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ARTICLES

PFO Law Reform, A Crucial First Step Toward Sentencing Sanity in Kentucky

Robert G. Lawson¹

INTRODUCTION

In a little more than 30 years, America has gone from holding 320,000 people in prisons and jails² to holding 2.31 million.³ It has gone from holding 110 prisoners for every 100,000 people⁴ to holding 750 for every 100,000 people,⁵ and it easily leads all countries of the world in the percentage of citizens incarcerated.⁶ It has 1000 more prisons and jails than it had in 1980,⁷ has had growth in the inmate population for 33 years

1 Charles S. Cassis Professor of Law, University of Kentucky. B.S. 1960, Berea College; J.D. 1963, University of Kentucky.

2 MARC MAUER, RACE TO INCARCERATE 19–20 (1999).

3 PEW CENTER ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008), available at <http://www.pewcenteronthestates.org>. See also PAIGE M. HARRISON & ALLEN J. BECK, PRISON AND JAIL INMATES AT MIDYEAR 2005 (Bureau of Justice Statistics, May 2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjimo5.pdf>.

4 Marie Gottschalk, *Black Flower: Prisons and the Future of Incarceration*, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 197 (July 2002) (“From the mid-1920s to the early 1970s, the incarceration rate in the United States was remarkably stable, averaging 110 state and federal prisoners per 100,000 people.”).

5 PEW CENTER ON THE STATES, *supra* note 3, at 35.

6 In 2008, the Pew Center on the States (a charitable trust research entity based in Washington D.C.) reported the following incarceration rates for countries around the world—United States (750), Russia (628), England (148), Germany (93), Greece (91), Belgium (91), France (85), Italy (67), and Denmark (67). PEW CENTER ON THE STATES, *supra* note 3, at 35. In 2005, the Sentencing Project (a research entity based in Washington, D.C.) reported some other incarceration rates in countries around the world (at a time when the U.S. rate was 726 per 100,000 population)—e.g., China (118), Australia (117), Canada (116), and Japan (58). See THE SENTENCING PROJECT, *NEW INCARCERATION FIGURES: GROWTH IN POPULATION CONTINUES* 1 (May 2005). The average incarceration rate for the whole world has been put at about 140 inmates per 100,000 population, less than one-fifth of the rate for America. See Andrew Coyle, *Prison Reform Efforts Around the World: The Role of Prison Administrators*, 24 PACE L. REV. 825, 825–26 (2004).

7 Eric Schlosser, *The Prison-Industrial Complex*, 282 THE ATLANTIC MONTHLY 51, 52 (Dec.

in a row,⁸ and has eased into the twenty-first century without substantial change in policies and practices that have produced such an enormous inmate population.

The statistical picture of incarceration in Kentucky is almost identical to the nation's picture. In the early 1970s, the state had about 3000 convicted felons in custody, operated two prisons for men and a small prison for women, made no use of private prisons, had no inmates housed in county jails, and had a corrections budget of about 10 million dollars a year.⁹ By February of 2008, the state had 22,719 felons under incarceration,¹⁰ owned and operated 13 full-sized state prisons (with very few if any empty beds),¹¹ supervised the incarceration of about 1,600 inmates in three private prisons,¹² had more than 8000 inmates serving their sentences in county jails across the state,¹³ and had a corrections budget of about 450 million dollars and rapidly bearing down on half-a-billion¹⁴ (not including the very heavy costs of prison construction¹⁵).

In one respect, the Kentucky picture is significantly different from the national picture. In May of 2006, the United States Bureau of Justice Statistics reported that the country's inmate population had grown during the most recent year by 2.6 percent,¹⁶ substantially below its more than 6 percent growth rate through the 1970s, 1980s, and 1990s;¹⁷ in this same report, the Bureau reported that the state of Kentucky had an inmate growth rate for the period of 6.7 percent (about 2½ times the national rate

1998).

8 THE SENTENCING PROJECT, *supra* note 6, at 1.

9 See Robert G. Lawson, *Difficult Times in Kentucky Corrections—Aftershocks of a "Tough on Crime" Philosophy*, 93 Ky. L. J. 305, 323 (2005).

10 See Ky. Dep't of Corrections, Statewide Population Report (February 29, 2008) (unpublished daily count sheet), (on file with author).

11 *Id.*

12 *Id.*

13 *Id.*

14 The General Assembly approved the expenditure of \$449 million for fiscal year 2008–09 and \$464.8 million for fiscal year 2009–2010. Kentucky Executive Branch Appropriations Bill, 2008 Ky. Acts 480, available at <http://www.lrc.ky.gov/record/o8RS/HB406htm>.

15 Sometime after year 2000, the state completed construction of its newest prison, then called Elliott County Phase I and now called the Little Sandy Corrections Complex. The cost of that project was reported to be about \$87 million. See Robert G. Lawson, *supra* note 9, at 332 n. 134. Currently operating at full capacity or above, the facility is used for medium security imprisonment of 994 inmates. See Kentucky Department of Corrections, Statewide Population Report No. IPT500–18 (April 1, 2008) (unpublished population report, on file with author).

16 HARRISON & BECK, *supra* note 3, at 2.

17 Alfred Blumstein & Allen Beck, *Population Growth in U.S. Prisons, 1980–1996*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 18 (Michael Toney & Joan Petersilia, eds., 1999).

and the fourth highest in the country).¹⁸ More recently (early 2008), the Pew Center on the States reported a growth rate for Kentucky's inmate population for year 2007 of 12 percent, the highest in the nation,¹⁹ a finding that provides some perspective for more explicit data from sources closer to home.

The first piece of this explicit data reveals recent growth in Kentucky's inmate population that is astounding and almost unbelievable—an increase in this population of 3218 inmates from January 1, 2004, to June 30, 2006²⁰ (a mere 30 months), and an additional increase of 2402 inmates during calendar year 2007.²¹ (In weighing this information, it is helpful to know that it took the state almost 200 years to reach an inmate population of 3000 for the first time.) The second piece of this explicit data consists of projections from the state's corrections professionals that ought to scare the politics out of lawmakers, projections showing the state with 31,057 felony inmates in year 2014 (an increase of 9000 inmates over the next seven years, an increase that could easily be much bigger if the state's recent trend continues).²²

How did we do this? United States Supreme Court Justice Anthony Kennedy offered succinct thoughts on this subject in a 2003 address to the American Bar Association:

... In countries such as England, Italy, France, and Germany, the incarceration rate is about 1 in 1000 persons. In the United States it is about 1 in 143 Our resources are misspent, our punishments too severe, our sentences too long.²³

While Justice Kennedy spoke of the nation, he could easily have been speaking of Kentucky, for we have seized every opportunity for three decades to make punishments harsher on criminals. We have elevated an untold number of misdemeanors to felonies,²⁴ have pushed sentences

18 HARRISON & BECK, *supra* note 3, at 1.

19 PEW CENTER ON THE STATES, *supra* note 3, at 8.

20 See Ky. Dep't of Corrections, Adult Institutions Daily Count Sheet (January 5, 2004) (unpublished daily count sheet, on file with author). Ky. Dep't of Corrections, Adult Institutions Daily Count Sheet (June 30, 2006) (unpublished daily count sheet, on file with author).

21 PEW CENTER ON THE STATES, *supra* note 3, at 8.

22 See Ky. Dep't of Corrections, Forecasted Populations 2004–2014 (undated) (unpublished forecast, on file with author).

23 Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (August 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html (last visited Oct. 2, 2006).

24 For example, nonsupport was a misdemeanor under the 1974 Penal Code (see Act of Apr. 2, 1974, ch. 406, § 261, 1974 Ky. Acts 870) and under a new label flagrant nonsupport is now a felony (KY. REV. STAT. ANN. § 530.050 (1988)); unlawful transaction with a minor was a misdemeanor under the 1974 Penal Code (see Act of Apr. 2, 1974, ch. 406, § 263, 1974 Ky. Acts 871) and under current law is classified in some situations as a high level felony (KY. REV. STAT.

higher through reclassification of crimes²⁵ and the enactment of a wide assortment of penalty enhancements,²⁶ and have eliminated parole for a long and ever-expanding list of serious offenses (the so-called “truth in sentencing” law).²⁷ In fact, we have left very few areas of our criminal law untouched by a philosophy devoted almost exclusively to harsher punishment of offenders.

And to what end? Those who have steered the country and our state in this direction believe that tougher penalties produce lower crime rates and safer communities. Scholars who have most closely examined this relationship are skeptical:

In the recent past and continuing through the present, crime prevention policy in the United States has been driven by attempts to produce deterrence by providing increasingly severe prison sentences for crimes. Evidence is emerging that, apart from being extremely costly, the lengthening of sentences is also ineffective.²⁸

* * * * *

A reasonable assessment of the research to date—with a particular focus on studies conducted in the past decade—is that sentence severity has no effect on the level of crime in society.²⁹

ANN. § 530.064 (2007) and KY. REV. STAT. ANN. §530.065 (1998)); and indecent exposure was a low level misdemeanor under the 1974 Penal Code (*see* Acts of Apr. 2, 1974, ch. 406, § 95, 1974 KY. ACTS 847-48) and under current law is a class D felony in some situations (KY. REV. STAT. ANN. § 510.148 (2004)).

25 For example, possession of a handgun by a convicted felon was a class D felony under the 1974 Penal Code (*see* Act of Apr. 2, 1974, ch. 406, § 237, 1974 Ky. Acts 867) and is now a class C felony (KY. REV. STAT. ANN. § 527.040 (1994)); (arson in the first degree was a class B felony and arson in the second degree was a class C felony under the 1974 Penal Code (*see* Act of Apr. 2, 1974, ch. 406, §§ 114-115, 1974 Ky. Acts 850) and are now a class A felony and a class B felony respectively (KY. REV. STAT. ANN. §§513.020-513.030)

26 For example, the penalty for unauthorized use of an automobile is enhanced from misdemeanor to felony if the defendant has a prior conviction of auto theft (KY. REV. STAT. ANN. § 514.100 (1980)), the penalty for knowingly receiving stolen property is enhanced from misdemeanor to felony if the property is a firearm and is enhanced from a class D felony to either a class B or class A felony if the stolen property is received with intent to manufacture methamphetamine (KY. REV. STAT. ANN. § 514.110 (2000)), and the penalty for assault in the fourth degree is enhanced from misdemeanor to felony if the victim is a family member and the defendant has two prior convictions of assaulting family members (KY. REV. STAT. ANN. § 508.032 (2000)).

27 KY. REV. STAT. ANN. § 439.3401 (2007).

28 John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J. LAW & POLICY 189, 193 (2005).

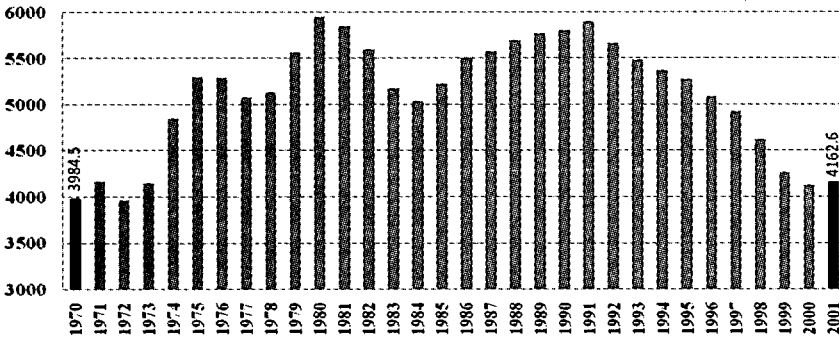
29 Anthony N. Doob & Cheryl M. Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, in 26 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 143 (Michael Tonry & Joan Perersilia, eds., 1999).

* * * * *

It might have been reasonable to expect crime to have declined as a result of the quadrupling of the incarceration rate . . . , but no such connection has been displayed.³⁰

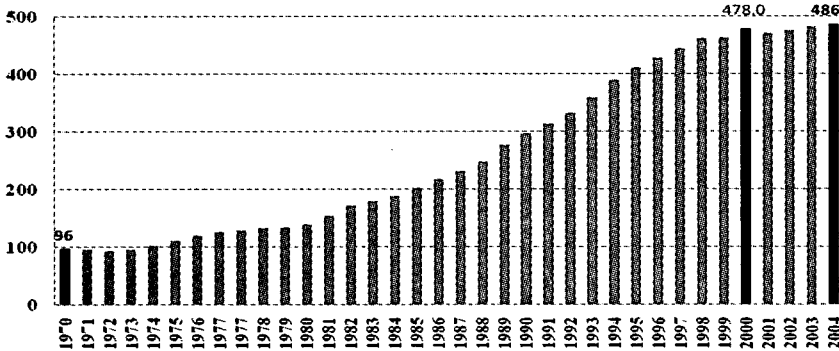
And the best available statistical data is also unresponsive of the tough-on-crime advocates, as shown in the two charts set out below:

Figure 1
Crime Rates (Per 100,000 Population)



Source: United States Bureau of Justice Statistics³¹

Figure 2
Prison Inmates (Per 100,000 Population)



Source: United States Bureau of Justice Statistics³²

³⁰ Blumstein & Beck, *supra* note 17, at 56.

³¹ U.S. Bureau of Justice Statistics, *Estimated Number and Rate (per 100,000 inhabitants) of Offenses Known to Police*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, available at <http://www.albany.edu/sourcebook/pdf/t31062004.pdf> (last visited on June 8, 2008).

³² U.S. Bureau of Justice Statistics, *Rate (per 100,000 of resident population) of Sentenced*

The crime rate moved up and down between 1970 and 2000 but ended the period very close to where it started (less than one-half of a percent higher); the inmate rate moved rapidly higher during the entire period and finished almost 400 percent above where it began (increasing from 96 inmates in prison for every 100,000 population in 1970 to 478 inmates in 2000).³³ Such data lends support to a very serious possibility: “[I]nsofar as the public is being sold such policies on crime reduction grounds, my conclusion is that we have substantial reason for believing it is being sold a bill of goods.”³⁴

Nonetheless, the public support and enthusiasm needed to sustain the incarceration experiment remains intact for the most part, impedes comprehensive law reform initiatives, and permits the thirty-year-old war on crime to roar ahead.³⁵ On the other hand, there are for the first time some signs of exhaustion with the war, some doubts about long range costs and benefits of mass incarceration, and in a few quarters even some concerns about the morality of penalties that are never harsh enough to satisfy the crime fighters. There is still a fear in lawmaking circles of the soft-on-crime label, but there is also an appreciation for the possibility that the tough-on-crime advocates have created at least as many problems as they have solved, enough of the former to suffocate any effort to promote across-the-board moderation of punishments but enough of the latter to spark some hope for modest law reform aimed at the very worst excesses of the tough-on-crime movement.

One of the worst excesses of Kentucky’s tough-on-crime movement is a repeat offender statute (called the persistent felony offender law) that is easily the most lethal weapon in the state’s tough sentencing arsenal. The persistent felony offender (PFO) law clearly heads the list of tough-on-crime measures that have filled prisons and jails beyond capacity, pushed the state’s corrections budget off the charts, and changed the balance of

Prisoners Under Jurisdiction of State and Federal Correctional Authorities on December 31, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, <http://www.albany.edu/sourcebook/pdf/t6292006.pdf> (last visited on June 8, 2008).

33 It should be noted that the incarceration rate reported in Figure 2 only counts inmates incarcerated in state and federal prison (mostly convicted felons) and does not count inmates in the country’s jail systems. If jail inmates are added to the numbers in Figure 1, the incarceration rate for year 2000 would stand at 683 inmates per 100,000 population. See HARRISON & BECK, *supra* note 3, at 2.

34 Richard Lippke, *Crime Reduction and the Length of Prison Sentences*, 24 LAW & POLICY 17, 18 (2002).

35 See e.g., Frank O. Bowman, III, *The Geology of Drug Policy in 2002*, 14 FED. SENT. REP. 123 (2001–2002) (“One of the verities of American political life for the last thirty years has been that no politician ever lost an election by promising to be ‘tougher’ on those who use and sell drugs.”); Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL’Y REV. 9, 12 (1999) (“It appears that a primary goal of harsh sentencing policies has been to satisfy the needs of politicians in their seemingly insatiable desire to appear to be ‘tough on crime.’”).

power over punishment in ways that threaten the basic fairness of the justice system. It deserves much credit for intolerable conditions that exist in at least some corrections facilities, devours corrections resources badly needed for rehabilitation and reentry efforts, and merits most of the blame for a never-ending need for more prison space. It is the centerpiece of sentencing laws and a sentencing regime that have been subjected to 30 years worth of ad hoc legislative action propelled mostly by an impulse to get tough on criminals and the great illusion that in harsher punishment there is some kind of quick fix to the crime problem. The end result is a set of sentencing laws that lack coherence, consistency, philosophy, and fairness, that drain the public treasury while exacerbating conditions in corrections facilities that are already shameful, and that fail in remarkable fashion to live up to the values and expectations of the justice system:

... Sentencing law is arguably the most important area of law. The sanctions available against offenders target the most cherished and coveted individual interests, such as the right to liberty and property. *Sentencing law is too important to not get 'right.'*³⁶

The sentencing laws of the Kentucky Penal Code are too important not to get “right,” and they are not “right.” The entire package cries out for major reform, reform that is absolutely crucial to any effort by the state to end its inmate explosion and the mass incarceration it has pursued for thirty years to no end.

The purpose of this article is to engage in some analysis and discussion of the part of this sentencing law that cries out loudest for reform (the state’s PFO law³⁷), reform that in short order would begin to deflate the population that has our prisons and jails grossly overcrowded. In this analysis and discussion, there is some brief consideration of the justifications used to support repeat offender laws (Part I), a segment on the history and evolution of Kentucky’s law (Part II), an examination of a selection of repeat offender laws from other states (Part III), a report on two field studies of the use of the PFO law in two Kentucky courts (Parts IV and V), and a concluding argument in support of a return to sentencing sanity that once prevailed in our laws and in our justice system.

I. PHILOSOPHY, PURPOSE, AND REALITY

Repeat offender statutes exist in one form or another in almost all states, better known by the baseball metaphor “three strikes and you’re out.” They are embraced in some circles for deterrence they are believed to

36 Mirko Bagaric & Richard Edney, *The Sentencing Advisory Commission and the Hope of Smarter Sentencing*, 16 CURRENT ISSUES IN CRIM. JUST. 125 (2004) (emphasis added).

37 KY. REV. STAT. ANN. § 532.080 (1974).

provide for high rate offenders and in others for the elevated incapacitation they are known to provide.³⁸ Doubt regarding their deterrence value is widespread, mostly because of studies such as the following:

“The findings suggest that 76 percent of active criminals and 89 percent of the most violent criminals either perceive no risk of apprehension or are incognizant of the likely punishments for their crimes.” If this is so, the sentence for a particular crime does not act as a deterrent in the mind of the potential criminal.³⁹

* * * * *

Fifty-two of the 60 prisoners reported that they did not think that they would be caught and, as a result, punishment size was unimportant. Thirty-two of the same 60 apparently did not know what the punishment would likely be. Most (51 of the 60) believe that they would not be arrested.⁴⁰

Almost as much doubt about their incapacitation value exists in some circles, because of the difficulty of identifying high rate offenders and the extremely high costs of incarcerating an aging inmate population:

Even if it were possible—which it is not—to identify accurately the most criminally active 6 percent of the male population, it would require a massive expansion of the prison system to incarcerate these offenders.⁴¹

* * * * *

38 Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55, 56–57 (2001) (“[T]hey argue, Three Strikes can have a significant impact on the crime rate, by either deterring these career criminals from committing further crimes, or, if they are not deterred, by removing them from the street by sentencing them to long prison terms.”).

39 Darley, *supra* note 28, at 196, quoting David Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 A. L. & ECON. REV. 295, 302-4 (2202). See also Chuck Colson & Pat Nolan, *Prescription for Safer Communities*, 18 NOTRE DAME J. L. ETHICS & PUB. POL'Y 387, 388 (2004) (“[T]he conservatives said that the penalties for crime were too lenient; that if we ratcheted up the sentences criminals would turn to other lines of work. Yet that presumes that criminals are rational calculators, carefully weighing the consequences of their actions. Our experiences in prison belie that. Neither of us ever met an inmate that thought they would get caught, and certainly most did not have the foggiest idea what the penalties for their crime were when they committed the crime.”)

40 Doob & Webster, *supra* note, 29 at 182.

41 Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L. J. 103, 115 (1998). See also Samara Marion, *Justice by Geography? A Study of San Diego County's Three Strikes Sentencing Practices From July–December 1996*, 11 STAN. L. & POL'Y REV. 29, 41 (1999–2000) (“Contrary to its proponents’ original claims that the law would keep ‘rapists, murderers, and child molesters behind bars where they belong,’ only three percent of the offenders in this study had committed such crimes.”).

. . . Three Strikes fills prison cells with offenders who are not particularly dangerous and who are aging. Not only are they less dangerous as they age, but they are also more expensive to maintain. In addition to the cost of prison construction, the state pays about \$26,000 per year to warehouse an average offender. By contrast, older felons cost the state between \$40,000 and \$70,000 per year. When those figures are projected into the future, the results are staggering. . . .⁴²

Nonetheless, driven by a very powerful intuitive belief that harsh punishment matters in crime control efforts, these laws have survived in most if not all states and for some time have occupied center stage in the war-on-crime, with little if any careful scrutiny by lawmakers and the potential to unleash at some point a problem of huge proportions:

The reality is that criminals sentenced under harsh systems . . . are being released. Eight or ten years ago, we could say that we will “lock them up and throw away the key,” or more realistically, lock them up now and worry about how to deal with their release when the time comes—somewhere in the distant future. However, that future is now upon us. The time for release is today or tomorrow or soon.

Those serious criminals will re-enter the free population. When they do so, they will have been confined for longer, with fewer remaining links to their families and communities, and having had less treatment and training than when resources were not so scarce and when there was more emphasis on rehabilitation. That is a reality we must face. The burning question is whether those released are citizens who will be successfully reintegrated into society, or are convicts, who in large numbers will re-offend at terrible costs.⁴³

The Kentucky version of these laws is especially draconian and problematic, because of the unusually wide net it casts and the huge contributions it has made to the incarceration explosion of the last 30 years. Like most such laws, it owes its existence to public anger, political expediency, and a lack of careful thought about long-term effects on

42 Michael Vitiello, *Reforming Three Strikes' Excesses*, 82 WASH. U. L. Q. 1, 16–17 (2004). See also Beres & Griffith, *supra* note 41, at 132 (“States that include minor offenses as strikes also may sentence older offenders to long prison terms when these offenders no longer pose a significant danger to society.”); Lippke, *supra* note 34, at p. 23 (“[O]ne of the best-established findings of criminology is that crime rates decline as individuals age. Crime is overwhelmingly the province of young males . . . This suggests that blanket policies of lengthy prison terms for serious crimes will generally be ineffective as a means of reducing crimes once offenders reach their thirties.”).

43 Robert P. Mosteller, *New Dimensions in Sentencing Reform in the Twenty-First Century*, 82 ORE. L. REV. 1, 24–25 (2003).

inmates and fairness in the assignment of punishment for bad behavior. It has evolved into a truly lethal sentencing weapon without serious consideration of the possibility that its benefits might be outweighed by its very high costs and an uncertain but real threat to public safety. Thoughts about this possibility and about the need for reform of this law fill the remaining pages of this article, beginning with a description of how this law evolved into the very lethal weapon that it is.

II. KENTUCKY'S REPEAT OFFENDER LAW

A. *The 1974 Penal Code*

After five years of careful study,⁴⁴ the Kentucky General Assembly repealed most of the state's criminal statutes in 1974 and adopted what is now called the Kentucky Penal Code,⁴⁵ barely ahead of the hardening of attitudes toward criminals and while lawmakers still had a taste for rehabilitation as a core if not overriding function of incarceration. The sentencing provisions of the new code (consistent with predominant views of the time) retained largely intact the state's longstanding commitment to indeterminate sentencing. They adopted a narrow penalty range for each felony offense,⁴⁶ required sentences to have maximum periods of imprisonment but no minimum periods, and left the Parole Board with very wide discretion to determine how much actual time convicted felons would serve in prison.⁴⁷

In using penalty ranges for sentencing, the 1974 Code was designed to promote proportionality (punishments commensurate with the seriousness of crimes) without depriving sentencing authorities of the flexibility needed for proper consideration of matters peculiar to individual offenders (age, employment history, drug and alcohol use, mental capacity, etc.) and, most importantly, criminal histories. In every felony classification, the penalty range was wide enough for a separation of high and low rate offenders and for significantly harsher punishment for deserving repeat offenders. The objective was to provide for balance between extremes, for punishment

44 See Ky. Crime Comm'n & Legislative Research Comm'n, *Kentucky Penal Code: Final Draft* (1971) [*hereinafter* Penal Code: Final Draft].

45 Act of Apr. 1, 1944, ch. 406, § 278, 1974 Ky. Acts 873.

46 The least serious felony crime (called Class D felony) had a penalty range of 1 to 5 years, slightly more serious felonies (called Class C felony) had a range of 5 to 10 years, the next more serious felony (class B felony) had a range of 10 to 20, and the most serious felony (class A) had a penalty range of 20 years to life imprisonment. See Act of Apr. 2, 1974, ch. 406, § 278, 1974 Ky. Acts 873.

47 "The actual length of his imprisonment is to be determined by the Parole Board in much the same manner as is done under the existing process. No minimum period of imprisonment is established in this code for a convicted felon." Penal Code: Final Draft, *supra* note 44, at 342.

partly tailored to the offense and partly tailored to the offender (striving to give offenders no more than they deserved and society no more than it needed).

Under this approach, prosecutors had some influence over penalties by virtue of their charging authority but most of the front end power in sentencing was held by trial judges. They had virtually unlimited discretion to substitute probation for imprisonment (and were encouraged by statute to use it),⁴⁸ had the responsibility in cases resolved by guilty plea for fixing defendants' maximum terms of imprisonment, and had authority to reduce penalties fixed by juries to lesser penalties within the applicable penalty ranges.⁴⁹ The authority and discretion of judges was unimpaired by mandatory minimum penalties and very few if any penalty enhancers, except for the new code's repeat offender law.

B. The 1974 PFO Law

In one instance, the 1974 Code abandoned its commitment to proportionality in punishment, shifted its focus in sentencing from rehabilitation to incapacitation, and added to the Code a statute known then and now as the persistent felony offender law. In this one departure from the sentencing policies and practices described above,⁵⁰ lawmakers embraced a more punitive philosophy toward offenders who were believed to be resistant to the deterrent effects of proportional punishment and who had squandered opportunities to change their behaviors. They had a very small target (felons who had committed crimes, who had been punished, and who then committed more crimes) and no reason to fear an inmate explosion for the prison system:

The 1974 Code carefully . . . guaranteed that its “three strikes” law would be used only against high-rate offenders who had been unresponsive to extended rehabilitation efforts by the state. In addition to requiring the

48 See Act of Apr. 2, 1974, ch. 406, § 285, 1974 Ky. Acts 875.

49 See Act of Apr. 2, 1974, ch. 406, § 283, 1974 Ky. Acts 874.

50 The effect of the PFO law on penalties varied from one felony class to another, although the objective and effect was to push all persistent offenders into harsher penalty categories. In the highest category of offender (Class A felony), instead of the normal range of 20 years to life, the persistent offender was given a life sentence automatically; in the next highest category (class B felony), instead of a normal range of 10 to 20 years, the persistent offender was moved into the range normally applicable to class A felons, not less than 20 years or more than life; in the next to lowest category (class C felony), instead of a normal range of 5 to 10 years, the persistent offender was moved into the range normally applicable to class B felons, 10 to 20 years; and in the lowest category (class D felony), instead of a normal range of 1 to 5 years, the persistent offender was moved into the same range used for the persistent felony offender who committed a class C felony, 10 to 20 years. It should be noted that the offender who suffered the worst under this law was the least serious offender. See Act of Apr. 2, 1974, ch. 406, § 280, 1974 Ky. Acts 873–74.

commission of a third offense . . . , the original “persistent felony offender” provision of the Code . . . required for “three strikes” punishments that the defendant be found to have committed his/her third offense after having been subjected to imprisonment on two separate occasions. . . .⁵¹

Nothing short of three convictions and two separate periods of imprisonment⁵² would trigger the “three strikes” option and its very harsh penalties. The option was meant for extraordinary use, and, in the early years of its life, it was used as contemplated: in 1980, five years after enactment of the 1974 law, the state had about 4000 inmates in prison with a mere 79 of that number carrying elevated sentences under the persistent felony offender law.⁵³ By this date, however, Kentucky’s version of the tough-on-crime movement was in full bloom and the repeat offender law of 1974 was much too soft to survive.

C. A New and Very Different PFO Law

The Kentucky General Assembly took early and careful aim at the 1974 PFO law and in a single piece of legislation⁵⁴ converted it into a sentencing weapon of monumental proportions. Well ahead of most states, and before “tough on crime” became a galvanizing political slogan, the penal code of Kentucky had one of the most far-reaching repeat offender laws ever enacted. The conversion from a sentencing tool for occasional use to one of the most far-reaching ever enacted resulted from a combination of three changes that were made to the 1974 law and one change that was not made:

One. The most fundamental of the three changes involved a redefinition of what is a “strike” for PFO punishment enhancement. The 1974 law had defined “strike” as a felony conviction that had sent the defendant to state prison for actual incarceration, a definition that was designed to significantly reduce the pool of offenders eligible for PFO punishment. In the overhaul, there was no requirement of imprisonment in the definition of “strike” and nothing in its place to guard against an overuse of its extraordinary punishment of repeat offenders. In opening the door to long prison terms for offenders who had never seen the inside of a prison, lawmakers abandoned the notion they once held “that ‘three strikes’ laws are defensible only as a last resort measure against incorrigible offenders.”⁵⁵

⁵¹ Lawson, *supra* note 9, at 336.

⁵² Two or more convictions with sentences served concurrently or consecutively were counted as one for “three strikes” purposes. Act of Apr. 2, 1974, ch. 406, § 280(3), 1974 Ky. Acts 873.

⁵³ See Ky. Dep’t of Corr., Kentucky Dep’t. of Corr. History, 1951–1995, http://corrections.ky.gov/CorrectionsHistory/Corrections_History_Part3.htm (last visited on Sept. 25, 2004).

⁵⁴ See Act of Mar. 29, 1976, ch. 180, § 283, 1976 Ky. Acts 425.

⁵⁵ See Lawson, *supra* note 9, at 338.

Two: The most significant of the three changes in the 1974 law was a reduction of the number of “strikes” needed for PFO status from three to two. In a second departure from its earlier “last resort” philosophy, the General Assembly added to its now toughened “three strikes” law a new “two strikes” law, providing for enhanced rather than ordinary punishment of any offender who had earlier been convicted of a single felony offense (again without any requirement of prior incarceration from that conviction).⁵⁶ With this change, lawmakers eliminated all restraint on the use of extraordinary punishment of repeat offenders, shifted the tough-on-crime movement into a higher gear, and added to the state’s sentencing arsenal a weapon far more likely to come into play than the “three strikes” weapon.

Three: The last of the changes in the 1974 law had the effect of elevating real punishments of repeat offenders. Believing it needed to close “loopholes” in PFO penalties, the legislature eliminated the possibility of probation for all repeat offenders⁵⁷ and more importantly closed the door to early parole for “three strikes” offenders: “A . . . persistent felony offender in the first degree shall not be eligible for . . . parole until having served a minimum term of imprisonment of not less than ten years.”⁵⁸ Although the mandatory minimum sentence of 10 years was later eliminated for the lowest classification of repeat offender (class D felons⁵⁹), it was kept intact for all others⁶⁰ and added to the repeat offender law a new capacity to push the state’s inmate population to unsupportable levels.

Four: The change in the 1974 law that was not made by this modifying legislation involved the definition of what is commonly called a “triggering offense” (the so-called last strike needed to bring persistent offender enhancement into play). The 1974 law used the most liberal of all definitions of “triggering offense” (namely any one of the state’s many felony crimes), something it could do without opening the door to irrational punishment because of the way in which it defined and used its “strike” requirements (two prior convictions with two separate periods of incarceration in state prison). The modified law used the same definition with very different consequences.

After these developments, the PFO law had an extremely liberal and far-reaching definition of “triggering offense,” an equally liberal and far-reaching definition of “strike,” and absolutely nothing to shrink the pool of repeat offenders who would qualify for extraordinary punishment. A significant increase in the PFO prison population was now guaranteed.

56 See Act of Mar. 29, 1976, ch. 180, § 1, 1976 Ky. Acts 425.

57 See Act of Mar. 29, 1976, ch. 180, § 1(5), 1976 Ky. Acts 425.

58 See Act of Mar. 29, 1976, ch. 180, § 1, 1976 Ky. Acts 425.

59 A class D felony is the lowest of four felony classifications in Kentucky’s law, carries normal penalties of 1 to 5 years in prison, and includes such crimes as theft, drug possession, and prostitution. KY. REV. STAT. ANN. § 532.010 (1975).

60 See KY. REV. STAT. ANN. § 532.080(7).

D. Conclusion

The 79 PFO inmates in the 1980 prison population were made to look insignificant in short order: “By 1984, that number had skyrocketed to 1,142 inmates and had only begun to have its long-term effect on the inmate population explosion”⁶¹ In the twenty-four years since 1984, the state has incarcerated several thousand inmates carrying the PFO status and its enhanced punishment and at the present time has a very substantial population of such inmates. And in these numbers one has no more than half the story concerning the impact of this law on the inmate population. The other half concerns the uncountable number of convicted felons who accept higher-than-normal terms in prison as a result of plea bargaining driven by a need and desire to obtain dismissal of PFO charges. And then beyond the numbers there is an invisible and largely unappreciated impact of this law on core principles of justice.

Beyond providing fuel for prison growth and overcrowding beyond almost anyone’s imagination, this law (more than any of the other “tough-on-crime” measures) gives to the prosecution absolutely enormous power and control over punishment, all at the expense of power and control that once rested in the more impartial hands of the judiciary. An adversarial balance that once dominated the criminal justice system has been victimized by unprecedented, unguided, and largely unchecked prosecutorial discretion to dictate sentences, evidenced most clearly by the ever increasing percentage of cases resolved by guilty plea and a virtual disappearance of the criminal trial,⁶² a troubling and largely unexplored phenomenon that is to be revisited in a later segment of this article.

III. REPEAT OFFENDER LAWS OF OTHER STATES

The harshness of repeat offender laws depends upon how they combine four characteristics—(1) the kinds of crimes that bring enhanced penalties into play (so-called “triggering offenses”), (2) the kinds of prior convictions that qualify offenders for extraordinary punishment (so-called “strikes”),

⁶¹ See Lawson, *supra* note 9, at 339.

⁶² See e.g., Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform* 58 STAN. L. REV. 235, 251 (2005) (“The ability to threaten defendants with very long sentences if they do not plead guilty or . . . cooperate against others is a hugely powerful tool in inducing pleas and securing cooperation As the Guidelines and associated statutes have grown ever more complex, giving prosecutors ever more bargaining chips, the rate of guilty pleas has steadily increased. . . .”); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) (“The overwhelming and dominant fact of the federal sentencing system . . . is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing. There is a lot of evidence to support this claim, but it can be demonstrated with one simple and awesome fact: Everyone pleads guilty . . .”).

(3) the number of prior convictions needed for repeat offender status (two, three, four), and (4) the effect on normal penalties of being treated as a repeat offender. In most states, these laws are sold to the public as weapons for use against offenders who are especially dangerous:

... Those who favor Three Strikes laws argue that a small group of high rate offenders commits most of the *serious crime* and that these laws can identify and incapacitate such high rate offenders⁶³

... The purpose of these laws is simple: Offenders convicted repeatedly of *serious offenses* should be removed from society for long periods of time, in many cases for life.⁶⁴

If true to this objective, such laws would cast their nets only over the worst of society's repeat offenders and would preserve the principle of proportionality as the cardinal determinant of punishment for all others.

More than just a few repeat offender laws, probably a very substantial majority, are in fact true to this objective and cast their nets over no more than a tiny percentage of repeat offenders. A few states achieve this objective by allowing for enhanced punishment only after offenders have served multiple periods of imprisonment (as Kentucky once did).⁶⁵ But a much greater number of states accomplish this objective by the ways in which they define "triggering offense" (current charges that bring enhancement into play) and "strikes" (convictions needed for repeat offender status), as shown by the set of state laws described below (formatted for easy comparison with Kentucky's repeat offender law) and by an additional representative group described in the appendix:

63 Beres & Griffith, *supra* note 41, at 103 (emphasis added).

64 John Clark, James Austin, & D. Alan Henry, "Three Strikes and You're Out": *A Review of State Legislation*, National Institute of Justice, p. 1 (September 1997) (emphasis added). See also Vitiello, *supra* note 42, at 1–2 ("Campaign literature backing the [California three strikes] initiative claimed that '3 STRIKES SAVES LIVES AND TAXPAYER DOLLARS!' and would keep 'career criminals, who rape women, molest innocent children, and commit murder, behind bars where they belong.'").

65 Some states rely mostly if not solely on the requirement of prior terms of actual imprisonment (in defining prior "strikes") in order to limit the reach of their repeat offenders laws. See e.g., MASS. ANN. LAWS ch. 279, § 25 (Lexis 2008) (requiring two prior felonies convictions with two separate terms of imprisonment for three–strikes status); N.H. REV. STAT. ANN. § 651–6 (West 2001) (requiring two terms of imprisonment ahead of commission of the triggering offense for three–strikes status); NEB. REV. STAT. § 29–2221 (Reissue 1995) (requiring convictions and imprisonment for felonies counted as "strikes" in applying its "three strikes" laws). Other states require prior convictions with imprisonment for some of its repeat offender provisions but not all. See e.g., N.Y. LAW § 70.00–70.10. (Consol. 2008); MISS. CODE ANN. § 99–19–81, 83 (1972); MD. ANN. CODE art. 5, § 905 (2008).

CONNECTICUT⁶⁶

1. Type: two–strikes and three–strikes laws.
2. Triggering Offense: manslaughter, arson, robbery, first degree assault or serious sex offense.
3. Strike: any conviction of one of the foregoing crimes or comparably dangerous crime, but only if it resulted in actual imprisonment.
4. Penalties: for a second strike normal penalties are doubled and for a third strike they are enhanced to “no more than life in prison.”

INDIANA⁶⁷

1. Type: three–strikes law.
2. Triggering Offense: a serious felony crime (such as murder, battery with a deadly weapon, confinement with a deadly weapon, kidnapping, rape, burglary with a deadly weapon, arson, robbery with a deadly weapon, and death causing DUI).
3. Strike: any conviction of a serious felony crime (from those listed above).
4. Penalties: for a third strike, normal penalties are enhanced to life imprisonment without parole.

MARYLAND⁶⁸

1. Type: two–strikes, three–strikes, and four–strikes laws.
2. Triggering Offense: a crime of violence from a short list of most dangerous to person offenses.
3. Strike: for two–strikes, one conviction for a crime of violence resulting in actual imprisonment; for three–strikes, two convictions for crimes of violence with one resulting in actual imprisonment; and for four–strikes, three convictions of crimes of violence all resulting in actual imprisonment.
4. Penalties: for a second strike, normal penalties are left intact except for a minimum sentence of 10 years, for a third strike, penalties are enhanced to not less than 25 years in prison, and for a fourth strike the penalty is life in prison without parole.

OHIO⁶⁹

1. Type: two–strikes violent offender law.
2. Triggering Offense: aggravated murder, murder, involuntary manslaughter, or a felony involving infliction or attempt to inflict serious bodily injury.
3. Strike: a conviction for a violent offense that would qualify as a triggering offense.
4. Penalties: a mandatory prison term at the upper end of the penalty range

66 CONN. GEN. STAT. ANN. § 53(a)–40 (West 1969).

67 IND. CODE ANN. §§ 35–50–2–8.5 (West 1994).

68 MD. ANN. CODE art. 5, § 905 (2008).

69 OHIO REV. CODE ANN. §§ 2929.01, 2929.14 (LexisNexis 1998).

for the triggering offense.

SOUTH CAROLINA⁷⁰

1. Types: two–strikes and three–strikes law.
2. Triggering Offense: for two–strikes, a “most serious offense” (murder, voluntary manslaughter, homicide by child abuse, assault and battery with intent to kill, criminal sexual assault, assault with intent to commit criminal sexual conduct, kidnapping, arson or burglary in first degree, armed robbery, damaging property with explosives, or other offenses causing or threatening death); for three strikes, a “serious offense” (any crime punishable by a maximum term of 30 years or more, lynching, engaging child in sex performance, and other serious crimes such as trafficking in drugs, trafficking within proximity of a school, and causing death by vehicle while under the influence).
3. Strike: for two–strikes, conviction of a “most serious offense”; for three–strikes, conviction of a “most serious offense” or a “serious offense.”
4. Penalties: normal penalties are elevated to life in prison without privilege of parole under both laws.

Virginia⁷¹

1. Type: three–strikes law.
2. Triggering Offense: a crime involving an “act of violence” (murder, voluntary manslaughter, mob–related felonies, kidnapping or abduction, malicious felony assault or bodily wounding, robbery and carjacking, criminal sexual assault, arson of occupied structure, or conspiracy to commit any of these crimes).
3. Strike: a conviction of a crime involving an “act of violence” (from triggering offense list).
4. Penalties: normal penalties are elevated to life imprisonment without privilege of parole.

In these laws and others like them⁷² there is no assassination of the proportionality principle and very little fuel for an inmate explosion in the prison systems:

Three strikes statutes that limit strikes to violent felonies like robbery, kidnapping, and rape do little to change prior sentencing practices. Few individuals are convicted three times for these offenses, and those convicted are likely to serve long prison terms without regard to Three Strikes laws⁷³

⁷⁰ S.C. CODE ANN. §17–25–45 (1976).

⁷¹ VA. CODE ANN. § 19.2–297.1 (1994).

⁷² The repeat offender laws in the attached appendix are virtually identical to the ones described in the text.

⁷³ Beres & Griffith, *supra* note 41, at 111.

* * * * *

Early evidence suggests that most of the ["three strikes"] laws will have minimal impact on their respective State prison systems. States have drafted these laws so that they would be applied to only the most violent repeat offenders. In most States these offenders were already receiving lengthy prison terms under existing statutes . . .⁷⁴

And on all counts and all scores the Kentucky law could hardly be any more different than it is from these laws. While these laws aim at serious offenders with a history of serious crimes, the Kentucky law throws a blanket over the entire pool of repeat offenders (by defining both "triggering offense" and "strike" to include "any felony crime"), promotes a sentencing regime with the capability of overwhelming the prison system, and above all else authorizes lengthy prison terms for offenders who pose very little (and oftentimes no) threat to public safety. To be sure, the Kentucky law will ensnare some very dangerous offenders and send them to state prison for long periods of time. But for no reason other than the simple fact that minor offenders outnumber serious offenders by an extremely wide margin, this law is sure to produce a flood of property, drug, and other relatively minor offenders carrying very heavy sentences and posing virtually no risk of serious harm to members of the public. Are its benefits outweighed by its costs to the corrections system and to persons who must bear the heavy burden of disproportionate punishment?

The field studies described in the next two parts of the article underscore the importance of pondering this question.

IV. PFO PRACTICES IN FAYETTE COUNTY

A. Introduction

There has been very little examination of the operation of Kentucky's PFO law in practice and as a result there is little appreciation of the contribution it has made to the conditions that prevail in the state's prisons and jails. Statistics from corrections sources show rapid growth over time of the number of inmates held under PFO status (from 79 in 1980 to 4,187 in 2004) but provide very little data about the nature of this population and even less about the extent to which the relationship between punishment and seriousness of crime is affected by the operation of this law.

With these voids of information in mind, field studies were conducted by the author in two counties (Fayette and Scott) with intent to shed light on the following inquiries: (1) the extent to which the law is used to enhance punishments (the frequency of its use), (2) the kinds of offenders subjected to its harsh penalties, (3) the extent to which it produces disproportionate

⁷⁴ Clark et al., *supra* note 64, at 13.

punishments, and (4) the consistency (or a lack thereof) of its use from one territorial jurisdiction to another. The results of the first study are reported in this section of the article.

B. Scope of the Study

All felony prosecutions for calendar year 2003 in Fayette Circuit Court were examined for this study (with this calendar year selected so that cases would have time to move through the court system to a conclusion). The number of files reviewed totaled about 1600 with approximately 1400 cases ending with a final disposition in the Circuit Court (with the balance being sent to a lower court for disposition or left unresolved for one reason or another). The number of cases involving PFO charges was 378—153 involving PFO first degree (PFO 1st) (requiring proof of two prior convictions) and 225 involving PFO second degree (PFO 2nd) (requiring proof of one prior conviction); in other words, almost 1 out of every 4 cases reviewed (378 out of 1600) involved a prosecution under the state's repeat offender laws.

The case files began with grand jury indictments and ended with judgments of the court (except for those sent to the lower court or left unresolved). The number of PFO prosecutions that ended with a final disposition (out of the 1400 cases reviewed) totaled 302—126 involving PFO 1st charges and 176 involving PFO 2nd charges. There was enough information in case files to paint a sketch of the criminal conduct under scrutiny and precise data on current charges, prior convictions, and final disposition of charges. A very high percentage of these cases (and all others) was resolved by guilty plea, with nothing in the court's records to indicate the specifics of the bargaining process or the most important factors underlying the negotiated settlements.

C. PFO 1st Degree Prosecutions

One. As stated above, the number of cases with charges of persistent felony offender in the first degree totaled 126 (out of 1400 cases with final dispositions). In 104 of these cases, defendants were being prosecuted (“triggering offense”) for the commission of relatively minor felonies (lower level drug crimes in 33 cases, minor property crimes such as theft and knowingly receiving stolen property in 47 cases, and other minor crimes like flagrant nonsupport and bail jumping in 24 cases); in only 18 of the 126 cases were defendants being prosecuted for crimes that would be regarded as serious or dangerous by most scholars (with four cases involving prosecutions for crimes resting on the border between serious and nonserious). In other words, if one looks only at “triggering offenses,” the PFO 1st law was used in this jurisdiction against nondangerous or nonserious offenders by an overwhelming margin.

Two: A very similar picture emerges from an examination of the convictions used as “strikes” against these offenders. In 93 of the 126 cases (about 75 percent of the total), the defendants had only nondangerous or nonserious crimes on their records (and in all of these cases—93 of 126—the defendants were being prosecuted for “triggering offenses” that were nondangerous and nonserious). In 10 of the 18 cases in which the defendants were charged with serious or dangerous “triggering offenses,” they had no “strikes” that would qualify as serious or dangerous and in 4 of the 18 cases they had one earlier conviction that would so qualify; in only 4 of 126 cases did defendants have both a dangerous or serious “triggering offense” and two convictions that would qualify as dangerous or serious “strikes.” In other words, if the repeat offender laws described in Part III above and in the appendix to this article were substituted for the Kentucky repeat offender law, no more than 4 of the 126 offenders in the study would have qualified for “three strikes” prosecution and the tough penalties that follow.⁷⁵

Three: The final results of these cases leave no room for doubt that the PFO 1st law achieves its objective of imposing on repeat offenders very harsh punishments, sometimes visible and measurable and sometimes hidden from view. In about two-thirds of the cases in this part of the study, defendants were punished as persistent felony offenders (62 PFO 1st convictions and 21 PFO 2nd convictions out of 126 prosecutions); in many if not most of the others, defendants entered guilty pleas (without PFO status) imposing punishments at the upper ends of penalty ranges for the charged (“triggering”) offenses. With appreciation of the fact that PFO penalties are two or three (or more) times higher than normal penalties, it is easy to see in these numbers a very real and substantial impact on inmate populations from the operation of this part of the law.

But it takes a look beyond the numbers to see the effect of this law on individual offenders, an effect that is predominated by a loss of relationship between punishment and the conduct for which it is imposed (and shown by a selection of representative cases from the study):

1. *Darnell Jackson*:⁷⁶ He was accused of taking goods from Dillard’s Department Store and was indicted for theft and PFO 1st (with knowingly receiving stolen property and low level burglary as prior convictions). He was sentenced to one year in prison for the theft, had this sentence enhanced to 10 years under the PFO, and was sent to state prison for 10 years for theft

⁷⁵ The California three-strikes law is often cited by scholars as an example of a tough repeat offender law: it allows for use of the law against offenders committing any felony crime (“triggering offense”) but only if those offenders carried into the case two prior convictions for “dangerous” crimes. *See e.g.*, Beres & Griffith, *supra* note 41, at 103. CAL. PENAL CODE § 667 (West 1994). Even under this often-recognized-as-tough law, only 15 of the 126 cases examined in this study would qualify for “three strikes” prosecution.

⁷⁶ *Com. v. Darnell Jackson*, No. 03-CR-00240 (Fay. Cir. Ct. Jan. 19, 2003).

of the goods.

2. *Mike Truglia*:⁷⁷ He was accused to stealing a DVD player from K-Mart and was indicted for theft and PFO 1st (based on a drug possession conviction and burglary convictions from New Jersey). He was sentenced to 1 year for the theft, had this sentence enhanced to 15 years by the PFO charge, and was sent to prison for 15 years for theft of the DVD player.

3. *Shawn Gifford*:⁷⁸ He was in the county jail serving time for a drug offense (having violated conditions of drug court) and while in the jail managed by forging court papers to get himself released during the day for community work. After 46 days of such activities, he was arrested and charged with escape in the second degree and PFO 1st (with prior convictions for possession of forged instruments and credit card fraud). He got five years for escape, had this sentence enhanced to 10 years by the PFO charge, and was sent to prison for 10 years.⁷⁹

4. *Fay Williams–Slone*:⁸⁰ She entered a coat factory twice for the purpose of theft and stole goods (valued at less than \$300). She was indicted for third degree burglary (two counts), misdemeanor theft, and PFO 1st (based on multiple prior convictions for possession of forged instruments). She was sentenced to one year for third degree burglary, had this enhanced to 10 years by the PFO, and was sent to prison for 10 years for stealing less than \$300 worth of goods.

5. *Billy Whittaker*:⁸¹ He forged five checks for these amounts—\$32, \$40, \$33, \$125, and \$108. He was indicted for second-degree forgery (five counts) and PFO 1st (with prior convictions for theft and flagrant nonsupport). He was convicted of second-degree forgery (one count) and PFO 1st, was sentenced to one year for forgery, had this enhanced to 10 years by the PFO charge, and was sent to prison for 10 years (for theft of \$333).

6. *Robert Dawson*:⁸² He was arrested for public intoxication and at booking for this offense was found in possession of one gram of cocaine. He was indicted for cocaine possession and PFO 1st (with prior convictions for drug possession, bail jumping, and possession of a handgun by a convicted felon).

77 *Comm. v. Mike Truglia*, No. 03–CR–00250 (Fay. Cir. Ct. Jan. 31 2003).

78 *Comm. v. Shawn Gifford*, No. 03–CR–00583 (Fay. Cir. Ct. March 3, 2003).

79 The prosecution seemed to consider the activities of this defendant to be particularly deserving of harsh punishment. He was away from the jail (on unapproved “work release”) for 46 days (always returning at night); he was indicted for 46 counts of escape in the second degree (one for each day away from the jail). He entered a guilty plea to one count of the indictment in return for dismissal of the other 45 and accepted a sentence for this conviction at the top of the penalty range (one to five years for a class D felony). His guilty plea to the PFO charge doubled his penalty and sent him to prison for 10 years (for being away from the jail on forged papers for one-and-a-half months during daylight hours only).

80 *Comm. v. Fay Williams–Slone*, No. 03–CR–01171 (Fay. Cir. Ct. May 6, 2003).

81 *Comm. v. Billy Whittaker*, No. 03–CR–01354 (Fay. Cir. Ct. May 28, 2003).

82 *Comm. v. Robert Dawson*, No. 03–CR–01358 (Fay. Cir. Ct. June 11 2003).

He was convicted of drug possession, sentenced to five years for this offense, had this sentence enhanced to 20 years by the PFO charge, and was sent to state prison for 20 years (for possession of one gram of cocaine).

7. *William Hunt*:⁸³ After an arrest for driving without a license, he was indicted for driving on a suspended license (a felony because of prior DUI convictions) and PFO 1st (with prior convictions for receiving stolen property and DUI 4th offense). He was convicted of driving on a suspended license, was sentenced to one year for this conviction, had this sentence enhanced to 10 years by the PFO charge, and was sent to state prison for 10 years (for driving on a suspended license).

8. *Bruce Beavers*:⁸⁴ He was arrested while in possession of stolen CDs and a CD storage tower and was indicted for knowingly receiving stolen property and PFO 1st (with prior convictions for low-level property crimes and burglary in the second degree). Upon conviction, he was sentenced to a one year term for knowingly receiving stolen property, got an enhanced sentence of 10 years under the PFO charge, and was sent to prison for 10 years (for possessing small amounts of stolen property).

9. *Fortino Martinez*:⁸⁵ Arrested for public intoxication, he was found in possession of a small amount of cocaine. He was indicted for possession of cocaine and PFO 1st (with two prior convictions for DUI fourth). After guilty pleas, he was sentenced to one year for drug possession, had this sentence enhanced to 10 years by the PFO charge, and went to prison for 10 years for possession of a small amount of cocaine.

10. *Andrian Richardson*:⁸⁶ He was arrested with a small amount of cocaine on his person and was indicted for drug trafficking and PFO 1st (with prior convictions for drug possession). He was convicted of drug possession, was sentenced to 5 years for this offense, had this sentence enhanced to 10 years by the PFO charge, and was sent to prison for 10 years for possession of a small amount of cocaine.

The defendants in these cases were typical of defendants in the whole study. They stood charged mostly with theft or possession of drugs (usually cocaine), had prior felony convictions for the same kind of behavior (theft and drug possession more often than not), and suffered punishments grossly disproportionate to the seriousness of their crimes. In seven of the 10 cases, after being sentenced to one year in prison for the crimes they had committed, defendants were labeled persistent felony offenders and sent to prison for 10 years, a tenfold increase in punishments that are certain to cost more than they are worth to both defendants and the state.

Conclusion: A repeat offender law that throws a blanket over all

⁸³ *Comm. v. William Hunt*, No. 03-CR-00166 (Fay. Cir. Ct. June 16, 2003).

⁸⁴ *Comm. v. Bruce Beavers*, No. 03-CR-00909 (Fay. Cir. Ct. June 25, 2003).

⁸⁵ *Comm. v. Fortino Martinez*, No. 03-CR-01197 (Fay. Cir. Ct. July 8, 2003).

⁸⁶ *Comm. v. Andrian Richardson*, No. 03-CR-01400 (Fay. Cir. Ct. Nov. 14 2003).

offenders with a felony record, as Kentucky's does, is destined to squander corrections resources by filling prison beds with many inmates who are more threatening to themselves than to others. And, as the cases described above show, it is destined to produce results that are totally at odds with core values of a justice system that is committed above all else to the belief that "all offenders should receive their particular deserts—no more and no less."⁸⁷

D. PFO 2nd Degree Prosecutions

One. The number of PFO 2nd degree prosecutions (requiring but one prior conviction) was higher than the number of PFO 1st prosecutions (176 to 126) but the dominant characteristic of the two types was exactly the same – an overwhelming use of the law against low-level felony offenders. Almost 90 percent of the PFO 2nd degree cases (158 out of 176) involved charges (or "triggering offenses") that would be classified as nonserious or nondangerous by most standards, dominated by low-level drug crimes (nearly a third of the subtotal), minor property felonies such as theft and knowingly receiving stolen property (another third), and an assortment of other low-level felonies such as nonsupport, bail jumping, and escape. Similarly, an equally high percentage of the cases involved prior convictions (or "strikes") of the same types; in a full two-thirds of these prosecutions (116 of 176), the defendants arrived in court with prior convictions for minor drug and property crimes. In 25 cases the defendants had prior convictions for serious or dangerous crimes but in only two cases (out of 176) did the defendants have both a dangerous or serious "triggering offense" and a dangerous or serious prior conviction (or "strike"). In other words, substitute for the Kentucky law a repeat offender statute like those described in Part III (and in the appendix) and one will find but two defendants (out of 176) qualifying for repeat offender prosecution and the harsher punishment that almost always follows.

Two: One would expect the PFO 2nd part of the law to have at least as much effect on the inmate population as the PFO 1st part of the law, and that expectation seems to be verified by the results of this study. In 68 percent of the PFO 2nd prosecutions (119 out of 176 cases), defendants were convicted under the PFO charges and in most given an enhanced sentence. In many of the other cases, PFO charges appear to have been dismissed in return for guilty pleas with penalties at the upper end of the penalty ranges for the charged offenses. In a very high percentage of cases (75 out of 119), penalties were enhanced from one year in prison (for the charged offense) to five years in prison (for PFO 2nd status); in 13 cases, penalties were enhanced from one year in prison (for the charged offense)

⁸⁷ Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 76 (Oct. 2005).

to more than five but less than 10 years in prison (for PFO 2nd status); and, in 12 cases penalties were enhanced from five years in prison (for the charged offense) to 10 years in prison (for PFO 2nd status).

Three: Looking beyond raw numbers to individual cases, one sees above all else punishments that exceed by several orders of magnitude the seriousness of the crimes for which they have been imposed:

1. *Edward Roberts:*⁸⁸ He stole a pressure washer and a tape measure from Wal-Mart and was charged with theft and PFO 2nd (with a prior conviction for theft). He pleaded guilty to theft, was sentenced to one year in prison for this offense, and had this sentenced enhanced to five years under the PFO 2nd charge. He was sent to drug court, violated conditions of probation, and was sent to prison for five years.

2. *Edward L. West:*⁸⁹ He was charged with cocaine possession (a class C felony because of a prior drug conviction) and with PFO 2nd (because of a prior conviction for flagrant nonsupport). He pleaded guilty to possession of drugs, was sentenced to five years for this offense, got an enhancement to 10 years under the PFO charge, and was sent to prison for 10 years for drug possession.

3. *April Gray:*⁹⁰ She took a check (for \$2,000) from a house she cleaned and forged it. She was charged with possession of a forged instrument and PFO 2nd (with a prior conviction for possession of a forged instrument). She entered a plea to both counts, was sentenced to 1 year for the possession charge, had this sentenced enhanced to five years by the PFO 2nd charged, and was sent to prison for five years.

4. *Donald Redman:*⁹¹ He was charged with credit card fraud and PFO 2nd (with a prior conviction for obtaining drugs by fraud). He was sentenced to one year for credit card fraud, had this sentence enhanced to five years under the PFO 2nd charge and was sent to prison for five years.

5. *Ale Roy Keith:*⁹² He wrote a cold check for \$5,320 and was charged with theft and PFO 2nd (with prior conviction for theft). He was sentenced to one year in prison for the theft, had this sentence enhanced to five years by the PFO 2nd charge, and was sent to prison for five years.

88 Comm. v. Edward Roberts, No. 03-CR-00269 (Fay. Cir. Ct. Jan. 25, 2003).

89 Comm. v. Edward L. West, No. 03-CR-00582 (Fay. Cir. Ct. June 15, 2003).

90 Comm. v. April Gray, No. 03-CR-00752 (Fay. Cir. Ct. July 15, 2003).

91 Comm. v. Donald Redman, No. 03-CR-00982 (Fay. Cir. Ct. Aug. 1, 2003).

92 Comm. v. Ale Roy Keith, No. 03-CR-00916 (Fay. Cir. Ct. Sept. 12, 2003).

6. *Jason Brammer*:⁹³ He made a false statement to obtain drugs from a pharmacy, was charged with obtaining drugs by fraud (which treats attempt like the completed crime) and PFO 2nd (with prior conviction for third degree burglary). He pleaded guilty, was sentenced to one year for attempting to obtain drugs by fraud, had this sentence enhanced to five years by the PFO 2nd charge, and was sent to prison for five years.

7. *Robert Baker*:⁹⁴ He failed to provide support for two children and was charged with flagrant nonsupport and PFO 2nd (with prior conviction for drug possession). He was sentenced to one year for flagrant nonsupport, had this sentence enhanced to five years by the PFO 2nd charge, and was sent to prison for five years for nonsupport of his children.

8. *Keesha Saylor*:⁹⁵ She shoplifted clothes from Dillard's Department Store and was prosecuted for theft and PFO 2nd (with prior conviction for third degree burglary). She was sentenced to two years for theft, had this sentence enhanced to five years by the PFO 2nd charge, and was sent to prison for five years.

9. *Ron Sparks*:⁹⁶ He committed an act of theft in his place of employment and was charged with theft and PFO 2nd (with a prior conviction for third degree burglary). He pleaded guilty to both charges, was sentenced to one year for theft, had this sentence enhanced to five years by the PFO charge, and was sent to prison for five years.

10. *Ronald Woods*:⁹⁷ He forged and cashed a check for \$101 at Krogers and was charged with possession of a forged instrument and PFO 2nd (with prior convictions for theft and drug possession from one occurrence). He pleaded guilty to both charges, was sentenced to one year for the forged check crime, had this sentence enhanced to five years by the PFO charge, and was sent to prison for five years (for forging and cashing a \$101 check).

The defendants in this set of cases look much like the ones in the PFO 1st cases described earlier. None can be labeled high risk offenders (with nine of the 10 committing low-level theft or minor drug crimes) and none can be said to have had a previous record of serious or dangerous crimes. The PFO effect on the defendants (as well as its inflationary pressure on the inmate population) is significant and undeniable; in 80 percent of the cases (eight of 10) defendants were sentenced to one year in prison for the crimes they had committed but sent to prison for five years as PFO

93 *Comm. v. Jason Brammer*, No. 03–CR–01482 (Fay. Cir. Ct. Sept. 12, 2003).

94 *Comm. v. Robert Baker*, No. 03–CR–00313 (Fay. Cir. Ct. April 11, 2003).

95 *Comm. v. Keesha Saylor*, No. 03–CR–00376 (Fay. Cir. Ct. April 17, 2003).

96 *Comm. v. Ron Sparks*, No. 03–CR–00653 (Fay. Cir. Ct. May 29, 2003).

97 *Comm. v. Ronald Woods*, No. 03–CR–01590 (Fay. Cir. Ct. Dec. 1, 2003).

offenders. Quadrupled sentences for the commission of trivial felonies by defendants who have never committed violent acts is a roadmap to overcrowded prisons and jails, one that appears to have been heavily used in PFO 2nd prosecution in Fayette County.

Conclusion: The problem with a repeat offender law that extends coverage to all defendants with a felony record is that it will catch in its net an occasional defendant who is a threat to public safety and a horde of defendants who are more of a public nuisance than a threat. The costs of catching that occasional serious offender are a steady flow of commitments to prison like the ones described above, a substantial drain on the state treasury, and an exacerbation of conditions in state prisons and jails that have already made them look more like storage bins than houses of reform. And to what end, if not an illusion that aggressive action against repeat offenders (under the PFO laws) will provide a quick-fix to the crime problem?

V. PFO PRACTICES IN SCOTT COUNTY

A. Introduction

Repeat offender laws have long presented the justice system with a great risk of unprincipled disparity in the treatment of defendants, because of the almost unlimited power of prosecutors to determine the charges to be brought and pursued in a given case:

Although always dominant and influential, the prosecutor now essentially controls the criminal justice system Prosecutors decide whether to charge an individual with a criminal offense, and what the charge should be That decision is left to the prosecutor, who has an almost unlimited amount of discretion in making this determination.⁹⁸

The risk inherent in repeat offender laws is a variation in the use of the laws from one county (or jurisdiction) to another and a consequential unevenness of justice that is sometimes called “justice by geography.”⁹⁹ With this in mind, the author went to an adjoining county for a second study of how the state’s PFO law is used against real defendants in real cases but by a different prosecutor.

B. Scope of the Study

It was necessary in this instance to review all criminal prosecutions for a

⁹⁸ Angela J. Davis, *Incarceration and the Imbalance of Power*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS INCARCERATION*, 63 (Marc Mauer & Meda Chesney-Lind, eds., 2002).

⁹⁹ See Marion, *supra* note 41, at 29.

two-year period (2002 and 2003) in order to have a reasonably comparable study to the one described above. All circuit court files were reviewed from grand jury indictment to final disposition and included 175 cases for 2002 and 169 for year 2003, a total of slightly less than 350 and about 25 percent of the number of cases reviewed for the Fayette County study. In one important respect the second study was different from the first, because of differences in the content of the court files. The indictments in Scott County alleged PFO violations without identifying the felonies underlying prior convictions and there was never any disclosure of this information in the court's records (mostly because the PFO cases all ended with guilty pleas); thus, the extent to which the PFO law was here used against offenders without a history of serious crime could not be determined.

C. Findings (Scott County)

The PFO 1st law was used in 13 cases in the two years under review, seven in 2002 and six in 2003. In not a single case was this part of the law used against an offender then charged with a serious crime. It was used mostly against minor drug and low level property offenders and occasionally against offenders charged with nonsupport of children or some other low-level felony. The results from this group of prosecutions included one PFO 1st conviction¹⁰⁰ and four PFO 2nd convictions;¹⁰¹ in addition, as in Fayette County, the results also included guilty pleas in most of the other PFO 1st cases with penalties at the upper end of the ranges for the charged offense (probably in return for dismissal of the PFO charges).

The PFO 2nd law was used in 25 cases during the two years of the study, 12 in 2002 and 13 in 2003. In two cases, it was used in the prosecution of serious offenses (one in each year); in the others, it was used in the prosecution of minor offenses (mostly low level drug and property crimes). The results included three PFO 2nd convictions (one in 2002 and two

100 The defendant in this case entered an unoccupied residence and took property, was charged with theft and burglary in the second degree, was convicted of both as well as PRO 1st, and was sentenced to prison for 12 years with PFO status. *See* *Comm. v. Donald Nelson*, No. 02–CR– 00159 (Scott County Cir. Ct., July 19, 2002).

101 *Comm. v. George Robinson*, No. 03–CR–00026 (Scott County Cir. Ct., Jan. 1, 2003) (defendant attempted flight from police while driving under the influence, had a collision with the police vehicle, was charged with wanton endangerment, criminal mischief, other minor crimes, and PFO 1st, was convicted of wanton endangerment and other minor crimes and PFO 2nd, and was sentenced to five years in prison); *Comm. v. Randolph Harris*, No. 03–CR–00101 (Scott County Cir. Ct., April 17, 2003) (defendant wrote cold checks for four-wheeler vehicles, was charged with theft and PFO 1st, was convicted of theft and PFO 2nd, and was sentenced to five years in prison with PFO status); *Comm. v. Bobby Townsend II*, No. 03–CR–00157 (Scott County Cir. Ct., Nov. 3, 2003) (defendant entered private storage units and was found with stolen property in his possession, was charged with burglary third degree, knowingly receiving stolen property, and PFO 1st, was convicted of both triggering offenses and PFO 2nd, and was sent to prison for five years with PFO status).

in 2003) and 12 additional cases in which penalties appear to have been enhanced to higher levels in return for dismissals of the PFO charges.

D. Comparisons (with Fayette County)

The PFO law was used against slightly more than one-fourth of the defendants prosecuted in Fayette County (378 out of 1400 cases or 27 percent) and against slightly more than one-tenth of the defendants prosecuted in Scott County (38 out of 344 or 11 percent). The difference in PFO 1st prosecutions in the two jurisdictions was somewhat greater than the difference in PFO 2nd prosecutions; the tougher weapon was used in 11 percent of the cases in Fayette (153 out of 1400) and in 3.75 percent of the cases in Scott County (13 out of 344).

A more aggressive use of the PFO weapon in Fayette County is even more clearly reflected in the results produced by PFO prosecutions in the two jurisdictions. Only eight defendants were convicted of PFO charges in Scott County while 203 defendants were so convicted in Fayette County (2.3 percent of all cases in Scott County and 14.5 percent of all cases in Fayette County); only 1 defendant was convicted of PFO 1st in Scott County while 62 defendants were so convicted in Fayette County (.2 percent of all cases in Scott County versus 4.5 percent of all cases in Fayette County).

In one important respect, there was little difference in the findings from the two studies. The PFO law was rarely used against serious/dangerous offenders in either county (in only two of 28 PFO prosecutions in Scott County and in 36 of 378 cases in Fayette County), meaning that it was used against nonserious and nondangerous offenders more than 90 percent of the time. In both Scott and Fayette, the law was used most prominently against low level drug and minor property offenders.

E. Conclusion

Perhaps the offender groups in these adjoining counties are different enough to account for disparities in the use of the PFO laws, perhaps not. A second, and more probable, explanation is the presence of significant variations in the exercise of an unguided prosecutorial discretion that is inherent to this and all other repeat offender laws. In an earlier era, in his acclaimed book on sentencing, Judge Marvin Frankel spoke very harshly about unchecked sentencing discretion in judges:

... As to the penalty that may be imposed, our laws characteristically leave to the sentencing judge a range of choice that should be unthinkable in a "government of laws, not of men." To underscore it by repetition, my first basic point is this: the almost wholly unchecked and sweeping powers we

give to judges in fashioning sentences are terrifying and intolerable for a society that professes devotion to the rule of law.¹⁰²

It is not hard to imagine what the judge would have said about unchecked discretion in the hands of prosecutors, exercised in the shadows of a law office rather than in the open light of a courtroom and capable of producing for identical crimes a soft or hard penalty depending upon whether they occurred on one or the other side of a county line.

VI. A FOOTNOTE ON DISAPPEARING TRIALS

In criminal law trenches and circles, there is some quiet conversation these days about the “disappearing criminal trial,” conversation that always involves prosecutorial discretion and the elevated leverage that has fallen into prosecution hands as a byproduct of the war-on-crime’s tougher penalties. In most war-on-crime literature there is a widespread recognition and acceptance of the reality of this shift of power and a growing concern about its effect on the justice system:

... Draconian sentencing laws have automatically increased the significance of prosecutorial decisions and have impaired an already broken system by radically tilting the delicate balance of the adversarial system toward the prosecutor. As the balance of power has shifted toward the prosecutor, the roles of the defense attorney and judge have weakened.

* * * * *

... Because prosecutors can control the sentencing range, they can control the likely (expected) differential in sentence after plea and after trial. And it is the plea/trial differential that reflects prosecutorial dominance and has led to the virtual disappearance of criminal trials in the federal system (and a parallel trend in many states).¹⁰³

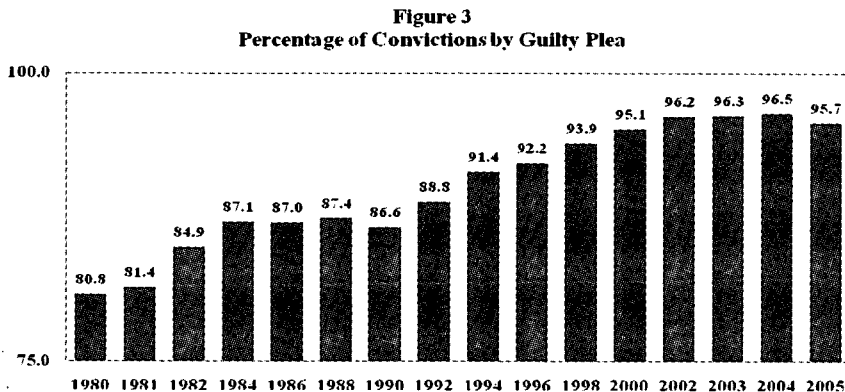
In this article about the state’s PFO law there is no room for a discussion of the “disappearing criminal trial,” just a footnote about some findings that are consistent with a dramatic downturn in trial rates and a fear of excessive prosecutorial power over punishments.

There was no intent in the first of the two field studies described above to gather data on trial rates, although by the end of the review (of approximately 1400 cases) it was crystal clear that guilty plea was the rule and trial a rare exception to the rule. Ahead of the second field study described above, with “disappearing trials” in mind, the author ventured into the Bureau of Justice Statistics (the best of all sources of criminal law

102 MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1972).

103 Miller, *supra* note 62, at 1257–58.

data) for a look at trial rates in the federal system, finding through that effort the information that is presented in Figure 3 below:



Source: United States Bureau of Justice Statistics¹⁰⁴

In 1982, the war-on-crime hit full stride in the federal system, with the creation of a sentencing commission, tougher penalties, and the abolition of parole. Ahead of these events, nearly 20 percent of all federal convictions resulted from trial (with about 80 percent resulting from guilty pleas); in 2005, only about 4 percent of federal convictions resulted from trial (with about 96 percent resulting from guilty pleas).¹⁰⁵ Thus, the claim that there has been a “virtual disappearance”¹⁰⁶ of trials in the federal system is no more than a slight exaggeration of the truth.

The second field study described above was conducted with an additional item on the agenda—the extent to which trial was chosen over disposition by guilty plea. The results provide no comfort to those concerned about the disappearing criminal trial and the consequential movement of power over punishment into the hands of the prosecution. The study covered two years of felony prosecutions, included an examination of 344 cases (175 in 2002 and 169 in 2003), and on the point under discussion ended with an incredible finding. The number of defendants choosing trial over plea bargaining was exactly two, *an average of one trial per year and about .5 percent of the total number of cases before the court*. It might be different in other courts or in this court in a different time period. But it might not be different

¹⁰⁴ U.S. Bureau of Justice Statistics, Defendants Disposed of in U.S. District Court, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, <http://www.albany.edu/sourcebook/pdf/t5222005.pdf> (last visited on April 1, 2008).

¹⁰⁵ It is notable and not surprising that during this period there was a significant decline in the percentage of cases producing acquittals (from 3.6 percent in 1980 to 0.6 percent in 2005) and in the percentage of cases not producing convictions (from 21.8 percent in 1980 to 10.1 percent in 2005). *See Id.*

¹⁰⁶ *See Miller, supra* note 62, at 1258.

elsewhere or at another time, suggesting a need, maybe even an urgent need, for further study of the so-called “disappearing trial.”

CONCLUSION

Once reserved for rare use against incorrigible offenders (twice incarcerated and still offending), Kentucky’s PFO law now awaits every defendant who arrives in court with a felony record. It supplies prosecutors with sentencing weapons that exist in very few states, inflates the prosecution’s already extraordinary power over punishment, deflates the judge’s role in that crucial decision, pushes some of the law’s most important decisions out of the sunshine and into the shadows, and, in conjunction with other sentencing weapons, elevates the risk of trial to almost intolerable levels. Exemplifying our undeniable enthusiasm for incarceration, it deserves a lion’s share of credit for the inmate explosion that has overcrowded our prisons and done far worse to our jails.

The long reach of this law absolutely guarantees inmate population growth and resulting stress for prisons and jails. It once produced a mere handful of inmates saddled with long sentences (79 in year 1980) but now delivers a handful of such inmates to the corrections system every week of every month of every year (with a cumulative total of 4187 by year 2004); and its impact extends beyond the numbers who arrive in the system as PFO inmates to include an untold number who accept higher than normal penalties in return for dismissal of PFO charges. It can be used against violent offenders (who would qualify for severe punishment without the law) but is far more likely to be used against felony offenders who pose very little if any threat to public safety (shoplifters, auto thieves, low-level burglars, drug users, etc.). It is said that “three strikes” legislation is little more than a “costly slogan,”¹⁰⁷ reflecting a widely held belief that benefits from long incarcerations are substantially outweighed by their enormous and varied costs.

Some of the costs of Kentucky’s PFO law are obvious and measurable, for example, average annual incarceration costs of \$18,613 for prison inmates,¹⁰⁸ substantially higher than average costs for aging and unhealthy inmates,¹⁰⁹ and prison construction that has recently cost about \$100,000 per inmate occupant.¹¹⁰ Some are less obvious, less measurable, and less

107 Peter J. Benekos & Alida V. Merlo, *Three Strikes and You’re Out!: The Political Sentencing Game*, 59 *FED. PROBATION* 3, 8 (1995).

108 Kentucky Department of Corrections, Cost of Incarceration, FY 2006–2007 (undated) (unpublished list, on file with author).

109 *Id.* (the annual cost of incarceration for inmates at the Kentucky State Reformatory—where older and ill inmates are imprisoned—is the highest in the system at \$ 26,578 per inmate).

110 As stated in footnote 15, *supra*, the state spent \$87 million to build its most recent

appreciated, for example, the need to incarcerate 8000 state inmates for service of lengthy sentences in local jails,¹¹¹ inadequate rehabilitation efforts in prisons and especially jails, and weak reintegration efforts for inmates upon release from custody. There is reason to believe that the most legitimate purposes of punishment are jeopardized by this law:

Criminal penalties should not . . . cause individual or social harms which outweigh their crime-controlling effects or other benefits . . . Penalties should not be more severe or more costly than necessary; if the same crime-control and other benefits can be achieved with less severe or less costly methods, those methods should be preferred. In a world of limited resources, punishment must also be prioritized. Prison beds and other scarce correctional resources should be reserved for the most socially harmful offenses and offenders. Prisons must also not be used beyond their effective capacities. Overcrowded prisons are unsafe for prisoners and staff, and reduced security and resources for programming increase the odds that prisoners will leave prison more violent or antisocial than when they entered . . .¹¹²

And beyond all this, there is reason to fear for the most basic of all principles of criminal justice—fair, just, even, and morally defensible punishments. Judge Marvin Frankel said in his book on *Criminal Sentences* that “we are all demeaned when we proceed in the name of the law to be arbitrary, cruel, and lawless.”¹¹³ Speaking with particular reference to sentencing and punishment, he also said:

. . . The law’s detachment is thought to be one of our triumphs. There is dignity and security in the assurance that each of us—plain or beautiful, rich or poor, black, white, tall, curly, whatever—is promised treatment as a bland, fungible ‘equal’ before the law.¹¹⁴

There is no detachment in a repeat offender law that leaves in partisan hands an unchecked, unguided, and largely unreviewable power to determine just how long citizens may be imprisoned or jailed for misbehavior. There is nothing “bland” or “fungible” about the treatment of offenders under a PFO law that allows for widely divergent punishments of citizens who have committed the same or similar crimes under the same or similar circumstances, all dependent upon the values and judgments of the prosecutors who will ultimately dictate punishments. In a system that is

prison (2000) and in that prison at this time the state holds 989 inmates.

111 See Kentucky Department of Corrections, Statewide Population Report No. IPTR500-18 (February 29, 2008) (unpublished population report, on file with author).

112 Frase, *supra* note 87, at 72-73.

113 FRANKEL, *supra* note 102, at x.

114 *Id.* at p. 11.

committed to the rule of law, there is no room for punishment that depends upon the good faith and sound judgment of lawyers who are obligated by duty and empowered by law to intrude upon individual freedom in order to prevent the commission of crime by those being punished.

APPENDIX

DELAWARE¹¹⁵

1. *Type*: only a three-strikes law.
2. *Triggering Offense*: crimes involving danger to person (such as arson, high level burglary, homicide, robbery, and kidnapping), listed sex offenses, or drug trafficking.
3. *Strike*: any conviction of one of the foregoing serious crimes.
4. *Penalties*: normal penalties are enhanced to life in prison.

ILLINOIS¹¹⁶

1. *Type*: only three-strikes laws (Types 1 and 2).
2. *Triggering Offense*: for Type 1 repeat offenders, the triggering offense is sexual assault, 1st degree murder, or a crime from the state's highest felony class and for Type 2 repeat offenders a triggering offense must be a "serious felony offense."
3. *Strike*: for Type 1 repeat offenders, a strike must be a conviction for criminal assault, 1st degree murder, aggravated kidnapping, or other felony from the state's highest felony class and for Type 2 must be a "serious felony offense."
4. *Penalties*: for Type 1 repeat offenders, normal penalties are enhanced to life imprisonment and for Type 2 they are enhanced to a term of 6 to 30 years in prison.

MAINE¹¹⁷

1. *Type*: only a three-strikes law.
2. *Triggering Offense*: a dangerous felony crime (crimes against persons, sexual assault, kidnapping, robbery, burglary of a dwelling, and assault of a police officer or emergency medical provider).
3. *Strike*: any conviction for a dangerous felony (from the above list).
4. *Penalties*: for the third strike, normal penalties are elevated one level (from class B to class A, from class C to class B, etc.).

MONTANA¹¹⁸

1. *Types*: a two-strikes and a three-strikes law.
2. *Triggering Offense*: for two strikes, the triggering offense is a serious offense of either deliberate homicide, rape, aggravated kidnapping, child sexual abuse, or ritual abuse of a minor, and for three strikes it is mitigated deliberate homicide, aggravated assault, kidnapping, robbery, or aggravated promotion of prostitution.

115 DEL. CODE ANN. tit. 11, § 4214 (1987).

116 720 ILL. COMP. STAT. ANN. 5/33B-1. (LexisNexis 1994).

117 ME. REV. STAT. ANN. tit. 17-A, § 1252.

118 MONT. CODE ANN. § 46-18-219 (1997).

3. *Strike*: under the two–strikes law, a strike is a prior conviction of a serious offense that would qualify as a two–strikes triggering offense and under the three–strikes law, a strike is a prior conviction for a crime that would qualify as a triggering offense under either of the repeat offender laws.

4. *Penalties*: for two–strikes, normal penalties are elevated to life imprisonment without parole and for three–strikes they are elevated to life imprisonment.

OREGON¹¹⁹

1. *Type*: only a two–strikes law.

2. *Triggering Offense*: a felony crime that seriously endangered the life or safety of another person.

3. *Strike*: a conviction for a felony offense and a personality disorder indicating a propensity toward crimes that seriously endanger life or safety of another.

4. *Penalties*: the maximum penalty for the triggering offense is elevated from 20 to 30 years.

PENNSYLVANIA¹²⁰

1. *Types*: two–strikes, three–strikes, and a separate two–strikes for murder.

2. *Triggering Offense*: murder, voluntary manslaughter, rape, aggravated assault, deviate sexual intercourse, arson, kidnapping, burglary of a dwelling, robbery, or attempt, conspiracy, or solicitation to commit these offenses for the general two and three strikes laws and, of course, murder is the triggering offense for the separate two–strikes law for murder.

3. *Strike*: a conviction for a crime of violence from the list of triggering offenses (for the general two and three–strikes laws) and a prior conviction for either murder or voluntary manslaughter for the separate two–strikes law for murder.

4. *Penalties*: a minimum sentence of 5 or 10 years for the general two–strikes law, a minimum sentence of 25 years for the general three–strikes law, and life imprisonment for the two–strikes murder law.

UTAH¹²¹

1. *Type*: only a three–strikes law.

2. *Triggering Offense*: a “violent felony” (from a long list).

3. *Strikes*: prior convictions for “violent felonies” committed on two separate occasions and resulting in actual imprisonment for those convictions.

4. *Penalties*: normal penalties are elevated to higher levels and at the highest level require consideration of offender’s history in parole decisions.

119 OR. REV. STAT. §§ 161.725 AND 161.605.

120 42 PA. CONS. STAT. ANN. §§ 9714 AND 9715.

121 UTAH CODE ANN. § 76–3–203.5d.

VERMONT¹²²

1. *Types*: three-strikes and four-strikes laws.
2. *Triggering Offense*: “felony crime of violence” for three-strikes law and “any felony crime” for the four strikes law.
3. *Strike*: conviction for “felony crime of violence” for three-strikes law and conviction for “any felony crime” for the four-strikes law.
4. *Penalties*: normal penalties are elevated to a prison term of “up to and including life” for both laws.

WASHINGTON¹²³

1. *Types*: two-strikes and three-strikes laws.
2. *Triggering Offense*: for the two-strikes law, a serious sex offense (from a short list) or some other major offense committed with a sexual motivation (murder, kidnapping, and the like), and for the three-strikes law, a “most serious offense” (from a short list of crimes causing/threatening death or serious harm to persons).
3. *Strike*: for two-strikes, a conviction of a crime that would qualify as a triggering offense and for three-strikes, two convictions for “most serious offenses” from two separate incidents.
4. *Penalties*: normal penalties are elevated to life imprisonment without privilege of parole for both laws.

WYOMING¹²⁴

1. *Types*: three-strikes and four-strikes laws.
2. *Triggering Offense*: a violent felony.
3. *Strikes*: prior convictions for felony crimes that were committed on separate occasions.
4. *Penalties*: for three-strikes, imprisonment for 10 to 50 years and for four-strikes life imprisonment.

122 VT. STAT. ANN. tit. 13 §§ 11 and 11a.

123 WASH. REV. CODE §§ 9.94A.30 and 9.94A.505.

124 WYO. STAT. ANN. § 6-10-201 (1988).