this table have statutes that cover crimes of sexual violence. The so-called nonviolent offenses appear under the column for “Prior Serious” felonies. Drug crimes and burglary receive separate attention in this column, again because of the large number of convictions and prison admissions that result from enforcing these laws. Only nine of the twenty-five jurisdictions cover drug crimes, while twelve cover some form of burglary.

The column for “Current Felony” records another variable with a large impact on the coverage of the statutes. In some states, the current felony of conviction (the third strike) must meet the same criterion as the prior felonies (the first and second strikes); in three jurisdictions, the list of current felonies covered is either longer or shorter than the list of prior felonies covered.

Finally, the “Time Sequence” column describes one of the most subtle and important limits on the scope of these laws: the rules regarding the allowable time sequence among the prior felonies. Some of the laws literally count any three prior convictions, allowing prosecutors to structure charges in a way to make more offenders eligible more quickly for three strikes treatment. Seven jurisdictions require only a “prior conviction” for the previous felonies, but do not require the third felony to be committed after the conviction for the previous crimes. Others employ one or more devices to limit the prosecutor’s control over the grouping and timing of charges and convictions. For instance, eight require that the prior crimes grow out of separate transactions, even if they are committed within the same time frame. Then there are the two timing techniques that place the strongest limits on the scope of the habitual felon laws. First, three jurisdictions require the offender to be at liberty between each conviction, or that the offender serve separate terms of imprisonment for each felony, regardless of when she committed the crime. Second, six states count a current felony only when it is “committed after conviction” for the prior felonies, while five jurisdictions go one step further to insist that each “strike” be committed after the previous conviction (“each committed after conviction”). Still others ignore prior felonies if they occur more than a specific amount of time before the current felony, or if the offender committed the offense as a juvenile.

As the next-to-last column indicates, fewer than half of the jurisdictions (eleven) offer the prosecutor the choice of whether to seek the sentence enhancement. Of course, the prosecutor always can choose not to file any charges for the third felony, or to select a charge (a less serious felony or a misdemeanor) that will not invoke the three strikes provision. But some states give the prosecutor the additional option to charge the third qualifying felony without asking for the life term. Similarly, only
### Table 2. Habitual Felon Legislation, passed 1993–1997

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>Date Passed</th>
<th>Number of Priors</th>
<th>Prior Violent</th>
<th>Prior Serious</th>
<th>Current Felony</th>
<th>Time Sequence</th>
<th>Enhancement</th>
<th>Initial Discretion</th>
<th>Later Release</th>
</tr>
</thead>
<tbody>
<tr>
<td>AR</td>
<td>§5-4-501(c)</td>
<td>1995</td>
<td>2</td>
<td>Agg. Rob., Agg. Assault, Sex Viol.</td>
<td>Same</td>
<td>Prior Conviction</td>
<td>Life</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>§5-4-501(d)</td>
<td></td>
<td>1</td>
<td>Agg. Rob., Sex Viol.</td>
<td>Same</td>
<td>Prior Conviction</td>
<td>40-80 or Life</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CT</td>
<td>§53a-40(f)</td>
<td>1994</td>
<td>2</td>
<td>Robbery, Agg. Assault, Sex Viol.</td>
<td>Same</td>
<td>Committed After Conviction</td>
<td>25-Life</td>
<td>Judge</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>§53a-40(f)</td>
<td></td>
<td>1</td>
<td>Robbery, Agg. Assault, Sex Viol.</td>
<td>Same</td>
<td>Committed After Conviction</td>
<td>25-40</td>
<td>Judge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DE</td>
<td>tit. 11 §4214(a)</td>
<td>1996</td>
<td>3</td>
<td>Any felony</td>
<td>Any felony</td>
<td>Same</td>
<td>Committed After Conviction</td>
<td>Statutory max, Life</td>
<td>Judge (for life term)</td>
<td></td>
</tr>
<tr>
<td>GA</td>
<td>§17-10-7(b)</td>
<td>1994</td>
<td>1</td>
<td>Agg. Rob., Sex Viol.</td>
<td>Same</td>
<td>Committed After Conviction</td>
<td>Life</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Year</td>
<td>Age at Conviction</td>
<td>Crime</td>
<td>Age Limit</td>
<td>Discharge Condition</td>
<td>Judge</td>
<td>Prosecutor</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IL</td>
<td>1994</td>
<td>2</td>
<td>Robbery, Assault, Sex Viol.</td>
<td>10 yrs.</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td></td>
<td></td>
</tr>
<tr>
<td>IN</td>
<td>1996</td>
<td>2</td>
<td>Robbery, Assault, Sex Viol.</td>
<td>25 yrs.</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LA</td>
<td>1995</td>
<td>2</td>
<td>Drug T., Drug P., Burg. (2d)</td>
<td>30 yrs.</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NV</td>
<td>1995</td>
<td>2</td>
<td>Any crime of violence</td>
<td>25 yrs.</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NJ</td>
<td>1995</td>
<td>2</td>
<td>Any crime of violence</td>
<td>25 yrs.</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NM</td>
<td>1994</td>
<td>2</td>
<td>Agg. Robbery, Sex Viol.</td>
<td>25 yrs.</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NC</td>
<td>1994</td>
<td>2</td>
<td>Agg. Robbery, Sex Viol.</td>
<td>25 yrs.</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td>Life</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>Date Passed</th>
<th>Number of Priors</th>
<th>Prior Violent</th>
<th>Time Sequence</th>
<th>Current Felony</th>
<th>Prior</th>
<th>Current Felony</th>
<th>Later Release</th>
</tr>
</thead>
<tbody>
<tr>
<td>ND</td>
<td>§121.3-29</td>
<td>1995</td>
<td>2</td>
<td>Assault, Robbery, Sex Viol. (all A-C)</td>
<td>Drug T, Burglary (Class A-C)</td>
<td>Same</td>
<td>Same</td>
<td>Same</td>
<td>Life</td>
</tr>
<tr>
<td>PA</td>
<td>§714(a)(2)</td>
<td>1995</td>
<td>2</td>
<td>Robbery, Agg Assault, Sex Viol.</td>
<td>Robbery, Agg Assault, Sex Viol.</td>
<td>Same</td>
<td>Same</td>
<td>Same</td>
<td>Life</td>
</tr>
<tr>
<td>TX</td>
<td>§12-42(d)</td>
<td>1995, 1997</td>
<td>2</td>
<td>Any felony &gt; 2 yrs.</td>
<td>Each</td>
<td>Same</td>
<td>Same</td>
<td>Life</td>
<td></td>
</tr>
</tbody>
</table>

Table 2. (cont.)
<table>
<thead>
<tr>
<th>State</th>
<th>Section</th>
<th>Year(s)</th>
<th>Charge(s)</th>
<th>Prior Conviction</th>
<th>Sentence</th>
<th>Eligibility Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>UT</td>
<td>§76-3-203.5</td>
<td>1995</td>
<td>1</td>
<td>Agg. Assault, Agg. Rob., Sex Viol.</td>
<td>Burg. Home</td>
<td>Same</td>
</tr>
<tr>
<td>VA</td>
<td>§19.2-297.1</td>
<td>1994</td>
<td>2</td>
<td>Agg. Assault, Rob., Sex Viol.</td>
<td>Same</td>
<td>Transaction, Separate Incarceration</td>
</tr>
<tr>
<td>WA</td>
<td>§9.94A.120(4), .030(27), (21)</td>
<td>1993</td>
<td>2</td>
<td>Assault, Robbery, Sex Viol.</td>
<td>Same</td>
<td>Each Committed After Conviction</td>
</tr>
<tr>
<td>WV</td>
<td>§61-11-18(b)</td>
<td>1994</td>
<td>2</td>
<td>Sex Viol.</td>
<td>Same</td>
<td>Prior Conviction</td>
</tr>
</tbody>
</table>

Key: Agg. assault, aggravated assault; Agg. Rob., aggravated robbery; Burg. Home, burglary of a home (aggravated burglary); Drug P, drug possession; Drug T, drug trafficking; Sex Viol., sexual violence.
a few states (seven) give judges some discretion over the sentencing enhancement. While most statutes simply instruct judges to impose a life term, a few give the judge choices from a range of enhancements, or they allow the judge to refuse to enhance a sentence at all. As the last column shows, once the enhanced sentence is imposed, the majority of states do not allow any reconsideration of the sentence.

C. POTENTIAL COMMISSION STRATEGIES IN THE FACE OF THREE STRIKES PROPOSALS

Three strikes legislation grows out of, and reinforces, the greatest institutional pathologies of legislatures in dealing with crime legislation. These laws embody the type of sentencing policy that many sentencing commissions are designed to prevent or change (Tonry 1996: 134–64; USSC 1991: i–iv). The question commissions face is how far to press in resisting a popular policy.

Sentencing commissions can overcome each of the institutional pathologies that contribute to the creation of three strikes laws, without blocking their passage altogether. Several different strategies are available to limit the scope of the statutes. Thus, commissions have little reason to oppose three strikes laws absolutely, and could lose considerable political clout by doing so.

1. Three Strikes and Legislative Pathologies

The leading legislative foible in setting criminal punishments, described above, is the inclination to set punishments today higher than the corrections system will be able to handle tomorrow. This problem is even more pronounced than usual with a three strikes statute, because the bill comes due so many years down the road. These laws extend the prison terms of offenders who would likely be going to prison for a number of years anyway. Only when the offenders start to serve the additional years will the public have to start paying for the new corrections resources. By then, the legislators who took the credit for the popular benefit may no longer be on the scene.

A commission concerned about this systematic failure would make every effort to estimate for the legislature the corrections costs of the proposal. It would argue that the new law should provide funds for any additional prison space that the new policy would make necessary, and not just the costs projected to arrive within the next five to ten years. The commission might call on legislators either to budget long-range funds for that purpose now, or to create a process for allocating those extra funds well before the time comes (Parent, et al. 1997: 5; Wright 1995: 81–82). Note, however, that a concern for linking policy and resources would not ordinarily lead a commission to oppose any and all three strikes bills. The commission would
accept any bill accompanied by a credible plan to pay for the necessary resources over the foreseeable life of the statute.

Three strikes laws also worsen a second legislative pathology: discontinuities in the overall sentencing scheme. The statute will inevitably group unlike cases together to receive a term of life without parole. Cases will be unlike each other because of the variety of conduct that could be charged under the different crimes covered by a three strikes bill, or even within a single criminal statute. The crime of conviction is a small subset of the information that most judges or prison and parole administrators consider to be important to a just sentence (Wheeler, Mann & Sarat 1988: 166-93; Stith & Cabranes 1998). Stephen Schulhofer calls this "misplaced equality" one of the inevitable features of a mandatory minimum penalty statute (Schulhofer 1993: 210-14). Moreover, three strikes laws are worse than ordinary "mandatory minimum" sentencing laws on this score because they cover a larger number and variety of felons, and because they increase the sentence by larger amounts than the typical mandatory minimum statute.

Just as a three strikes statute can create misplaced equality among dissimilar cases, it can also produce dissimilarities among essentially similar cases. They can produce radically different punishments for those who are charged under the statute and those who commit similar wrongs but fall under a different criminal statute. These situations are known as "cliffs" (Schulhofer 1993: 209).

Commissions are better able than legislatures to tailor their rules to a variety of cases. More nuanced sentencing rules can avoid misplaced equality and cliffs. When compared to three strikes laws and other statutory minimum sentences, sentencing guidelines allow most judges, most of the time, to consider what they believe to be the important facts in setting a sentence.

Once again, however, a commission could address its concerns about the inflexibility of a three strikes bill by attempting to limit its scope, rather than trying to block it altogether. Perhaps a commission could endorse a statute that imposes life terms on those who would probably receive very long prison terms under the guidelines. Although such a statute takes away the power of the guidelines and the courts to pick out slightly different cases for slightly different treatment, the problem would be tolerable (in terms of cost and the undermining of commission authority) where it increases punishment only a small amount above the typical guideline sentence, and where departures from the guidelines are rare. The commission might also respond to the inflexibility of three strikes legislation by arguing for more discretion on the part of prosecutors and judges to decide the specific cases in which to apply the enhanced punishment.8

2. Three Strikes and Other Pathologies

Just as legislative pathologies can grow worse during the passage of a three strikes bill, judicial and executive pathologies can worsen once a statute is
passed. For instance, if a three strikes bill gives judges the option of refusing to impose a life term, the judge can impose disparate sentences on similar offenders or overuse corrections resources.

A commission concerned about judicial disparity in sentencing faces a close question if the legislature proposes to allow judicial discretion over the habitual felon enhancement. Maybe the commission would oppose the judicial discretion feature because judges could then treat similar felons differently. On the other hand, the commission might believe that some felons eligible for the life term should receive different treatment from the others. The commission might therefore support a judicial option statute, knowing that it could either pass guidelines to guide the courts in this choice or trust the judges to select properly the felons to receive the life terms. The commission might be particularly comfortable in leaving this question to the judges in a state where judges have responsibly exercised their departure power in the past. The commission might be more reluctant to entrust such choices to elected judges.

As for executive pathologies, three strikes laws can give more power to prosecutors because their felony charging decisions have a far larger impact. The most common form of the three strikes statute, which gives the prosecutor the option of not seeking the life term after filing the third felony charge, creates the most prosecutorial discretion.

A few habitual felon laws also create the risk of more executive pathologies at the time of release. These laws allow the executive to decide whether to retain or release a felon after the felon serves a certain amount (say twenty-five years) of the sentence, or after the felon turns sixty-five years old. On the one hand, these provisions offer a method for keeping the size and cost of the prison system under control, and a commission hoping to curb prison growth might favor this type of discretionary release (Parent, et al. 1997: 5). But these provisions also revitalize parole. If a commission operates in a state that has abolished parole, it might decide to oppose any executive release power. Commissions in states with parole still in place (particularly if the parole authority uses written guidelines) might be less concerned about a discretionary release feature in a three strikes law.

IV. COMMISSION PRIORITIES IN LIMITING THE SCOPE OF THREE STRIKES LEGISLATION

Sentencing commissions often do not leave fingerprints. We cannot easily reconstruct today the role of most sentencing commissions during legislative deliberations about three strikes laws. It is difficult to determine in many states whether sentencing commissions participated at all in those debates, or what commission staffers might have said, or what effect the commissions might have had on the legislative outcome. The legislative process in most states simply does not capture the information necessary to answer these
questions; later analysts must depend on conversations after the fact with interested parties.9

We might, however, sketch a tentative portrait of the influence of sentencing commissions on the terms of three strikes legislation. The portrait draws on journalistic anecdotes, the terms of the statutes passed, and the early experience with three strikes laws. The scraps of evidence, taken together, suggest two things. First, sentencing commissions are unlikely to block passage of three strikes laws. Second, when commissions do convince legislators to limit the scope of habitual felon statutes, they place the highest priority on limits that address judicial pathologies in sentencing, and place the lowest priority on prosecutorial pathologies.

A. BLOCKING PASSAGE

There are very few accounts of sentencing commissions that have successfully blocked the passage of three strikes legislation in any form. Minnesota offers one exception. In that state, the legislature has periodically considered three strikes legislation, and the Minnesota Sentencing Guidelines Commission has consistently argued against passage of such a law. Thus far, the legislature has agreed that the current guidelines already provide extra punishment for those with longer felony records. The only noteworthy change to the sentencing statutes for habitual felons has been a 1994 law that prevents judges from departing from the presumptive guideline sentence for the most serious repeat offenders (Minn Stat Ann § 609.152 subd. 2a).

Florida offers a variation on this story. As part of a package of sentencing law changes enacted in 1995, the legislature repealed several mandatory minimum penalties and added judicial discretion to an existing habitual felon statute (Fla Stat Ann § 775.084). Unlike the sentencing commissions in many states, the Florida commission did not find itself reacting to a discrete legislative proposal for habitual felon sentencing, originating from the legislators themselves. Instead, the treatment of habitual felons arose as part of a debate about a wide-reaching and integrated package of changes to sentencing laws, a package that the commission had for the most part constructed on its own terms.

The developments in Minnesota and Florida are both unusual, for it is rare to find states where the legislature actively considered a three strikes bill and the sentencing commission played a noteworthy role in preventing its passage. Legislators in just under forty states introduced bills in the mid-1990s to enhance sentences for habitual felons; the legislature failed to pass a new law in roughly a dozen of these states, and most of them were non-commission states. In Ohio and Oklahoma, new sentencing commissions had recently begun operation in 1994 when the legislatures in those states declined to enact the new laws, suggesting that the commissions did not influence the outcome. In Michigan and Missouri, the commissions were created after the habitual felon bills were introduced and voted down in
1994, and thus had no opportunity at all to influence the debate (Turner, et al. 1995: 20–24; Braun & Pasternak 1994: 1A). I am not aware of published accounts from any other states where a sentencing commission opposed an automatic enhancement for habitual felon sentences and convinced the legislature not to pass one at all. Thus, the scarcity of commission states among the small group of states that have debated and rejected three strikes bills points toward a hypothesis: commissions are not systematically blocking the passage of three strikes laws.

The simple fact that habitual felon laws have passed recently in states with some of the most well-established sentencing commissions, such as Pennsylvania and Delaware, offers some further evidence on this score. Indeed, the Pennsylvania legislation included directions to its sentencing commission to estimate increases in prison population only after passage of the law (Act of 11 October 1995: § 5).

The same conclusion flows from the lack of any correlation between noncommission states and three strike states. As Tables 1 and 2 above indicate, such legislation is just as likely to pass in a commission state as in a noncommission state. According to Table 1, there were twenty-five guideline jurisdictions out of a possible fifty-two (counting the federal system and the District of Columbia as separate jurisdictions), which means that about 48 percent of all American jurisdictions from 1993 to 1997 relied on a sentencing commission to evaluate sentencing laws and to make or recommend changes in those laws. Table 2 lists twenty-five jurisdictions that changed their habitual felon statutes between 1993 and 1997. Of those twenty-five, twelve were commission jurisdictions at the time the legislature passed the new habitual felon statutes. Thus, sentencing commissions were operating in about half of the habitual felon jurisdictions (48%), just as they made up about half of the jurisdictions altogether.

We can refine this initial calculation by excluding certain states where a commission might be expected to exert little influence on three strikes legislation. However, these adjustments do not change the basic insight of the overall comparison: commission states are no less likely than other states to pass new habitual felon laws. For instance, newer sentencing commissions (those formed within a few years of the time that a legislature debates a three strikes bill) might be expected to show less influence than commissions with a longer track record. Of the twelve jurisdictions with sentencing commissions operating at the time of the habitual felon legislation, only Arkansas had a commission created less than four years before the relevant legislative debate. By the same token, several states that did not pass any new habitual felon statutes (such as Massachusetts, Ohio, and Oklahoma) also had inexperienced commissions during this period. In both types of states, it may be fair to expect that the commission would not play a critical role.

Similarly, Tables 1 and 2 do not show any particular effectiveness in blocking three strikes laws among commissions with amendment power or among commissions with the duty to submit fiscal impact statements to the
legislature. Just under half of the commissions operating at the time that habitual felon legislation was debated and passed (five of twelve) possessed amendment power, and less than half of the commissions overall (ten of twenty-five) have such power. The same numbers apply to the commissions with power to submit impact statements.

Taking all these indicators together, it seems clear that commissions have not made passage of these laws any less likely. One of two explanations for this pattern could be true: either commissions have tried and failed to block this legislation, or they have not even tried to block it. Surely some commissions were convinced that they had no statutory authority to campaign against such legislation, or calculated that such a campaign would be futile (cf. Shane-DuBow 1995: 100–2). As the following section suggests, commissions have little reason to take the political risks necessary to block the passage of habitual felon laws. They can accomplish some objectives (and those most consistent with their priorities in other areas) by arguing for limits on the scope of habitual felon statutes.

B. SCOPE LIMITS

This survey of the limitations built into habitual felon laws must confront a causation problem: the fact that a habitual felon law contains limits on its scope or operates in a limited manner does not necessarily mean that the sentencing commission requested or anticipated that limit. The commission might have asked for greater or lesser limits, or may have remained completely silent. For instance, in Washington a citizen initiative placed the issue before the state’s voters, so there was no opportunity for the Sentencing Guidelines Commission to frame the terms of the law.

Nonetheless, if enough commission states pass habitual felon laws with particular kinds of limits on their scope, and if those limits differ often enough from the scope limits passed on habitual felon laws in noncommission states, we can draw an inference. Commissions, we may assume, tend to request and obtain particular scope limits if those limits show up disproportionately in commission jurisdictions.

1. Scope Limits as Reflected in Statutory Terms

The scope limitations commonly found in the three strikes statutes show the most concern for judicial pathologies in sentencing. The basic thrust of the statutes is to direct the sentencing judge to a particular sentencing outcome for a described set of cases. It is rare to find a statute that compromises on this basic strategy. In Table 2, the column for “Initial Discretion” shows those few states giving judges authority to decide whether to impose the enhanced prison term for the habitual felon. Only seven states (three of them commission states) leave judges with this discretion.
These statutes also keep in check the dangers of discretionary release decisions. As the “Later Release” column shows in Table 2, the statutes in seven jurisdictions empower a government official (usually a corrections or parole official, but sometimes a judge) to release a habitual felon who has served some minimum portion of the life term or who has reached some qualifying age (sixty or sixty-five). This discretionary release decision is not the norm. Thus, the ordinary habitual felon law passed in the mid-1990s either makes no provision at all for release, or allows release only after a lengthy term of years or the arrival of advanced age (when speaking in criminological terms).

While the statutes feature some powerful limits on judicial sentencing discretion and executive or judicial release decisions, they embody less stringent limits on legislative pathologies and prosecutorial discretion. One well-documented effort by a sentencing commission to address legislative pathologies and prosecutorial discretion in a three strikes law took place in the federal system. The U.S. Sentencing Commission produced, at the request of House of Representative members, a thorough analysis of the potential impact of the proposed bill (USSC 1994: 81). The report recommended that Congress not enact any new habitual felon laws. In the alternative, the commission recommended some specific limitations on the proposal.

The commission gave a variety of reasons to support its position. The new statute, it pointed out, duplicated many of the functions of the existing sentencing guidelines on career criminals, but handled these cases more cruelly by giving identical sentences to offenders who commit a variety of crimes, while the guidelines imposed lengthy but proportionate sentences for those different crimes. The commission also pointed out that the prior felonies relevant under the statute could vary tremendously, because the statute used general definitions and included state law felonies meeting those definitions. The result would be arbitrary inclusion of some offenders but not others, based only on the peculiarities of state law where the conviction occurred. The report also observed that the new statutes “can be expected to increase substantially federal prison population,” although the effect would be delayed by a number of years.

Each of these arguments speaks to a classic legislative pathology in sentencing. The most prominent theme deals with the discontinuities that the new statute would create: it would fit together poorly with the existing federal guidelines and the state systems and create misplaced equalities and cliffs. In particular, the federal commission argued that the statute would enhance prosecutorial power to create irrational and inconsistent sentences. The proposal, it said, allowed prosecutors to shelter certain defendants by selecting charges not covered under the three strikes statute, even though the evidence might support a conviction for a crime covered under the statute (for instance, in a small drug sale case the prosecutor could choose between charging drug possession or drug trafficking). It also empowered
prosecutors to decide whether or not to request the sentencing enhancement after the conviction for the third qualifying felony, and whether or not to request a "departure" from the statutory requirement for offenders who have given the government "substantial assistance" in other criminal investigations.

Finally, the commission objected to the timing provisions of the recidivist bill. The ideal target of a habitual felon statute should be the offender who commits a crime, is arrested, convicted, and punished, and then goes through the entire process two more times without "learning a lesson." The proposed legislation would have allowed a life term for a person who committed a third felony, so long as the sentence for the third felony was imposed after "conviction" for the previous felonies. The commission described the potential for prosecutorial manipulation like this:

[All three offenses may have occurred essentially on the same occasion, provided they were sequentially processed to produce convictions on three different occasions (with the federal conviction being the last obtained, even if the federal offense might have been the first committed). For example, a defendant may have burglarized three warehouses on the same night, the first on a military base and the other two on private property just outside the base gate. If, through arrangement of state and federal prosecutors, the state first convicts the defendant of the two private property burglaries in separate proceedings, then the defendant's subsequent conviction in federal court of the military warehouse burglary (the first of the three offenses committed) would result in a life sentence. (USSC 1994: 86)

In the end, the federal commission did not convince the Congress to abandon the three strikes idea. The Congress did, however, accept most of the commission's suggestions for limiting the scope of the statute. In particular, the current federal statute applies to a narrower group of prior felonies and uses the most restrictive available timing constraint.

Despite the apparent success of the federal sentencing commission in limiting the scope of three strikes legislation, a comparison between the federal statute and the most common elements of state three strikes laws shows that the federal statute does not in every case adopt the most restrictive option. For instance, the federal law falls in the mid-range of three strikes laws when it comes to the types of felonies that can trigger the enhanced penalties (that is, the crimes that count as "strikes"). About half of the statutes only apply to violent crimes, while five states (most prominent among them California) have laws that count any felony as one of the strikes. There does not appear to be any correlation between commission states and states with tight limits on the felonies covered. For instance, of the eight jurisdictions that allow prior drug trafficking convictions to trigger an enhanced sentence, five are commission jurisdictions.

Granted, commissions may have convinced legislatures in some states to limit the number of felonies covered under the habitual felon provision by
explaining the high cost of earlier and broader proposals. Recall that the federal legislation as originally proposed would have applied to all crimes falling within a generic formulation ("crime of violence") while the final legislation listed particular statutes that would trigger the new punishments. North Carolina is another example of a commission that convinced a legislature to trim back on the number of crimes covered in some early proposals (Wright 1998: 8–10). Nevertheless, the North Carolina legislature still passed a statute that covers more felonies than the typical three strikes law, and so does the federal legislation (which reaches drug trafficking offenses). Commonly committed felonies also trigger the new habitual offender statutes in commission states such as Delaware, Louisiana, Pennsylvania, and South Carolina.

Other limitations on the scope of the three strikes laws reveal the persistence of prosecutorial discretion. One indicator of resilient prosecutorial power under these statutes appears in the "Initial Discretion" column of Table 2. Eleven jurisdictions out of twenty-five (including the federal system) give the prosecutor authority to invoke or withhold the sentencing enhancement even after she charges a qualifying third felony and obtains the conviction.

The timing provisions are another subtle indicator in the state laws showing that prosecutorial charging decisions were not a major concern for many state legislatures. The two most permissive timing rules are those requiring only a prior conviction regardless of the timing of the offenses, and those requiring that each strike arise out of a separate criminal transaction without insisting on any particular time relationship between the crimes and the convictions. Over half the jurisdictions listed in Table 2 employ one of these flexible timing constraints.

On the other hand, the remaining statutes place more serious controls on the power of the prosecutor to group crimes to qualify for higher punishments. Six jurisdictions have statutes declaring that the third strike must be committed after conviction for the previous felonies. A group of five jurisdictions, including the federal government, require each strike after the first to be committed after final conviction for the previous strike. Commission states are disproportionately represented among the states using the most restrictive timing rules. All five of the "each strike" jurisdictions are also commission jurisdictions. Perhaps because of the subtle nature of this scope limitation, the expertise of a sentencing commission makes it possible to present the concept effectively to the legislature. Or perhaps commissions are more willing to advocate this subtle limitation on scope rather than more direct and visible strategies.

Apart from the timing provisions, it does not appear that commission states are more likely than other states to adopt particular types of limits on the scope of these laws. There are some commission states that adopted the most restrictive combination of features, but the same is true for roughly the same number of noncommission states. Whether or not a commission was

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HeinOnline -- 20 Law & Pol'y 456 1998
involved in the legislative debates, the limits finally built into habitual offender laws in the 1990s touched very lightly indeed on prosecutorial power.

2. Scope Limits as Reflected in Early Experience

The early experience with three strikes laws shows that they have had less impact than their terms might have allowed. The studies to date have all concluded that, in most states, there have been very few prosecutions under the three strikes laws, and in many states no prosecutions at all. The most convincing explanation for this practice is the existence of older habitual felon laws that already provided lengthy prison terms (but not life terms) for many repeat offenders. Prosecutors have continued to charge crimes that use the older habitual felon enhancements, and rarely have invoked the new ones (Clark, Austin & Henry 1997: 1; Dickey 1996: 1; Robertson 1998). The exception to this pattern is California, and to a far lesser extent, Washington State. California's two strike and three strike laws have generated huge numbers of cases (although not as many as predicted), with accompanying delays in case processing, increases in corrections costs, and arbitrary differences in charging practices from office to office (Administrative Office of the California Courts 1996: 2–7; Butterfield 1996: A1; Perry & Dolan 1996: A1).

Those concerned with the potential for large increases in prison populations, or with the possibility of rampant abuse of prosecutorial power, might take this early experience to be good news. To the extent that sentencing commissions have been able to anticipate such practices, it may confirm the wisdom of allowing broad-based statutes to pass through the legislative process, and to leave any necessary limitations for prosecutors to create at the charging stage. This early experience may suggest that prosecutorial pathologies are not especially dangerous in the creation of sentencing policy, because prosecutorial discretion can correct many legislative missteps. Any concerns about arbitrary or unequal application of laws are not major when the total number of cases involved is trivial (cf. Florida. EDR 1992: 40–47).

But I suggest that we suspend judgment before concluding that the new three strike provisions are having a minuscule impact outside of California. Granted, there appear to be few convictions and sentences imposed under three strikes laws in many states. But we know far less about the number of three strikes charges filed, or threatened, or mentioned in passing during plea negotiations. Surely much of the impact of a three strikes law would be invisible to anyone who cannot observe cases in great detail (Kessler 1998). If a three strikes law gives the prosecutor bargaining leverage in a broad range of cases, it could inflate the charges that defendants would feel obliged to accept, and inflate the sentencing recommendations the parties might agree upon. The real impact of three
strikes laws may show up in the sentences imposed for many of the crimes that form the predicate felonies, or crimes similar to predicate felonies. In short, the scope of these laws in operation may be much larger than conviction statistics can tell us.

V. CONCLUSION

It has often been observed that sentencing commissions have done little so far to address prosecutorial discretion (Tonry 1996: 67–68). Given this history, it should not surprise us that prosecutors are the last to feel the effects of the scope limits imposed on three strikes proposals during the legislative process. Three strikes legislation, like many other efforts to structure sentencing decisions, has strengthened the prosecutor relative to the court and corrections officials.

The resulting system is not at all transparent. Negotiations and other interactions between prosecutor and defense attorney, which occur out of public view and leave few records behind, become the most powerful determinant of sentences. Commissions and legislators can set boundaries on those negotiating choices. We have talked much in recent years about truth-in-sentencing, to ensure that an offender will serve a sentence close to the sentence the judge announces. Do three strikes laws point out the need for truth-in-charging? When a law creates a severe sentencing enhancement and makes the enhancement available for people charged with one crime, but not for those charged with comparable crimes, that law may present the most compelling case for controls over the charging decision.

The experience with three strikes legislation described in this article tells us that sentencing commissions must economize on their limited influence with the legislature. They need to choose their battles. Legislative proposals to make sentences more severe and more discontinuous with other sanctions might create the opening necessary to begin a discussion of prosecutorial choices. If sentences are to become more discontinuous and severe, who will control the discontinuity and severity? During future legislative debates about sentencing proposals along the lines of a three strikes law, sentencing commissions might give a higher priority to prosecutorial charging discretion. Legislators need to focus not only on the fiscal costs of three strikes laws, but on the accountability of the prosecutors who will administer them.

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NOTES

1. For reasons explained in Part III, this total includes full-time commissions that may or may not produce sentencing guidelines, either binding or voluntary. The critical feature of a sentencing commission for purposes of this article is the use of a full-time government entity to provide specialized advice to the legislature about sentencing legislation.

2. Even though judges all believe they are considering the same basic facts about the offender's past and the circumstances of the offense, they do not share the same views on how much to weight those facts (Wheeler, Mann & Sarat 1988: 167-74). They also do not share the same view of the proper objectives to pursue in sentencing different classes of cases (Miller 1991: 413).

3. Of course, a commission is not the only mechanism that might address these two problems. Judges themselves could fix the problems through appellate elaboration of general statutory principles as in the United Kingdom or Alaska (Ashworth 1992; State v Wentz 1991). But the point is that judges, through their individualized sentencing decisions, make poor choices in a collective sense. Some mechanism is necessary to coordinate the judges.

4. Because the prosecutor is more accountable to the public than most parole or corrections officials, the problem of prosecutorial entry discretion might not be as acute as the problem of release discretion. Nevertheless, the public's control over prosecutors is a very blunt instrument, and greater use of sentencing rules might address the dangers of prosecutorial entry discretion.

5. The Table does not include Maryland, which restricted the scope of its existing habitual felon statute during this period to exclude burglary. The Table also does not include states (such as Florida) which changed the sentencing of repeat offenders as part of a new set of sentencing guidelines or other comprehensive sentencing reform. Although these systems do generally call for sentencing judges to impose more serious sentences on those with prior criminal records, they differ from "three strikes" legislation in several ways. First, comprehensive sentencing reforms generally do not instruct judges to place more weight on criminal record than they would in the absence of guidelines. Second, these comprehensive reforms address the influence of several different determinants of a sentence, and not prior record alone. Finally, the comprehensive reforms have generally pursued either a "proportionality" objective, or some mix of sentencing objectives. Three strikes bills have aimed more single-mindedly for incapacitation and crime control.

6. Sentences for drug trafficking, which made up 20.2% of the state prison admissions in 1994 and over half of the federal prison admissions, receives the code "Drug T." Drug possession crimes receive a "Drug P"; they made up 9.4% of the 1994 state prison admissions. This column also includes a special designation for burglary ("Burg." or "Burg. Home" for burglary of a home or other aggravated forms of burglary) and theft because these two crimes make up the largest number of prison admissions for those convicted of non violent crimes other than drugs: 13.2% for burglary and 10.9% for theft in 1994.

7. For instance, a drug trafficker may sell illegal drugs to two different customers on the same day. If the state's joinder rules allow it, the prosecutor might obtain a conviction for the sale to the first customer, then obtain a second conviction for the sale to the second customer, resulting in two "strikes" against the offender.

8. There is a third legislative failure that grows stronger during debates about a three strikes bill. For those who believe that legislatures tend to overuse prison and dismiss alternatives to prison too quickly, a three strikes law makes a bad situation worse. The law makes the prison system grow larger. For some, that is
enough to condemn it in a nation that already imprisons more of its citizens any other Western country (Alder 1983). But most commissions will not find it politically feasible to oppose any and all growth in the prison system. Instead, they might oppose bills only if they siphon funds away from alternatives to prison, or if they reach so broadly that they exclude some viable candidates from nonprison sanctions.

9. Given the types of documents typically available to memorialize state legislative debates, a complete study of sentencing commission influence in legislative debates would require on-site interviews with the key participants and review of any minutes or recordings of relevant committee meetings. Such an inquiry is unlikely to occur in even a single state, let alone a sufficient number to produce a meaningful comparison.

10. The sentencing commissions in Montana, Nevada, and Virginia did not operate at the time of the state's amendment of its habitual felon laws. The commission jurisdictions that passed or amended habitual felon laws include Arkansas, Delaware, Louisiana, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin, and the United States.

11. Similarly, one might exclude Washington from the group of commission states where habitual felon legislation has passed, because the legislation in Washington passed as a citizen initiative and the commission had no opportunity to influence its terms.

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