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THREE STRIKES: CAN WE RETURN TO RATIONALITY?

MICHAEL VITIELLO*

I. INTRODUCTION

California's widely publicized "Three Strikes"¹ legislation was the culmination of over a decade of "get tough on crime" legislation.² The story surrounding Three Strikes is symptomatic of the excesses of our nation's crime prevention policy during the 1980s and 1990s.

Despite a threefold increase in the nation's prison population between 1980 and 1994,³ most Americans felt more vulnerable to violent crime than they did a decade earlier.⁴ At a time when crime rates

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¹ "Three Strikes" is used in this article to describe both the statute adopted by the legislature, 1994 Cal. Stat. Ch. 12, sec. 1 (AB 971) (enacting CAL. PENAL CODE § 667), and the initiative, Proposition 184. CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION (Nov. 8, 1994).

There is some debate about whether the two provisions are identical. For example, at least one court found significance in minor variation in the language of the two laws. *People v. Reese*, No. 94-0714-7 (Super. Ct. Contra Costa County, Dec. 21, 1994).

² See THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 14-16 (Steven R. Donziger ed., 1996) (listing significant anti-crime legislation of the last two decades: 1984 anti-crime legislation increasing penalties for drug offenses; 1986 bill mandating sentences for possession of crack cocaine; 1988 bill increasing funding for federal drug control; 1994 federal crime bill, the most expensive ever, allocating over \$29 billion for law enforcement and crime prevention programs); FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 14-15 (1995) (discussing the appeal of incapacitation as a justification for imprisonment in a post-rehabilitative political era). For a discussion of earlier enhanced sentencing provisions in California, see Markus Dubber, Note, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193 (1990).

³ See THE REAL WAR ON CRIME, *supra* note 2, at 15.

⁴ One argument says the media, government, politicians, special interest groups and private industry have artificially inflated fear of crime. *Id.* at 68-69. See Steven R. Donziger, *The Prison-Industrial Complex; What's Really Driving the Rush to Lock 'em Up*, WASH. POST, Mar.

were declining modestly,⁵ politicians in several states seized on the fear of crime as a powerful political issue. For example, in a close gubernatorial race, Governor Pete Wilson's support of Three Strikes provides a case study of sound-bite electioneering substituting for careful analysis of frustratingly complex social and penological problems.⁶

Two years of experience with Three Strikes in California has not quieted debate about the efficacy of the law. Proponents claim victory based on lower crime rates since its passage⁷ while opponents point to widely reported cases, involving minor third strikes, leading to grossly disproportionate prison terms.⁸

While a number of jurisdictions have recently adopted multiple

17, 1996, at C3 (arguing that "[i]t is fear of crime, rather than crime itself, that is now driving criminal justice policy in the United States").

⁵ For example, a 1994 public opinion poll found that 73% of the American people believed that the national crime rate had increased even though the crime rate had decreased by three percentage points. See *THE REAL WAR ON CRIME*, *supra* note 2, at 65 (citing a N.Y. Times/CBS News poll conducted Jan. 15-17, 1994).

⁶ See discussion *infra* notes 77-152 and accompanying text.

⁷ In the city of Los Angeles, crime dropped 14.2% in 1994 and 6.6% in 1995 (even though the average time served on a year sentence is 71 days due to the early release of inmates to accommodate the influx of Three Strikes defendants). See Andy Furillo, *Future of "Three Strikes" Hinges on Issue of Deterrence*, SACRAMENTO BEE, Apr. 1, 1996, at A1, A8. In response to these statistics, Attorney General Dan Lungren stated that "[i]f more [offenders] are being pushed out in the street and the crime rate is going down, it's difficult not to say some are being deterred from committing other crime." *Id.*

⁸ Perhaps the most noted case is that of Jerry Dewayne Williams—"the pizza thief." Williams, at the age of 27, was sentenced to prison for 25-years-to-life for stealing a slice of pepperoni pizza. Although he was found guilty of a standard misdemeanor, petty theft, his prior convictions for robbery, attempted robbery, unauthorized use of a motor vehicle and possession of a controlled substance bumped the misdemeanor conviction up to a felony, which served as his final strike under California's Three Strikes law. Eric Salter, *Pizza Thief Receives Sentence of 25 Years to Life in Prison*, L.A. TIMES, Mar. 3, 1995, at 9B.

There also is the case of Duane Silva, a 23-year-old who suffers from manic depression and has an IQ of 70. With previous convictions for setting fire to trash barrels and the glove compartment of a car, Silva's final strike, stealing a video recorder and a coin collection from his neighbors, landed him a 30 years to life sentence. *Id.*

Stealing a drill from a garage was Ricky Valadez's final strike. With two prior residential burglaries to serve as prior strikes, including one that dated back to the late 1970s, Valadez was sentenced to 25 years to life. Rene Lynch & Anna Cekola, *'3 Strikes' Law Causes Juror Unease in O.C.*, L.A. TIMES, Feb. 20, 1995, at A1.

Kevin Weber, 35 years old with two previous burglary convictions, was sentenced to life imprisonment with a minimum of 26 years to be served for entering a closed restaurant from the roof and stuffing four cookies into his pockets. *Crumby Crime: Life Sentence for Cookie Thief*, 82 A.B.A. J. 12 (1996).

A recent study addressing the effects of California's Three Strikes law reported that in the two years since its enactment, the law has led to life imprisonment for 192 marijuana users while only 40 convicted murderers, 25 rapists and 24 kidnappers have been sentenced to life. CAL. DEP'T OF CORRECTIONS, IMPACT OF "THREE STRIKES" LAW ON THE CALIFORNIA DEPARTMENT OF CORRECTIONS Chart 6a (Feb. 1996).

offender statutes, California's is the most draconian.⁹ Section II of this article examines the key elements of California's Three Strikes legislation and the events that led to its adoption.¹⁰ Section III then considers a significant and rapid change in penological theory that has taken place in less than a decade. During the 1960s through the mid-1980s, legislatures, judges and commentators abandoned the rehabilitative ideal of the criminal justice system. A broad political coalition oversaw a return to retribution as the justification for punishment.¹¹ Renewed interest in multiple offender statutes like the Three Strikes legislation signals another dramatic shift from retribution to incapacitation and, to a lesser degree, deterrence as the primary justifications for punishment.¹²

Incapacitation and deterrence are supported by utilitarian arguments; as such, they rest on factual premises. Utilitarian justifications for punishment rest on the premise that the pain inflicted by punishment is justified only if greater good results from its imposition.¹³ For utilitarians, punishment should not, therefore, be imposed if it will not lead to a net benefit.

Proponents in California and elsewhere have justified the massive increase in prison construction by reference to cost benefit analyses.¹⁴

⁹ See Appendix A for a comparison of habitual offender statutes.

¹⁰ See discussion *infra* notes 25-152 and accompanying text.

¹¹ See discussion *infra* notes 153-76 and accompanying text.

¹² See *infra* notes 178-216 and accompanying text.

¹³ Jeremy Bentham wrote the following in this regard:

The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief. But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.

Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 110 (6th ed. 1995).

¹⁴ One study concluded that the cost to society of not incarcerating a career criminal is approximately \$430,000 per year—based on annual cost of \$25,000 per year for incarceration of a convicted felon, the study surmised that society pays \$405,000 more than the cost of imprisonment. See Phil Wyman & John G. Schmidt, Jr., *Three Strikes You're Out (It's About Time)*, 26 U. WEST L.A. L. REV. 249, 258 (1995) (citing WILLIAM J. BENNETT, *THE INDEX OF LEADING CULTURAL INDICATORS 2* (1993)). See generally NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *VICTIM COSTS AND CONSEQUENCES: A NEW LOOK* (Feb. 1996) (analyzing the cost of crime to victims including medical expenses, property losses, reduced productivity and pain and suffering). See also NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *RESEARCH PREVIEW: THE EXTENT AND COST OF CRIME VICTIMIZATION 1-2* (Jan. 1996) (advocating that studies concerning the costs and benefits of incapacitation should include the social costs to victims in the calculus [e.g., the tangible cost of a rape—property losses, productivity losses and medical bills—is approximately \$5,100; however, the intangible cost—pain and suffering, emotional trauma and risk of death from victimization—is about \$81,400] because early release of an offender to avoid the high cost of incarceration shifts the cost to the

Section III examines whether Three Strikes can deliver on its promised benefits.¹⁵ Careful review of the claimed benefits of incapacitation suggests that those benefits have been exaggerated.¹⁶ Franklin Zimring and Gordon Hawkins' serious study of widespread incapacitation during the 1980s casts doubt on whether Three Strikes produced a concomitant reduction in crime.¹⁷ Their conclusions should cause hesitation in wholesale adoption of legislation like Three Strikes. Even if Three Strikes has led to a reduction in crime, we are paying far too much for those benefits.¹⁸

A great deal has already been written about Three Strikes, most of it negative and much of it forecasting doom.¹⁹ Critics of Three

victims by forcing them to internalize the tangible and intangible costs of crime).

Based on similar reasoning, Mike Reynolds published a statement in which he concluded that the implementation of Three Strikes had saved Californians over \$1.6 billion dollars in crime victim costs in 1994. See *Lowering The Cost of Victimization: Multi-Billion Dollar Savings Achieved Under 3 Strikes and You're Out: Joint Hearing of the Cal. Senate Comm. On Judiciary, Crim. Proc. and Budget and Fiscal Review on The Impact of The "Three Strikes" Law on The Civil and Criminal Justice System in California*, Feb. 20, 1996 (statement of Mike Reynolds) (calculating savings to society by multiplying losses per victimization by the decreased number of crimes since the passage of Three Strikes [e.g., from 1993 to 1994, the homicide rate decreased by 9.7%, or 396 fewer homicides, and the estimated cost of homicide, including tangible and intangible costs, is \$2,940,000. \$1.16 billion dollars in savings was reached by multiplying 396 fewer homicides by \$2,940,000 in savings). See THE EXTENT AND COST OF CRIME VICTIMIZATION, *supra*, at 14.

See also U.S. DEP'T OF JUSTICE, OFFICE OF POL'Y DEV., THE CASE FOR MORE INCARCERATION 14-19 (1992) (arguing that a costs and benefits evaluation for increasing prison space must include the cost of crime averted by incapacitation of offenders). But see THE REAL WAR ON CRIME, *supra* note 2, at 75-76 (scrutinizing the statistics used in *The Case for More Incarceration* study and concluding that the study is "a classic example of how crime data can be misused").

¹⁵ See discussion *infra* notes 217-45 and accompanying text.

¹⁶ See *id.*

¹⁷ ZIMRING & HAWKINS *supra* note 2. Their study on imprisonment and crime in California concluded that additional restraint of offenders is an equivocal explanation for California's reduction in crime. *Id.* at 126. For an historical evaluation of the studies conducted regarding the effects of incapacitation upon crime rates, see *id.* at 25-38.

¹⁸ See *infra* notes 216-44 and accompanying text.

¹⁹ In response to the manner in which the Three Strikes law was "rammed through the legislature despite warning of drafting errors and unworkable provisions," one commentator wrote:

The result is a law whose scatter-gun shot-in-the-dark approach is the statutory equivalent of the \$500 hammer. Just as the wide availability of ten-dollar hammers makes it outrageous to spend nearly \$500 of taxpayers' hard-earned money on equivalent hammers, the cost and inefficiency, and even counter-efficiency, of three strikes is also outrageous when compared to what California *could* have had.

Victor Sze, Comment, *A Tale of Three Strikes: Slogan Triumphs Over Substance As Our Bumper-Sticker Mentality Comes Home To Roost*, 28 LOYOLA L.A. L. REV. 1047, 1049-50 (1995).

See also William M. Thornbury, *What is the Meaning of Three Strikes and You Are Out Legislation?*, 26 U. WEST L.A. L. REV. 303-04 (1995) (stating that the poor draftsmanship of AB 971 and Proposition 184 has created confusion and uncertainty in application of the law, and identifying some of the many adverse effects of Three Strikes [e.g. overcrowding of jails and prisons, incarceration of offenders for periods extending well beyond an age

Strikes rightly point to some potentially disastrous effects. Three Strikes has already exacerbated the racially discriminatory effects of sentencing policy.²⁰ Moreover, the projected costs for prison construction and operation are staggering,²¹ and absent other ready revenue sources the legislature may be forced to shift funds from education to corrections.²²

Section IV discusses a number of events that may signal rational reform of Three Strikes.²³ Rational debate was largely muted during passage of Three Strikes. If we listen carefully, we can begin to hear voices of reason. In light of that fact, section IV closes with some proposed legislative reforms that may curb some of the excesses of the penological reform of the past decade.²⁴

when they would no longer be a threat to society, and enormous increases in the cost of the criminal justice system as a result of a Three Strikes criminal proceedings influx which drastically reduces the availability of court time for civil jury trials and compromises the integrity of the entire civil jury system]); see generally Jeff Brown, *Why California's "Three Strikes Law" is Terrible Legislation*, 26 U. WEST L.A. L. REV. 269 (1995) (discussing the lack of intelligent debate preceding the enactment of AB 971, the severe disparity in sentencing borne by third time non-violent felony offenders, and the alarming increase in criminal justice expenditures); Albert J. Menaster, *Eighteen Ways to Avoid Three Strikes*, 26 U. WEST L.A. L. REV. 283 (1995) (confirming that Three Strikes Law can be subverted and its austere provisions avoided).

But see generally Bill Jones, *Three Strikes and You're Out*, 26 U. WEST L.A. L. REV. 243 (1995) (arguing adamantly that by incapacitating career criminals, Three Strikes will produce annual society savings of approximately \$14.102 billion by the year 2000 and also help restore California's economy and quality of life); Wyman & Schmidt, *supra* note 14, at 249 (advocating vehemently that Three Strikes is good public policy, and declaring that "[t]his new statute reintroduces the now alien principle to the criminal justice system that if you commit a serious or violent crime, you should be punished for it, and if you do not toe the line, you should be removed from society").

²⁰ African-Americans make up only 7% of the state's population but account for 23% of all felony arrests; see CHRISTOPHER DAVIS ET AL., CENTER ON JUV. AND CRIM. JUSTICE, "THREE STRIKES": THE NEW APARTHEID 2 (1996). More significant, African-Americans account for 38% of all second and third strike felony convictions. CALIFORNIA DEPARTMENT OF CORRECTIONS, *supra* note 8, at 5.

²¹ The estimated increase in prison operating costs per year when the statute has maximum effect will be \$5.7 billion and the total prison construction costs will be \$21.3 billion. See Richard S. Welch, *Memorandum to the Director of Corrections: Estimate of the 'Three Strikes' Initiative*, Feb. 28, 1994 (on file with author) [hereinafter *Estimate of the 'Three Strikes' Initiative*]. While reduction of violent crime might outweigh costs, 85% of those charged under Three Strikes have not committed a violent or serious felony as a third strike. DAVIS ET AL., *supra* note 20, at 1.

²² See PETER W. GREENWOOD ET AL., RAND CORP., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS OF CALIFORNIA'S NEW MANDATORY SENTENCING LAW 34 (1994) (stating that the budget realities will force the corrections budget to take additional funds from the higher education budget); Vincent Schiraldi, *Corrections and Higher Ed Compete for California Dollars, Corrections Winning*, OVERCROWDED TIMES, June 7, 1994, at 7 (illustrating the sharp rise in budget allocations for prisons while no rise for the state's higher education budget).

²³ See *infra* notes 320-60 and accompanying text.

²⁴ See *infra* notes 361-83 and accompanying text.

II. THREE STRIKES COMES TO CALIFORNIA

A. HOW THE "STRIKE ZONE" MAY VARY

Multiple offender statutes, imposing stepped up sentences for "incurable" offenders, have a long history in the United States.²⁵ But during the 1990s, several states have enacted multiple offender statutes in reaction to public alarm with violent crime.²⁶

Popularized by the "Three Strikes" slogan, multiple offender statutes vary in a number of significant ways. For example, some statutes give judges and/or prosecutors discretion whether to invoke the enhanced sentencing power.²⁷ Statutes nationwide vary in the number of prior felonies that trigger the sentence enhancement.²⁸ They also vary in what qualifies as a prior "strike;" for example, at least 22 states limit prior felonies to violent felonies.²⁹ A third variable is what qualifies as the felony that triggers the sentence enhancement. Several states require the applicable felony to be one from among an enumerated list of violent felonies.³⁰ Statutes also vary on whether the age of the prior felony conviction is relevant. Some statutes include a "wash out" period; in other words, if the prior conviction is sufficiently stale, it cannot be used to invoke enhancement provisions.³¹

²⁵ American legislatures have enacted statutes enhancing punishment for repeat offenders since 1796. Dubber, *supra* note 2, at 195.

²⁶ See Appendix A.

²⁷ See, e.g., CONN. GEN. STAT. ANN. § 53a-40(f) (West 1994) (stating that sentencing of an habitual offender is mandatory only if the court is of the opinion that the defendant's history and character and the nature and circumstances of the criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest); S.C. CODE ANN. § 17-25-45(G) (Law. Co-op. Supp. 1995) (providing that where a defendant has a current conviction of a serious offense and two prior convictions of a most serious or serious offense, the decision to invoke the sentencing provisions of the habitual offender statute is in the discretion of the prosecutor).

²⁸ In 1979, 45 states and the District of Columbia had enacted some form of an habitual offender statute, with the required prior convictions ranging anywhere from 2 to 4. See MODEL PENAL CODE § 7.03 Appendix (Official Draft 1985). Today, every state except Minnesota has a recidivist criminal statute, see Appendix A, Chart 1, and approximately 22 states have enacted more stringent statutes as a reaction to "get tough on crime" campaigns of the early 1990s. See Appendix A. The 1993 enactment of Washington's initiative measure 593, "The Persistent Offender Accountability Act," served as the catalyst for enactment of recidivist legislation across the states.

²⁹ Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Montana, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin. See Appendix A for the definition of a "violent" felony in the individual states.

³⁰ Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Montana, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin. See Appendix A.

³¹ California's Three Strikes law specifically rejects "wash-out" provisions. CAL. PENAL CODE § 667(c)(3) (West Supp. 1996) (mandating that the length of time between a prior

Another variable is the sentence imposed upon the multiple offender. In some instances, the increased punishment relates to the available sentence for the substantive offense.³² For example, if a thief is subject to a term of five years in prison, the multiple offending thief may be subject to a term of ten years in prison.³³ More common are statutes which impose long terms of imprisonment without regard to the underlying felony.³⁴ Frequently, the sentence will be an indeterminate sentence of life in prison with a stated minimum term.³⁵ In some instances, the term of imprisonment is life without benefit of parole.³⁶

felony conviction and a current felony conviction shall not affect imposition of sentence); CAL. PENAL CODE § 1170.12(a)(3) (West Supp. 1996) (same). *But see* N.J. STAT. ANN. § 2C:43-7.1b(2)(c) (West 1995) (setting forth that in order for a felony conviction to count as a prior strike, the current crime must have been committed either within ten years of the date of the defendant's last release from confinement for commission of any crime, or within ten years of the date of the commission of the most recent of the crimes for which the defendant has a prior conviction).

³² *See, e.g.*, COLO. REV. STAT. § 16-13-101(2) (West Supp. 1996) (determining that every person who has three separate prior felony convictions, except as specified in the three strikes provision [*see* Appendix A], and is subsequently convicted of another felony will be adjudged an habitual offender and will be punished for a term four times the maximum range for the class of felony for which the offender was convicted); GA. CODE ANN. § 17-10-7(a) (Harrison 1994) (requiring that any person with a prior felony conviction who subsequently commits another felony that is punishable by confinement in a penal institution shall be sentenced to the longest period of time prescribed for the punishment of the subsequent offense of which the defendant stands convicted).

³³ *See, e.g.*, LA. REV. STAT. ANN. § 15:529.1(A)(1)(a) (West Supp. 1996) (stating that any person convicted of a second felony, where had it been a first conviction the offender would be punished by imprisonment for any term less than natural life, may be sentenced for a term of up to twice the longest term prescribed for a first conviction).

By comparison to the Three Strikes aspect of California's statute (any felony may trigger a term of life imprisonment), California's two strike provision (a sentence shall be twice the term otherwise provided as punishment for the current felony conviction) is tied to the penalty provision of the substantive offense. CAL. PENAL CODE § 667(e)(1) (West Supp. 1996); CAL. PENAL CODE § 1170.12(c)(1) (West Supp. 1996).

³⁴ *See, e.g.*, NEB. REV. STAT. § 29-2221(1) (1995) (providing that a defendant with two prior convictions for any crime resulting in a prison sentence of not less than one year, who is subsequently convicted of any felony, shall be imprisoned for 10 to 60 years); WASH. REV. CODE ANN. § 9.92.090 (West Supp. 1996) (stating in part that every person convicted of any felony who has one prior felony conviction shall be punished by imprisonment in a state correctional facility for not less than ten years, and every person convicted of any felony who has two prior felony convictions shall be punished by imprisonment in a state correctional facility for life).

³⁵ *See, e.g.*, ARK. CODE ANN. § 5-4-501(c)(1) (Michie Supp. 1995) (requiring that a defendant who is convicted of a serious felony involving violence and who has one or more previous serious felony convictions shall be sentenced to imprisonment, without eligibility of parole, for either a term of 40 to 80 years, or a term of life); TEX. PENAL CODE ANN. § 12.42(d) (West 1994) (mandating that a defendant who has two separate prior felony convictions, and is subsequently convicted of another felony, shall be punished by imprisonment for life, or for any term of 25 to 99 years).

³⁶ *See, e.g.*, DEL. CODE ANN. tit. 11, § 4214(a) (1995) (asserting that the court may, in its discretion, impose up to a life sentence to any person who has three prior felony convic-

These differences are no minor matter because they may have an enormous impact on a state's prison population. Most felony prosecutions are for non-violent crimes.³⁷ Inclusion of non-violent felonies, either as prior strikes or as a third (or final) strike, may overwhelm a prison system.³⁸ If a prosecutor or judge has discretion whether to invoke the enhancement penalties, limited use of the statutory provisions may prevent bloating state prison populations.

California's Three Strikes legislation took the most extreme position on almost all of the variables discussed above. AB 971 amended California Penal Code section 667 by adding new subsections (b) through (j).³⁹ The law keeps intact section 667(a)(1), a harsh sentence enhancement law enacted as part of an earlier wave of "get tough on crime" legislation.⁴⁰ Subsection (a)(1) applies to any de-

tions, other than those enumerated in § 4214(b), *see* Appendix A, and is thereafter convicted of another felony. The life sentence shall not be subject to suspension by the court and shall be served in its entirety without benefit of probation or parole [applicable only for class A felonies, *e.g.*, murder in the first degree or unlawful sexual intercourse in the first degree]; MISS. CODE ANN. § 99-19-83 (1994) (indicating that every person convicted of a felony who has two prior separate felony convictions and has served one or more years for each prior conviction, with any one of such felony convictions being for a crime of violence, shall be sentenced to life imprisonment without parole).

³⁷ Nonviolent offenders account for 84% of the increase in state and federal prison admissions since 1980. *THE REAL WAR ON CRIME*, *supra* note 2, at 16 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PRISONERS IN 1993 13, tbl.18 (June 1994)). Currently, 58% of California's prisoners are incarcerated for nonviolent crimes. *Too Close for Comfort: California's Prisons*, *ECONOMIST*, May 4, 1996, at 24 (citing a study conducted by the Legislative Analyst's Office).

³⁸ During the first eight months of the California Three Strikes law, approximately 70% of all second and third strike defendants had been convicted of nonviolent and nonserious offenses. *See* LEGISLATIVE ANALYST'S OFFICE, *THE "THREE STRIKES AND YOU'RE OUT" LAW—A PRELIMINARY ASSESSMENT* 8 (Jan. 6, 1995). The number of third strike offenders convicted for non-violent offenses soared to 85% after two years of implementation of the law. *DAVIS ET AL.*, *supra* note 20, at 1. Ironically, in the two years since the Three Strikes law soared through the legislature as a response to public fear and anger over violent crime, the law has led to life imprisonment for 192 marijuana users who previously would have served little or no time, while only 40 convicted murderers, 25 rapists, and 24 kidnappers have been sentenced to life. *See* Giles Whittel, *Small-Time Drug Crooks Clog California Prisons*, *THE TIMES (LONDON)*, Mar. 9, 1996 (*Overseas's News*) (citing figures released by the California Dept. of Corrections). As of January 1996, out of the 14,497 convicted second strike offenders, approximately 80% were committed to prison for a non-violent offense; furthermore, of the 1,342 convicted third strike offenders, approximately 62% were committed to prison for a non-violent offense. *See* LEGISLATIVE ANALYST'S OFFICE, *THE IMPACT OF THE "THREE STRIKES AND YOU'RE OUT" LAW ON CALIFORNIA'S JUSTICE SYSTEM* 5 (Feb. 20, 1996) [hereinafter *LEGISLATIVE ANALYST'S OFFICE, IMPACT*]. In Los Angeles County, where approximately 70% of the jail population consists of three strike defendants, the Sheriff's department is forced to release already-sentenced inmates to accommodate the influx of offenders. *See* Furillo, *supra* note 7, at A8.

³⁹ *See* CAL. PENAL CODE § 667 (West Supp. 1996).

⁴⁰ Encompassed within a criminal justice reform initiative known as "The Victim's Bill of Rights," section 667(a)(1) of the Cal. Penal Code was introduced in 1982 when voters passed California's Proposition 8. The initiative, prompted by public frustration with a

defendant convicted of a "serious felony" who is currently charged with another serious felony.⁴¹ That provision already provided for a sentence enhancement of five years for each of the defendant's prior serious felony convictions. The enhancement runs consecutively to the term of imprisonment for the current offense.⁴² The effect of retain-

seemingly ineffective criminal justice system and the California Supreme Court's disinclination to compromise the rights of criminal defendants for greater public safety, not only included victims' rights provisions but also introduced provisions to establish harsher penalties for repeat offenders. See Dubber, *supra* note 2, at 197-98.

⁴¹ CAL. PENAL CODE § 667(a)(1) (West Supp. 1996). Section 667(a)(4) defines "serious felony" as "a serious felony listed in subdivision (c) of Section 1192.7." CAL. PENAL CODE § 667(a)(4) (West Supp. 1996); Section 1192.7(c) provides:

As used in this section, "serious felony" means any of the following: (1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any other felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary of an inhabited dwelling house, or trailer coach as defined by the Vehicle Code, or inhabited portion of any other building; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish administer, or give to a minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug, as described in paragraph (2) of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamine, as described in subparagraph (a) of paragraph (1) of subdivision (f) of Section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code; (25) any violation of subdivision (a) of Section 289 when the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) carjacking; any attempt to commit a crime listed in this subdivision other than an assault; and (28) any conspiracy to commit an offense described in paragraph (24) as it applies to Section 11370.4 of the Health and Safety Code where the defendant conspirator was substantially involved in the planning, direction, or financing of the underlying offense.

Not all of the felonies in section 1192.7 qualify as strike priors. Carjacking, for example, is inapplicable because Three Strikes only counts felonies that were on the serious felony list on June 30, 1993. CAL. PENAL CODE § 667(h) (West Supp. 1996).

⁴² CAL. PENAL CODE § 667(a)(1) (West Supp. 1996). That section provides:

In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

ing section 667(a) is to make its enhancement provision applicable over and above the new enhancement provisions in section 667.⁴³

Section 667(b) states the legislative intent to "ensure longer prison sentences and greater punishment" for those who have committed prior felonies.⁴⁴ The law does so in a number of ways. For example, the law eliminates limitations on aggregate terms of imprisonment.⁴⁵ Amended section 667 prohibits probation for second or third time felons within its provisions;⁴⁶ it also withdraws discretion to commit offenders covered by its provisions to diversion programs or to the California Rehabilitation Center.⁴⁷ It reduces the amount of good time credits that may be awarded.⁴⁸ The law requires courts to sentence certain defendants to consecutive, rather than concurrent, terms of imprisonment.⁴⁹

Subsection 667(c)(3) also provides that "[t]he length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence."⁵⁰ Section 667(c)(3) is intended to apply the new stepped up sentences for all multiple offend-

Id. The former subsections (b) through (e) have been renumbered as sections 667(a)(2) through (5). Compare CAL. PENAL CODE § 667 (West 1988) with CAL. PENAL CODE § 667(a) (West Supp. 1996).

⁴³ JUDICIAL COUNCIL OF CAL., MEMORANDUM TO PRESIDING JUDGES AND SOLE JUDGES OF THE TRIAL COURTS 3 (Mar. 18, 1994) (on file with author).

⁴⁴ CAL. PENAL CODE § 667(b) (West Supp. 1996).

⁴⁵ CAL. PENAL CODE § 667(c)(1) (West Supp. 1996); CAL. PENAL CODE § 1170.12(a)(1) (West Supp. 1996).

⁴⁶ CAL. PENAL CODE § 667(c)(2) (West Supp. 1996); CAL. PENAL CODE § 1170.12(a)(2) (West Supp. 1996).

⁴⁷ CAL. PENAL CODE § 667(c)(4) (West Supp. 1996); CAL. PENAL CODE § 1170.12(a)(4) (West Supp. 1996). Since section 667(c)(4) prohibits commitment to any facility other than state prison, it appears to preclude commitment to the California Youth Authority. A defendant under the age of eighteen who is convicted of a felony with a prior "serious" or "violent" felony apparently must be sent to state prison rather than the Youth Authority.

⁴⁸ While prior law permitted good time credits up to one-half of the total sentence, section 667(c)(5) permits good time credits only up to one-fifth of the sentence. CAL. PENAL CODE § 667(c)(5) (West Supp. 1996); CAL. PENAL CODE § 1170.12(a)(5) (West Supp. 1996). Furthermore, the subdivision provides that the credits "shall not accrue until the defendant is physically placed in the state prison." *Id.* The "shall not accrue" language is problematic. It may mean that a defendant may not earn any credits until he reaches state prison. Alternatively, the language may mean that the defendant may earn credits for time served prior to being placed in state prison, but the credits do not vest until he is placed in state prison. Under the latter interpretation, uncertainty arises as to whether the pre-prison credits are subject to the one-fifth limitation or are governed by other provisions. The Judicial Council Report states that the statute's failure to mention section 4019(b)-(c) of the Cal. Penal Code, which governs credits in county facilities, means that § 4019 credits remain intact after § 667 was amended. JUDICIAL COUNCIL OF CAL., *supra* note 43, at 5.

⁴⁹ See CAL. PENAL CODE § 667(c)(6)-(8) (West Supp. 1996); CAL. PENAL CODE § 1170.12(a)(6)-(8) (West Supp. 1996) (identical voter initiative provision).

⁵⁰ CAL. PENAL CODE § 667(c)(3) (West Supp. 1996); CAL. PENAL CODE § 1170.12(a)(3) (West Supp. 1996).

ers even though a defendant may not have had a felony conviction for a number of years.⁵¹ Thus, the law recognizes no "wash out" period.

Sections 667(d), (e) and (f) include the key provisions of the Three Strikes legislation. Subsection (d) identifies what is colloquially called a "strike."⁵² Specifically, section 667(d)(1) states that any offense listed in Penal Code sections 667.5(c) or 1192.7(c) is "a prior conviction of a felony" for purposes of amended section 667,⁵³ i.e., one that will serve to trigger the law's enhancement provisions. Section 667.5(c) lists what are considered "violent" felonies and section 1192.7(c) lists "serious" felonies.⁵⁴ Subsection 667(d)(3) lists certain

⁵¹ CAL. PENAL CODE § 667(c)(3).

⁵² CAL. PENAL CODE § 667(d) (West Supp. 1996); CAL. PENAL CODE § 1170.12(b) (West Supp. 1996).

⁵³ CAL. PENAL CODE § 667(d)(1) (West Supp. 1996); CAL. PENAL CODE § 1170.12(b)(1) (West Supp. 1996).

⁵⁴ See the text of CAL. PENAL CODE § 1192.7(c) (West Supp. 1996) (defining "serious" felonies), *supra* note 41. "Violent" felonies are enumerated in CAL. PENAL CODE § 667.5(c) (West Supp. 1996). That provision provides:

For the purpose of this section, "violent felony" shall mean any of the following:

- (1) Murder or voluntary manslaughter.
- (2) Mayhem.
- (3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.
- (4) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
- (5) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
- (6) Lewd acts on a child under the age of 14 years as defined in Section 288.
- (7) Any felony punishable by death or imprisonment in the state prison for life.
- (8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5 or 12022.55.
- (9) Any robbery perpetrated in an inhabited dwelling house, vessel, as defined in Section 21 of the Harbors and Navigation Code, which is inhabited and designed for habitation, an inhabited floating home as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, an inhabited trailer coach, as defined in the Vehicle Code, or in the inhabited portion of any other building, wherein it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of that robbery.
- (10) Arson, in violation of subdivision (a) of Section 451.
- (11) The offense defined in subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person.
- (12) Attempted murder.
- (13) A violation of Section 12308.
- (14) Kidnapping, in violation of subdivision (b) of Section 207.
- (15) Kidnapping, as punished in subdivision (b) of Section 208.
- (16) Continuous sexual abuse of a child, in violation of Section 288.5.
- (17) Carjacking, as defined in subdivision (a) of Section 215, if it is charged and proved that the defendant personally used a dangerous or deadly weapon as provided in subdivision (b) of Section 12022 in the commission of the carjacking.

The Legislature finds and declares that these specified crimes merit special con-

juvenile offenses that may be used as prior "strikes" for the purpose of sentence enhancement.⁵⁵

Section 667(e) enhances punishment for the offender on his second strike.⁵⁶ Under subsection (e)(1), for an offender with a prior "serious" or "violent" felony conviction who has a current felony conviction—which need not be serious or violent—the term of imprisonment "shall be twice the term otherwise provided as punishment for the current felony conviction."⁵⁷ The doubled term of imprisonment

sideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person.

Id.

Subdivision (d)(1) of section 667 states that "the determination of whether a prior conviction is a [strike] shall be made upon the date of that prior conviction. . . ." CAL. PENAL CODE § 667(d)(1) (West Supp. 1996); CAL. PENAL CODE § 1170.12(b)(1) (West Supp. 1996). The intent of the drafters was to prevent situations where a defendant was convicted of a felony which would be a strike, but due to factors following the conviction, such as the suspension of his sentence, the defendant tries to argue that the prior should not be a strike. However, read literally, only convictions taking place after the amendment of section 667 could count as strikes.

Subdivision (d)(2) of § 667 also counts a felony conviction in another jurisdiction as a strike if that felony includes the elements of a particular felony defined in § 1192.7(c) (serious felonies) or § 667.5(c) (violent felonies). See CAL. PENAL CODE § 667(d)(2) (West Supp. 1996); CAL. PENAL CODE § 1170.12(b)(2) (West Supp. 1996).

⁵⁵ CAL. PENAL CODE § 667(d)(3) (West Supp. 1996); CAL. PENAL CODE § 1170.12(b)(3) (West Supp. 1996). While a detailed analysis is beyond the scope of this article, there is a significant concern raised with counting juvenile adjudications as "prior felony convictions." Juveniles are not provided with the full scope of due process rights when they are tried. For instance, juveniles do not have a right to a jury trial. If juvenile adjudications are to count as "convictions" for the purposes of sentence enhancement, it is likely that juveniles could demand jury trials. Of course, this would accentuate the hardship on the judicial system already presented by the increased demand for jury trials by Three Strikes defendants. See generally L.A. SUPER. CT., THE IMPACT OF "THREE STRIKES" LAW ON THE LOS ANGELES JUSTICE SYSTEM (Feb. 1996) (on file with author) (assessing the immense impact Three Strikes has had on the judicial system, and reporting that there are more than 2,300 second strike cases and approximately 1,600 third strike cases pending jury trial in Los Angeles superior court, with Three Strikes cases comprising over half of all cases awaiting trial).

⁵⁶ CAL. PENAL CODE § 667(e)(1) (West Supp. 1996); CAL. PENAL CODE § 1170.12(c)(1) (West Supp. 1996).

⁵⁷ CAL. PENAL CODE § 667(e)(1) (West Supp. 1996); CAL. PENAL CODE § 1170.12(c)(1) (West Supp. 1996). Appellate courts have uniformly held that a defendant with one prior serious or violent felony conviction shall be sentenced to double the "base term" (the punishment for the current offense) in addition to a five-year enhancement under CAL. PENAL CODE § 667(a) if the prior conviction was a serious felony. See *People v. Ramirez*, 39 Cal. Rptr. 2d 374, 383 (Cal. Ct. App. 2d Dist. 1995); *People v. Anderson*, 41 Cal. Rptr. 2d 474, 477-83 (Cal. Ct. App. 1st Dist. 1995); *People v. Cartwright*, 46 Cal. Rptr. 2d 351, 358-59 (Cal. Ct. App. 3rd Dist. 1995).

If a defendant with a prior strike is convicted of multiple current felonies not committed on the same occasion and not arising from the same set of operative facts, the sentencing calculation under such circumstances is as follows:

Where there is a conviction for more than one felony, and therefore more than one determinate term, the greatest determinate term is selected as the principal term; any

is "in addition to any other [applicable] enhancement provisions."⁵⁸

Subsection 667(e)(2)(A) is the "three strikes" provision of the law.⁵⁹ It provides that if a defendant has two or more prior "serious" or "violent" felony convictions, the term of imprisonment for the current felony conviction "shall be an indeterminate term of life imprisonment."⁶⁰ The minimum sentence shall be the greater of three times the term of imprisonment provided for each current felony, twenty-five years or the term of imprisonment determined by application of section 1170 plus other enhancement provisions.⁶¹ Under this provision, read in conjunction with section 667(c)(5), the best that a three strikes defendant can hope for is a real term of twenty years in prison.

Section 667(f) is especially important in light of the realities of the criminal justice system. Typically, serious charges and sentencing provisions may be nullified by plea bargaining. Prosecutors also have vast discretion in decisions relating to criminal charges.⁶² Our criminal justice system ordinarily grants judges wide sentencing discretion as well.⁶³ Amended § 667 limits the normal prosecutorial and judicial

other consecutive term is a subordinate term. For non-violent felonies, the subordinate term is one-third the midterm. For violent felonies, the subordinate term is one-third the midterm plus one-third the mid-term of any applicable enhancements.

CAL. PENAL CODE § 1170.1(a) (West Supp. 1996); *see* *People v. McDaniel*, 52 Cal. Rptr. 2d 595 (Cal. Ct. App. 1996). The calculation is, therefore, reduced to the addition of double the principal term, and double each subordinate term (adjusted according to § 1170.1(a)). Accordingly, if a defendant's principal term was robbery in the first-degree with a base term of nine years, and the subordinate term was first-degree burglary with a base term of 16 months (the midterm for burglary is four years—one-third the midterm would reduce four years to 16 months), the mandatory minimum sentence would be 18 years (principal term [nine years] multiplied by two) plus two years and eight months (subordinate term [16 months] multiplied by two), for a grand total of 20 years and eight months to be served by the defendant. *See* *People v. Dominguez*, 45 Cal. Rptr. 2d 153, 162 (Cal. Ct. App. 1995).

⁵⁸ CAL. PENAL CODE § 667(e)(1) (West Supp. 1996); CAL. PENAL CODE § 1170.12(c)(1) (West Supp. 1996). *See* CALIFORNIA BALLOT PAMPHLET, at 36 (confirming that only the base term shall be doubled and explaining that "[a] second felony conviction, with one prior serious/violent felony doubles the base sentence for the conviction. Any additional enhancements under existing law, including those for prior convictions, are then added").

⁵⁹ CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1996); CAL. PENAL CODE § 1170.12(c)(2)(A) (West Supp. 1996).

⁶⁰ CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1996); CAL. PENAL CODE § 1170.12(c)(2)(A) (West Supp. 1996).

⁶¹ CAL. PENAL CODE § 667(e)(2)(A)(i)-(iii) (West Supp. 1996); CAL. PENAL CODE § 1170.12(c)(2)(A)(i)-(iii) (West Supp. 1996).

⁶² *See* WAYNE L'FAVE & AUSTIN W. SCOTT, CRIMINAL PROCEDURE 623-24 (2d ed. 1992).

⁶³ That discretion has been narrowed in jurisdictions, like the federal system, that have adopted sentencing guidelines. *See* 18 U.S.C. §§ 3551-86, 3621-25, 3742 (1994). For instance, a judge must remain within the sentencing guidelines unless the court finds that there is an aggravating or mitigating factor which had not been adequately considered by the Sentencing Commission in determining the guidelines. 18 U.S.C. § 3553(b). Further, the judge may venture below the guideline's minimum sentence only upon motion by the government and provided that the defendant has rendered substantial assistance in the

discretion.⁶⁴

Subsection 667(f)(1) states that the key provisions of the law "shall be applied in every case" involving defendants with two or three strikes.⁶⁵ A prosecutor must "plead and prove each prior felony."⁶⁶ Thus, section 667(f)(1) limits the authority of a prosecutor to bargain in a case within the provisions of the law.⁶⁷ It recognizes prosecutorial discretion, but that discretion is limited.

Subsection 667(f)(2) provides that the prosecutor "may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to section 1385, or if there is insufficient evidence to prove the prior conviction."⁶⁸ The role of the judge's discretion is limited to cases in which "there is insufficient evidence to prove the prior felony conviction."⁶⁹

Section 667(h) states that references to existing statutes in other provisions of the amended law "are to statutes as they existed on June 30, 1993."⁷⁰ That has the effect of freezing applicable "strikes." If the legislature adds new offenses to the list of serious or violent felonies,⁷¹

investigation or prosecution of another offender. 18 U.S.C. § 3553(e). Finally, any sentence which falls outside the guidelines is subject to appellate review on the motion of either the defendant or the government. 18 U.S.C. § 3742(a)-(b). *See also* 28 U.S.C.A. §§ 991-998 (West 1993 & 1995) (creating the United States Sentencing Commission and setting forth its powers and duties).

⁶⁴ *See* CAL. PENAL CODE § 667(f)(1)-(2),(g) (West Supp. 1996); CAL. PENAL CODE § 1170.12(d)(1)-(2),(e) (West Supp. 1996).

⁶⁵ CAL. PENAL CODE § 667(f)(1) (West Supp. 1996); CAL. PENAL CODE § 1170.12(d)(1) (West Supp. 1996).

⁶⁶ CAL. PENAL CODE § 667(f)(1) (West Supp. 1996); CAL. PENAL CODE § 1170.12(d)(1) (West Supp. 1996).

⁶⁷ Whatever doubt that remained regarding plea bargaining is resolved in § 667(g), which reads:

Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f).

CAL. PENAL CODE § 667(g) (West Supp. 1996); CAL. PENAL CODE § 1170.12(e) (West Supp. 1996) (identical language in voter initiative version).

⁶⁸ CAL. PENAL CODE § 667(f)(2) (West Supp. 1996); CAL. PENAL CODE § 1170.12(d)(2) (West Supp. 1996).

⁶⁹ CAL. PENAL CODE § 667(f)(2) (West Supp. 1996); CAL. PENAL CODE § 1170.12(d)(2) (West Supp. 1996). The California Supreme Court recently read this provision to the contrary. In *People v. Romero*, the court held that the intent of the legislation was not to withdraw judicial discretion to "strike" prior felonies in the interest of justice. *People v. Super. Ct. (Romero)*, 917 P.2d 628, 637 (Cal. 1996). Six justices agreed that, were the intent to withdraw discretion, the statute would violate the state constitutional doctrine of separation of powers. *Id.* at 635.

⁷⁰ CAL. PENAL CODE § 667(h) (West Supp. 1996).

⁷¹ *See, e.g.*, ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1985, at 2 (May 29, 1996) (submitting that "Three Strikes" be expanded by including various vehicular manslaughter offenses as prior "serious" felonies [strikes]).

those offenses do not automatically become "strikes" within section 667(e). The legislature would have to make specific provision for that to take effect.⁷² The intent of section 667(h) is to prevent a later legislature from removing an offense from the list of "serious" or "violent" felonies while retaining the offense as a felony. For example, critics have commonly mentioned residential burglary as a poor choice as a strike for purposes of severe sentence enhancement.⁷³ Subsection (h) prevents reform by prohibiting deletions from the list of serious or violent felonies.

Section 667 thus achieves a number of goals. Defendants convicted under the Three Strikes legislation will serve dramatically stepped up sentences.⁷⁴ They will serve a greater percentage of their sentence than other offenders.⁷⁵ Judges and prosecutors will have less discretion in dealing with defendants within the law's provisions.⁷⁶

B. THREE STRIKES: THE EARLY STAGES

In 1991, *Time* magazine ran a cover story announcing California's decline as a trendsetter.⁷⁷ For better or worse, California has regained its position as a trendsetter with its multiple offender statute. In virtu-

⁷² See CAL. PENAL CODE § 667(j) (West Supp. 1996) (requiring a two-thirds vote for any amendment to § 667). In proposed bills creating new felonies, Democrats have been placing provisions that prevent the new felony from counting as a third strike. See, e.g., ASSEMBLY COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF SB 1502, at 1 (Apr. 1, 1996) (amending the existing misdemeanor statute for illegally knowingly obtaining a state income tax refund to a "wobbler," and exempting the offense from Three Strikes); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1511 at 1 (May 29, 1996) (increasing the penalty for reckless driving while evading a peace officer from a "wobbler" to a straight felony, and exempting the new felony from Three Strikes); SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 871, at 1 (Jun. 25, 1996) (proposing that the misdemeanor/felony ["wobbler"] offense of distributing sexual depictions of minors to adults shall be exempted from Three Strikes); SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2111 at 2 (Jun. 18, 1996) (creating a new crime of "aggravated disorderly conduct" for persons who loiter on, or peep into, private property in order to photograph others without their consent, and exempting the new felony from Three Strikes).

⁷³ See Schiraldi, *supra* note 22, at 7 (asserting that elimination of residential burglary as a strike would diminish the costs of Three Strikes by 75%). The provision is unfortunate. It reflects Mike Reynolds' deep distrust of the legislature, but it also limits the legislation's ability to correct the law's excesses given that amendments must be supported by a two-thirds vote of each house. See CAL. PENAL CODE § 667(j) (West Supp. 1996).

⁷⁴ See CAL. PENAL CODE § 667(b) (West Supp. 1996) (indicating the legislative intent to provide increased prison sentences for habitual offenders).

⁷⁵ See CAL. PENAL CODE § 667(c)(5) (West Supp. 1996) (reducing the available "good time" credits for defendants sentenced under this provision from one-half to one-fifth of the total sentence); CAL. PENAL CODE § 1170.12(a)(5) (West Supp. 1996).

⁷⁶ CAL. PENAL CODE § 667(f),(g) (West Supp. 1996); CAL. PENAL CODE § 1170.12(d),(e) (West Supp. 1996). It is unclear how the court's recent decision in *People v. Superior Ct.* will affect what would appear to be the drafters' original goal in limiting judicial discretion.

⁷⁷ *California*, TIME, Nov. 18, 1991, at 32.

ally every area mentioned above, California, unlike any of the other states that recently enacted multiple offender statutes, took the most draconian position when it enacted its "Three Strikes" legislation.⁷⁸ As argued below, its extremism creates serious risks for the state.⁷⁹ During the enactment of the legislation, the Governor and legislators were aware of the flaws of the law and had alternative legislation available.⁸⁰ As observed by Professor Zimring, Three Strikes nonetheless sailed through the legislature untouched by human hands.⁸¹

As developed in this section, Three Strikes passed without serious rational discourse or legislative compromise because of public panic, its chief proponent's distrust of politicians, judges and lawyers, and politicians' manipulation of public fear.⁸² Understanding those influences is relevant to how California may emerge from the excesses created by Three Strikes.

On June 29, 1992, a career criminal murdered Kimber Reynolds during a failed robbery attempt.⁸³ Shortly after the murder, the victim's father, Mike Reynolds, solicited the assistance of James Ardaiz, the presiding justice for the Fifth District Court of Appeals, in drafting the original Three Strikes legislation.⁸⁴

⁷⁸ For a comparison of habitual offender statutes across the states, see *infra* Appendix A.

⁷⁹ See *infra* notes 216-301 and accompanying text.

⁸⁰ See *infra* notes 99-152 and accompanying text.

⁸¹ Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections On "Three Strikes" in California* 1-2 (Apr. 8, 1996) (unpublished manuscript, on file with author) (forthcoming in 28 PAC. L.J. 243 (1996)).

⁸² See *infra* notes 83-152 and accompanying text.

⁸³ George Skelton, *Capitol Journal: A Father's Bittersweet Crusade*, L.A. TIMES, Dec. 9, 1993, at A3. Convicted felon Joe Davis attempted to take Kimber Reynolds' purse. Upon her resistance, Davis shot and killed Kimber in front of at least twenty-four witnesses. Mike Reynolds, Kimber's father, met with Governor Pete Wilson shortly after her death. He told the governor, "I'm going after these guys in a big way, the kind of people who would murder little girls in this way." Dan Morain, *A Father's Bittersweet Crusade*, L.A. TIMES, Mar. 7, 1994, at A1.

⁸⁴ Dan Morain, *Judge Admits His Role in '3 Strikes' Law*, L.A. TIMES, Nov. 3, 1994, at A3. Two other Fresno Municipal Court judges cooperated with Judge Ardaiz in drafting an initial outline of the Three Strikes measure. While it would appear that Mike Reynolds would have used judicial authorship as a selling point, he didn't reveal the authors until October, 1994. During a debate in San Francisco in October, 1994, Reynolds was challenged to reveal the identity of the authors of Three Strikes. Vincent Schiraldi, the Director of the Center on Juvenile and Criminal Justice in San Francisco and outspoken critic of Three Strikes, made an unfounded accusation that the National Rifle Association had authored the bill. In response, Reynolds said, "I'm going to tell you who was responsible for this . . . They were judges that did the actual pen to paper, the initial draft." Dan Morain, *California Elections/Proposition 1984: Sponsor Says Judge Helped Write '3 Strikes'*, L.A. TIMES, Oct. 19, 1994, at A3. Reynolds also said that the measure was then circulated among deputies in the state attorney general's office. Reynolds then refused to name the judges, and stated that the judges had requested anonymity. The reason they wanted to remain anonymous, according to Reynolds, was because "they may need to rule on a 'three strikes' case and

In 1993, Reynolds prevailed on Bill Jones, then a Republican Assemblyman from the Fresno area, to sponsor Assembly Bill 971.⁸⁵ Reynolds and four bus-loads of supporters showed up for the first hearing on the bill before the Assembly Public Safety Committee on April 20, 1993.⁸⁶ After Reynolds' impassioned plea for stiffer sanctions for habitual offenders, the committee soundly defeated the bill. The Assembly's inaction forced Reynolds to use the initiative process to bypass the legislature.⁸⁷

Despite financial backing from the National Rifle Association and the California Corrections and Peace Officers Association,⁸⁸ Reynolds' reform efforts may not have succeeded but for Polly Klaas' kidnapping on October 1, 1993. Unlike the case of over 50,000 other missing children, Polly's plight galvanized people all over the country because of her family's efforts to locate her before her death was discovered.⁸⁹

The public was outraged when the police arrested her admitted killer, Richard Allen Davis—a repeat offender.⁹⁰ Davis became a glar-

they didn't want to [be] placed in a position of partiality." *Id.*

⁸⁵ Morain, *supra* note 83, at A1.

⁸⁶ *Id.*

⁸⁷ *Id.* Reynolds was justifiably angered by the committee's response. In disgust, Reynolds stated, "They figured they'd listen to me, pat me on the head, say I'm sorry about your daughter, and send me home." *Id.*

⁸⁸ *Outrage Drives Move to Tighten Sentencing Laws*, PLAIN DEALER (Cleveland), Dec. 9, 1993, at 2A. In order to compile the daunting 385,000 required signatures to place an initiative on the ballot, Reynolds needed tremendous financial support. The California Correctional Peace Officers Association (CCPOA) and the National Rifle Association (NRA) provided the early financial help. The NRA donated \$40,000 to the effort and the CCPOA made a \$51,000 contribution. In addition, Mike Reynolds reportedly placed his "whole life savings" of \$60,000 into the "Three Strikes and You're Out Kitty." *Id.*

In addition to significant donations from the CCPOA and the NRA, Reynolds also drew substantial financial support from the California Gun Owner's Association, the Republican Party, and the campaign committees of Governor Wilson and Republican senatorial candidate and business tycoon, Michael Huffington. These sources were able to stockpile \$880,000 for the Three Strikes and You're Out Committee. Dana Wilkie, *Prop 184: 3 Strikes Already on Books, Foes Say its Passage Only Bolsters a Bad Law*, SAN DIEGO UNION-TRIB., Oct. 12, 1994, at A1.

⁸⁹ Polly's parents responded immediately after her abduction by getting a videotape of Polly into the public spotlight. Polly was not just another girl on a milk carton. The Polly Klaas Foundation was formed with the express purpose of keeping Polly in the public eye. Their strategy for bringing her home safely was to saturate our living rooms with Polly's youthful charm. The volunteer efforts of the Foundation were successful by all accounts, except in the final result. John Carman, *Why Polly Was So Special*, ORLANDO SENTINEL, Dec. 9, 1993, at A19.

⁹⁰ Richard Allen Davis had a rap sheet that was eleven pages long, including two prior kidnapping convictions. In his most recent stay in prison—a 16-year sentence for kidnapping, assault, and burglary—he had served only half of his sentence before early release for good behavior. Davis would have still been in jail on the day Polly Klaas was abducted if he had served his entire sentence. Richard Price, *Cruel Lesson/Why Polly Died/Town Angry at a System that Failed*, USA TODAY, Dec. 8, 1993, at 1A.

ing symbol of the failure of the criminal justice system and Polly's death became a compelling moment for Reynolds' efforts to push for passage of Three Strikes.⁹¹

Shortly after Polly's murder was discovered, Reynolds secured Polly's father's (Marc Klaas) signature on his petition to place the initiative on the ballot.⁹² Prior to news of Polly's death, Reynolds had collected only about 20,000 signatures.⁹³ Within days of the reports of her murder, Three Strikes had gathered 50,000 signatures and was well on its way to becoming the fastest qualifying voter initiative in California history.⁹⁴

C. REYNOLDS' SWAY WITH THE LEGISLATURE AND GOVERNOR

After Polly Klaas' death, Reynolds returned to the legislature. The Klaas murder and public perception that crime was on the rise created overwhelming popular support for tough anti-crime legislation.⁹⁵ Reynolds approached the legislature with a choice: pass AB

⁹¹ If there was any doubt about how intense the anger at Davis was, Governor Wilson's loss of control during an interview with a reporter was telling. Wilson said, "I mean, when I think of that son of a bitch, you cannot help but be angered. Did you see the picture of him on the front page of the [San Francisco] Chronicle? Smirking? Jesus, boy. I wanted to just belt him right across the mouth." George Skelton, *Capitol Journal: Wilson Seizes the Day After Polly's Murder*, L.A. TIMES, Dec. 13, 1993, at A3. After the arrest, politicians scurried to find an avenue to respond to the fears of their constituencies. Mike Reynolds' initiative was the perfect answer. His initiative, had it been prior law, would have kept Richard Allen Davis in prison. The name "Three Strikes and You're Out" was the perfect soundbite for legislators anxious to capitalize on the publicized murder of Polly Klaas.

⁹² Shortly after the announcement of Polly's death, Reynolds showed up at the Polly Klaas Foundation in Petaluma with a car full of petitions. He introduced himself to Klaas as "the father of a murdered daughter." Peter Hecht, *Two Grieving Fathers Part Ways on '3 Strikes' Crusade*, SACRAMENTO BEE, July 10, 1994, at A1 (reporting Polly's grandfather Joe Klaas' account of the meeting between Mike Reynolds and Marc Klaas). Marc Klaas immediately signed the petition and joined Reynolds in his campaign to place Three Strikes on the ballot. Reynolds told Klaas, "Together you and I are great pillars for this cause and it would be very difficult to defeat us when we stand side by side." *Id.* However, Marc Klaas later withdrew his support of the Reynold's initiative. *Id.* See also *infra* note 342 and accompanying text.

⁹³ Richard Kelly Heft, *Legislating With a Vengeance*, INDEPENDENT, Apr. 26, 1995, at 27.

⁹⁴ *Id.*

⁹⁵ The coordination of Reynolds' efforts and Polly Klaas' death led to a decidedly different tone from the politicians who had only months before rejected AB 971. Bruce Cain, a U.C. Berkeley professor who specializes in California politics described the upturn for Three Strikes: "A dramatic event has to coincide with a huge consensus out there. There was a big consensus. Remember, we're in an election year. That is going to quicken the pace of any idea. It's a matter of timing." Morain, *supra* note 83, at A1. The mixture of Polly Klaas's murder, public perception that crime was on the rise, and election year rhetoric was a potion that Mike Reynolds and his backers used to put the legislature under a spell. Mike Reynolds harnessed the fears and frustration of an electorate ready for a widespread overhaul of politics as usual, and at once became California's new guru of criminal justice policy.

971 or the voters will do it for you. In an election year, Reynolds had the legislature's attention.⁹⁶

Prior to passage of AB 971, a variety of observers with widely different political agendas highlighted the bill's drafting flaws. Reynolds refused to allow any amendments to the bill.⁹⁷ Further, Reynolds' sway with the legislature was almost unprecedented. Reynolds was adept in using the press to intimidate those who raised questions about the legislation. Reynolds' judgment that a politician was soft on crime promised to be devastating.⁹⁸

A number of legislators presented alternative proposals to AB 971.⁹⁹ Reynolds' own advisers suggested revisions of AB 971 that would have narrowed the legislation to target violent offenders. Law enforcement officials gave Reynolds a list of what they considered flaws in the proposed initiative.¹⁰⁰ Reynolds was unrelenting. Even

⁹⁶ See, e.g., Dan Walters, *Politicos Fail to Do It Right*, SACRAMENTO BEE, Apr. 13, 1994, at A3 (stating that legislators were in a "panicky rush to do exactly what Reynolds wanted."). See also Morain, *supra* note 83, at A1.

⁹⁷ Despite knowledge that the Jones/Costa bill contained flaws that minimally could be considered as only embarrassing drafting errors, Reynolds refused to allow any amendments whatsoever to AB 971. Reynolds stated, "We are not going to allow politicians to take this life-and-death issue and turn it into a political football just because it is an election year and they want to get re-elected." Ken Calves, *Victims' Kin Rally At Capitol*, SACRAMENTO BEE, Jan. 5, 1994, at A1. Reynolds gave the legislature until March 7, 1994, to pass a law that mirrored the Three Strikes initiative. If the legislature failed to do so, Reynolds would place his initiative on the ballot. Dan Morain, *Three Strikes Clears State Legislature*, L.A. TIMES, Mar. 4, 1994, at A1.

⁹⁸ Evidence of Reynolds' power was seen at the final Senate committee hearing before the passage of AB 971. After state fiscal analysts had projected the billions of dollars AB 971 would cost California, an amendment was successfully added to spend some of the money on crime prevention. Reynolds arose from the audience and said, "When we start adding amendments, it's going to open a Pandora's box . . . It will demonstrate to me at the least the inability of the Legislature to act in a responsible way." Morain, *supra* note 97, at A1. Then he reminded the committee of the upcoming elections. One senator objected to what he termed as a "threat," but minutes later the amendment was repealed. *Id.* Senator Quentin Kopp remarked on the failure of his colleagues to exercise their power despite Reynolds' objections: "They feel threatened in an election year and they're afraid of being denounced as trying to subvert his initiative." Hecht, *supra* note 92, at A1.

⁹⁹ They were AB 9x (Johnson), AB 167 (Umberg), AB 1568 (Rainey), and AB 2429 (Johnson). In the wake of tragedies like that of Polly Klaas and Kimber Reynolds, revision of current sentencing laws seemed reasonable. However, most of the legislators who proposed Three Strikes legislation had an added incentive because of the upcoming election. Bill Jones was poised to become the state's next Secretary of State. Jim Costa was preparing to exit the Assembly for a state senatorship. Tom Umberg was preparing to run for the Attorney General against Dan Lungren. Notably, Richard Rainey, the Republican former Sheriff, was not aspiring to a higher office at the time. See Dana Wilkie, *Is It Fame? With Three Strikes at Issue, Two Key Dads Are on the Outs*, SAN DIEGO UNION-TRIB., June 13, 1994, at A3.

¹⁰⁰ James Richardson, *Three Strikes Supporters Divided*, SACRAMENTO BEE, Feb. 12, 1994, at A4 (reporting law enforcement's concern that Three Strikes didn't contain a life without parole provision and that possibly Three Strikes "superseded the death penalty"). See also

after the legislature passed the bill, he feared that lawmakers would undermine the bill. As a result, he reneged on an earlier promise to abandon the initiative process if AB 971 became law.¹⁰¹

Reynolds was not the only person unwilling to compromise on Three Strikes—Governor Pete Wilson used the occasion of Polly Klaas' funeral to make a political speech, announcing his support for Three Strikes.¹⁰² Later, even after flaws in the Three Strikes laws became apparent, Wilson resisted compromise in order to preserve his position as the toughest candidate on the crime issue.¹⁰³

Passage of AB 971 is striking for a number of reasons. Various legislative committees were aware of the bill's excesses. Individual legislators had doubts about the efficacy of the law;¹⁰⁴ some legislators proposed more modest legislation that would have avoided many of AB 971's excesses.¹⁰⁵ The RAND Corporation published a report critical of the law.¹⁰⁶ The legislature nonetheless passed AB 971 by an overwhelming majority without any change in the original draft of the bill.¹⁰⁷

The Senate Committee on the Judiciary, among other committees, was aware of AB 971's excesses. It prepared an analysis demonstrating some of its serious flaws.¹⁰⁸ Legislators also had available

ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1568, at 3 (Jan. 6, 1994) (indicating that the California District Attorney's Association supported an alternative to Three Strikes); SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 971, at 8 (Feb. 17, 1994) (indicating the concern of critics that Three Strikes poses a cruel and unusual punishment problem); Bill Ainsworth, *Why D.A.'s Don't Like 'Three Strikes,'* THE RECORDER, Jan. 18, 1994, at 1 (indicating that some critics perceived an equal protection problem in Three Strikes).

¹⁰¹ Morain, *supra* note 97, at A1. Even after the Legislature passed AB 971 and Governor Wilson signed it into law, Reynolds was distrustful of the politicians who had made Three Strikes the law. Reynolds feared that lawmakers would undermine the Jones/Costa version of Three Strikes. Reynolds stated that the legislators had held the four alternative bills "like a trump card. They've forced our hand." *Id.* Because of his fear, he rescinded his promise to abandon the initiative process. He wanted to put the nail in the coffin for any challenger bill. He remarked that his victory was a "house of straw, easily changed or dismantled." *Id.* He wanted to send a message to lawmakers that attempts to change his bill would be political suicide. See Wilkie, *supra* note 88, at A1.

¹⁰² See Hecht, *supra* note 92, at A1.

¹⁰³ *Id.*

¹⁰⁴ For example, both Senator Leroy Greene and Assembly Speaker Willie Brown expressed doubts about the wisdom of the law, but refused to come out against the bill. See *infra* note 113.

¹⁰⁵ They were AB 9x (Johnson), AB 167 (Umberg), AB 1568 (Rainey), and AB 2429 (Johnson).

¹⁰⁶ GREENWOOD ET AL., *supra* note 22.

¹⁰⁷ AB 971 passed through four committees and two floor votes in 59 days. Jones, *supra* note 19, at 244. The bill passed the Assembly on a vote of 63 to 9 and passed the Senate on a vote of 29 to 7. ASSEMBLY FINAL HISTORY, 1993-94 Cal. Reg. Sess., 260 (Oct. 6, 1994).

¹⁰⁸ SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 971, at 4-11 (Feb. 17,

detailed reports of the comparative merits of various competing three strikes measures.¹⁰⁹ The Judiciary Committee knew that Three Strikes might require imposition of a sentence of twenty five years to life in prison on a repeat felon who had never committed a violent felony.¹¹⁰

Elsewhere in the legislature, the Assembly demonstrated a settled unwillingness to tackle the difficult financial problems posed by AB 971. In late January, 1994, the Assembly Ways and Means Committee approved all of the "three strikes" bills, despite the Committee's failure to procure any reports outlining the cost of the legislation. It did have a preliminary report from the Legislative Analyst's Office, estimating the cost in the billions.¹¹¹ Nevertheless, the Assembly approved all five three strikes bills and sent them to the Senate without a fiscal analysis.¹¹²

With alternative bills before the legislature, legislators had the opportunity to evaluate the economic impact of the three strikes proposals. Despite what they learned, no influential politician took a

1994).

¹⁰⁹ For example, the Rainey Bill (AB 1568) mandated a sentence of life imprisonment without possibility of parole for defendants with a present conviction for a "serious" felony and two prior convictions for "violent" felonies, or for defendants with a present conviction for a violent felony and two prior convictions for any combination of serious or violent felonies. An indeterminate sentence with a minimum of 25 years was reserved for defendants convicted of a third serious felony or defendants convicted of a serious or violent felony with one prior violent conviction. AB 1568, 1993-1994 Cal. Reg. Sess. (1994). See generally SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 971 (Feb. 17, 1994); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 971 (Jan. 6, 1994).

¹¹⁰ The Judiciary Committee's report specifically stated that AB 971 "would make no distinction in severity of sentencing between different felonies." SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 971, at 4 (Feb. 17, 1994). To further demonstrate consciousness of the harsh effects AB 971 would have upon non-violent or no longer violent offenders, the Committee provided the following examples:

(1) A person who was convicted of breaking into a neighbor's attached garage on two occasions in order to steal a bicycle . . . would have two prior offenses. Any third felony, such as theft of \$400 worth of property would result in a life term . . . regardless of whether or not he or she had ever acted violently or dangerously.

(2) . . . forgery of a \$10 check, petty theft with a prior, or possession of a stolen radio with two prior serious felonies would result in a life sentence.

Id. See also Jones, *supra* note 19, at 245 (stating "[opponents] are correct that this law will cast a broad net, but that is certainly not an unintended provision. 'Three Strikes' is an anti-crime law, not just an anti-violent law.").

In addition, the Senate Judiciary Committee also highlighted some of the ambiguity in the statute and raised concerns about the constitutionality of the statute as written. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 971, at 8 (Feb. 17, 1994) (noting that "this bill appears to be constitutionally infirm in that it would require cruel and unusual punishment in some cases, with no option for a lesser sentence in the interest of justice").

¹¹¹ Dan Morain, *Assembly Panel OKs Five '3 Strikes' Bills*, L.A. TIMES, Jan. 27, 1994, at A3. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 971, at 2 (Jan. 27, 1994) (acknowledging the Legislative Analyst's Office cost projections).

¹¹² See Morain, *supra* note 111, at A3; see also ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 971, at 2 (Jan. 27, 1994) (failing to provide a fiscal analysis and passing the measure).

leadership role that might have produced a more measured bill than Three Strikes.¹¹³

On January 26, 1994, prior to passage of AB 971, the RAND Corporation challenged the use of its earlier study to estimate the savings generated by incarcerating large numbers of criminals.¹¹⁴ Three Strikes proponents had used the earlier RAND study to estimate the average number of offenses committed by each repeat offender, estimates greatly distorting the benefits gained by incarcerating each new (marginal) repeat offender.¹¹⁵

Typical of the unwillingness of the legislature to deal with the economic realities of AB 971 was the way in which the Senate Committee on Appropriations dealt with the various bills. A month after the Ways and Means' committee analysis was available, the senate committee convened to discuss the fiscal impact of the various three strikes measures.¹¹⁶ The committee had available the fiscal analysis of AB 971; it did not have similar projections for Rainey's or Umberg's bills. Despite that, members of the committee recognized that residential

¹¹³ Senator Leroy Greene and then Assembly Speaker Willie Brown failed to advocate for a better measure despite their opposition to AB 971. Greene, after objecting to the bill as providing "a blank check," ended up reluctantly supporting the measure. He said, "I'm going to vote for these turkeys [the five three strikes measures] because my constituents want me to." Morain, *supra* note 97, at A1. When asked whether he could have used his power to create rational debate, Brown responded, "I got out of the way of this train because I am a realist." Jerry Gillam, *Legislators Fear Public on "3 Strikes," Brown Says*, L.A. TIMES, Mar. 2, 1994, at A3. Brown also distanced himself from all of the measures saying, "Put everything on the governor's desk and let him deal with it . . . [a]nd that's a pure, unadulterated, practical political approach." Richardson, *supra* note 100, at A4.

¹¹⁴ ASSEMBLY COMMITTEE ON WAYS AND MEANS, COMMITTEE ANALYSIS OF AB 971, at 2 (Jan. 26, 1994). In response to numerous studies citing that the average repeat offender commits between 187 and 278 crimes per year at an average cost of \$430,000, the RAND Corporation provided a correction to what it termed "the erroneous references to RAND data and findings related to the three-strikes debate." *Id.* In rebuttal to the cost of crime, RAND stated: "There is, as yet, no commonly accepted framework for estimating such costs . . . RAND's studies contained no cost figures whatsoever." *Id.*

¹¹⁵ In response to proponents' use of the RAND study to estimate that the average repeat offender commits 187 to 278 crimes per year, RAND stated that "[t]his figure was skewed by the fact that 10 percent of the group was extremely active, committing more than 600 crimes apiece. The typical inmate—the median in the distribution—reports having committed 15 crimes per year." *Id.* at 2. It is reasonable to assume that high rate offenders are more likely to be arrested. Hence, dramatic increases in incarceration rates are likely to lead to incarceration of lower rate offenders. Therefore, the effect of the crime rate will not be constant. As low rate offenders are incarcerated, there will be less effect on overall crime rates.

¹¹⁶ See generally SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 971 (Feb. 28, 1994); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 2429 (Feb. 28, 1994); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 9X (Feb. 28, 1994); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1568 (Feb. 28, 1994); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 167 (Feb. 28, 1994).

burglary was not a strike under those measures and knew that those bills would offer significant savings over AB 971.¹¹⁷ The committee approved all of the measures despite the daunting cost of AB 971.¹¹⁸

Even though AB 971 had very strong political support, most importantly from Governor Wilson,¹¹⁹ its passage and the failure of more carefully drafted alternatives is surprising. Especially since various law enforcement groups, immune from claims of being soft on crime, brought political pressure against AB 971 in favor of alternatives such as the Rainey bill.¹²⁰

The Rainey measure offered even tougher sentences for some of the worst offenders and would have been less expensive than Three Strikes.¹²¹ It should have been easy to back AB 1568 instead of AB 971 by arguing that it was tougher on crime and more fiscally responsible, two issues that predominated the politics of 1994.¹²² That did not happen for a number of reasons dealing largely with election year politics. Wilson was outspoken in his support of Reynolds. Wilson

¹¹⁷ See SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 167 (Feb. 28, 1994) (citing the Department of Corrections' estimate of the cost of incarceration under the "Three Strikes Initiative," and stating that *excluding burglary as a strike* would cost "\$22 million in 1993-94, increasing annually to the year 2003-04 and \$1.6 billion annually thereafter," compared to "\$75 million in 1995-96, increasing annually with a full-year fiscal impact in 2027-28 at \$5.7 billion" when burglary is included as a prior strike).

¹¹⁸ SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 971 (Feb. 28, 1994) (Policy Vote: 8-3); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 2429 (Feb. 28, 1994) (Policy Vote: 10-0); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 9X (Feb. 28, 1994) (Policy Vote: 9-0); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1568 (Feb. 28, 1994) (Policy Vote: 10-0); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 167 (Feb. 28, 1994) (Policy Vote: 8-2).

¹¹⁹ See generally Hecht, *supra* note 92, at A1; Jon Matthews, *Wilson Still Pitching For Three Strikes Law*, SACRAMENTO BEE, Mar. 3, 1994, at A1.

¹²⁰ ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1568, at 3 (Jan. 6, 1994) (indicating that the California District Attorneys' Association and the California State Sheriffs' Association supported the Rainey measure).

¹²¹ See generally SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 971, at 10-11 (Feb. 17, 1994); GREENWOOD ET AL., *supra* note 22, at 26-27.

¹²² Crime was a hot issue for the 1994 California Gubernatorial race with 27% of Californians saying it was the election's most important issue. Bill Stall, *Governor Brown Ads Target Job Losses, Crime Politics*, L.A. TIMES, July 8, 1994, at A3.

Fiscal responsibility was another theme of the gubernatorial race. Governor Wilson, regretting giving consent for a \$7 billion tax increase in his first year as governor, sought to portray himself in the campaign as a defender against tax increases. Both candidates, Wilson and Kathleen Brown, proposed various solutions to the state's debt, such as a one-time issuance of bonds (Brown) and a demand of reimbursement from the federal government for the expenses California incurred in incarcerating illegal aliens (Wilson). *Special Guide to California's Elections: Governor's Race—The Issues*, L.A. TIMES, Oct. 30, 1994, at W2. Both candidates treaded cautiously on the economic issue, which 36% of Californian voters considered to be the most important issue of the election. Stall, *GOP Pins Hopes on Crime Issue to Re-elect Wilson*, L.A. TIMES, Feb. 28, 1994, at A3.

argued that the economic concerns of opponents of Three Strikes were overstated.¹²³ Had Wilson distanced himself from Reynolds or had Reynolds been willing to work with Rainey, better legislation might have been approved.¹²⁴

Despite the overwhelming support for AB 971 when the legislature ultimately voted on AB 971,¹²⁵ it passed in an atmosphere of political distrust. Reynolds would neither compromise nor work with Rainey on an alternative bill.¹²⁶ In reaction to what he saw as the unsavory nature of the political process and fearful that the legislature might later weaken AB 971, Reynolds pursued the initiative process despite an earlier promise to the contrary.¹²⁷ Few in the legislature were willing to take on Reynolds or Wilson who would have portrayed opponents as soft on crime, a tough label to wear in 1994.

Wilson, involved in a tough gubernatorial race, used crime as a campaign issue.¹²⁸ He was able to mute the economic concerns about AB 971 by emphasizing projected savings generated by the law. After Governor Wilson signed AB 971 into law, Wilson's Chief Economist, Philip Romero, issued a report arguing that Three Strikes would save California billions of dollars.¹²⁹ The report contended that the public debate over the cost of Three Strikes was one sided. Romero claimed to balance the debate by fully discussing the benefits that would be generated by Three Strikes.¹³⁰

In September, 1994, the RAND Corporation issued a report concerning the fiscal impact and crime prevention efficiency of Three Strikes.¹³¹ The report might have brought rationality to the discussion of crime prevention. But given its timing, after alternatives like

¹²³ Governor Wilson balked at any suggestion that the Three Strikes bills would not be economically feasible: "There's really no dispute that these reforms will require considerable additional expense That is an expense, I submit, that the public is willing to pay We cannot afford not to pay." Matthews, *supra* note 119, at A1. Wilson stated, "We're producing . . . capital improvements for future generations, and they rightly can be called upon to help pay for it." Daniel M. Weintraub, '3 Strikes' Law Goes Into Effect, L.A. TIMES, Mar. 8, 1994, at A1.

¹²⁴ Brown stated, "If the three-strikes sponsors would come to the reality of the defects in their measure, they probably would embrace the Rainey measure and that would reach the governor's desk." Richardson, *supra* note 100, at A4.

¹²⁵ The Assembly passed AB 971 by a 63-9 margin on January 31, 1994. The Senate passed it by a 29-7 margin on March 3, 1994. ASSEMBLY FINAL HISTORY, *supra* note 107, at 260.

¹²⁶ See Hecht, *supra* note 92, at A1 (reporting Reynolds' refusal to allow amendments).

¹²⁷ See Wilkie, *supra* note 88, at A1.

¹²⁸ See Weintraub, *supra* note 123, at A3.

¹²⁹ PHILIP J. ROMERO, GOVERNOR'S OFFICE OF PLAN. AND RES., HOW INCARCERATING MORE FELONS WILL BENEFIT CALIFORNIA'S ECONOMY (Mar. 31, 1994).

¹³⁰ *Id.* at 2.

¹³¹ GREENWOOD ET AL., *supra* note 22.

the Rainey bill had been tabled and the initiative process was in full swing, and given the fact that Pete Wilson had tied his election campaign to Three Strikes, the RAND report was too little, too late.¹³²

The RAND report constructed models to predict the relative efficiency and cost of five sentencing enhancement proposals.¹³³ The report estimated the crime reduction from AB 971 to be between 22 and 34 percent.¹³⁴ The legislation would generate minor savings in several areas, including costs of police, adjudication and jail operation. Any savings would be "overwhelmed by a large difference in prison operating costs and a twelve-fold increase in the annual cost of prison construction."¹³⁵ The cost of implementing Three Strikes was estimated to be \$5.5 billion annually.¹³⁶

Three Strikes would achieve the greatest reduction in crime, but was by far the most expensive.¹³⁷ The alternative with the most promise was the Guaranteed Full Term proposal which would have given California almost as much reduction in crime. The report singled out GFT because it would reduce costs by "incapacitating offenders early

¹³² The stated goals of the RAND Corporation in compiling its study were: 1) to inform the public debate over Proposition 184 on the November 1994 ballot; 2) to discuss alternative versions of Three Strikes the public may have considered if the Proposition failed; and 3) to inform other states that were considering implementation of "three strikes" laws. *Id.* at iii. The authors remarked that "[c]itizens are not getting much information on [the cost of Three Strikes] from the law itself, the media, or their elected representatives." *Id.* at 2. The study concluded that California would benefit from crime rate reduction if Three Strikes were fully implemented, but it would come at substantial costs. *Id.* at 18. RAND demonstrated that a considerable reduction in crime could be achieved at a substantially lower cost than with Three Strikes. *Id.* at 25-36.

¹³³ RAND examined the effects of the following alternatives to Three Strikes: "Jones Second-Strike Only;" "Jones Violent Only;" "Rainey Three Strikes;" and a variant they constructed entitled "Guaranteed Full Term." The "Jones Second-Strike Only" would be triggered by a conviction for any felony with a prior serious/violent felony, and the "third strike" provision was eliminated. The Jones Violent Only alternative would apply only to a defendant with a current conviction for a violent felony and a prior conviction for a serious/violent felony. Rainey Three Strikes was identical to the Rainey bill that was proposed in the legislature. Finally, the "Guaranteed Full Term" (GFT) proposal would require a prison term for all serious or violent felonies even if the defendant had no priors. GFT would not allow good time for serious/violent felons, and it would cut costs by not incarcerating half of the people convicted of minor offenses. *Id.* at 8-9.

¹³⁴ *Id.* at xii. RAND projected that the number of serious and violent crimes prevented would increase quickly over the first ten years, and more slowly thereafter. *Id.* at 22.

¹³⁵ *Id.* at 19-20.

¹³⁶ *Id.* at 18.

¹³⁷ *Id.* at 25-30. RAND projected that the crime reduction for Three Strikes would come at a cost of a 120% increase in the prison budget. Jones Second-Strike Only would have yielded 85% of Three Strikes' crime reduction with a 90% increase in the prison budget. Rainey Three Strikes was about as effective and costly as Jones Second Strike. Jones Violent Only would yield two-thirds of the crime reduction of Three Strikes, but it would increase the prison budget by 57%. GFT matched the crime reduction effectiveness of Three Strikes with only a 97% increase in prison budget. *Id.*

in their criminal careers."¹³⁸

The RAND report made projections similar to those made by the Department of Corrections.¹³⁹ But the report went further and analyzed how the state was likely to fund the increased costs.¹⁴⁰ It argued that a tax increase was unlikely and that the electorate was unlikely to approve prison bond issues.¹⁴¹ It then explored how the prison expansion could be paid for from the General Fund. The report concluded that the most probable result, if Three Strikes was to be funded, would be that Three Strikes will compete directly with higher education for funds.¹⁴²

When confronted with challenges to the Romero study, Wilson and the Three Strikes You're Out Committee stuck by its claims.¹⁴³ Despite legal challenges, the Three Strikes You're Out Committee succeeded in including its claimed savings in the ballot pamphlet.¹⁴⁴

¹³⁸ *Id.* at 29.

¹³⁹ *Id.* at 18.

¹⁴⁰ *Id.* at 31-36.

¹⁴¹ *Id.* at 32. Passage of bond issues used to be a virtual certainty in California but that changed in the past few elections as California's voters became more conscious of increasing the state's debt. Twelve out of 14 bond measures were rejected by California voters in 1990. These measures would have provided funds for the purchase of ancient forests, the expansion of the university system, and prison construction. See Virginia Ellis, *Bond Measures/Backers Fear Voters' Aversion to New Debt*, L.A. TIMES, May 31, 1994, at A3.

The reluctance to issue bonds does not bode well for California's Department of Corrections. The Department has requested \$6 billion in bonds to finance the construction of 25 new prisons it estimates it will need over the next five years to handle the predicted prisoner increase as a result of Three Strikes. Dan Morain & Virginia Ellis, *Tobacco Industry Power May Go Up in Smoke, Foes Say*, L.A. TIMES, Nov. 10, 1994, at A3.

¹⁴² GREENWOOD ET AL., *supra* note 22, at 33-34. Faced with the unfavorable predictions from the RAND study, supporters of Three Strikes attacked its validity. They claimed that the report failed to consider the economic benefits of the measure, specifically deterrence and lower insurance rates. Ben Wildavsky, *'3 Strikes' Could Drain College Money*, S.F. CHRON., Sept. 22, 1994, at A21. Bill Jones assailed the study for unfairly depicting it as competing with education and other state funded programs. Pamela J. Podger, *'3 Strikes' Could Bust State, Study Says*, FRESNO BEE, Sept. 22, 1994, at A1. Bill Jones further disparaged the report by saying, "The beauty of a report for someone sitting in academia . . . is they don't have to get tough laws through the Assembly Public Safety Committee." *Id.*

The solution to allocation of scarce resources may ultimately be the decision by prosecutors to use Three Strikes selectively. See Susan Freinkel, *Strike Zone*, AMERICAN LAWYER, July/Aug. 1995, at 61 (reporting that prosecutors are enforcing three strikes according to voter support in their constituencies for the initiative).

¹⁴³ For example, Wilson defended the report and stated that the report "underscores the costs all of us bear when crimes are committed: higher medical costs, higher insurance premiums, business flight, and the loss of choice about where to work [sic] live or shop because of fear of crime." Dana Wilkie, *Three-Strikes Law Seen as an Economic Boon: Wilson Team Envisions \$23 Billion in Benefits*, SAN DIEGO UNION-TRIB., Apr. 7, 1994, at A3.

¹⁴⁴ Superior Court Judge James T. Ford ruled that the claim of savings of \$23 billion by the year 2000 could stay on the ballot. See Peter Hecht, *'3 Strikes' Fight Rages Inside, Outside Court*, SACRAMENTO BEE, Aug. 16, 1994, at B1; Three Strikes And You're Out Committee, *Judge Rules '3 Strikes Saves \$23 Billion' is O.K. for Ballot Pamphlet*, Aug. 15, 1994 (press release

Three Strikes proponents relied heavily on the Romero report in campaigning for the ballot initiative.¹⁴⁵

After passage of AB 971, the Senate flirted briefly with reviving the Rainey measure and placing it on the ballot.¹⁴⁶ Wilson vehemently opposed the alternative measure on the grounds that it would mislead the voters and because he had touted the virtues of the original bill as a primary issue in his gubernatorial campaign.¹⁴⁷ He threatened to veto the alternative proposal.¹⁴⁸ In light of the threatened veto, Rainey refused to champion the bill despite broad support from various law enforcement groups, including the California District Attorneys' Association;¹⁴⁹ officials, including state sheriffs and police chiefs; and private citizens, including Polly Klaas's father and grandfather. Wilson's opposition effectively killed the chances of an alternative appearing on the ballot.¹⁵⁰

Without an alternative proposition and without significant funding, opponents of Proposition 184 could not get out their message. Left unchecked, proponents of Three Strikes were able to engage in a major propaganda campaign.¹⁵¹ The initiative passed by an over-

on file with author).

¹⁴⁵ See Three Strikes And You're Out Committee, *supra* note 144; See also CALIFORNIA BALLOT PAMPHLET, *supra* note 1, at 36.

¹⁴⁶ Hallye Jordan, *Alternative '3 Strikes' Bill Pushed*, L.A. DAILY J., June 10, 1994, at 3.

¹⁴⁷ George Skelton, *Capitol Journal: Pete (Give 'em Hell) Wilson Strikes Back*, L.A. TIMES, Mar. 21, 1994, at A3.

¹⁴⁸ *Wilson Says He Will Block Try to Weaken "Three Strikes"*, S.F. CHRON., June 10, 1994, at D3.

¹⁴⁹ The support from the CDAA became unstable when Rainey refused to back the bill. Gil Garcetti went public with his plea for the Rainey alternative. Garcetti was joined in his public campaign by San Mateo County District Attorney James Fox in urging the legislature to pass the alternative bill. Specifically, Garcetti predicted, "there's not going to be justice for those citizens who rely on the civil court process for relief and justice." Michael D. Harris, *Garcetti Calls for New 3-Strikes Law*, L.A. DAILY J., June 9, 1994, at 2. Garcetti reported that in just three months, his office had filed 400 three-strike cases and 1100 second-strike cases. He further reported that "none of those cases are settling and that they all are going to trial." *Id.*

Garcetti and DAs supporting him were made to look somewhat of an enemy. Chuck Cavalier, a consultant with the Three Strikes You're Out Committee, accused Garcetti and like-minded DA's of only being concerned with plea bargaining and clearing caseloads. He said, "They simply don't like the fact that they will be held accountable." Peter Hecht, *Case Merits "Three Strikes"? Depends on the DA*, SACRAMENTO BEE, Aug. 7, 1994, at A1. This accusation did not comport with the fact that, despite his personal opposition, Garcetti was prosecuting every possible third strike case coming through his office. *Id.*

¹⁵⁰ The bill died in the Assembly Public Safety Committee on June 21, 1994. Hallye Jordan, *Alternative to '3 Strikes' Killed*, L.A. DAILY J., June 22, 1994, at 3.

¹⁵¹ In the published argument for Proposition 184, proponents stated that the measure would "keep rapists, murderers and child molesters behind bars where they belong." CALIFORNIA BALLOT PAMPHLET, *supra* note 1, at 5. They repeated the chimerical savings argument, that "3 Strikes saves lives and taxpayer dollars!" *Id.* The literature answered three main counter-arguments: 1) in response to a claim that the prison system would be full of

whelming majority.¹⁵²

III. FLAWED PREMISES AND OTHER PROBLEMS WITH THREE STRIKES

Three Strikes reflects two decades of dramatic change in American penal philosophy. A glimpse of that sea change is provided by the following statement made by the New York City Correction Commissioner in 1972: "All men are redeemable. Every man can be rehabilitated, and it's up to us in the community and in the field of criminal justice to see that this is done."¹⁵³ During the 1970s,¹⁵⁴ judges and scholars¹⁵⁵ abandoned the rehabilitative ideal. A broad political coalition forced a return to a retributivist model of punishment.¹⁵⁶ Less obvious in the debate about Three Strikes is that it represents another dramatic shift in penal philosophy. Three strikes has abandoned retributivist theory in favor of incapacitation and deterrence.

This section argues that Three Strikes is quite distinctly not retributivist.¹⁵⁷ Three Strikes is premised on factual, utilitarian benefits. Next, this section examines a number of flawed assumptions that led to its passage. Proponents of Three Strikes and incapacitation generally overstate the benefits gained from long terms of imprisonment by overestimating the amount of crime prevented and the social savings of crime prevention.¹⁵⁸ But even assuming accurate data, proponents

non-violent offenders, it claimed that "3 Strikes targets only career criminals—those with a history of committing serious/violent crimes;" 2) in response to the claim that taxes would be increased, it stated that taxpayers would save money because Californians "will no longer have to pay the outrageous costs of running career criminals through the judicial system's revolving door time and again;" and 3) it rebutted the claim that essential services would have to be cut, again, by citing the savings created by the initiative. *Id.* at 37.

In order to illustrate how taxpayer dollars would be saved, the pamphlet reported that "3 Strikes Saves \$23 Billion over five years." Relying on Romero's report, the committee further explained that "[e]very repeat felon returned to our streets costs nearly \$200,000 annually in direct losses to victims and the enormous expense of running the same criminals through police stations, courts, and prisons time and again." *Id.* at 36. Opponents of the measure strongly objected to the use of Romero's study in the "Pro" argument because it had been disparaged by its sources, notably the RAND Corporation. *Id.* The opponents filed suit, but failed to enjoin supporters of the initiative from disseminating Romero's study as if it were fact. Three Strikes And You're Out Committee, *supra* note 144.

¹⁵² Proposition 184 was approved by 71.85% of the electorate. STATEMENT OF VOTE, GENERAL ELECTIONS, Nov. 8, 1994, at 107.

¹⁵³ Tolchin Malcolm, *A Black Named Correction Chief by Mayor*, N.Y. TIMES, Jan. 20, 1972, at 1, reprinted in MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 91 (1973).

¹⁵⁴ See, e.g., Frankel, *supra* note 153, at 86-102.

¹⁵⁵ See generally JOEL FEINBERG, DOING AND DESERVING (1970); RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT (1979); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

¹⁵⁶ See Michael Vitiello, *Reconsidering Rehabilitation*, 65 TULANE L. REV. 1011, 1014-15 (1991).

¹⁵⁷ See *infra* notes 177-215 and accompanying text.

¹⁵⁸ See *infra* notes 216-44 and accompanying text.

of incapacitation fail to compare the cost of incapacitation schemes like Three Strikes with other equivalent and less expensive schemes that might provide similar reductions in crime.¹⁵⁹ Under Three Strikes sentences may be far longer than necessary to achieve similar results. At a minimum, incapacitating older prisoners makes little sense if we recognize that prison resources are finite.¹⁶⁰ Like the return to retributivism, the current preference for incapacitation is partially grounded in the belief that less expensive rehabilitative programs do not work. Commentators and policy makers have begun to reexamine that assumption.¹⁶¹ Few would assert today that all men are redeemable, but some men and women are capable of rehabilitation at a cost significantly less than the cost of warehousing them.

A. FROM REHABILITATION TO RETRIBUTION

California once led the nation in the use of indeterminate sentencing, a sentencing scheme premised on the rehabilitative model.¹⁶² Sentences were not fixed; instead, the offender was released from prison, in effect, when he was cured of his criminality.¹⁶³ Criticism of the rehabilitative model dominated the discussion about the criminal justice system during the 1970s.¹⁶⁴

An "explosion of criticism"¹⁶⁵ of the rehabilitative model led to sentencing reform in states like California. As argued elsewhere, the change in public discourse about punishment was not simply a shift

¹⁵⁹ ZIMRING & HAWKINS, *supra* note 2, at 142.

¹⁶⁰ See *infra* notes 245-62 and accompanying text.

¹⁶¹ See, e.g., James Bonta & Laurence L. Motiuk, *The Diversion of Incarcerated Offenders to Correctional Halfway Houses*, 24 J. RES. CRIME & DELINQ. 302 (1987); Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 254-58 (1979); James Q. Wilson, "What Works?" *Revisited: New Findings on Criminal Rehabilitation*, 61 PUB. INTEREST 3, 3-10 (1980); see also THE REAL WAR ON CRIME, *supra* note 2, at 55-58 (advocating that punishment which is less expensive and more effective at curtailing recidivism should be employed [e.g., probation, intensive probation, day reporting centers, halfway houses, boot camps, fines and restitution, community service, home detention, and drug treatment]); FEDERAL CITY COUNCIL, CRIMINAL PUNISHMENT IN THE DISTRICT OF COLUMBIA: INTERMEDIATE SANCTIONS, PRISONS AND PUBLIC SAFETY 5 (Mar. 1996) (reporting that a pilot drug court program, which intimately intervened in the lives and rehabilitation of convicted drug-dependent persons, appears to be highly cost-effective [including in terms of recidivism] when compared to traditional methods of incarceration).

¹⁶² FRANKEL, *supra* note 153, at 89.

¹⁶³ *Id.*

¹⁶⁴ See generally FEINBERG, *supra* note 155; NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974); SINGER, *supra* note 155; THE TWENTIETH CENTURY FUND TASK FORCE ON CRIM. SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976).

¹⁶⁵ WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 28-29 (2d ed. 1986) (quoting Martin R. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 Wis. L. REV. 781).

towards conservatism.¹⁶⁶ Liberals and radicals joined the persistent attack on the rehabilitative model.¹⁶⁷

As observed by Dean Francis Allen, "[t]he objects of this attack [were] sentencing discretion, the indeterminate sentence, the parole function, the uses of probation in cases of serious criminality, and even allowances of 'good time' credit in the prisons."¹⁶⁸ A significant amount of literature endorsed a retributive, just-deserts model of punishment and argued that the rehabilitative ideal was largely incompatible with a deserts based theory of punishment.¹⁶⁹

The reformers were successful in replacing rehabilitation as a primary goal of punishment. Legislatures abandoned indeterminate sentencing.¹⁷⁰ Sentencing guidelines narrowed judicial discretion and demonstrated efforts to lessen the discriminatory aspects of sentencing.¹⁷¹ These reforms demonstrated the reemergence of retribution as the primary justification for imprisonment.¹⁷²

Many liberal reformers argued that prison sentences should be relatively short.¹⁷³ In many jurisdictions, the return to retributivism led to longer terms of imprisonment.¹⁷⁴ That trend was advanced in

¹⁶⁶ Vitiello, *supra* note 156, at 1014-15.

¹⁶⁷ In their introduction to *Doing Justice*, Willard Gaylin and David J. Rothman observe that the rehabilitative model has "always [been] under attack from the conservative community, to which it had appeared as a mollicoddling, bleeding-heart outrage, and now we [prominent liberals] find ourselves, for different reasons, with different motives, joining the argument for its abandonment." Willard Gaylin & David J. Rothman, *Introduction in VON HIRSCH, supra* note 155, at xxxvii.

¹⁶⁸ FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 8 (1981).

¹⁶⁹ See, e.g., sources cited *supra* note 155.

¹⁷⁰ Franklin E. Zimring, *Sentencing Reform in the States, Lessons from the 1970s, in REFORM AND PUNISHMENT* 101-12 (Michael Tonry & Franklin E. Zimring eds., 1983) (discussing rapid change from indeterminate to determinate sentencing).

¹⁷¹ For example, the Federal Sentencing Guidelines recognize "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6) (1994). See also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988) (providing an overview of the development of the Federal Sentencing Guidelines and its intended goals).

¹⁷² Vitiello, *supra* note 156, at 1027-32. I do not want to oversimplify the debate. Retributivists have various philosophical disagreements among themselves (e.g., whether retributivism implies only a moral obligation to punish or whether it also implies a limitation on punishment, limited to an actor's just deserts). Retributivists also disagree about how much punishment is deserved. Many liberals, for example, were disappointed when "retributivist" reform led to longer terms of imprisonment. See ZIMRING & HAWKINS, *supra* note 2, at 10.

¹⁷³ See VON HIRSCH, *supra* note 155, at 113-14.

¹⁷⁴ Utilizing the notion of crime prevention as the primary justification for incarceration led to longer prison terms and larger prison populations. ZIMRING & HAWKINS, *supra* note 2, at 25-38. California represents an interesting situation. For many substantive crimes, maximum sentences are quite low by comparison to other jurisdictions. See CAL. PENAL CODE §§ 461 and 213 (West 1988) (setting forth, respectively, the maximum sentence for

jurisdictions that adopted mandatory minimum sentences¹⁷⁵ and abandoned parole.¹⁷⁶

B. THREE STRIKES: ABANDONMENT OF RETRIBUTION

The abandonment of rehabilitation and renewed retributivist sentiment coincided with the doubling of the nation's prison population.¹⁷⁷ Intuitively, a wholesale increase in the prison population should lower the crime rate.¹⁷⁸ In the 1990s, despite the burgeoning prison population and some evidence that crime rates were declining,¹⁷⁹ crime has continued as a hot political issue.¹⁸⁰ In that regard, reaction to the Polly Klaas murder is a symbol of a broader public concern for more severe sanctions.

Three Strikes represents a change in penological philosophy from the retributivist justification for punishment. Habitual offender legislation is simply not retributivist. Proponents sometimes speak as if Three Strikes is retributive, a judgment of an offender's entire rec-

burglary and for robbery at six years); *but see* FLA. STAT. ANN. §§ 810.02(3) (West Supp. 1996) and 812.13(2)(c) (West 1994) (making the maximum sentence for both burglary and robbery 15 years imprisonment); GA. CODE ANN. §§ 16-7-1 and 16-8-40 (1994) (mandating the maximum sentence for both burglary and robbery at 20 years). At the same time, California's sentencing reform in the early 1980s led to adoption of a stringent sentence enhancement provision, leading to long sentences. CAL. PENAL CODE § 667(a) (West 1988); *see* Dubber, *supra* note 2, at 197-98 (detailing the history of the enactment of section 667(a) of the California Penal Code, and noting that Proposition 8, passed by the voters in 1982 as a reaction to public frustration with a seemingly ineffective criminal justice system, established much harsher penalties for repeat offenders).

¹⁷⁵ *See, e.g.*, GA. CODE ANN. § 16-13-31(b)(1) (Supp. 1995) (mandating that any person who knowingly sells, manufactures, delivers or possesses four grams or more of heroin shall be sentenced to a mandatory minimum term of five years imprisonment). *See also* FLA. STAT. ANN. § 790.235 (West Supp. 1996) (requiring a mandatory minimum sentence of 15 years imprisonment for any violent career criminal who owns or has in his or her possession, care, custody or control any firearm or carries a concealed weapon).

¹⁷⁶ In an effort to ensure the certainty of an offender's sentence, the Sentencing Reform Act, enacted by Congress in 1984, abandoned the rehabilitative ideology, adopted determinate sentencing, and eliminated parole. *See* 18 U.S.C. § 3624(a)-(b) (1985) (asserting that a prisoner must complete his or her sentence, reduced only by limited "good" time).

¹⁷⁷ Over the 12 year period from 1974 to 1986, the population of state prisons increased 2½ times nationally. *Children and Families at Risk in Deteriorating Communities: Hearings Before the Subcomm. on Human Resources of the House Ways & Means Comm.*, 103d Cong. 59 (1993) (testimony of John Hagan, Professor at University of Toronto School of Law). Further, in the last decade, the national incarceration rate of residents has also doubled to 373 residents per 100,000 serving sentences of one year or more. Stan C. Proband, *Prison Population Exceeds One Million*, *OVERCROWDED TIMES*, Dec. 1994, at 4.

¹⁷⁸ ZIMRING & HAWKINS, *supra* note 2, at vi. Despite the strong appeal of the proposition, studies come to wildly different conclusions about actual impact on crime rates. *Id.* at 79-99.

¹⁷⁹ *Id.* at 100-127 (concluding that evidence of crime reduction caused by restraint is "more equivocal than first appeared").

¹⁸⁰ *See supra* notes 82-152 and accompanying text.

ord.¹⁸¹ For example, in a recent and thorough news article on Three Strikes, the author quotes one prosecutor as follows: "You can't just look at the current offense, . . . 'These people are being punished for being recidivists, not just the current offense.'"¹⁸²

If a judge is punishing the offender for other offenses upon which he has already been sentenced, such legislation would violate double jeopardy. An offender sentenced to a term of imprisonment, in the language of retributivists, must pay his debt to society.¹⁸³ His debt is measured by the term of imprisonment. Completion of the term of imprisonment pays that debt. When the offender commits another offense and the earlier conviction becomes a prior strike to increase his term of imprisonment, that increase cannot be additional punishment for the earlier crime. To punish the offender again for the same conduct would violate double jeopardy.¹⁸⁴ Insofar as Three Strikes considers felonies committed before its effective date, punishing for that past conduct would also violate the prohibition against ex post facto laws.¹⁸⁵

¹⁸¹ In a recent appellate court decision, a defendant convicted for possession of 0.13 grams of cocaine was sentenced to 25 years to life under California's Three Strikes Law. *People v. Super. Ct. (Romero)*, 37 Cal. Rptr. 2d 364, 380 (Cal. Ct. App. 1995), *rev'd in part and remanded*, 917 P.2d 628 (Cal. 1996). The court of appeal stressed that the defendant Romero was subject to 25 years to life imprisonment not because he possessed 0.13 grams of cocaine, but because of his recidivist behavior. *Id.*

For at least the last 15 years, Romero has continually preyed upon society. He has spent much of his adult life in county jail or prison with no apparent impact upon his behavior upon release. He is an addict who finances his habit by theft and burglary. He dropped out of school and has never maintained steady employment.

Id.

Similarly, the deputy district attorney who prosecuted the "pizza thief" said, "[He] is a habitual offender and that is what we are sentencing. The people of California are sick of revolving door justice, they're sick of judges who are soft on crime. It is wrong to focus on the last offense." OFFICE OF PLANNING AND RESEARCH, CAL. DEP'T OF CORRECTIONS, *THREE STRIKES, YOU'RE OUT: TWO YEARS LATER* 7 (1996).

In the same vein, retributivist sentiment is high among victims of crime. In a notable news article interviewing several victims of Three Strike law offenders, one victim, previously threatened with a brick and held up on an Oakland street, stated that "[the offender] doesn't follow the rules of civilization. If you can't follow them after three tries, you deserve to be gone." Andy Furillo, *The Victims: It's Hightime, They Say, That Justice Was Done*, SACRAMENTO BEE, Mar. 31, 1996, at A21.

¹⁸² Andy Furillo, *Three Strikes: The Verdict's In*, SACRAMENTO BEE, Mar. 31, 1996, at A1. A similar argument was made by another prosecutor. One county district attorney was quoted as saying, "The current offense may not be serious, but they have a criminal history that really spells danger. We're saving a lot of risk for the future, and *we're making them pay for their past.*" *Id.* (emphasis added).

¹⁸³ See HERBERT MORRIS, *ON GUILT AND INNOCENCE* 33-34 (1976).

¹⁸⁴ See U.S. CONST. amend. V.

¹⁸⁵ See U.S. CONST. art. I, §§ 9, cl. 2 and 10, cl. 1. Nonetheless, the California Supreme Court held in *People v. Jackson* that "increased penalties for subsequent offenses are attributable to the defendant's status as a repeat offender and arise as an incident of the subsequent offense rather than constituting a penalty for the prior offense." *People v. Jackson*,

Habitual offender statutes are not retributive for another reason: under many such statutes, long sentences are imposed without regard to the culpability of the offender or degree of social harm caused by the offender's behavior. Instead, the length of the offender's record triggers the heightened punishment.¹⁸⁶ The concern is that multiple offenders cause a great deal of harm because they are incorrigible.¹⁸⁷ But the term of imprisonment, often life in prison, has little to do with the gravity of the offenses.¹⁸⁸

Andrew von Hirsch has advanced an argument that consideration of a felon's prior convictions under certain circumstances may be consistent with retributivist justice.¹⁸⁹ First, he argues that repetition of

694 P.2d 736, 739 (Cal. 1985); *accord* *People v. Mills*, 8 Cal. Rptr. 2d 310, 315 (Cal. Ct. App. 1992); *People v. Sweet*, 254 Cal. Rptr. 567, 573 (Cal. Ct. App. 1989).

¹⁸⁶ For example, Three Strikes' severe penalties are triggered by *any* felony. CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1996). As widely publicized cases demonstrate, that felony may be quite trivial. *See supra* note 8.

Unlike California, every other state that has enacted an habitual offender statute requires the triggering felony to be one of an enumerated list of felonies. *See infra* Appendix A. New Mexico, for example, requires the current felony conviction to be one of any of the following "violent" offenses: murder in the first degree; murder in the second degree; shooting at or from a motor vehicle resulting in great bodily harm; kidnapping resulting in great bodily harm inflicted upon the victim by the captor; and robbery while armed with a deadly weapon. N.M. STAT. ANN. § 31-18-23 (Michie Supp. 1994).

¹⁸⁷ *Rummel v. Estelle*, 445 U.S. 263, 284 (1980).

¹⁸⁸ *Rummel* demonstrates that habitual offender statutes have little to do with retributivism. There, a repeat offender was sentenced to life in prison under Texas' habitual offender statute. As recounted by the Supreme Court, *Rummel's* various offenses that led to his sentencing under the habitual offender statute consisted of fraudulent use of a credit card to obtain \$80 worth of goods in 1964; passing a forged check in the amount of \$28.36 in 1969; and finally, obtaining \$120.75 by false pretenses in 1973. 445 U.S. at 265-66.

Rummel might have been incorrigible on the assumption that he would continue to commit petty offenses and, therefore, the only way to protect society is to segregate *Rummel* in prison. The life sentence has little to do with his culpability. By comparison, under Texas law, in a murder prosecution, a defendant who convinces the jury that he committed the murder in an immediate and sudden passion is guilty of a second degree felony and subject to a term of imprisonment of only 2 to 20 years. *See* TEX. PENAL CODE ANN. § 19.02(d) (West 1994) (defining the offense of second degree murder); TEX. PENAL CODE ANN. § 12.33 (West 1994) (setting the term for a second degree felony). An offender convicted of non-capital murder is guilty of a first degree felony and subject to a term of imprisonment of life in prison or a term of years from 5 to 99 years. *See* TEX. PENAL CODE ANN. § 19.02(c) (West 1994) (defining the offense of first degree murder); TEX. PENAL CODE ANN. § 12.32 (West 1994) (setting the term for a first degree felony). Practical problems exist in comparing culpability, but one can say with confidence that a murderer is far more culpable and, retributivists would argue, deserves far greater punishment than a person who steals. And a man who steals trivial sums no doubt is less culpable than one who steals greater sums.

¹⁸⁹ VON HIRSCH, *supra* note 155, at 84-88. *See also* Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591 (1981). Von Hirsch was not arguing in favor of habitual offender statutes; he was arguing simply for proper consideration of prior criminal conduct in a just deserts model. But his arguments are the most plausible that habitual offender statutes may be consistent with retributive justice.

criminal activity is more culpable because it persists after forceful censure in the form of prior punishment: "In assessing a first offender's culpability, it ought to be borne in mind that he was, at the time he committed the crime, only one of a large audience to whom the law impersonally addressed its prohibitions."¹⁹⁰ A second offense is more culpable, according to von Hirsch, because the offender persists in his criminal behavior after society has made its displeasure clear.

Second, the increased sanction for repeat offenders is similar to the "progressive loss of mitigation."¹⁹¹ In that view, the offender's sentence for the first trespass may be mitigated by his plea that the action is uncharacteristic of his previous behavior.¹⁹² The actor is claiming, in effect, although his act is wrong, "he should be the object of less obloquy, because his behavior on this particular occasion is uncharacteristic of his past behavior."¹⁹³ This plea is most compelling upon the first offense and becomes progressively less persuasive with repetition of criminality. Thus, the increased sentences for recidivists are actually the result of a loss of the mitigating factor.¹⁹⁴

There are a number of problems applying von Hirsch's theory to multiple offender statutes. The first problem is that proponents seldom attempt to justify habitual offender statutes in terms of culpability. The rhetoric is almost always forward looking; the statutes are justified by a need to protect society from future criminality and deterrence.¹⁹⁵

¹⁹⁰ VON HIRSCH, *supra* note 155, at 85.

¹⁹¹ Martin Wasik, *Desert and the Role of Previous Convictions*, in PRINCIPLED SENTENCING 233, 236 (Andrew von Hirsch & Andrew Ashworth eds., 1992).

¹⁹² von Hirsch, *supra* note 189, at 597.

¹⁹³ *Id.* at 599.

¹⁹⁴ *Id.* at 602-04.

¹⁹⁵ For example, the president of the California Police Chiefs' Association wrote, "By depriving these recent offenders of a future life of crime, we have helped create a brighter future for law-abiding residents." Ronald E. Lowenberg, *Orange County Voices, "3 Strikes" Costs Money but Pays Off*, L.A. TIMES, Apr. 28, 1996, at B9. "Three Strikes is not aimed solely at those who have already committed violent or heinous crimes," wrote California State Senator Phil Wyman. "The primary purpose of [the law] is not simply to punish serious or violent felons, but also to deter other such felons from committing future crimes." Wyman & Schmidt, *supra* note 14, at 257.

One deputy district attorney's description of Three Strikes defendants is that "[t]here are just some people who are . . . never going to change and society shouldn't have to wait until they kill someone or hurt someone badly to lock them up. By the time they've been convicted of two felonies, they've probably gotten away with 100 more." OFFICE OF PLANNING AND RESEARCH, CAL. DEP'T OF CORRECTIONS, *supra* note 181, at 6.

At a 1995 University of West Los Angeles Symposium on the Three Strikes law, Governor Pete Wilson stated that "[Three Strikes] is not only emotionally attractive, but it is also a judicially sound policy for the simple reason that the repeat, violent offenders, targeted by the legislation, have shown that they are beyond reform and that they will only continue to bring terror to our citizens." Governor Pete Wilson, *Justice Demands and California Needs "Three Strikes"*, 26 U. WEST L.A. L. REV. 239, 240 (1995). At the same symposium, California

Second, his argument that an offender's second act is more culpable because society has "dramatically and personally"¹⁹⁶ called his attention to his criminality also fails in the context of multiple offender statutes. The argument seems to suggest that an offender might be uncertain whether his conduct really is criminal, the familiar problem relating to ignorance of the law.¹⁹⁷ But in most cases of crimes *mala in se*,¹⁹⁸ one cannot seriously contend that the actor is unaware that society condemns the conduct. That is the context in which the historic maxim *ignorantia legis neminem excusat* makes sense.¹⁹⁹ A person who commits robbery cannot plausibly claim that he was confused or uncertain that society takes that kind of behavior seriously.

Another problem with von Hirsch's argument, if applied to habitual offender statutes, relates to the common structure of repeat offender statutes. Even if one were confused about the criminality of his conduct, habitual offender statutes are not triggered only if the second offense is of the same nature as the first offense.²⁰⁰ Hence, the argument might make sense if an offender committed rape under the belief that a woman means yes when she says no. One might justify a lesser punishment for his first offense on the view that his mistake was

Secretary of State Bill Jones stated that "Three Strikes' is an anti-crime law, not just an anti-violent crime law. It was our intent in enacting 'Three Strikes,' not only to keep dangerous repeat felons in prison (that is why the third strike can be *any* felony), but also to begin moving toward the concept of zero tolerance for crime." Jones, *supra* note 19, at 245 (emphasis in original).

An article addressing concerns regarding the type of offenders being caught in the wide net of California's Three Strikes law reported that "[i]f the past [criminal record] is a prologue, then the statute is removing hundreds of offenders who most predictably would commit more felonies if they weren't in prison." Furillo, *supra* note 182, at A20. This reasoning, however, is not without criticism. A county assistant public defender stated, "I don't see much difference between that and just running a record check on the people that have two strikes and going off and arresting them and sending them to prison. Why go through the process of waiting until they commit a minor offense?" *Id.*

See also Andy Furillo, *Wilson Praises 3-Strikes Law*, SACRAMENTO BEE, Mar. 7, 1996, at A1 (reporting Governor Wilson's claim that Three Strikes is responsible for California's decreasing crime rate); Dan Morain, *Three Strikes: A Steamroller Driven by One Man's Pain*, L.A. TIMES, Oct. 17, 1994, at A3 (similar claim from Three Strikes author Mike Reynolds); Nicholas Riccardi, *Statewide Crime Rate Is Down in First Half of '94*, L.A. TIMES, Aug. 31, 1994, at A3 (reporting Attorney General Dan Lungren's assertion that Three Strikes is having a deterrent effect).

¹⁹⁶ VON HIRSCH, *supra* note 155, at 85.

¹⁹⁷ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 13.01 (2d ed. 1995).

¹⁹⁸ *Mala in se* crimes are defined as "[w]rongs in themselves; acts morally wrong; offenses against conscience." BLACK'S LAW DICTIONARY 956 (6th ed. 1990).

¹⁹⁹ See DRESSLER, *supra* note 197, at § 13.01 [B][1].

²⁰⁰ See, e.g., CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1996) (third strike may be any felony); TEX. PENAL CODE ANN. § 12.42 (West Supp. 1996) (multiple offender statute applies to any felony).

negligent but that he did not act with the necessary willfulness to justify the full sanction of the law.²⁰¹ Upon a second conviction for rape, he could no longer make that claim. By contrast, if his second crime were theft (where he was confused about the victim's consent), it is hard to see how the first penalty put him on notice that society was serious about theft.

Third, in most habitual offender statutes, the penalty for the final strike typically is not graded according to the seriousness of that offense. If a statute merely provided that a thief received probation for her first offense, three months in jail for her second offense, and one year in prison for her third offense, his theory is plausible. But that is not how habitual offender statutes work: instead, as with Three Strikes,²⁰² the first offense may be robbery, the second rape. The offender may have received and served the maximum term for both prior offenses (hence, he has not been accorded any mitigation at all for the earlier offenses) or may have received the minimum sentence for both. Upon conviction of the third strike, the punishment is the same. In addition, the third strike may be any felony, not a serious or violent felony.²⁰³ Hence, even though the hypothetical offender may have become a non-violent felon after serving time for robbery and rape, the long sentence accorded the habitual offender would be a blossoming of the sentence to full magnitude even though the actual term (twenty five to life) may far exceed the sentence ordinarily imposed for the felony that serves as the third strike.²⁰⁴

Although some of the arguments surrounding Three Strikes focused on the culpability of the repeat offender, most of the debate was about predicted future harm.²⁰⁵ Indeed, that is often the benefit promised by those advocating such laws.²⁰⁶ The lowered crime rates

²⁰¹ In typical American jurisdictions, a defendant's mistake about a woman's consent must be reasonable. *See, e.g.*, *People v. Mayberry*, 542 P.2d 1337, 1344-45 (Cal. 1975); *State v. Oliver*, 627 A.2d 144, 152 (N.J. 1993). Some courts have held that even a reasonable mistake as to consent is not a defense to a rape charge. *See, e.g.*, *Commonwealth v. Ascolillo*, 541 N.E.2d 570, 575 (Mass. 1989); *State v. Reed*, 479 A.2d 1291, 1296 (Me. 1984).

²⁰² CAL. PENAL CODE § 667 (West Supp. 1996); CAL. PENAL CODE § 1170.12 (West Supp. 1996).

²⁰³ CAL. PENAL CODE § 667(e)(2) (West Supp. 1996); CAL. PENAL CODE § 1170.12(c)(2) (West Supp. 1996).

²⁰⁴ *See, e.g.*, CAL. PENAL CODE § 489 (West Supp. 1996) (maximum term of imprisonment for grand theft is three years).

²⁰⁵ *See supra* text accompanying note 195.

²⁰⁶ For example, in the introductory memo of *The Case for More Incarceration*, a study conducted by the Department of Justice in 1992, former Attorney General William P. Barr stated, "[T]here is no better way to reduce crime than to identify, target, and incapacitate those hardened criminals who commit staggering numbers of violent crimes whenever they are on the streets." OFFICE OF POLICY DEV., U.S. DEP'T OF JUSTICE, *THE CASE FOR MORE INCARCERATION* ii (1992). Supported by findings that offenders placed on probation com-

promised by Three Strikes proponents result from placing incorrigible offenders behind bars where they cannot commit crimes against the rest of us and from deterring others from committing crimes.²⁰⁷ Its proponents focus on future benefits, not on repayment for past harms. Three Strikes is a form of incapacitation and looks forward to promised benefits, specifically, the reduction in crime.²⁰⁸

The morality of incapacitation has been the focal point of active debate.²⁰⁹ The justification for the increased length of the offender's sentence is the prediction of future criminal behavior. That is, punishment is not based on what a person has done.²¹⁰ The retributivist justifies punishment because it is earned and the appropriate punishment is measured by the harm or unfair advantage gained by the offender.²¹¹ There is little room in that scheme for setting punishment according to some future harm. In other words, one gives an eye for an eye taken, not for one that may be taken at some uncertain time in the future.²¹²

The moral questions about incapacitation, where the primary justification of the increased sentence is a prediction about future dangerousness, should not be dismissed without serious consideration.²¹³

mit new crimes while on probation and offenders who are released early commit new crimes during the period when they would otherwise have been incarcerated, the study concluded that "[f]ailure to incarcerate convicted criminals will lead to additional crimes." *Id.* at 5 (emphasis in original).

In accord with this theory is California's Attorney General, Dan Lungren, who recently wrote the following: "A criminal in prison cannot commit crimes. Criminals are not all stupid; if the state promises tougher punishments for their criminal behavior and then delivers on the promise, they will find the price of doing business here too high." Dan Lungren, *Falling Crime Rates Signal Heartening Trends*, SAN DIEGO UNION-TRIB., May 19, 1996, at G1.

²⁰⁷ See OFFICE OF PLANNING AND RESEARCH, CAL. DEP'T OF CORRECTIONS, *supra* note 181, at 9 (noting that Attorney General Dan Lungren attributes California's recent 8.5% decrease in crime to the deterrent value of Three Strikes); see also Jones, *supra* note 19, at 245 (stating that "[i]t was our intent in enacting 'Three Strikes,' not only to keep dangerous repeat felons in prison . . . but also to begin moving toward the concept of zero tolerance for crime").

²⁰⁸ See *supra* note 195.

²⁰⁹ See ZIMRING & HAWKINS, *supra* note 2, at 42-75 (reviewing the debate surrounding incapacitation); see also ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 31 (1985) (arguing that prospective considerations are incompatible with a theory of desert); Jacqueline Cohen, *Selective Incapacitation: An Assessment*, 1984 U. ILL. L. REV. 253 (same).

²¹⁰ See generally ZIMRING & HAWKINS, *supra* note 2, at 156-57; Cohen, *supra* note 209.

²¹¹ MORRIS, *supra* note 183, at 33-34.

²¹² VON HIRSCH, *supra* note 189, at 592 ("[p]enalties must, as a matter of justice, depend on the offender's deserts: that is, they must be commensurate with the degree of blameworthiness of the offender's past criminal conduct"). See also VON HIRSCH, *supra* note 155, at 66-76, 132-40.

²¹³ Franklin Zimring and Gordon Hawkins make a similar argument that the difference between general and selective incapacitation has been overstated: selective incapacitation

However, this article considers more pragmatic concerns. Attention is better spent on factual assertions made by proponents of Three Strikes. As with other utilitarian arguments, proponents of Three Strikes rely on factual arguments to support the efficacy of the law. Proponents also justify Three Strikes by its deterrent effect.²¹⁴ The deterrence question is discussed later in the article.²¹⁵

C. THREE STRIKES AND FALSE PROMISES

That incapacitation does have an effect on the crime rate has strong intuitive appeal.²¹⁶ The argument is straightforward: "Unlike probation and parole, incarceration makes it physically impossible for offenders to victimize the public with new crimes for as long as they are locked up."²¹⁷

The intuitive appeal of this argument derives from the fact that most felons will continue to commit crimes upon their release from

involves obvious problems of false positives. If the court sentences X to an extra five years of imprisonment based on an incorrect prediction that X will be dangerous, that imprisonment will be unjust. But so too, if the legislature enacts a policy of general incapacitation, for example, for all thieves: "[i]s this not a wholesale prediction of dangerousness for an entire class of offenders? And will it not produce 'false positives' in the same way as does individualized prediction since some of the offenders sentenced to imprisonment would not have reoffended if they had remained in the community?" ZIMRING & HAWKINS, *supra* note 2, at 68.

²¹⁴ After the release of the 1995 California Crime Index—reporting an 8.5% decrease in crime from 1994 to 1995—Governor Pete Wilson declared that "[c]learly three strikes has been an integral reason why we're winning the war against crime." Furillo, *supra* note 195, at A1.

Mike Reynolds stated—in rebuttal to disapproving cost/benefits studies conducted regarding Three Strikes—that "[the deterrence factor] is the one thing that's never been figured into the equation. A law that is a deterrent is the best kind of law in the world. It's one that doesn't have to be implemented. There is no cost of incarceration, no cost of prosecution, no cost to victims." Andy Furillo, "Three Strikes" Law Snares Persistent Lawbreakers, *Study Finds*, SACRAMENTO BEE, Apr. 8, 1996, at A1.

²¹⁵ See *infra* notes 263-301 and accompanying text.

²¹⁶ ZIMRING & HAWKINS, *supra* note 2, at 16, 27.

²¹⁷ OFFICE OF POLICY DEV., U.S. DEP'T OF JUSTICE, *supra* note 206, at 1. Proponents have stated that Three Strikes has lowered crime rates. See Edgar Sanchez, *Crime Falls in State's Big Cities—Lungren Cites '3 Strikes' As Major Offenses Drop 8.5%*, SACRAMENTO BEE, Mar. 13, 1996, at B1 (commenting on the release of the 1995 California Crime Index—which reported an 8.5% decrease in crime from 1994 to 1995). If that is the case, it must be because of the law's deterrent effect, not from the enhanced prison sentences. That is so because offenders imprisoned under Three Strikes have yet to begin serving the enhanced term of years. See, e.g., OFFICE OF THE DISTRICT ATT'Y, COUNTY OF KERN, RUMINATIONS ON "THREE STRIKES: A REPORT TO THE KERN COUNTY BOARD OF SUPERVISORS ON THE LOCAL IMPACT OF AB 971 AND PROPOSITION 184, at 3 (July 1995) (on file with author) [hereinafter RUMINATIONS ON "THREE STRIKES"] (explaining that any reduction in the crime rate of Kern County may not be attributed to Three Strikes' incapacitation of offenders because every "third strike" defendant presently incarcerated would have been incarcerated under prior law at this point in time anyway).

prison at least if their release comes during their younger years.²¹⁸ Therefore, incarcerating those offenders means that they will not be in the population committing criminal offenses, and therefore, the crime rate will go down.

Efforts at empirical verification are more difficult. While acknowledging that incapacitation through incarceration may reduce crime, Professor Franklin Zimring and Dr. Gordon Hawkins offer some sobering observations in an important new book, *Incapacitation: Penal Confinement and the Restraint of Crime*.²¹⁹ Well before passage of Three Strikes, California began incarcerating large numbers of felons. The crime rate in California did drop.²²⁰ Examining the data causes doubt about the causal link between incarceration and the crime rate. In the California study, the crime rate showed a measurable decline. But the rate for most crimes, including homicide, robbery, and auto theft, declined only slightly.²²¹ A large decline occurred in burglary and larceny. But even there, the increase in incarceration came among adult offenders and the decline occurred among juvenile offenders.²²² As observed by Zimring and Hawkins, "[a]t a minimum, then, these data should inspire substantial caution about the role of additional incarceration as the major explanation for decreasing offenses in California in the 1980s."²²³

Other problems exist with the cost-benefit analysis advanced by proponents of incapacitation. The cost benefit analysis purports to identify offenders' rate of crime, the cost of the crime prevented, and then multiplies one by the other to determine the benefits of incarcerating the offenders. The analysis then compares those benefits with the projected cost of future incarceration.²²⁴ But measurement of both crimes prevented and cost of crime is problematic.

Estimates of crime rates are notoriously imprecise. The range of disagreement in various studies that have attempted to measure how many crimes would be prevented for each year of incarceration demonstrates profound methodological difficulties in attempting meaningful quantification. Studies have varied in estimates of the number of crimes prevented per year from 3 to 187 crimes per offender.²²⁵ That kind of disparity should reduce one's confidence in relying on

²¹⁸ See OFFICE OF POLICY DEV., U.S. DEP'T OF JUSTICE, *supra* note 206, at 5-9; ZIMRING & HAWKINS, *supra* note 2, at 33-34.

²¹⁹ See ZIMRING & HAWKINS, *supra* note 2.

²²⁰ *Id.* at 100-02.

²²¹ *Id.* at 100-01.

²²² *Id.* at 101.

²²³ *Id.* at 125.

²²⁴ *Id.* at 136.

²²⁵ *Id.* at 38, 50, 145.

any of the existing studies.

The wide array may be explained by the different methodologies relied on to arrive at those results. For example, one study focused on self reporting by incarcerated individuals.²²⁶ Such a technique involves a number of pitfalls; for example, motive and memory raise questions.²²⁷ Further, such studies may involve offenders at the height of their criminal career when they presumably were most active.²²⁸ Any measurement flaws become grossly exaggerated when such numbers are projected over a significant term of years.

Any study that relies on measuring individual crime rates, rather than on community impact,²²⁹ may overstate the benefits of incarceration.²³⁰ Studies attempting to measure crime prevention by establishing individual crime rates typically ignore the fact that offenders often commit crimes in groups and that incarceration of one member of a group may have little effect on the crime rate.²³¹ A group member may readily be replaced;²³² indeed, once he returns to the street, not only may he return to committing crime, but his group may have enlisted another new offender.²³³ Hence, the impact of incarceration may be to increase the number of offenses. For example, if three burglars will commit twenty burglaries a year, but only one is incarcerated while his two associates remain on the street, the crime rate will not decline if his associates remain active.

Crime rates are affected by additional considerations. Opportunities to commit crime may be "unlimited and undifferentiated."²³⁴ For example, drug interdiction has failed because other suppliers simply fill the void left upon the arrest of a drug seller.²³⁵ Incarcerating one person for selling drugs does not reduce the crime rate if five other sellers are available. By contrast, reducing demand, for example, by treating or incarcerating one drug user may have a measurable

²²⁶ *Id.* at 81 (discussing PETER W. GREENWOOD, SELECTIVE INCAPACITATION: REPORT PREPARED FOR THE NATIONAL INSTITUTE OF JUSTICE (1982)).

²²⁷ *Id.* at 82.

²²⁸ *Id.* at 83.

²²⁹ *Id.* at 43 (community impact is defined as the net effect of the absence of criminal activity in the community setting).

²³⁰ *Id.* at 53.

²³¹ *Id.*

²³² *Id.* at 53-54.

²³³ *Id.* at 54.

²³⁴ *Id.* at 56.

²³⁵ See THE REAL WAR ON CRIME, *supra* note 1, at 116 (commenting that despite the war on drugs' increase in arrests and harsher sentences, dealers were not forced off the streets—instead, most drug dealing remained steady or increased in the affected communities).

effect on the crime rate.²³⁶

Incapacitation argued for new and more careful studies of crime rates, focusing both on offender rates and community effect of incarceration.²³⁷ Recognizing the inadequacies of existing studies, Zimring and Hawkins nonetheless estimated that the drop in the crime rate during a period of dramatic increased incarceration in California produced a drop of only about 3.5 crimes per offender per year of incarceration,²³⁸ far less than the "conservative" estimate of twenty crimes per year relied on by Three Strikes' proponents.²³⁹ Elsewhere, Professor Zimring has argued that if the estimate used by the Governor's Chief Economist, Philip Romero, was accurate, given California's incarceration increases during the 1980s, the crime rate should already have dropped to zero.²⁴⁰

Similar doubts exist concerning Romero's estimated savings resulting from each crime prevented. He determined the cost of crime by adding out-of-pocket expenses, monetary value of pain and suffering, and costs of crime prevention.²⁴¹ Acknowledging that society's expenditures for crime prevention would not be reduced in equal proportion to a reduction in crime, Romero hypothesized the actual cost reduction if crimes were prevented by the increased incapacitation of habitual offenders. He calculated the savings that would result if society did not spend either twenty-five or seventy-five percent of the costs attributable to each crime avoided. Hence, using the figure of twenty crimes per year prevented by a year of incarceration, a figure

²³⁶ One commentator argues that "[i]t's profit that drives the drug trade. And the way to reduce the profitability of drugs is not by stemming supply, but by dampening demand." Joseph Perkins, *America's War on Drugs Has Accomplished Little. It is Time to . . . Legalize Drugs? No Let's Work on Cutting Demand*, ATLANTA J. & CONST., May 19, 1993, at A11 (proposing a means by which to reduce the demand and advocating Attorney General Janet Reno's "carrot-and-stick approach" to decreasing illegal drug use: "The carrot should be treatment on demand for those who need help to beat their self-destructive habit. The stick should be swift and sure punishment for those who refuse treatment and get caught buying or doing drugs."). An example of such a policy at work can be seen in Miami and Baltimore. These cities implemented a program which requires nonviolent offenders to undergo mandatory, periodic drug testing in addition to substance abuse treatment—penalties are also mandatory if satisfactory progress is not displayed. See Janet Reno, *Fighting Youth Violence: The Future is Now*, CRIM. JUST., Summer 1996, at 33. The success of such a program is demonstrated by a drop in recidivism—Miami had a 33% drop in recidivists and Baltimore decreased its expected re-arrests by 50 percent. *Id.*

²³⁷ ZIMRING & HAWKINS, *supra* note 2, at 79.

²³⁸ *Id.* at 114-17 (concluding, based on four different methods, that increased incarceration of an additional 115,000 people led to a reduction of 3.5 offenses per individual per year).

²³⁹ ROMERO, *supra* note 129, at 3.

²⁴⁰ Franklin E. Zimring, *The Voodoo Economics of California Crime*, OVERCROWDED TIMES, Oct. 1994, at 3.

²⁴¹ ROMERO, *supra* note 129, at 2.

not reduced over time to recognize that an offender commits fewer crimes as he ages, Romero estimated that a year of incarceration saves between \$137,000 and \$248,000, far in excess of the cost of incarceration. Further, Romero estimated that if 150 crimes were prevented, the savings would jump to between \$302,000 and \$515,000.²⁴²

Small overestimates in either number of crimes or cost per crime produce dramatic results. Hence, as RAND study author Peter Greenwood has argued, if we rely on out-of-pocket expenses of between \$1,000 and \$2,000 per crime, even using Romero's twenty crimes per offender figure, the savings amount to only \$20,000-\$40,000 per

²⁴² *Id.* at 3. Romero's estimated savings from crime prevention measures is a good example of why those savings are almost certainly overstated. Those expenditures are driven by public fear about crime, rather than by the reality of those risks. See generally THE REAL WAR ON CRIME, *supra* note 1, at 3 (reporting a vast difference between the public perception of crime and the reality of crime rates in the United States—the reality being that crime rates have remained stable for several years), *id.* at 61-98 (exploring the prevailing criminal policies and attributing their failure to having been implemented as reactions to public fear of crime, rather than crime itself). But Three Strikes is a case study of how politicians use fear of crime and ignore the reality—here that the crime rates were going down—for political advantage. See John Vasconcellos, *Three Strikes and You're Out: No*, DOCKET: SACRAMENTO COUNTRY BAR ASS'N, Mar. 1994, at 11 (criticizing such politicians).

Politicians have an incentive as well as the desire to appear tough on crime. The "Prison-Industrial Complex," consisting of people who benefit economically from construction and maintenance of prisons, gives large campaign contributions and has become a powerful lobbying group. See THE REAL WAR ON CRIME, *supra* note 1, at 89, 96-97 (asserting that the founders of the Corrections Corporation of America, the largest private prison company, consists of several individuals who have major political influence among both Democrats and Republicans). Donzinger also notes that the California Correctional Peace Officers Association (CCPOA), the most powerful prison guards' union, is the second largest campaign donor in the state. The CCPOA donated the second-highest amount in support of Proposition 184, the Three Strikes initiative—spending approximately \$1 million during each campaign cycle to support candidates who promote prison expansion. This included an expenditure of over \$1 million toward Governor Pete Wilson's 1994 campaign. *Id.*

The CCPOA has become one of the most powerful lobby groups in Sacramento during the tenure of its 15-year president, Don Novey. Between 1985 and 1990, the number of California prison guards nearly doubled, from about 7,500 to 14,249. John Jacobs, *California's Growth Industry*, SACRAMENTO BEE, Aug. 11, 1994, at B8. By 1994, that figure had risen to 22,547. Not only has there been a drastic increase in jobs for prison guards, but Novey has helped to make them lucrative as well. A California prison guard with a high school diploma and six years on the job now makes \$45,000 annually. Almost 65 percent of the Department of Corrections budget in 1994 went to prison guard salaries. *Id.* The financial implications of Three Strikes on CCPOA members is obvious. Don Novey has been able to influence lawmakers to favor his union through strategic alliances. The CCPOA contributed \$1.4 million to Pete Wilson's 1990 and 1994 gubernatorial campaigns. Bill Ainsworth, *A Marriage of Convenience; Powerful Victims' Right Groups Have Found a Financial Backer That Also Wants More People Behind Bars—Prison Guards*, RECORDER, Nov. 30, 1994, at 1. After the CCPOA contributed nearly \$1 million to Wilson's 1990 campaign, Wilson launched the most expensive prison construction plan that any state has ever undertaken. W. John Moore, *Locked In*, 26 NAT'L J. 1784 (Jul. 30, 1994).

year.²⁴³ A cost-benefit analysis looks different if that figure is compared to the cost of incarcerating an offender for a year. Zimring and Hawkins' estimated reduction of only 3.5 crimes per year would further reduce the savings to about \$3,500 to \$7,000.

Because of serious methodological flaws in Romero's study, Three Strikes will not be able to deliver the benefits promised by its proponents. As developed below, while Three Strikes may reduce crime, California may have been able to realize similar benefits for far less.²⁴⁴

D. THREE STRIKES AND OLDER PRISONERS

Another result of Three Strikes is that it creates an aging prison population. Older prisoners are more expensive to care for than their younger counterparts.²⁴⁵ For example, one report estimates that the cost of incarcerating a geriatric prisoner is three times that of maintaining a regular inmate.²⁴⁶

The added cost of maintaining older prisoners cannot be justified by risk of recidivism if those prisoners were released to the general population. The New York State Department of Correctional Services, for example, has maintained statistics correlating age and recidivism. The Department reported the following rates for various age groups: the rate for offenders between 45 and 49, 26.6%; for those between 50 and 64, 22.1%; for those 65 and over, 7.4%. By contrast, the recidivism rate for those 16 to 18 years old was over 70%.²⁴⁷ The New York findings are hardly surprising. One of the widely recognized facts about criminality is that it diminishes with age. As Judge Posner has observed, crime is a young man's game.²⁴⁸

Three Strikes will undoubtedly lead to an older prison popula-

²⁴³ See Dan Morain, *Wilson Adviser Says '3 Strikes' Will Save Money*, L.A. TIMES, Apr. 7, 1994, at A3.

²⁴⁴ See *infra* notes 307-19 and accompanying text; see *supra* notes 134-39 and accompanying text.

²⁴⁵ JOHNATHAN TURLEY ET AL., POPS: THE PROJECT FOR OLDER PRISONERS, REPORT TO THE STATE OF NEW YORK 11 (1994) (discussing the Geriatric and Older Prisoner's Act of 1994) [hereinafter POPS].

²⁴⁶ *Id.* at 7.

²⁴⁷ *Id.* at 13.

²⁴⁸ We know that criminal careers taper off with age, although with the aging population and the improvements in the health of the aged the fraction of crimes committed by the elderly is rising. Crimes that involve a risk of physical injury to the criminal are especially a young man's game. In 1986 more than 62 percent of all persons arrested for robbery . . . were below the age of 25, and only 3.4 percent were 60 years old or older

United States v. Jackson, 835 F.2d 1195, 1199 (7th Cir. 1988) (Posner, J. concurring) (citations omitted). See also JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 126-41 (1985).

tion if only because the mandatory minimum sentence is longer than the statutory maximum for many underlying criminal offenses.²⁴⁹ Two proponents of Three Strikes have argued that the suggestion that prisons will turn into "geriatric wards" is "erroneous, if not warped."²⁵⁰ State Senator Wyman, described in the article as the "point man"²⁵¹ for Three Strikes in the Senate, and his co-author argue that "[i]f these so-called nonviolent prisoners have reached the point where they are unlikely to commit another crime, they will most likely be paroled when they reach eligibility."²⁵²

Their point is important, but tells only part of the story. Violent crime is a young man's game.²⁵³ While Three Strike offenders face a

²⁴⁹ For example, the statutory maximum sentence for a conviction of grand theft without the Three Strikes law normally is one year unless it involves theft of a firearm in which case the sentence can be up to three years, CAL. PENAL CODE § 489 (West Supp. 1996), possession of marijuana is one year, CAL. HEALTH & SAFETY CODE § 11357 (West 1991), and burglary is six years, CAL. PENAL CODE § 461 (West 1988). The burgeoning effect of Three Strikes' sentencing provisions is most evident when a criminal defendant is convicted of a third strike. See CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1996) (setting forth the sentencing requirements for criminal defendants with two prior serious or violent felony convictions and a current felony conviction which need not be serious or violent); CAL. PENAL CODE § 1170.12(c)(2)(A) (West Supp. 1996). Under the Three Strikes law the offender must serve a minimum of 25 years to life even if his or her third felony conviction is for theft, possession of marijuana, burglary, or any other minor, non-violent offense. *Id.*

²⁵⁰ Wyman & Schmidt, *supra* note 14, at 252. State Senator Wyman premised this argument on the assumption that "[i]f so-called nonviolent prisoners have reached the point where they are unlikely to commit another crime, they will most likely be paroled when they reach eligibility." *Id.* at n.18. The provisions of the Three Strikes law, however, do not permit parole—the only provision allowing an offender to serve less than the mandatory sentence is found in section 667(c)(5). See CAL. PENAL CODE § 667(c)(5) (West Supp. 1996) (permitting the accrual of good time credits for a maximum of one-fifth the total term of the imposed sentence—making the minimum sentence for a third strike 20 years); CAL. PENAL CODE § 1170.12(a)(5) (West Supp. 1996). In light of this, a repeat nonviolent offender who commits his or her third strike at the age of 34 would, contrary to Senator Wyman's proposition, continue to be incarcerated long after the point he or she is likely to commit another crime—there is a strong argument to be made that a 54 year-old offender is unlikely to commit another crime. See LEGISLATIVE ANALYST'S OFFICE, CRIME IN CALIFORNIA 17 (1994) (reporting that most criminal offenses are committed by persons between the ages of 11 and 24, and after the 30th birthday, criminal activity for most offenders significantly decreases). Therefore, the only way Senator Wyman's statement can hold water is if the third strike offender is in his or her younger years—say, 20 years old, which even then would lead to incarceration of the offender for approximately 10 years above and beyond an age where he or she may pose a danger to society.

²⁵¹ Wyman & Schmidt, *supra* note 14, at 253.

²⁵² *Id.* at 252 n.18.

²⁵³ Offenders within the 20-34 age group comprise a total of 66.59% of all second and third strike defendants. CAL. DEP'T OF CORRECTIONS, IMPACT OF "THREE STRIKES" LAW ON THE CALIFORNIA DEPARTMENT OF CORRECTIONS 20 chart 8 (Feb. 1996). The 20-24 year-old defendants are at the top of the scale with 24.18%, closely followed by those 25-29 years-old at 22.24%, and the 30-34 year-old offenders at 20.17%. *Id.* Criminal defendants under the age of 20 comprise 7.26% of all second and third strike defendants, while those over the age of 35 constitute 26.15%, and those 50 and older place at the lowest end of the scale

possible term of life in prison, many will be released in only twenty years.²⁵⁴ For example, if a Three Strikes offender is twenty-five years old when he is sentenced under § 667(e), and earns all available good time credit, he will be only forty-five years old at the time of his release from prison. For some offenders, the mandatory minimum will be longer than twenty-five years, but only in cases in which the term of imprisonment for the third strike, multiplied by three, is in excess of twenty-five years. Those offenses are relatively few.²⁵⁵

The senator and his co-author ignore part of the problem. There will be a measurable number of offenders who will become geriatric prisoners. Because the statute includes no wash-out period, older offenders who may have committed serious or violent offenses as younger adults may commit non-violent third strikes.²⁵⁶ Incarcerating

with 1.87%. *Id.*

²⁵⁴ See CAL. PENAL CODE §§ 667(c)(5) and 667(e)(2)(A)(ii) (West Supp. 1996) (providing, respectively, that the total amount of credits awarded toward reduction of a sentence under the Three Strikes law shall not exceed one-fifth of the total term of imprisonment imposed, which has a mandatory minimum of 25 years); CAL. PENAL CODE §§ 1170.12(a)(5) and 1170.12(c)(2)(A)(ii) (West Supp. 1996) (same).

²⁵⁵ See, e.g., CAL. PENAL CODE § 208 (West Supp. 1996) (setting forth that a defendant shall be sentenced for up to 11 years if convicted of kidnapping a person under the age of 14); CAL. PENAL CODE § 215 (West Supp. 1996) (mandating that a defendant convicted of carjacking shall be sentenced for a maximum of nine years); CAL. PENAL CODE § 451 (West Supp. 1996) (determining that a defendant convicted of arson resulting in great bodily injury shall be sentenced for up to nine years); CAL. PENAL CODE § 213 (West Supp. 1996) (establishing that a defendant shall serve up to nine years if convicted of first degree robbery of an inhabited dwelling). *But see* CAL. PENAL CODE § 264 (West Supp. 1996) (requiring a maximum sentence of only eight years for any defendant convicted of rape); *see also*, CAL. PENAL CODE § 461 (West 1988) (setting the maximum imprisonment for a defendant convicted of first degree burglary at six years).

In determining the mandatory minimum sentence for a third strike, a question arises concerning offenders who have two prior strikes and are subsequently convicted of multiple, current felonies not committed on the same occasion and not arising from the same set of operative facts. *See* CAL. PENAL CODE § 667(c)(6) (West Supp. 1996) ("If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e)."); *see also* CAL. PENAL CODE § 1170.12(a)(6) (West Supp. 1996). The appellate courts have consistently held that the defendant must be consecutively sentenced for *each count*. *See* *People v. Cartwright*, 46 Cal. Rptr. 2d 351 (Cal. Ct. App. 1995); *People v. Ingram*, 48 Cal. Rptr. 2d 256 (Cal. Ct. App. 1995); *People v. Hendrix*, No. F023420, 1996 WL 376318 (Cal. Ct. App. July 3, 1996); *cf.* *People v. Jenkins*, 893 P.2d 1224 (1995) (en banc). For a detailed analysis of the three-strikes law see AL MENASTER & ALEX RICCIARDULLI, 3 STRIKES MANUAL (1996). *See infra* note 57 and accompanying text for a comparison of the second strike sentencing scheme.

See also *People v. Nelson*, 51 Cal. Rptr. 2d 9 (Cal. Ct. App. 1996), *review granted*, 917 P.2d 624 (1996). In *Nelson*, the appellate court held that Three Strikes mandates imposition of consecutive 25-year-to-life sentences when multiple crimes occur *on the same occasion and arise out of the same set of operative facts*. This issue is currently being reviewed by the California Supreme Court.

²⁵⁶ CAL. PENAL CODE § 667(c)(3) (West Supp. 1996); CAL. PENAL CODE § 1170.12(a)(3) (West Supp. 1996).

an older drug addict or shoplifter who commits a third strike at forty-five years old until he is seventy years old is hard to justify as necessary for public protection. At least in the short run, the population almost certainly includes a significant number of older offenders who no longer commit crimes of violence but do commit lesser felonies.²⁵⁷ For example, an older offender who is currently charged with possession of narcotics does not represent a threat to public safety sufficient to warrant a term of imprisonment for a minimum of twenty years. Unless the prosecutor or court strikes prior felonies, those older offenders are subject to Three Strikes' sentence enhancement.

Some proponents of Three Strikes have argued that those offenders are doing "life on the installment plan."²⁵⁸ In other words, some offenders who may not represent a serious threat of physical harm may nonetheless serve numerous short sentences of imprisonment for lesser crimes, like drug violations and related crimes to feed drug addiction.

This group of offenders, older offenders who may no longer be violent, but who frequently commit minor felonies, will end up as geriatric prisoners. Warehousing them poses a significant problem. Their care is expensive.²⁵⁹ Three Strikes mandates that they do prison time in a state correctional facility,²⁶⁰ filling prison space with less un-

²⁵⁷ See, e.g., *People v. Reese*, 50 Cal. Rptr. 2d 162, 164 (Cal. Ct. App. 1996), *review granted*, No. S052695, 1996 WL 346368 (Cal. Jun. 12, 1996) (a 41 year-old offender earned his third strike upon a conviction for burglarizing a residence, stealing a videocassette recorder and three screw drivers. Prior to his third strike, the defendant had 14 previous felony and misdemeanor convictions: possession of drugs in 1992 and 1979, driving under the influence in 1992 and 1977, attempted robbery in 1988, ex-felon in possession of a firearm in 1985, unlawful sexual intercourse with a minor and battery in 1983, aggravated assault in 1982 and 1977, possession of drugs for sale in 1979, robbery in 1972, burglary in 1972 and possession of an illegal weapon and throwing rocks at a vehicle in 1965); see also *People v. Super. Ct. (Romero)*, 44 Cal. App. 4th 1073, 1082 (at the age of 32, the time of his last offense, Jesus Romero was convicted of a third strike and sentenced to 25 years to life for possession of 0.13 grams of rock cocaine. Prior to his third strike, Romero had previously been convicted of five non-violent felonies: burglary in the second degree in 1980, attempted burglary in the first degree in 1984, burglary in the first degree in 1986, and possession of a controlled substance in 1992 and 1993).

One effect of the California Supreme Court's recent holding in *People v. Superior Court* is that it may limit the use of Three Strikes in such cases. See *People v. Superior Ct.*, 917 P.2d 628, 630 (Cal. 1996) (guiding the lower courts in the exercise of their discretion to strike prior convictions, and noting that any dismissal must be "in furtherance of justice" as proscribed by section 1385(a) of the California Penal Code).

²⁵⁸ "We're getting some very bad people," said a Ventura County deputy district attorney, "and instead of them doing life on the installment plan, they're just going away." Andy Furillo, *Most Offenders Have Long Criminal Histories*, SACRAMENTO BEE, Mar. 31, 1996, at A1.

²⁵⁹ See POPS, *supra* note 245, at 11.

²⁶⁰ See CAL. PENAL CODE § 667(c)(4) (West Supp. 1996); CAL. PENAL CODE § 1170.12(a)(4) (West Supp. 1996).

ruly inmates, leaving less space for younger more violent offenders. On the realistic assumption that prison space will be finite,²⁶¹ Three Strikes makes a bad choice by requiring incarceration of inmates past the years of their active criminal careers. Three Strikes prevents consideration of less expensive alternatives to incarceration.²⁶²

E. THREE STRIKES AND DETERRENCE

California has experienced a reduction in its crime rate since the effective date of Three Strikes. Its proponents claim that the law is a powerful deterrent that explains the downturn in the crime rate.²⁶³ For example, one news reporter observed, "[a]ccording to the FBI, major crime in California dropped 4.9 percent in 1994—the first year of 'three strikes'—compared to 2 percent nationwide. The disparity was even more pronounced in the first six months of 1995—a 7 percent reduction in California compared with 1 percent for the nation."²⁶⁴ Beyond anecdotal evidence, establishing that Three Strikes is responsible for all or even most of that reduction is certainly open to question.

Deterrence arguments are notoriously difficult to assess, in large part because society is not set up to allow carefully controlled experiments. A claim that the threat of severe sanctions will deter crime has more intuitive appeal than factual support. Over 200 years ago, Cesare Beccaria argued that certainty of punishment has greater deterrent effect than does severity of punishment.²⁶⁵ Subsequent studies support that conclusion.²⁶⁶ One California study, for example, concluded that increased severity had no effect on the crime rate.²⁶⁷ But

²⁶¹ See *infra* note 272 and accompanying text.

²⁶² See CAL. PENAL CODE § 667(c)(4) (West Supp. 1996) (requiring that all Three Strikes defendants must be committed to the state prison, and expressly prohibiting eligibility for commitment to the California Rehabilitation Center).

²⁶³ In the first six months of 1994, the rate of violent crimes in California, including homicides, dropped 7.7% from the rate a year before. Riccardi, *supra* note 195, at A3. The rate of murders in the state dropped almost 12%. *Id.* Attorney General Dan Lungren was quick to link the decreases to the deterrent effects of the Three Strikes law. *Id.* Governor Wilson credited the Three Strikes law as the reason behind the drop in the crime rate during the two-year-period, 1994-1995. Furillo, *supra* note 195, at A1. However, other experts believe that the drop in the crime rate can be attributed to the improvement in the state's economy during this time as well as a change in the state's demographics. *Id.* at A3.

²⁶⁴ Furillo, *supra* note 7, at A8.

²⁶⁵ CESARE BECCARIA, ON CRIMES AND PUNISHMENT 58 (Henry Paolucci trans., Bobbs-Merrill 1963).

²⁶⁶ A number of these studies are summarized in George Antunes & A. Lee Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URBAN LAW 145 (1973), and Charles R. Tittle, *Punishment & Deterrence of Deviance*, in THE ECONOMICS OF CRIME AND PUNISHMENT 85 (Simon Rottenberg ed., 1973).

²⁶⁷ CALIFORNIA ASSEMBLY COMMITTEE ON CRIMINAL PROCEDURE, PROGRESS REPORT, DETER-

the lack of good empirical evidence leaves other scholars less certain.²⁶⁸

Certainty of punishment does seem to be more important than severity of the sentence imposed.²⁶⁹ The leading criminal law textbook cites anecdotal examples in support of that conclusion, for example, instances in which law enforcement was weak or nonexistent, due to a police strike or, as occurred during World War II, the arrest of the Copenhagen police.²⁷⁰

If certainty of punishment and criminals' perception of that fact do create general deterrence,²⁷¹ and if severity of punishment is a less important factor in the deterrence equation, Three Strikes takes the wrong approach to maximizing the deterrence benefit of our resources. Resources are finite.²⁷² One possibility is that the legislature will be forced to allocate resources away from law enforcement to prison construction and maintenance.²⁷³ But if that is the case, fewer street officers will lead to fewer arrests and less certainty of punishment. On the plausible assumption that resource allocation will be necessary, Three Strikes may mean longer terms of imprisonment for offenders who will grow old (and less dangerous) in prison while younger offenders will face less chance of being caught, and even when they are, they will face shorter terms of imprisonment until they run afoul of Three Strikes. The net result is that we may extend the career of younger felons while warehousing older felons.

To underscore the point about resource allocation, consider three separate offenders: one, an older offender who commits his

RENT EFFECT OF CRIMINAL SANCTIONS 7 (May 1968) [hereinafter PROGRESS REPORT], cited in KADISH & SCHULHOFER, *supra* note 13, at 117.

²⁶⁸ VON HIRSCH, *supra* note 155, at 40-41.

²⁶⁹ *Id.* at 37-44; Antunes & Hunt, *supra* note 266; Tittle, *supra* note 266.

²⁷⁰ KADISH & SCHULHOFER, *supra* note 13, at 117.

²⁷¹ See PROGRESS REPORT, *supra* note 267. There is a good deal of irony in recent efforts by politicians to use the fear of crime for political advantage. Despite the recent decline in crime rates—perhaps a result of the increase in the prison population in the 1980s—claims by politicians that crime goes unpunished may undercut the deterrent effect of the criminal law by making would-be offenders believe that the possibility of criminal sanctions is remote.

²⁷² See GREENWOOD ET AL., *supra* note 22, at 34; Schiraldi, *supra* note 22, at 7.

²⁷³ While California has had a dramatic decline in its crime rate, so has New York, where no three strikes law is in effect. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 1995 PRELIMINARY ANNUAL RELEASE tbl.4 (May 5, 1996) (noting that crime in New York City fell approximately 14.5% from 1994 to 1995). In New York City, the police now make arrests for minor offenses, a strategy that is credited with reducing the crime rate. The strategy has been suggested by a number of criminologists. See, e.g., George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29 (arguing that tolerance of petty offenses leads to increased crime rates). That approach has numerous and obvious advantages over California's; not the least significant is that it comes at a lower cost.

third felony and receives a minimum term of twenty five years; two, a young violent offender who commits his third felony and receives a minimum term of twenty five years; third, a young violent offender who commits his first felony. The chances of the older felon committing violent crimes is quite low;²⁷⁴ but Three Strikes mandates that he serves his time in a state prison and that his sentence can be reduced only by 20% by good time credits.²⁷⁵ It is hard to see an argument that favors incarcerating him rather than the third offender. But the reality that prison space will remain limited means that the judge who sentences the third felon is less likely to give that offender a sentence commensurate with the violent nature of the offense. Three Strikes makes more probable a lighter sentence in such cases.²⁷⁶

The choice between the second and third felons is harder. But the choice to imprison the second felon for a minimum of twenty years, again with the result that prison space may not be available for the third felon (e.g. resulting in a short jail term), is shortsighted. The second felon will grow old in prison, almost certainly past the point where social protection requires his imprisonment. Using limited prison resources for felons as they graduate from violent careers leaves fewer resources to be spent on young criminals at the point when they represent their greatest threat to society.

What then of the statistical data quoted by Three Strikes proponents? For example, in a thorough series of articles in the *Sacramento Bee*,²⁷⁷ the author cited Three Strikes' proponents who relied not just on anecdotal evidence, like reported cases of parolees leaving the state, but also on data compiled by the F.B.I., indicating a significant

²⁷⁴ See *supra* notes 246-47 and accompanying text.

²⁷⁵ CAL. PENAL CODE § 667(c)(5) (West Supp. 1996); CAL. PENAL CODE § 1170.12(a)(5) (West Supp. 1996).

²⁷⁶ "If [the jail population] continues to grow," said Merced County Sheriff and chairman of a statewide panel examining the effect of Three Strikes on county jails, "the easiest way to get out of jail is going to be to get sentenced." *Three Strikes After One Year*, CAL. J., Oct. 1, 1995 (reporting that the influx of Three Strikes prisoners awaiting trial has forced many jails to refuse to accept suspects charged with misdemeanors, and further noting that many jails must release virtually anyone who is not a violent felon while others have resorted to instructing the police to forego arresting low-level offenders).

²⁷⁷ See Andy Furillo, "Three Strikes" Law Snares Persistent Lawbreakers, SACRAMENTO BEE, Apr. 8, 1996, at A1; Andy Furillo, "Three Strikes" Collides With California's Bursting Prisons, SACRAMENTO BEE, Apr. 2, 1996, at A1; Andy Furillo, Prosecutors, SACRAMENTO BEE, Apr. 2, 1996, at A11; Andy Furillo, Sentencing Discretion May Return to Courts, SACRAMENTO BEE, Apr. 2, 1996, at A10; Andy Furillo, Future of "Three Strikes" Hinges on Issue of Deterrence, SACRAMENTO BEE, Apr. 1, 1996, at A1; Andy Furillo, The Race Issue, SACRAMENTO BEE, Mar. 31, 1996, at A19; Andy Furillo, Most Offenders Have Long Criminal Histories, SACRAMENTO BEE, Mar. 31, 1996, at A1; Andy Furillo, L.A. Story, SACRAMENTO BEE, Mar. 31, 1996, at A19; Andy Furillo, The Victims, SACRAMENTO BEE, Mar. 31, 1996, at A21; Andy Furillo, The Convicts, SACRAMENTO BEE, Mar. 31, 1996, at A20; Andy Furillo, Wilson Praises 3-Strikes Law, SACRAMENTO BEE, Mar. 7, 1996, at A1.

drop in California's crime rate.²⁷⁸

Specifically, "there were nearly 500 fewer homicide victims statewide in 1995 compared with 1993."²⁷⁹ California experienced a 4.9% drop in major crime in the first year of Three Strikes, "compared with 2 percent nationwide."²⁸⁰ Further support for the deterrent effect of the law, according to the article, is found in a RAND study, "comparing the reduction in crime in selected California cities with non-California cities over the past three years." The California cities "showed bigger reductions in homicide . . . , robbery . . . , and burglary . . ." than their counterparts.²⁸¹ If Three Strikes is responsible for those results, it may be a cause for celebration. As Three Strikes' author Mike Reynolds has pointed out, in effect, deterrence comes at a very low price. Crimes not committed mean no cost to the courts, prisons or victims.²⁸²

Two questions surface though. The first question relates to what the numbers actually show. Even the numbers cited by proponents of Three Strikes suggest that its deterrent effect is not the whole story. As for the RAND study, going back *three* years, before the effective date of Three Strikes should actually demonstrate that serious crime rates had been on the decline for four years running.²⁸³ Likewise, the F.B.I. study also specifically reported that violent crime decreased consistently since 1993.²⁸⁴

It is doubtful that the sharp decline in homicides is attributable to Three Strikes. Homicide cases may be Three Strike cases, but penalties available for murder are comparable to or greater than those available in Three Strikes cases.²⁸⁵ The drop in homicide rates might

²⁷⁸ See Furillo, *supra* note 7, at A1 (reporting a remarkable exodus of parolees from California to other states — in the first eleven months of 1995, there was an average of 286 out-of-state parole requests per month, compared with 249 per month in 1994 and 237 per month in 1993—and further noting that "[a]ccording to the FBI, major crime in California dropped 4.9 percent in 1994 . . . compared with 2 percent nationwide").

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ UNIFORM CRIME REPORTS 1995 PRELIMINARY ANNUAL RELEASE, *supra* note 273, at tbl.3 (reporting that the crime index dropped 3% from 1991 to 1992; 2% from 1992 to 1993; 1% from 1993 to 1994; and 2% from 1994 to 1995).

²⁸⁴ See *id.* (noting that from 1992 to 1993, there was no change in violent crime; from 1993 to 1994, violent crime fell by 3%; and from 1994 to 1995, violent crime dropped by 4%).

²⁸⁵ See CAL. PENAL CODE § 190 (West Supp. 1996) (indicating that every person convicted of murder in the first degree shall be sentenced to death, life imprisonment without the possibility of parole, or 25 years to life; every person convicted of murder in the second degree shall be sentenced for 15 years to life, or for 20 years to life if the killing was committed by means of shooting a firearm from a motor vehicle, or 25 years to life if the victim was a peace officer).

be explained by a number of other factors, some of which have nothing to do with the penalty for homicide.²⁸⁶ But even assuming that would-be offenders are deterred by the available criminal sentence, one might have expected proponents of severe criminal sanctions to have explained the decline in homicides by the renewed use of the death penalty in California, but for their advocacy in favor of Three Strikes.²⁸⁷

Examination of the F.B.I. data suggests that factors other than multiple offender legislation may explain crime rates. For example, the three most violent cities nationwide are in states with three or two strikes legislation in place.²⁸⁸ Meanwhile, crime in New York City fell by 14.5%, in a state with no three strikes law, while crime fell by less than 4% in Los Angeles.²⁸⁹

Three Strikes proponents conveniently ignore the simple fact of demographics. F.B.I. data indicate that while overall crime rates are declining, the number of crimes committed by juveniles is increasing.²⁹⁰ Young offenders represent the largest group of violent offend-

²⁸⁶ See Furillo, *supra* note 7, at A1 (exploring a change in demographics as a possible reason for the decrease in the crime rate and citing the Center on Juvenile and Criminal Justice findings that "there were 106,851 fewer young men between the ages of 15 to 30, a traditionally high-crime group, in July 1995 than three years earlier"); see *id.* (reporting further that California's economy is improving, as evidenced by the state Employment Development Department's report that 340,000 more Californians were employed in 1995 than in 1993); see also Lori Montgomery, *Another Drop in Crime Rate*, SACRAMENTO BEE, May 6, 1996, at A1 (referring to experts who attribute the drop in crime to other possible causes such as assertive police stratagem, community policing, an increase in incarceration of offenders, and stabilization of turf battles between drug dealers). But see Michael Prowse, *Paying For Crime*, FINANCIAL TIMES, May 13, 1996, at 18 (warning that the lull in crime rates is unlikely to continue as the next decade promises to bring a 20% increase in the number of males aged 14 to 17, resulting in a significant increase among the most crime-prone minority groups); see also Montgomery, *supra* (anticipating an increase of violent crime among teens and quoting one commentator as saying, "[t]his is the calm before the crime storm. It's great that crime is down now, but if we start celebrating our successes, we may be blindsided by a bloodbath.").

²⁸⁷ See Bruce Fein, *Death Penalty End Game . . . And Debate*, WASH. TIMES, Apr. 28, 1992, at F1 (reflecting on the execution of Robert Alton Harris—California's first administration of the death penalty since 1967).

²⁸⁸ The F.B.I.'s annual uniform crime report found that Newark, New Jersey, Atlanta, Georgia and Miami, Florida, have the highest violent crime rates per 100,000 population. See Montgomery, *supra* note 286, at A1 (citing FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: 1995 PRELIMINARY ANNUAL RELEASE tbl.4 (May 5, 1996)). For an abstract of the Three and Two Strikes legislation for these states, see Appendix A.

²⁸⁹ See UNIFORM CRIME REPORTS: 1995 PRELIMINARY ANNUAL RELEASE, *supra* note 273, at tbl.4.

²⁹⁰ See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM ANNUAL CRIME REPORTS 227 (1994); compare FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM ANNUAL CRIME REPORTS 227 (1993); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM ANNUAL CRIME REPORTS 227 (1992); FEDERAL BUREAU OF

ers. The reason that an increase in juvenile crime has not resulted in higher crimes rates is that juveniles represent a smaller percentage of the overall population.²⁹¹ Demographics alone may account for the most significant portion of the declining crime rate.

If Three Strikes has a powerful deterrent effect, it should have produced a measurable decline in the juvenile crime rate. That is so because Three Strikes allows felony convictions of juveniles to count as prior strikes.²⁹² But the data are to the contrary; California juveniles, like those elsewhere, continue to commit violent crime at increasing rates.²⁹³

Even if one assumes that Three Strikes deters, a second question arises: would a more carefully crafted statute have provided similar deterrent benefits? As indicated above, California's Three Strikes applies to numerous offenders who do not present a grave social harm.²⁹⁴ The outcry that has led to multiple offender statutes is a reaction to concern about violent crime.²⁹⁵ No one seems to have asked whether a three strikes law aimed at violent offenders might have the deterrent benefits without the added cost of making Three Strikes applicable to non-violent offenders.

As currently crafted, Three Strikes is a crude deterrent tool. In setting criminal sentences, deterrent theorists favor graded offenses, reserving the most severe sanctions for conduct that society wants to

INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM ANNUAL REPORTS 223 (1991) (finding, respectively, that juvenile crime rates increased 4.5% from 1993 to 1994, 6% from 1992 to 1993, and 17% from 1991 to 1992); *cf.* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM ANNUAL CRIME REPORTS 174 (1986) (the juvenile crime rate has increased over 74% from 1986 to 1994).

²⁹¹ Juvenile crime is on the rise and experts do not expect this trend to cease. In fact, the incessant increase in juvenile crime is expected to skyrocket in the near future. In 1990, there were only 10 million juveniles aged 15 to 17. By the year 2010, however, the juvenile population is expected to grow to 13.1 million. *See* Reno, *supra* note 236, at 30. Even if the trend in juvenile crime were to stabilize, in the face of 3.1 million more juveniles by the year 2010, the number of crimes committed by this group will nevertheless increase by one-third. *Id.*

²⁹² *See* CAL. PENAL CODE § 667(d)(3)(A)-(D) (West Supp. 1996) (requiring that a prior juvenile adjudication shall constitute a prior felony conviction if the juvenile was, among other requirements, 16 years of age or older at the time she or he committed the prior offense).

²⁹³ For example, in California, juvenile violent offenses increased 4.6% from 1993 to 1994. CAL. DEP'T OF JUSTICE, CRIME AND DELINQUENCY IN CALIFORNIA 11 (1994). More alarming is the fact that from 1985 to 1994, juvenile violent offenses increased 81.9%, while the juvenile population only increased 13.4% in that same time period. *Id.*

²⁹⁴ *See supra* notes 246-47 and accompanying text.

²⁹⁵ *See* Sam Walker, *Questions Surface Over Fairness, Cost of 3-Strikes Laws*, CHRISTIAN SCIENCE MONITOR, Nov. 18, 1994, at 3 (asserting that 74% of Americans support mandatory life sentences for three-time violent felons).

deter the most.²⁹⁶ Relying on the premise that the offender is a rational actor, even if he is not entirely deterred to desist from committing crimes, these theorists believe that the offender may choose to commit the lesser offense, rather than the greater.²⁹⁷ If the punishment is the same for both offenses, the offender has no reason to avoid the greater social harm.²⁹⁸ For example, if an offender shifts from robbery to theft to feed a drug habit because penalties are harsher for robbery, deterrence theorists would claim that deterrence has worked properly, if incompletely.²⁹⁹ Three Strikes gives the felon with two strikes little incentive to shift from robbery to theft.³⁰⁰

²⁹⁶ "[T]he obstacles that deter men from committing crimes," wrote Cesare Beccaria, "should be stronger in proportion as they are contrary to the public good . . . [for] [i]f an equal punishment be ordained for two crimes that do not equally injure society, men will not be anymore deterred from committing the greater crime . . ." Cesare Beccaria, *On Crimes and Punishment*, in *THEORIES OF PUNISHMENT* 131-32 (Stanley E. Grupp ed., 1971). "[T]here ought to be a corresponding scale of punishments," he continued, "descending from the greatest to the least . . . [b]ut it is enough for the wise legislator to mark the principal points of division without disturbing the order, not assigning to crimes of the first grade the punishments of the last." *Id.* at 133.

²⁹⁷ Ted Honderich wrote, "[c]learly the concept of deterrence is based on an assumption that ' . . . we are rational beings, who make careful calculations of possible gain and losses before deciding upon our actions.'" LAW REFORM COMMISSION OF CANADA, *FEAR OF PUNISHMENT: DETERRENCE* 10 (1976) (quoting TED HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 56 (1969)). "Criminals who do commit certain offences," proceeded Honderich, "are restrained from more serious ones because of the threat of greater penalties. They sometimes take self-preserving steps, such as not carrying weapons." *Id.* at 13.

²⁹⁸ Some law enforcement officials express concern that Three Strikes has made offenders more violent and unmanageable because they have little to lose. For example, one career burglar expressed, "I might as well get 25-to-life for murder and do 16 than not shoot you and do 20." Andy Furillo, *The Convicts*, SACRAMENTO BEE, Mar. 31, 1996, at A20. "I shoot you, I do less time," he continued, "so I might as well shoot you." *Id.*

An article addressing the need to step-up security to absorb the adverse effects of an ever increasing number of violent offenders warehoused in county jails quoted one county chief deputy sheriff as saying: "We're getting individuals in for their second or third strike that essentially have nothing to lose. Why should they worry about following internal rules? They ask, 'What are you going to do, send us to prison for life?'" *Three Strikes After One Year*, *supra* note 277. The Los Angeles superior court recently reported that its county jails are in crisis. See L.A. SUPER. CT., *THE IMPACT OF "THREE STRIKES" LAW ON THE LOS ANGELES JUSTICE SYSTEM* 6 (Feb. 1996) (remarking that "[r]ecent increases in high security inmates and increased length of stay for Strike inmates [awaiting trial] have created a system that recently erupted in violent riots"). See also LEGISLATIVE ANALYST'S OFFICE, *IMPACT*, *supra* note 38, at 4 (stating that some county jails have reported an increase in assaults on staff, and that many jails need to increase security measures to compensate for the increase in second- and third-strike offenders, commonly considered high-risk offenders).

²⁹⁹ Imposing a lesser punishment for the offense of attempt is justified in order to preserve some incentive for the defendant to avert the threatened harm. Stephen J. Schulhofer, *Attempt* in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 96 (Sanford H. Kadish ed., 1983). In the same vein, decreased punishment for offenses that result in less social harm is equally justified.

³⁰⁰ See CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1996) (mandating that the third strike may be for *any* felony conviction); see also CAL. PENAL CODE § 1170.12(c)(2)(A)

Apart from theoretical concerns about Three Strikes, policy makers should ask whether, even assuming a deterrent effect, that same benefit may be available at a lower cost. That question has simply been ignored by its proponents who are still trying to justify its sweeping provisions.³⁰¹

F. REASSESSING REHABILITATION

Three Strikes as well as other recent sentencing reforms are premised, in part, on rejection of rehabilitation.³⁰² When rehabilitation was under attack during the 1970s, its critics raised important questions about rehabilitation, including concerns about excessive paternalism.³⁰³ There are serious questions whether the state ought to attempt to make criminal offenders "flourishing, happy and self-actualizing members of society," especially when "such a paternalistic reform theory allocates scarce societal resources away from other, more deserving groups that want them . . . to a group that hardly can be said to deserve such favored status . . ." ³⁰⁴

The critics of rehabilitation forced a reexamination of that form of excessive paternalism. But unthinkingly, we also abandoned a more limited role of rehabilitation. As described by Professor Moore, offenders may become "nondangerous . . . because such offenders either become 'penitent,' or they are no longer willing to commit crimes because they are unwilling to risk [incarceration] again."³⁰⁵ If that is the view of the offender, rather than as a beneficiary of social largesse, the rehabilitative efforts are justified not by making the offender a happier person, but because such an effort at reform is "a cost effective means of shortening the expensive incarceration that would otherwise be necessary to protect us all against crime."³⁰⁶ But even the more modest kind of rehabilitation was rejected because of an almost universal belief that rehabilitation simply does not work.

(West Supp. 1996) (same).

³⁰¹ Shortly after Three Strikes' second anniversary, Governor Pete Wilson declared that Three Strikes is an "integral reason why we're winning the war against crime." Fox Butterfield, *Tough Law on Sentences is Criticized*, N.Y. TIMES, Mar. 8, 1996, at A14.

³⁰² Attorney General Dan Lungren credits the drop in California crime rates to tougher responses to crime which began in the early 1980s. He further attributes the move toward social incapacitation policies, "rather than the noble-sounding but failed mission of forced rehabilitation," as the touchstone of falling crime rates. See Dan Lungren, *California Falling Crime Rates Signal Heartening Trends*, SAN DIEGO UNION-TRIB., May 19, 1996, at G1.

³⁰³ See STRUGGLE FOR JUSTICE 17-18 (1971).

³⁰⁴ MICHAEL MOORE, LAW & PSYCHIATRY 234-35 (1984) reprinted in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 123-24 (6th ed. 1995). See also MORRIS R. COHEN, *Moral Aspects of the Criminal Law*, 49 YALE L. J. 987, 1012-14 (1940).

³⁰⁵ MOORE, *supra* note 304.

³⁰⁶ *Id.* at 123.

That factual premise has had a curious history. Critics of rehabilitation almost all cited Robert Martinson's work as support of the view that, when we consider rehabilitation programs, "nothing works."³⁰⁷ That was a misstatement of his original research where he concluded, less dramatically, that "[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."³⁰⁸ The "nothing works" refrain became a powerful symbol to attack rehabilitation programs despite Martinson's more modest conclusions, including his observation that "some treatment programs have had modest successes"³⁰⁹

More significant though was Martinson's retraction of his earlier conclusions. In 1979, Martinson argued that his earlier work had used the wrong methodology.³¹⁰ Martinson specifically denounced the "nothing works" label attributed to his writings.³¹¹ He urged sentencing reform based on his new findings and characterized the movement to abandon parole release and supervision as "the most extreme case of radical tinkering with the system of criminal justice."³¹² He concluded that "[t]he evidence that parole supervision *works* . . . is more convincing than the bare assumption that it does not."³¹³

A number of other commentators challenged Martinson's original work.³¹⁴ In addition, there is now a growing body of literature that suggests that some rehabilitative programs work.³¹⁵ Unlike the overly optimistic view that all offenders can be rehabilitated, recent research suggests that careful selection of offenders, based on a variety of predictive factors in conjunction with close supervision does reduce recidivism.³¹⁶

Depending on the program, its costs are likely to be far less than the costs of long term incarceration.³¹⁷ In a related context, we have

³⁰⁷ VON HIRSCH, *supra* note 155, at 14 n.4; *see* SINGER, *supra* note 155, at 7 (discussing Martinson's works); THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 74 n.16 (1976) (discussing Martinson's conclusion that little works).

³⁰⁸ Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 25 (1974) (emphasis omitted).

³⁰⁹ DOUGLAS LIPTON ET AL, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 627 (1975).

³¹⁰ Martinson, *supra* note 161, at 254.

³¹¹ *Id.*

³¹² *Id.* at 257.

³¹³ *Id.*

³¹⁴ *See generally* Wilson, *supra* note 161; CHARLES A. MURRAY & LOUIS A. COX, JR., BEYOND PROBATION: JUVENILE CORRECTIONS AND THE CHRONIC DELINQUENT (1979).

³¹⁵ *See* Bonta & Motiuk, *supra* note 161, at 302-05.

³¹⁶ *See* Vitiello, *supra* note 156, at 1032-37.

³¹⁷ *See* CRIMINAL PUNISHMENT IN THE DISTRICT OF COLUMBIA: INTERMEDIATE SANCTIONS, PRISONS AND PUBLIC SAFETY, *supra* note 161, at 6 (recommending that an efficient commu-

completed a decade of unsuccessful interdiction programs to stop the influx of drugs from abroad. Shutting off one supply seems merely to shift the source of drugs elsewhere.³¹⁸ Even insofar as such programs can claim success, they have been extremely expensive. By comparison, recent commentators have resumed urging drug treatment of users as a far less expensive alternative to incarceration.³¹⁹

Three Strikes' proponents relied on faulty factual support; as a result, Three Strikes will yield far fewer benefits than promised. As important as its faulty factual support was the failure of policy-makers to compare the Three Strikes' solution with other alternatives. There is a growing body of literature that suggests that realistic alternatives are available at considerably less cost.

IV. THE RETURN OF RATIONALITY

California adopted Three Strikes with little rational discourse about its promised benefits.³²⁰ Some legislators sought political advantage by playing the crime issue to the hilt, while others simply got out of the way.³²¹ Three Strikes' advocate Mike Reynolds was uncom-

nity policing program "can be an effective public safety tool in reducing the numbers of persons who enter the law enforcement, court and correctional systems as offenders"). See also *THE REAL WAR ON CRIME*, *supra* note 2, at 55-58 (advocating that punishment which is less expensive and more effective at curtailing recidivism should be employed [e.g., probation, intensive probation, day reporting centers, halfway houses, boot camps, fines and restitution, community service, home detention, and drug treatment]); *Rand Study and Crime Problem*, *TIMES-PICAYUNE* (New Orleans), Jun. 28, 1996, at B6 (reporting that a recent study released by the RAND Institute found that "dollar for dollar, programs that encourage young people to stay in school and out of trouble prevent five times as many crimes as stiff penalties imposed on repeat offenders using three-strikes-and-out laws").

³¹⁸ A 1992 study regarding the impact of the war on drugs and reviewing 20 years of drug interdiction efforts, concluded that attempts to control drug supply "tend to divert the supply and to create new sources, rather than stamping out production of the targeted drugs." *Foundation Report Urges New Priorities for Drug War Abroad; Risk of "Real" War, Failure of Andean Strategy Cited*, U.S. NEWSWIRE, Feb. 25, 1992.

³¹⁹ See Reno, *supra* note 236, at 33 (demonstrating that alternative criminal punishment programs are highly effective and noting that cities like Miami and Baltimore, which have implemented programs requiring nonviolent offenders to undergo mandatory drug testing and substance abuse treatment, have experienced a marked decline in recidivism—Miami experienced a 33% drop in recidivism and Baltimore decreased its expected rearrests by 50%); see also *CRIMINAL PUNISHMENT IN THE DISTRICT OF COLUMBIA: INTERMEDIATE SANCTIONS, PRISONS AND PUBLIC SAFETY*, *supra* note 161, at 5 (reporting that a pilot drug court program, which intimately intervened in the lives and rehabilitation of convicted drug-dependent persons, is highly cost-effective [including in terms of recidivism] when compared to traditional methods of incarceration); *id.* at 7-8 (noting the success of the drug court program, as evidenced by hundreds of convicted drug-dependent offenders who successfully remained in the community under continuing judicial supervision, and finding that of the offenders who successfully completed another program, more than 70% of males and 90% of females do not become recidivists).

³²⁰ See *supra* notes 95-152 and accompanying text.

³²¹ See *supra* notes 102-113 and accompanying text.

promising even when his own advisers warned that AB 971 was flawed.³²² The Governor showed similar rigidity and earned a second term for his "tough on crime" stance.³²³ Politicians and ultimately the electorate missed the irony that Polly Klaas' father opposed Three Strikes. Even his departure from among the ranks of Three Strikes supporters could not slow its passage.

After the initiative, Three Strikes proponents have argued that the voters have spoken since the overwhelming vote in favor of the initiative. But that is not as readily apparent as its advocates assert.³²⁴ As indicated, the Governor and Three Strikes proponents relied on the governor's Chief Economist's report that made Three Strikes sound like a bargain.³²⁵ Promised savings are supposed to dwarf the substantial costs of prison construction and maintenance. Three Strikes opponents unsuccessfully challenged the use of those projections as part of the literature that went to the voters.³²⁶

The passionate rhetoric in support of Three Strikes, inflamed by the kidnapping and murder of Polly Klaas, muted concerns that many Three Strikes' defendants would be sentenced to long prison terms for non-violent offenses, not the kind of offenses involved in the Klaas case.³²⁷ Surveys of voters indicate that Americans want to increase punishment for violent offenders.³²⁸ The overwhelming majority in

³²² See *supra* notes 97-101 and accompanying text.

³²³ See *supra* notes 102-03, 120-31 and accompanying text.

³²⁴ In an article confronting California's bursting prison population, Joe Sandoval, secretary of the California Youth and Adult Corrections Agency, stated that "special interests" opposed to Three Strikes "have now found a way to overturn the will of the people" by "trying to kill the critical prison-construction funding needed to keep repeat offenders and violent juvenile criminals off the street." Andy Furillo, "Three Strikes" Collides With California's Bursting Prisons, SACRAMENTO BEE, Apr. 2, 1996, at A1. "If you talk to the average citizen who lives in a crime-ridden community," he continued, "that individual says, 'I will pay for the prisons.'" *Id.*

³²⁵ See *supra* notes 129-30 and accompanying text.

³²⁶ See *supra* note 144.

³²⁷ The emotional and political whirlwind propelled by the Polly Klaas murder engulfed both politicians and voters. In the face of an election year, political pressure to pass a stringent anti-crime bill was so high that California politicians apathetically swept AB 971's flaws under the carpet. Despite the Senate Committee on the Judiciary's analysis of AB 971's many flaws, in addition to its express statements that AB 971 may very well require imposition of a sentence of 25 years to life for a repeat offender with no prior violent felonies, AB 971 soared through four committees and two floor votes in 59 days. See generally SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 971 (Feb. 17, 1994). The proponents of the Three Strikes initiative inundated the electorate with literature assuring that Three Strikes would keep "rapists, murderers and child molesters behind bars where they belong." CALIFORNIA BALLOT PAMPHLET, *supra* note 1, at 5. Furthermore, in response to opponents' claim that Three Strikes would fill the prison system with non-violent offenders, supporters of the initiative ardently proclaimed that "3 Strikes targets only career criminals—those with a history of committing serious/violent crimes." *Id.* at 37.

³²⁸ See Joseph W. Queen & William Murphy, *Race Doesn't Dictate Politics*, NEWSDAY, Apr.

support of Three Strikes is consistent with that view. Less clear is whether the electorate would have endorsed Three Strikes had its full implications been clearly developed during the campaign.

Another reason that the election results are not a resounding endorsement of Three Strikes is that the electorate did not have to vote on revenue measures to pay for additional prison construction. Public financing through bond issues has lost some of its appeal. For example, in 1990, Californians rejected a proposed bond issue of \$450 million for prison construction.³²⁹ Projections for the costs of Three Strikes are considerably higher.³³⁰

As is often the case with anti-crime measures, the invitation to beat the anti-crime drum is too tempting for politicians because funding the costs associated with the legislation is usually left for the future.³³¹ Neither AB 971 nor the initiative included a provision to raise revenue. One could vote for the bill or the initiative without a vote on how the added costs would be financed. Its proponents were promising that Three Strikes would result in net savings, savings that have been misrepresented.³³²

26, 1996, at 29 (reporting that 82% of the overall population favor life imprisonment sentences imposed under Three Strikes laws for violent criminals convicted of a third violent offense).

³²⁹ John Hurst, *Full Cells and Empty Pockets*, L.A. TIMES, May 8, 1991, at A1. See also Matthews, *supra* note 119, at A1. There has been further evidence that the proposed bond financing may not work. In the June 1994 primary election, voters rejected a bond measure for earthquake recovery, a proposal to buy parkland, a proposal to improve college campuses, and one for public school construction. Virginia Ellis, *Defeat of Quake Relief Bonds Adds to Budget Crisis*, L.A. TIMES, June 9, 1994, at A1. Bruce Cain, Professor at UC Berkeley stated, "The election . . . shows that bond measures, which were the panacea of the '80s for public finance, are not going to be a panacea in the 1990s." Susan Yoachum & John Wildermuth, *Californians Voted Against Spending, Crime*, S.F. CHRON., June 9, 1994, at A1.

³³⁰ The California Department of Corrections initially projected that the legislation would add \$5.7 billion per year in operating costs by fiscal year 2027-28 and would require 20 new prisons in addition to the 12 prisons already on the drawing board for fiscal year 2003-04 and the 16 new prisons constructed during the past 10 years. Welch, *supra* note 21. The total cost of construction would be \$21.3 billion. *Id.*

³³¹ Noting that most states corrections budgets will not feel the immense impact of Three Strikes until several years from now, Law Professor Ronald F. Wright observed that "the remoteness in time of the costs of Three Strikes laws gives legislators a powerful reason to discount those costs The long time frame makes the cost seem politically irrelevant and easy to ignore." Ronald F. Wright, *Three Strikes Legislation and a Sinking Fund Proposal*, FED. SENTENCING REP., Sept.-Oct. 1995, at 80.

³³² For example, in order to illustrate how taxpayer dollars would be saved, the California Ballot Pamphlet reported that "3 Strikes Saves \$23 Billion over five years." CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTIONS, Nov. 8, 1994, at 37. Relying on Romero's report, the committee further explained that "[e]very repeat felon returned to our streets costs nearly \$200,000 annually in direct losses to victims and the enormous expense of running the same criminals through police stations, courts, and prisons time and again." *Id.*

Opponents of the measure, however, fervently discredited the savings promised by the

Decisions about funding Three Strikes are still several years away. Many offenders currently sentenced under Three Strikes would have received some prison time for the underlying offense, enhanced even under pre-Three Strikes law.³³³ Creating space for new offenders, without normal timely release of those who are now sentenced under Three Strikes, is a problem for future legislators.

Three Strikes' critics have been strident in underscoring the enormous costs to give full effect to its provisions.³³⁴ But its opponents understate the significance of Three Strikes. Three Strikes was a reaction to a real social problem.

The shift in sentencing philosophy over the past twenty-five years has created anomalies in the current sentencing scheme in California. When the legislature abandoned indeterminate sentences, it put in place fixed terms of imprisonment.³³⁵ The legislature appears to have been influenced by prominent commentators advocating both fixed and fairly short terms of imprisonment.³³⁶ For example, in many jurisdictions, robbery is punishable by a far longer term of imprisonment than California's relatively light sentence of a maximum of nine years for first degree robbery.³³⁷ When combined with earned good

Romero study. See, e.g., Dan Morian, *Wilson Adviser says '3 Strikes' Will Save Money*, L.A. TIMES, April 7, 1994, at A3.

³³³ See RUMINATIONS ON "THREE STRIKES," *supra* note 217, at 3 (explaining that any reduction in the crime rate of Kern County may not be attributed to Three Strikes' incapacitation of offenders because every "third strike" defendant presently incarcerated would have been incarcerated under prior law at this point in time anyway).

³³⁴ The estimated increase in prison operating costs per year when the statute has maximum effect will be \$5.7 billion and the total prison construction costs will be \$21.3 billion. Welch, *supra* note 21, at 9. In early June of 1996, the RAND Corporation released a study projecting that the cost to California of expanding the prison system will not only subvert the university system by 2002, but it will also put the state's entire economy in jeopardy by 2005. Lisa Lynch, "Three Strikes" and Chain Gangs Struck Down in California, INTER PRESS SERVICE, June 26, 1996. John Vasconcellos, Chair of the Assembly Ways and Means Committee and ardent opponent of Three Strikes, wrote the following:

It is essential that we acknowledge and respect the legitimate concern people have for their safety. But real respect means addressing their fears constructively, not mortgaging the state's future under the pretense that criminals with little to lose will somehow be scared straight by the prospect of longer prison terms.

Vasconcellos, *supra* note 242, at 32.

³³⁵ Zimring, *supra* note 170, at 101-12 (discussing the rapid shift during the 1970s from indeterminate to determinate sentencing).

³³⁶ VON HIRSH, *supra* note 155, at 132-40 (arguing that the use of incarceration should be restricted to serious offenses and length of sentencing should be kept relatively short—for example, a sentencing scheme with a high penalty of five years for felonies [excluding murder] and sparing use of sentences for more than three years).

³³⁷ See CAL. PENAL CODE § 213 (West Supp. 1996); See also, e.g., GA. CODE ANN. § 16-8-40 (1992) (creating a maximum punishment 20 years imprisonment for robbery); MINN. STAT. ANN. § 609.245 (West 1987) (designating 20 years imprisonment as the maximum punishment for robbery); NEB. REV. STAT. § 28-324 (1995) (setting the maximum punishment for conviction of robbery at 50 years imprisonment); TEX. PENAL CODE § 29.03 (West

time credits up to 50% of the term of imprisonment,³³⁸ sentences for serious crimes like robbery and kidnapping may be too short to incapacitate dangerous offenders during their most active years. Three Strikes is grounded, in part, on the view that sentences are too short.³³⁹

Insofar as Three Strikes is a reaction to sentences that are too short, it is a blunt instrument, taking a wide variety of offenders and providing extremely long sentences far in excess of the punishment usually reserved for the substantive offense.³⁴⁰ As Marc Klaas has argued, Three Strikes may provide too little for some offenders and too much for others.³⁴¹ A simple comparison makes the point: a defendant who has committed two residential burglaries and is currently charged with possession of narcotics will be imprisoned for a minimum term of twenty years³⁴² while an offender who commits first degree robbery will face a maximum term of nine years.³⁴³ That is a poor use of resources, especially if we are confident that the first of

1994) (mandating a maximum term of 99 years imprisonment for any person convicted of aggravated robbery).

³³⁸ See CAL. PENAL CODE § 2933 (West Supp. 1996) (noting that offenders participating in a worktime credit qualifying program shall be granted a six-month credit reduction from his or her term of confinement for every six months of full time performance completed).

³³⁹ See CAL. PENAL CODE § 667(b) (West Supp. 1996) (declaring that the "intent of the Legislature [is] . . . to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses").

³⁴⁰ For example, the maximum penalty for a conviction of robbery is nine years. See CAL. PENAL CODE § 213 (West Supp. 1996). Under Three Strikes, however, if a robbery conviction serves as a third strike, the minimum sentence imposed would be 27 years. See CAL. PENAL CODE § 667(e)(2)(A)(i) (requiring the sentence for a third strike to be three times the term proscribed for the substantive offense in cases where the punishment would be greater than 25 years); see also CAL. PENAL CODE § 1170.12 (c)(2)(A)(i) (West Supp. 1996). The burgeoning effect of Three Strikes is even more glaring when the third strike is a conviction of burglary, which normally carries a maximum sentence of six years. See CAL. PENAL CODE § 461 (West 1988). Three Strikes boosts the punishment from six years to 25 years in one fell swoop. See CAL. PENAL CODE § 667(e)(2)(A)(ii) (West Supp. 1996); CAL. PENAL CODE § 1170.12(c)(2)(A)(ii) (West Supp. 1996).

³⁴¹ Marc Klaas signed a ballot pamphlet opposing the Three Strikes proposal, calling it "too hard on soft crime and too soft on hard crime." See Daniel M. Weintraub, *Lone Justice*, L.A. TIMES, Feb. 14, 1995, at E1 (reflecting on Marc Klaas' initial involvement with the Three Strikes campaign and noting that Marc Klaas' subsequent resolute opposition to the initiative was nearly lost in the chaos of the crusade). "We really need to focus on the evil," stated Klaas, "on those people who are now committing crimes against people." *Id.*

³⁴² See CAL. PENAL CODE § 667(c)(5) (West Supp. 1996) (permitting the accrual of good time credits for a maximum of one-fifth the total term of the imposed sentence—making the minimum 25 year sentence for a third strike 20 years); see also CAL. PENAL CODE § 1170.12 (a)(5) (West Supp. 1996); *People v. Superior Ct.*, 917 P.2d 628 (Cal. 1996) (dealing with a 32 year old defendant with two prior residential burglary convictions and one current conviction for possession of narcotics).

³⁴³ CAL. PENAL CODE § 213 (West 1988).

fender is nearing the end of his criminal career and the second offender is at the beginning of his career.

This section discusses whether California can avoid the excesses of Three Strikes. Framed differently, policy makers must consider whether and how a more rational sentencing scheme might emerge. The obvious answer is for the legislature to do its job.

Proponents of term limits promised that legislators will exercise greater independence than their predecessors.³⁴⁴ A number of constituencies favor a legislative solution to Three Strikes' excesses. Despite that, legislative reform is problematic. The jury is still out on whether term limits result in greater independence. A number of prominent proponents of Three Strikes, for example, were at the end of their legislative careers. AB 971's chief proponent, Bill Jones, is symptomatic: he was about to run successfully for Secretary of State.³⁴⁵ Term limits may exacerbate the problem with legislation like Three Strikes: the legislators who vote for it may not be the ones who will have to face the voters when funding its provisions become controversial.³⁴⁶

The most obvious constituencies that care about Three Strikes' excesses are minority communities, where its impact has been disproportionate.³⁴⁷ If the result of Three Strikes were merely to lengthen

³⁴⁴ In an interview regarding the effects of implementing term limits, Assemblyman Richard L. Mountjoy, a proponent of the measure, contended that "term limits would give the people of California more control over the Legislature, and the Legislature would be less prone to special interest, because legislators would know they are going to be there for six years and they're out." Xandra Kayden, *Term Limits: What Would Be Changed?*, L.A. TIMES, Oct. 21, 1990, at M1.

³⁴⁵ See Wilkie, *supra* note 99, at A3 (reporting that most of the legislators who proposed Three Strikes legislation had an added incentive because of the upcoming election—Bill Jones, Jim Costa, and Tom Umberg were running for office in 1994).

³⁴⁶ See Wright, *supra* note 331 (indicating that most states' corrections budgets will not feel the immense impact of Three Strikes until several years from now).

³⁴⁷ A recent study conducted by the California Department of Corrections reveals that African-Americans—who represent only 7% of California's population—comprise an alarming 43% of third strike defendants sentenced to state prison. DAVIS ET AL., *supra* note 20, at 2. On the other hand, whites—who make up 53% of the state's population—constitute only 24.6% of third strike offenders. *Id.*

Vincent Schiraldi, executive director of the Center on Juvenile and Criminal Justice and staunch opponent of Three Strikes stated that "[i]f one were writing a law to deliberately target blacks, one could scarcely have done it more effectively than Three Strikes." Furillo, *supra* note 195. "If the average demographic on Three Strikes prisoners was a white, middle-class kid from the suburbs," said Schiraldi, "there's no way we'd pass 'Three Strikes' . . . We would scratch our heads and wonder what we could do to stop kids from selling cocaine and [breaking into] cars." Andy Furillo, *The Race Issue*, SACRAMENTO BEE, Mar. 31, 1996, at A19.

At the other end of the spectrum, however, Attorney Dan Lungren views disproportionate sentences between whites and African-Americans in a different light. *Id.* "If minorities are disproportionately victimized by crime," he stated, "especially in street and violent

the sentence of violent offenders, one doubts whether the concerns of minority communities would resonate.³⁴⁸ We might argue whether a sentence ought to be five, ten or twenty years, but some significant term of imprisonment would be justified in light of culpable behavior and future danger.

The effect of Three Strikes on the African-American community, for example, has been devastating because of the inclusion of any felony as a possible third strike.³⁴⁹ Drug enforcement underscores the point. Drug usage is not significantly greater in the black community than in the white community, but drug enforcement is.³⁵⁰ It is not surprising that African-Americans have been incarcerated under Three Strikes at 13.3 times the rate as whites.³⁵¹

crime, then the drop in violent crime, which is contributed to by 'Three Strikes and You're Out,' will benefit those communities more than anybody else." *Id.*

³⁴⁸ See Furillo, *supra* note 196 (responding to the contention of prosecutorial racism, one African-American deputy district attorney stated: "I don't have time to sit around and say, 'I'll let this white robber go; I'll go after the black robber.' We just go after the robbers.").

³⁴⁹ One opponent of Three Strikes suggests that the disparity between white and African-American third strike defendants may be attributed to the fact that most poor, minority young men, unable to afford private attorneys, were induced to accept plea bargains even in circumstances where they may have been innocent of the charges. Furillo, *supra* note 196. The history of plea bargaining has created a pool of African-Americans with first and second strikes—making African-Americans extremely susceptible to triggering the provisions of Three Strikes. *Id.*

The *San Jose Mercury News* conducted a comprehensive study on the disparity of plea bargaining between whites and minorities. See *THE REAL WAR ON CRIME*, *supra* note 2, at 111-13 (citing Christopher Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, *SAN JOSE MERCURY NEWS*, Dec. 8, 1991, at A1). The study analyzed approximately 700,000 California criminal cases from 1981 to 1990 and found that whites were more successful at essentially every stage of pre-trial plea bargaining. *Id.* at 112. For example, the study demonstrated that "[o]f 71,668 adults who had no prior record and were charged with a felony, one third of whites had their charges reduced to a misdemeanor or less [while] [o]nly a quarter of African-Americans and Hispanics received such reductions." *Id.*

³⁵⁰ Drug dealing and distribution is significantly different in white and African-American neighborhoods. See Furillo, *supra* note 196. In most African-American neighborhoods, the bulk of drug trafficking is conducted on the streets, whereas white communities tend to use and distribute drugs behind closed doors—hence, the disparity between those who get caught committing crime. *Id.*

The National Institute for Drug Abuse found that African-Americans and whites use cocaine and marijuana at virtually the same rate. *THE REAL WAR ON CRIME*, *supra* note 2, at 115. Despite this fact, however, African-Americans are arrested five times more often than their white counterparts. *Id.* A disturbing example of this disparity was found in the city of Baltimore. *Id.* at 117. In 1991, 11,107 of the 12,956 arrests for "drug abuse violations," were of African-Americans. *Id.* Moreover, in that same year, 13 white juveniles were arrested for drug sales, compared to 1,304 African-American juveniles. *Id.* at 206. In California, the total arrests for narcotics in 1994 was 67,822—of these arrests, whites comprised 12,437, African-Americans 26,274, and Hispanics 27,779. *CAL. DEP'T OF JUSTICE*, *supra* note 293, at 61.

³⁵¹ See *DAVIS ET AL.*, *supra* note 20, at 4.

The racial disparity creates political incentive for reform. Democrats must take seriously the concerns of loyal democratic constituencies, including African-American voters.³⁵² The disparate impact on minorities, especially in cases in which the final strike is not a violent offense, becomes a powerful ethical and political argument in favor of modification of the law.³⁵³

The primary difficulty with political reform is that alternative legislation will require a supermajority.³⁵⁴ That was the cost of Reynolds' decision to renege on a promise not to pursue his initiative if the legislature adopted AB 971. Proponents simply distrusted the legislature and feared that, absent the requirement of a supermajority, the law would be gutted over time.³⁵⁵

Events in the legislature suggest that, for better or worse, Three Strikes proponents were correct that the legislature would frustrate its drafters. Despite significant increases in prison space during the 1980s and 1990s, California will be out of prison space in 1998. Failing to fund further prison construction or to place prison bond legislation on the ballot will result in prison overcrowding.³⁵⁶ The threat of overcrowding and the prospect of a court-ordered release of inmates may force political compromise.³⁵⁷

Legislative reform may require a significant swing in public sentiment about crime, which is not unheard of.³⁵⁸ On the assumption

³⁵² See Dan Walters, *Three Strikes Application Varies*, SAN DIEGO UNION-TRIB., June 20, 1995, at B6 (reporting that more than 80% of the voters who approved the Three Strikes law were white, and demonstrating the disparate impact of such voter demographics—African-Americans and Latinos made up 70% of those sentenced in the first year of Three Strikes).

³⁵³ See generally DAVIS ET AL., *supra* note 20 (exposing the biases against African-Americans in the criminal justice system and advocating for immediate change in this sphere of California's penal law).

³⁵⁴ Three Strikes may not be amended by the legislature except by a two-thirds vote of both houses. CAL. PENAL CODE § 667(j) (West Supp. 1996).

³⁵⁵ See *supra* notes 97-101, 125-27 and accompanying text.

³⁵⁶ Furillo, *supra* note 324 (noting that the State Department of Corrections is currently operating at 181% of capacity and warning that the prison population is projected to grow by more than 230,000 by 2001—without new prison construction, "something has to give").

³⁵⁷ *Id.*

³⁵⁸ *Id.* Over time, American attitudes about punishment have changed dramatically. For example, support for the death penalty has grown from under 50% in the early 1960s to 80% in 1994. Cheryl Russel, *True Crime*, AM. DEMOGRAPHICS, Aug. 1994, at 22. Ironically, use of the initiative process, resulting in a requirement that amendments to Three Strikes must be by a two-thirds majority of the legislature, has created an opportunity for rational debate about the law. Efforts to respond to the California Supreme Court's decision in *Romero* must be approved by a two-thirds majority. That gives moderates an opportunity to force some reform of the law's more extreme aspects. See *Bill to Strengthen "3 Strikes" Law Clears Committee*, S.F. EXAMINER, June 27, 1996, at A4 (quoting Senate leader Bill Lockyer as saying, "This bill is unnecessary We need more thoughtful analysis, not a rushed, panicky reaction designed to grab tough-guy headlines.").

that political reform is possible, I offer a few suggestions about the shape of that reform: one, Three Strikes is an overreaction to a real problem. It offers too much time too late. Increasing time served by violent first time offenders is a promising alternative to Three Strikes.³⁵⁹

Two, we should engage in further research into identification of the most serious multiple offenders. Habitual offender statutes are here to stay. Habitual offender statutes are so tempting because a small number of offenders commit a grossly disproportionate number of crimes.³⁶⁰ Identifying and incapacitating those offenders should result in meaningful reductions in crime.³⁶¹ As currently written, habitual offender statutes like Three Strikes make little effort to select those likely to commit serious offenses in the future.³⁶² As argued above, the long prison term may also come too late in a criminal's career.³⁶³

A provocative book published over a decade ago argued persuasively that the criminal justice system underpunishes serious multiple offenders. *Dangerous Offenders* assumed that high rate offenders "appear in the system repeatedly" and are given "special attention" by the criminal justice system.³⁶⁴ Despite those assumptions, the authors argued that the system deals with them less harshly than they deserve. That results from two important facts: first, the crimes committed by serious offenders, like robbery, "are among the most difficult to

³⁵⁹ See *supra* notes 131-42 and accompanying text.

³⁶⁰ See MARVIN E. WOLFGANG ET AL., *DELINQUENCY IN A BIRTH COHORT* (1972) (a widely cited study on offender crime rates, which reviewed records of 9,945 boys from their 10th through 18th birthdays). While approximately one-third had a record of involvement with police, 627 boys had five or more arrests during those years. *Id.* at 88. That small group committed over one-half of the recorded delinquencies and two thirds of the violent offenses. *Id.*

³⁶¹ See MARK H. MOORE, *DANGEROUS OFFENDERS, THE ELUSIVE TARGET OF JUSTICE* 85-87 (1984) (conceding that incapacitation of dangerous recidivist offenders will result in a reduction of crime, as it may be the only method to deter resolute offenders); see also *id.* at 38-39 (intimating that a portion of high-rate offenders are so active—committing more than 50 robberies per year—that incapacitation would be wholly justified based on deterrence, rehabilitative or retributivist theories of punishment). The Wolfgang study concluded that incarcerating high rate offenders could have a significant impact on the crime rate. See *supra* note 360. By contrast, Three Strikes incapacitates an offender for a long period based only on commission of three felonies, one of which may be trivial. See CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1996); CAL. PENAL CODE § 1170.12 (c)(2)(A) (West Supp. 1996).

³⁶² The most obvious example is § 667(e)(2)(A) (any felony triggers the enhanced penalties). CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1996); CAL. PENAL CODE § 1170.12(c)(2)(A) (West Supp. 1996).

³⁶³ See *supra* notes 245-62 and accompanying text.

³⁶⁴ MOORE, *supra* note 361, at 47.

solve."³⁶⁵ Second, when an offender is arrested and prosecuted, the system has a bias against investigating other potential charges against the suspect. That is so because, even if the police have probable cause to believe that the suspect may have committed numerous other robberies, the police have little additional incentive to investigate those crimes if they are assured a conviction based on the current charge.³⁶⁶

Similar pressures work to limit the prosecutor's incentive to seek multiple convictions. Even if the prosecutor brings multiple charges, judges are likely to impose concurrent terms of imprisonment. "Thus the whole system might ignore the robber's other offenses on the grounds that it would make little difference to the ultimate outcome of the case."³⁶⁷ The authors found support for their hypothesis in criminal justice records that led them to conclude that the system "tends to dampen rather than exaggerate differences among offenders."³⁶⁸ Habitual offender statutes also make little attempt to distinguish among offenders as long as they are convicted of a certain number of identified offenses.

Dangerous Offenders presented a set of criteria to improve the system's ability to identify the most serious offenders.³⁶⁹ Narrowing the scope of laws like Three Strikes would improve the use of resources likely to be available for incarceration in the state's prisons.

Three, California should put in place a program of selective release of older low risk inmates.³⁷⁰ Separate from whether other purposes of punishment may be served by imprisonment of older offenders, warehousing elderly prisoners is not necessary for social protection.³⁷¹

³⁶⁵ *Id.* at 49.

³⁶⁶ *See id.* at 49-50 (explaining that even if evidence of other crimes committed by the offender were available, a prosecutor may choose not to introduce it because it may serve to confuse and weaken a solid case certain to result in conviction).

³⁶⁷ *Id.* at 50.

³⁶⁸ *Id.* at 50-51 (stating that a first time offender who commits one or two robberies per year will be sentenced the same as a robber who commits robberies throughout the year).

³⁶⁹ *Id.* at 182-94. The premise of the authors' theory is to reserve limited incarceration capacity for offenders who most deserve punishment and whose incarceration would benefit society by reducing future criminality. *Id.* The authors propose that the key is to sharpen the focus on dangerous offenders at each stage of the criminal system and to use a very narrow definition of "dangerous offenders." *Id.* at 182-83.

³⁷⁰ *Cf.* POPS, *supra* note 245. For the selection process, *see id.* at 23-30. *See also* MD. ANN. CODE art. 27, § 643B(f) (Supp. 1995) (providing that a defendant sentenced under the state's Four Strikes law [*see* Appendix A] may petition for parole after the age of 65 if she or he has served at least 15 years of the imposed sentence); VA. CODE ANN. § 19.2-297.1(c) (Michie 1995) (setting forth that a defendant sentenced under the state's Three Strikes may petition for parole if she has either reached the age of 65 and has served at least five years of the imposed sentence, or has reached the age of 60 and has served at least 10 years of the imposed sentence).

³⁷¹ *See supra* notes 245-62 and accompanying text.

Four, California should explore methods of limiting freedom less expensive than incarceration. Electronic monitoring and in-home detention, close parole and probation supervision and halfway houses are all possible alternatives to incarceration and have proven effective for properly selected detainees.³⁷²

Five, California should reexamine rehabilitation programs and implement those that have worked. A variety of programs have proven effective with some offenders and at less cost than incarceration.³⁷³

Related to rehabilitation is our approach towards drug violators. Our attitude about drug offenses should be reexamined. The policy of the 1980s, a war aimed at the source of drugs, proved ineffective and expensive.³⁷⁴ The terms of imprisonment for drug offenses have also increased,³⁷⁵ creating anomalies where some drug offenders are incarcerated for longer terms than far more dangerous offenders. Even if we continue to incarcerate drug dealers, we should reexamine whether lesser sentences are appropriate when we compare sentences available for other, more culpable conduct.³⁷⁶ At a minimum, re-

³⁷² See POPS, *supra* note 245, at 16-18; see generally Gennaro F. Vito, *Felony Probation and Recidivism: Replication and Response*, 50 FED. PROBATION 17 (1986).

³⁷³ See *supra* notes 302-19 and accompanying text.

³⁷⁴ In *The Real War on Crime*, Dozinger exposes the fact that the war on drugs was ineffective and failed to meet its objectives: e.g., the reduction of supply of illicit drugs should have increased prices—instead, the street value of cocaine dropped; harsher sentences and an increase in arrests should have had a deterrent effect—instead, drug dealing in most communities remained constant; drug use was supposed to drop—instead, like crime rates today, drug use had already been decreasing well before the declaration of the war on drugs. THE REAL WAR ON CRIME, *supra* note 2, at 116. See also Jim Haner, *The War on Drugs: Unwinnable, Profligate, Corrupting*; "Smoke and Mirrors": *The Latest Book Argues Politicians Wage the Battle to Serve Their Own Interests*, BALTIMORE SUN, May 19, 1996, at 1E (revealing that since 1981, the U.S. has spent \$65 billion on the War on Drugs movement—most of it on anti-drug law enforcement—"without making so much as a dent in the supply, price or general availability of illegal drugs"); Pat Hynds, *Latin America: Growing Consensus That U.S. Anti-Drug Policy is Not Working*, NOTISUR—LATIN AM. POL. AFF., Feb. 9, 1996 (summaries & analysis) (discussing the failed U.S. war on drugs and noting that drug supplier countries "insist that as long as the US, the world's largest drug consumer, continues to demand ever-increasing amounts of illegal drugs, the suppliers will find a way to meet the demand.").

³⁷⁵ See ZIMRING & HAWKINS, *supra* note 2, at 164 (observing that between the years 1985 and 1990, the sanctions for drug offenders expanded more rapidly than any other major offender group); see also THE REAL WAR ON CRIME, *supra* note 2, at 118-19 (remarking that in 1986, the federal penalties for use of "crack" cocaine became up to 100 times harsher, making a conviction for possession a felony carrying a mandatory minimum sentence of five years).

³⁷⁶ See, e.g., CAL. HEALTH & SAFETY CODE § 11379.6 (West 1991) (mandating that any person who offers to manufacture, compound, convert or produce specified controlled substances shall be sentenced for a minimum of three years); cf. CAL. PENAL CODE § 215 (West Supp. 1996) (providing that the minimum sentence for carjacking is three years); CAL. PENAL CODE § 216 (West Supp. 1996) (setting the minimum sentence for conviction

sources for drug treatment should be increased as a less expensive alternative to incarceration.³⁷⁷ Incarcerating one drug dealer does little to reduce drug use and availability; treating one user cuts demand at less cost.³⁷⁸

Six, the legislature should follow the lead of other states and establish a sentencing commission.³⁷⁹ Passage of Three Strikes demonstrated that politicians cannot resist the appeal of campaigning against crime and that the general electorate is not likely to follow debate about rational crime policy.³⁸⁰ Three Strikes' proponents staked out two positions: either one was for Three Strikes or for crime. Reliance on a sentencing commission to propose sentencing reform increases the possibility for rational discourse out of the glare of the media. A commission may report its recommendations when politicians are not facing a general election, increasing their willingness to engage in rational debate. A bipartisan commission may have suffi-

of robbery in the second degree at two years); CAL. PENAL CODE § 264 (West Supp. 1996) (determining that the offense of rape carries a minimum sentence of three years); CAL. PENAL CODE § 461 (West Supp. 1996) (punishing a defendant convicted of burglary in the second degree by imprisonment in the county jail for a term not exceeding more than one year).

³⁷⁷ A recent editorial addressing California's love affair with incarceration reported that the War on Drugs was the catalyst that reversed the 60% to 40% ratio of violent to nonviolent incarcerated offenders to 40% to 60%. *California's Disastrous Incarceration Frenzy*, S.F. CHRON., Feb. 15, 1996, at A24. The editorial noted that "[i]f just half of those nonviolent offenders—some 5,000 of whom are serving sentences for petty theft—were diverted to community-based, alternative forms of punishment and treatment, state taxpayers would save \$848 million in prison costs." *Id.* See *supra* note 318.

³⁷⁸ See Perkins, *supra* note 236. An example of such a policy at work can be seen in Miami and Baltimore. See Reno, *supra* note 236, at 33. These states implemented a program which requires nonviolent offenders to undergo mandatory, periodic drug testing in addition to substance abuse treatment—penalties are also mandatory if satisfactory progress is not displayed. *Id.* The success of such a program is demonstrated by a drop in recidivism—Miami had a 33% drop in recidivists and Baltimore decreased its expected re-arrests by 50%. *Id.*

³⁷⁹ See MICHAEL TONRY, *Sentencing Guidelines and Their Effects in THE SENTENCING COMMISSION AND ITS GUIDELINES* 16-43 (Andrew von Hirsch et al., eds. 1987) (reviewing the Sentencing Commissions of Minnesota, Maine, Connecticut, New York, Pennsylvania, South Carolina and Washington, and concluding that the most successful Sentencing Commissions are those that develop presumptive sentencing guidelines and policies for appellate sentence review); *id.* at 19 (expounding on Minnesota's initial success with its Sentencing Commission and describing its founding policy decisions: (1) the commission was "prescriptive" in that it established its own sentencing priorities rather than imitating existing sentencing patterns; (2) it de-emphasized imprisonment for non-violent offenders and increased sentencing schemes for violent offenders; (3) the commission narrowed sentencing ranges to strike back at sentencing disparities; (4) the commission elected to premise its policies on a theory of "just deserts"; (5) it determined that sentencing policies must reflect available resources; and (6) it prohibited consideration of personal factors [e.g., education, employment, marital status] to mitigate sentences as a means to further discourage sentencing disparity).

³⁸⁰ See *supra* notes 95-152 and accompanying text.

cient credibility to allow rational discourse about difficult public policy issues.

VI. CONCLUSION

This article does not attempt to disavow the legitimate concern that gave impetus to Three Strikes. Violent crime is a legitimate public and political concern. Instead, it has focused on the absence of dispassionate debate about those hard issues that have resulted in poor allocation of limited public resources.

This article does not advocate Three Strikes' outright repeal. It does argue for reexamination of the premises that resulted in an excessive habitual offender statute. It urges reexamination of alternatives to that excessive policy, but does so on the assumption that a state should retain a multiple offender statute aimed at our most culpable and violent offenders.

Recent commentators have begun to warn about the new Prison-Industrial Complex.³⁸¹ Three Strikes demonstrates some of its sway on local government.³⁸² But ours is an era in which the electorate has demanded more for less from government. This article offers several specific proposals resulting in better use of our resources devoted to public safety and to punishment of criminal offenders.

³⁸¹ See generally THE REAL WAR ON CRIME, *supra* note 2, at 85-88 (noting that in order to guarantee a prosperous return on investments, companies geared toward servicing the correctional system need sufficient amounts of raw material, and warning that "the raw material is prisoners, and industry will do what is necessary to guarantee a steady supply").

³⁸² For example, the California Correctional Peace Officers Association (CCPOA)—one of the most powerful lobby groups in Sacramento and an ardent proponent of "get tough on crime" legislation—utilizes its powerful financial backing and its association with appealing victims' rights groups as a sledgehammer against politicians who challenge its agenda. See generally Bill Ainsworth, *A Marriage of Convenience; Powerful Victims' Right Groups Have Found a Financial Backer That Also Wants More People Behind Bars—Prison Guards*, THE RECORDER, Nov. 30, 1994, at 1. The CCPOA flexed its muscle against outspoken opponents of Three Strikes, as the bill promised to yield more jobs for prison guards than any of the alternative proposals. *Id.* When Los Angeles District Attorney Gil Garcetti supported Rainey's Three Strikes bill rather than AB 971, he received a warning from a CCPOA lobbyist. *Id.* The lobbyist reminded Garcetti that the CCPOA endorsement was crucial to his reelection, and that the CCPOA would oppose him unless he supported Three Strikes. *Id.* When Garcetti refused to relent in his support of the Rainey bill, the lobbyist suggested that Garcetti would suffer. *Id.* It is not surprising that the CCPOA wanted to silence a high profile district attorney like Garcetti, as the CCPOA stood to gain 49,218 additional jobs from Three Strikes over the next 35 years, compared to only 14,391 in the same period under Rainey's bill. *Id.*

APPENDIX A
 ABSTRACT OF HABITUAL OFFENDER STATUTES ACROSS
 THE STATES

TABLE 1

| 4 strikes | 3 strikes | 2 strikes | 2 or 3 strikes |
|-----------|---------------|-----------|----------------|
| Florida | Colorado | Georgia | Arkansas |
| Maryland | Connecticut | | California |
| | Delaware | | Montana |
| | Illinois | | S. Carolina |
| | Indiana | | Tennessee |
| | Louisiana | | |
| | New Jersey | | |
| | New Mexico | | |
| | N. Carolina | | |
| | Pennsylvania | | |
| | Texas | | |
| | Virginia | | |
| | Washington | | |
| | West Virginia | | |
| | Wisconsin. | | |

STATE: ARKANSAS

| | |
|------------------------|--|
| STATUTE: | ARK. CODE ANN. § 5-4-501 (Michie Supp. 1995) <i>Habitual offenders - Sentencing for felony</i> |
| EFFECTIVE: | June 30, 1995 |
| TRIGGERING EVENTS: | <i>Two Strikes:</i> TRIGGERING CONVICTION: Conviction of a <i>serious felony involving violence</i> . PRIOR CONVICTIONS REQUIRED: One prior <i>serious felony involving violence</i> conviction. <i>Three Strikes:</i> TRIGGERING CONVICTION: Conviction of a <i>felony involving violence</i> . PRIOR CONVICTIONS REQUIRED: Two prior <i>felony involving violence</i> convictions. |
| DISCRETION: | No judicial discretion in sentencing. The State is not mandated to prosecute under this statute. |
| SENTENCING PROVISIONS: | <i>Two Strikes:</i> Between 40 - 80 years, or life. Not eligible for parole or community punishment. <i>Three Strikes:</i> If the third conviction is a: (1) class Y felony: term of not less than life in prison; (2) class A felony: term of 40 years to life; (3) class B felony: term of 30 - 60 years; (4) class C felony: term of 25 - 40 years; (5) class D felony: term of 20 - 40 years; (6) unclassified felony punishable by less than life imprisonment: term of not more than three times the maximum sentence for the unclassified offense. |

**SERIOUS/VIOLENT CRIMES
DEFINED:**

Two Strikes:

Murder 1°, Murder 2°, Kidnapping, Aggravated robbery, Rape, Terrorist act, Causing a catastrophe.

Three Strikes:

Murder 1°, Murder 2°, Kidnaping, Aggravated robbery, Rape, Battery 1°, Terroristic act, Unlawful discharge of a firearm from a vehicle. Felony attempt, solicitation, or conspiracy to commit: Capital murder, Murder 1°, Murder 2°, Kidnapping, Aggravated robbery, Rape, Battery 1°, Sexual Abuse 1°, Violation of a minor 1°.

NOTES:

If the defendant can be sentenced under Two Strikes and/or Three Strikes, the defendant shall be sentenced under the Three Strikes provision.

The jury determines guilt first, then determines whether prior convictions can serve as a strike.

The statute includes several sentence enhancement provisions for prior felony convictions that fall outside the Strike provisions.

STATE: COLORADO

STATUTE:

COLO. REV. STAT. § 16-13-101 (Supp. 1995) *Punishment for habitual criminals*

EFFECTIVE:

May 31, 1994

TRIGGERING EVENTS:

Three Strikes:

TRIGGERING CONVICTION: Conviction of a *Class 1 felony, Class 2 felony or a Class 3 felony that is a Crime of Violence.*

PRIOR CONVICTIONS REQUIRED: Two prior convictions that were either a *Class 1 felony, Class 2 felony or Class 3 Crime of Violence felony.*

Five Strikes:

TRIGGERING CONVICTION: Conviction of a *Crime of Violence.*

PRIOR CONVICTIONS REQUIRED: Four prior convictions of any felony.

DISCRETION:

No judicial discretion. However, sentencing under the Three Strikes provision is not mandatory for a *Class 1 felony* conviction. The state is not mandated to prosecute under this statute.

SENTENCING PROVISIONS:

Three Strikes & Five Strikes:

Life imprisonment.

PAROLE EXCEPTION: Those sentenced to life imprisonment are nonetheless eligible for parole after 40 years.

**SERIOUS/VIOLENT CRIMES
DEFINED:**

Crimes of Violence:

Use or threat of use of a deadly weapon or causing serious bodily injury to another in the commission or attempted commission of:

Any crime against an at-risk adult or at-risk juvenile, Murder, Assault 1° or 2°, Kidnapping, Sexual assault, Aggravated robbery, Arson 1°, Escape, Criminal extortion, Unlawful sexual offense.

EXCEPTION: First or second degree burglary shall not count as a prior or current strike for purposes of the Three Strikes provision.

NOTES:

Governor may issue a pardon or clemency order.

STATE: CONNECTICUT

STATUTE:

CONN. GEN. STAT. ANN. § 53a-40 (West 1994)

Persistent Offenders

EFFECTIVE:

1994

TRIGGERING EVENTS:

Three Strikes:

TRIGGERING CONVICTION: One Current Conviction *as defined below.*

PRIOR CONVICTIONS REQUIRED: Two Prior Convictions *as defined below.*

DISCRETION:

This sentencing provision is mandatory only if the court is of the opinion that the defendant's history and character and the nature and circumstances of the criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest.

SENTENCING PROVISIONS:

Maximum life sentence.

SERIOUS/VIOLENT CRIMES

Current Conviction:

DEFINED:

Manslaughter, Arson, Kidnapping, Sexual assault 1° or 3°, Aggravated sexual assault 1°, Sexual assault 3° with firearm, Robbery 1° or 2°, or Assault 1°.

Prior Convictions:

Any listed under *current convictions*, Murder or the attempt to commit any of said crimes of murder, or a previous sentence to serve more than one year of imprisonment. Prior to 10/1/75: Sexual assault 3°. Prior to 10/1/71: Assault with intent to kill, Injury to or impairing morals of a child.

NOTES:

A defendant enjoys an affirmative defense under this section if a necessary prior conviction includes a conviction that was pardoned on the ground of innocence.

STATE: DELAWARE

STATUTE:

DEL. CODE ANN. tit. 11, § 4214 (1995)

Habitual criminal; life sentence.

EFFECTIVE:

1994

TRIGGERING EVENTS:

Three Strikes:

TRIGGERING CONVICTION: Felony conviction *as defined below.*

PRIOR CONVICTIONS REQUIRED: Two prior felony convictions *as defined below.*

DISCRETION:

No judicial discretion.

The prosecutor is required to have the defendant declared an habitual offender if at any time after conviction and before sentence it appears by reason of present and prior convictions that the defendant should be subjected to the sentencing provisions of this statute. The judge must sentence accordingly. See DEL. CODE ANN. tit. 11, § 4215(b) (1995).

| | |
|---------------------------------|---|
| SENTENCING PROVISIONS: | Life sentence without parole. No Good Time Credits provision. |
| SERIOUS/VIOLENT CRIMES DEFINED: | <i>Felonies are the same for current conviction and prior convictions:</i> Arson 1°, Burglary 1° or 2°, Murder 1°, Murder 2°, Manslaughter, Kidnaping 1° or 2°, Assault 1°, Rape 1° or 2°, Sodomy 1°, Robbery 1°, Unlawful sexual penetration 1° or 2°, Sexual intercourse 3°, Unlawful sexual intercourse 1° or 2°, Intent to manufacture, deliver or possess a narcotic drug or nonnarcotic controlled substance, Unlawful delivery or attempt to deliver noncontrolled substance, Trafficking in marijuana, cocaine, illegal drugs or methamphetamines. |
| NOTES: | WASHOUT PROVISION: The Delaware Supreme Court has interpreted the statute as requiring three separate felony convictions with <i>some chance for rehabilitation</i> after each sentencing; this means that only <i>some</i> period of time must have elapsed between sentencing on earlier conviction and commission of later felony. <i>Johnson v. Butler</i> , No. 423, 1995 Del. LEXIS 47, at *1 (Del. Jan. 30, 1995). |

STATE: FLORIDA

| | |
|---------------------------------|--|
| STATUTE: | FLA. STAT. ANN. § 775.084 (West Supp. 1996) <i>Violent career criminals; habitual felony offenders and habitual violent felony offenders.</i> |
| EFFECTIVE: | October 1, 1995 |
| TRIGGERING EVENTS: | <i>Four Strikes:</i> TRIGGERING CONVICTION: Felony conviction as defined below. PRIOR CONVICTIONS REQUIRED: Three prior felony convictions as defined below. |
| DISCRETION: | The court is not mandated to impose a sentence if it finds that such sentence is not necessary for the protection of the public. |
| SENTENCING PROVISIONS: | If the current conviction is a life felony or Felony 1°, the punishment is life imprisonment. If the current conviction is Felony 2°, the punishment is a term of years not exceeding 40, with a mandatory minimum term of 30 years imprisonment. If Felony 3°, the punishment is a term of years not exceeding 15 years, with a mandatory minimum term of 10 years imprisonment. A defendant may have his sentence reduced by a maximum of 15% through "gain-time." |
| SERIOUS/VIOLENT CRIMES DEFINED: | <i>Current and Prior Felony Offenses For Three Strikes Provision:</i> Any forcible felony, Aggravated stalking, Aggravated child abuse, Lewd or lascivious or indecent conduct, Escape, or Felony violation involving the use or possession of a firearm. |

NOTES: WASHOUT PROVISION: The current conviction must have been within five years after the conviction of the last prior enumerated felony conviction OR within five years after the defendant's release from confinement imposed as a result of a prior conviction for an enumerated felony, whichever is later.

STATE: GEORGIA

STATUTE: GA. CODE ANN. § 17-10-7 (Supp. 1995)
Punishment of repeat offenders.
(also known as the Sentence Reform Act of 1994)

EFFECTIVE: January 1, 1995

TRIGGERING EVENTS: *Two Strikes:*
TRIGGERING CONVICTION: Conviction of a *serious violent felony.*

PRIOR CONVICTIONS REQUIRED: One prior conviction of a *serious violent felony.*

DISCRETION: No judicial discretion.

SENTENCING PROVISIONS: Imprisonment for life without parole.
No Good Time credits provision.

SERIOUS/VIOLENT CRIMES DEFINED: *Serious Violent Felony:*
Murder, Felony murder, Armed robbery, Kidnapping, Rape, Aggravated child molestation, Aggravated sodomy, or Aggravated sexual battery.

NOTES: The statute explicitly notes that future amendments to the Constitution of Georgia may modify the current sentencing provisions.

STATE: ILLINOIS

STATUTE: 720 ILL. COMP. STAT. ANN. 5/33B-1 (West Supp. 1996)
Habitual criminals — Determination — Application of article

EFFECTIVE: December 15, 1994

TRIGGERING EVENTS: *Three Strikes:*
TRIGGERING CONVICTION: Felony conviction *as described below.*

PRIOR CONVICTIONS REQUIRED: 2 prior felony convictions *as described below.*

DISCRETION: No judicial discretion.

SENTENCING PROVISIONS: Life imprisonment.

SERIOUS/VIOLENT CRIMES DEFINED: *Current and Prior Felony Convictions include the following offenses:*
Criminal sexual assault, Aggravated kidnapping, murder 1st, or a Class X felony, which includes: Aggravated criminal sexual assault, Aggravated vehicular hijacking, Contraband in penal institutions, Manufacture or delivery of controlled substances, Drug induced homicide, Home invasion, Indecent solicitation of an adult, Possession of metal piercing bullets, and Solicitation of murder.

NOTES: WASHOUT PROVISION: The third felony conviction must have been committed within twenty years of the date that judgment was entered on the first conviction. Time spent in custody is not counted.

 STATE: INDIANA

| | |
|---------------------------------|---|
| STATUTE: | IND. CODE ANN. § 35-50-2-8.5 (West Supp. 1995) <i>Life imprisonment without parole upon third felony conviction.</i> |
| EFFECTIVE: | 1994 |
| TRIGGERING EVENTS: | <i>Three Strikes:</i> TRIGGERING CONVICTION: One Current Conviction <i>as described below.</i> PRIOR CONVICTIONS REQUIRED: Two prior felony convictions <i>as described below.</i> |
| DISCRETION: | Judicial Discretion: "The court may sentence a person found to be subject to life imprisonment without parole under this section, to life imprisonment without parole." § 35-50-2-8.5(d). The State may also prosecute a defendant under this provision. |
| SENTENCING PROVISIONS: | Life imprisonment without parole. |
| SERIOUS/VIOLENT CRIMES DEFINED: | <i>Current Conviction and Prior Convictions are the same:</i> Murder, Battery with a deadly weapon, Sexual battery with a deadly weapon, Kidnapping, Confinement with a deadly weapon, Rape, Criminal deviate conduct, Child molesting, Robbery resulting in serious bodily injury or with a deadly weapon, Arson for hire or resulting in serious bodily injury, Burglary resulting in serious bodily injury or with a deadly weapon, Resisting law enforcement with a deadly weapon, Escape with a deadly weapon, Rioting with a deadly weapon, Dealing in cocaine, narcotic drug or dealing in controlled substance over three grams. |

 STATE: LOUISIANA

| | |
|------------------------|---|
| STATUTE: | LA. REV. STAT. ANN. § 15:529.1 (West Supp. 1996) <i>Sentences for second and subsequent offenses</i> |
| EFFECTIVE: | 1995 |
| TRIGGERING EVENTS: | <i>Three Strikes:</i> TRIGGERING CONVICTION: Conviction of a felony OR a <i>Crime of Violence.</i> PRIOR CONVICTIONS REQUIRED: Two prior felony OR <i>Crime of Violence</i> convictions. <i>Four Strikes:</i> TRIGGERING CONVICTION: Conviction of a felony OR a <i>Crime of Violence.</i> PRIOR CONVICTIONS REQUIRED: Two prior felony OR <i>Crime of Violence</i> convictions. |
| DISCRETION: | The district court has authority to reduce any part of a mandatory minimum sentence when such a term would violate a defendant's constitutional protection against excessive punishment. <i>State v. Pollard</i> , 644 So. 2d 370, 371 (La. 1994). The state is not mandated to prosecute under this statute. |
| SENTENCING PROVISIONS: | Life imprisonment without parole. |

SERIOUS/VIOLENT CRIMES
DEFINED:

Three Strikes & Four Strikes:

If the third felony (or the fourth felony under the Four Strikes provision) or either of the two prior felonies (or the three prior felonies under the Four Strikes provision) is either (1) a felony defined as a *Crime of Violence*, (2) a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than 5 years, or (3) any other crime punishable by imprisonment for more than 12 years, the defendant is to be imprisoned for life without possibility or parole.

CRIME OF VIOLENCE:

A crime of violence is defined to include: Solicitation for murder, Murder 1°, Murder 2°, Manslaughter, Aggravated battery, Battery 2°, Aggravated assault, Mingling harmful substances, Aggravated rape, Forcible rape, Simple rape, Sexual battery, Aggravated sexual battery, Oral sexual battery, Aggravated oral sexual battery, Intentional exposure to AIDS virus, Aggravated kidnapping, Kidnapping 2°, Simple kidnapping, Aggravated arson, Aggravated criminal damage to property, Aggravated burglary, Armed robbery, Robbery 1°, Simple robbery, Purse snatching, Extortion, Assault by drive-by shooting, Aggravated crime against nature, Carjacking, Illegal use of weapons or dangerous instrumentalities, or any attempt thereof.

NOTES:

WASHOUT PROVISION: If more than ten years have passed since the expiration of the maximum sentence or sentences of the previous conviction(s) and the time of the commission of the last felony conviction, then the Three and Four Strikes provisions do not apply.

STATE: MARYLAND

STATUTE:

MD. ANN. CODE art. 27, § 643B (Supp. 1995)
Mandatory sentences for crimes of violence.

EFFECTIVE:

October 1, 1994

TRIGGERING EVENTS:

Three Strikes:

TRIGGERING CONVICTION: Conviction of a *Crime of Violence*.

PRIOR CONVICTIONS REQUIRED: Two prior convictions of *Crimes of Violence*.

Four Strikes:

TRIGGERING CONVICTION: Conviction of a *Crime of Violence*.

PRIOR CONVICTIONS REQUIRED: Three prior convictions of *Crimes of Violence*.

DISCRETION:

No judicial discretion.

The state is not mandated to prosecute under this provision.

SENTENCING PROVISIONS:

Three Strikes:

Minimum of 25 years imprisonment.

Four Strikes:

Life Imprisonment without parole.

PAROLE EXCEPTION: Under either strike regime, the defendant may petition for parole after age 65 if he has served at least 15 years of the sentence imposed.

SERIOUS/VIOLENT CRIMES
DEFINED:

Crimes of Violence:

Abduction, Arson 1°, Kidnapping, Manslaughter (excluding involuntary manslaughter), Mayhem and maiming, Murder, Rape, Robbery, Robbery with a deadly weapon, Carjacking or armed carjacking, Sexual offense 1° or 2°, Use of handgun in commission of a felony or other crime of violence, Attempt to commit any of the aforesaid, or Assault with intent to Murder, Rape, Rob, or Commit a 1° or 2° sexual offense.

STATE: MONTANA

STATUTE:

MONT. CODE ANN. § 46-18-219 (1995)
Life sentence without possibility of release.

EFFECTIVE:

July 1, 1997

TRIGGERING EVENTS:

Two Strikes:

TRIGGERING CONVICTION: Felony Conviction as described below.

PRIOR CONVICTIONS REQUIRED: One prior felony conviction as described below.

Three Strikes:

TRIGGERING CONVICTION: Felony conviction as described below

PRIOR CONVICTIONS REQUIRED: Two prior felony convictions as described below.

DISCRETION:

No judicial discretion.

SENTENCING PROVISIONS:

Two Strikes & Three Strikes: Life imprisonment without parole.

Entire sentence shall be served in prison. No Good Time credits provision.

SERIOUS/VIOLENT CRIMES
DEFINED:

Two Strikes: Current conviction and prior conviction must be one of the following:

Deliberate homicide, Aggravated kidnapping, Sexual intercourse without consent, Sexual abuse of children, Ritual abuse of a minor.

Three Strikes:

Current Conviction must be one of the following:

Mitigated deliberate homicide, Aggravated assault, Kidnapping, Robbery.

Prior Convictions must be either one of those mentioned under Two Strikes, above, or one of those mentioned under Three Strikes, immediately above.

NOTES:

STRIKES THAT DO NOT COUNT: Juvenile convictions; when the defendant's mental capacity was significantly impaired; when the defendant was acting under unusual or substantial duress; when the defendant was an accomplice and his participation was relatively minor. See MONT. CODE ANN. § 46-18-222 (1995).

STATE: NEW JERSEY

- STATUTE:** N.J. STAT. ANN. § 2C:43-7.1 (West 1995)
Persistent offenders; sentencing (also known as the Persistent Offenders Accountability Act)
- EFFECTIVE:** June 22, 1995
- TRIGGERING EVENTS:** *Three Strikes:*
TRIGGERING CONVICTION: Felony conviction as described below.
PRIOR CONVICTIONS REQUIRED: Two prior felony convictions as described below.
- DISCRETION:** No judicial discretion.
- SENTENCING PROVISIONS:** Life imprisonment without parole.
PAROLE EXCEPTION: If the defendant is at least 70 years old and has served at least 35 years of his/her sentence, the defendant will be eligible for parole.
- SERIOUS/VIOLENT CRIMES DEFINED:** *Felony Convictions:*
Murder, Aggravated manslaughter, Sexual assault, Kidnapping 1°, Robbery, Carjacking.
- NOTES:** **WASHOUT PROVISION:** To count as a strike, the current conviction must have been committed within 10 years of the date of defendant's last release from confinement for the commission of any crime, or within ten years of the date of the commission of the most recent of the crimes for which the defendant has a prior conviction.

STATE: NEW MEXICO

- STATUTE:** N.M. STAT. ANN. § 31-18-23 (Michie 1996)
Three violent felony convictions; mandatory life imprisonment.
- EFFECTIVE:** July 1, 1994
- TRIGGERING EVENTS:** *Three Strikes:*
TRIGGERING CONVICTION: *Violent felony conviction.*
PRIOR CONVICTIONS REQUIRED: Two prior *violent felony convictions.*
- DISCRETION:** No judicial discretion.
Section 31-18-19 of the New Mexico Code requires the district attorney to charge a defendant as an habitual offender if his conviction record qualifies under the statute. See N.M. STAT. ANN. § 31-18-19 (Michie 1996). However, in *March v. State* the New Mexico Supreme Court held that, despite the mandatory tone of section 31-18-19, the prosecutor has discretion not to seek enhanced sentencing. *March v. State*, 782 P.2d 82, 83 (N.M. 1989).
- SENTENCING PROVISIONS:** Upon a third strike conviction, the defendant is to serve the punishment imposed by that conviction, in addition to life imprisonment without parole.
PAROLE EXCEPTION: Defendant is eligible for a parole hearing after having served thirty years of the life sentence. See N.M. STAT. ANN. § 31-21-10(A) (Michie 1996).

SERIOUS/VIOLENT CRIMES
DEFINED:

Violent Felony:

Murder 1°, Murder 2°, Shooting at or from a motor vehicle resulting in great bodily harm, Kidnapping resulting in great bodily harm inflicted upon the victim by the captor, Robbery while armed with a deadly weapon resulting in great bodily harm, and Criminal sexual penetration.

NOTES:

Two Violent Sexual Offenses Provision: This provision requires current conviction of a *violent sexual offense* plus one prior conviction of a *violent sexual offense*. The punishment is life in prison, subject to parole exception as defined above. N.M. STAT. ANN. § 31-18-25 (Michie 1996).

Violent Sexual Offense is defined as Criminal sexual penetration 1° or 2°. *Id.*

STRIKES THAT DO NOT COUNT: Juvenile convictions.

STATE: NORTH CAROLINA

STATUTE:

N.C. GEN. STAT. § 14-7.7 (Supp. 1995)
Persons defined as violent habitual felons.
(also known as the Crime Control Act)

EFFECTIVE:

May 1, 1994

TRIGGERING EVENTS:

Three Strikes:

TRIGGERING CONVICTION: *Violent felony* conviction.

PRIOR CONVICTIONS REQUIRED: Two prior *violent felony* convictions.

DISCRETION:

No judicial discretion.

The State is not mandated to charge the defendant under this statute.

SENTENCING PROVISIONS:

Life imprisonment without parole.

SERIOUS/VIOLENT CRIMES

Violent Felony:

DEFINED:

All Class A - E felonies

NOTES:

The jury shall not be made aware of the habitual felon status until after the decision of guilt or innocence regarding the principal violent felony.

STATE: PENNSYLVANIA

STATUTE:

42 PA. CONS. STAT. § 9714 (West Supp. 1996)
Sentences for second and subsequent offenses

EFFECTIVE:

December, 1995

TRIGGERING EVENTS:

Three Strikes:

TRIGGERING CONVICTION: Conviction of a *Crime of Violence*.

PRIOR CONVICTIONS REQUIRED: Two prior convictions for a *Crime of Violence*.

DISCRETION:

No judicial discretion.

SENTENCING PROVISIONS:

Twenty-five years to life imprisonment without parole

SERIOUS/VIOLENT CRIMES
DEFINED:

Crimes of Violence:

Murder 3rd, Voluntary manslaughter, Aggravated assault, Rape, Involuntary deviate sexual intercourse, Arson, Kidnapping, Burglary of a structure adapted for overnight accommodation in which at the time of the offense any person is present, Robbery, Robbery of a motor vehicle, Criminal attempt, Criminal conspiracy or criminal solicitation to commit murder or any of the above listed offenses.

STATE: SOUTH CAROLINA

STATUTE:

S.C. CODE ANN. § 17-25-45 (Law Co-op. Supp. 1995)
Life sentence for person convicted three times for certain crimes; discretion of solicitor to invoke.

EFFECTIVE:

January 1, 1996

TRIGGERING EVENTS:

Two Strikes:

TRIGGERING CONVICTION: Conviction of a *Most Serious* offense.

PRIOR CONVICTIONS REQUIRED: One prior *Most Serious* offense conviction.

Three Strikes:

TRIGGERING CONVICTION: Conviction of a *Serious* offense.

PRIOR CONVICTIONS REQUIRED: Two prior convictions of either a *Most Serious* offense or a *Serious* offense.

DISCRETION:

Two Strikes:

No judicial discretion. Prosecutor required to charge defendant as an habitual offender.

Three Strikes:

The decision to invoke sentencing is in the discretion of the "solicitor" (prosecutor).

SENTENCING PROVISIONS:

Two & Three Strikes

Life imprisonment without possibility of parole.

PAROLE EXCEPTION:

If (1) the Department of Probation determines that due to the defendant's health or age he is no longer a threat to society, and (2) the defendant has served at least 30 years of the sentence imposed, and (3) the defendant is (a) at least 65 years old, or (b) afflicted with a terminal illness where life expectancy is one year or less, or (c) "can produce evidence comprising the most extraordinary circumstances," the defendant will be eligible for parole. A person who is at least 70 years old, and who has served at least 20 years of his sentence, is also eligible for parole, so long as he satisfies the criteria of (1), above.

SERIOUS/VIOLENT CRIMES
DEFINED:

Most Serious Offense:

Murder, Killing by poison or by stabbing or thrusting, Voluntary Manslaughter, Homicide by child abuse, Aiding and abetting homicide by child abuse, Lynching 1°, Killing in a duel, Assault and battery with intent to kill, Criminal sexual conduct 1° or 2° or with minors if unconsenting, Assault w/intent to commit criminal sexual conduct 1° or 2°, Kidnapping, Conspiracy to commit Kidnapping, Arson 1°, Burglary 1°, Armed robbery, Attempted armed robbery, Damaging property by means of explosives, Giving information respecting national or state defense to foreign contacts during war, Gathering information for an enemy, Unlawful removing or damaging of airport facility or equipment when death results, interference with traffic-control devices or railroad signs or signals prohibited when death results from violation, Obstruction of railroad, death results, or Accessory or Attempt to commit any of the aforementioned offenses.

Serious Offense:

Any offense punishable by a maximum term of 30 years or more, Lynching 2°, Engaging child for sexual performance, Acceptance of bribes by officers, Accepting bribes for purpose of procuring public office, Burglary 2°, Embezzlement of public funds, Breach of trust with fraudulent intent, Obtaining signature or property by false pretenses, Insurance fraud, Trafficking in controlled substances, Trafficking in ice or crack or crack cocaine, Distributing, selling, manufacturing, or possessing controlled substances within proximity of a school, Causing death by operating vehicle while under influence of drugs or alcohol, or Accessory before the fact or Attempt to commit any of the aforementioned offenses.

STATE: TENNESSEE

STATUTE:

TENN. CODE ANN. § 40-35-120 (Supp. 1995)
Repeat violent offenders - "Three strikes"

EFFECTIVE:

Three Strikes: July 1, 1994

Two Strikes:

(1994 Version) = July 1, 1994

Two Strikes--1995 Version) = July 1, 1995

TRIGGERING EVENTS:

Three Strikes:

TRIGGERING CONVICTION: Felony conviction under (b)(1), *listed below.*

PRIOR CONVICTIONS REQUIRED: Two prior convictions under (b)(1) or (b)(2), *listed below.*

Two Strikes:

TRIGGERING CONVICTION: Felony conviction under (c)(1), *listed below.*

PRIOR CONVICTIONS REQUIRED: One prior conviction under (c)(1) or (c)(2), *listed below.*

Two Strikes:

TRIGGERING CONVICTION: Convicted of a violent crime on or after July 1, 1995 as described in (d)(1), *listed below.*

PRIOR CONVICTIONS REQUIRED: One prior conviction under (d)(1) or (d)(2), *listed below.*

DISCRETION:

The judge may not accept a plea agreement that fails to recommend that a defendant with a sufficient number of prior convictions be sentenced as a repeat violent offender.

If the judge denies the plea agreement, the district attorney may still amend the offense to an offense that is not designated as a violent offense for *Three Strikes* of 1994 and *Two Strikes* of 1994. § 40-35-120(f). This section does not refer to *Two Strikes* of 1995. The district attorney is not required to prosecute under this statute.

**SENTENCING PROVISIONS:
SERIOUS/VIOLENT CRIMES
DEFINED:**

Life imprisonment without possibility of parole.

(b)(1) As applicable to CURRENT conviction under Three Strikes:

Murder 1°, Murder 2°, Especially aggravated kidnapping, Especially aggravated robbery, Aggravated rape, Rape of a child, Aggravated arson. Attempt, solicitation or facilitation of any of the aforementioned. Aggravated kidnapping, Aggravated robbery, Rape, Aggravated sexual battery, Especially aggravated burglary, Aggravated child abuse, Aggravated or Especially Aggravated sexual exploitation of minor.

(b)(2) As applicable to PRIOR convictions under Three Strikes:

Any of the felony offenses listed above in (b)(1), and all Class A and Class B felonies, listed below, with the exception of Robbery by use of a deadly weapon.

(c)(1) As applied to 1994 CURRENT conviction under Two Strike

Murder 1° (including attempt, solicitation or facilitation), Murder 2°, Especially aggravated kidnapping, Especially aggravated robbery, Aggravated rape, Rape of a child, Aggravated arson.

(c)(2) As applied to 1994 PRIOR convictions under Two Strike

Any of the felony offenses listed above in (c)(1), and Class A felonies, listed below, with the exception of Robbery by use of a deadly weapon.

(d)(1) As applied to 1995 CURRENT conviction under Two Strike:

Murder 1°, Murder 2°, Especially aggravated kidnapping, Especially aggravated robbery, Aggravated rape, Rape of a child, Aggravated arson, Aggravated kidnapping, Rape, Aggravated sexual battery, Especially aggravated burglary, Aggravated child abuse, Aggravated or Especially aggravated sexual exploitation of a minor.

(d)(2) As applicable to 1995 PRIOR convictions under Two Strike

NOTES:

Any of the felony offenses listed above in (d)(1), as well as Class A and Class B felonies, listed below, with the exception of Robbery by use of a deadly weapon.

JUVENILES: If the defendant is tried and sentenced as an adult, the conviction will serve as a prior strike.

THE JURY: Is not made aware of the habitual offender status when determining guilt or innocence.

GOVERNOR'S POWER TO REDUCE PRISON

OVERCROWDING: Tennessee statute provides that the governor has a general power to reduce sentences to reduce prison overcrowding. TENN. CODE ANN. § 40-35-201(b)(2)(A)(i) (1995).

CLASS A & CLASS B
FELONIES*Class A Felonies:*

Criminal sexual conduct 1°, Conspiracy to take a human life, Assault with intent to commit murder 1°, Murder 1°, Murder 2°, Aggravated kidnapping, Prisoners holding hostages, Unlawful representation to obtain ransom, Aggravated rape, Abduction of female from parents for purposes of prostitution, Aggravated arson, Willful injury by explosives, Treason, Adulteration of foods or liquors or pharmaceuticals in which death occurs, Obstruction or damage to railroad tracks resulting in death, Killing an officer while officer is arresting a person on a charge of unlawful gaming, Furnishing intoxicating liquor which results in death (murder 2°). *See* TENN. CODE ANN. § 40-35-118 (Supp. 1995).

Class B Felonies:

Criminal sexual conduct 2°, Conspiracy to sabotage a nuclear production facility, Conspiracy to commit illegal act capable of destroying human life by possession or use of transportation of explosives, Conspiracy by convicts to kill, assault with intent to commit or attempt to commit aggravated kidnapping, Kidnapping child under 16, robbery by use of a deadly weapon, Bank robbery, Rape, Aggravated sexual battery, Causing injury to person by use of fire bomb, Aggravated child abuse, Rebellion by convict with intent to kill or escape, Adulteration of food product or drug resulting in injury, Obstruction or damage to railroad tracks resulting in injury, Manufacture or delivery or sale or possession with intent to do same with Schedule I controlled substance, Manufacture or delivery or sale of certain amount of controlled substances, Habitual drug offender, Person over 18 distributing Schedule I controlled substance to person under 18 who is at least 3 years his junior, Wounding officer while he is arresting person on charge of unlawfully gaming, Using minors for obscene purposes.

STATE: TEXAS

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|---------------------------------|---|
| STATUTE: | TEX. PENAL CODE ANN. § 12.42 (West Supp. 1996) <i>Penalties for Repeat and Habitual Felony Offenders</i> |
| EFFECTIVE: | January 1, 1996 |
| TRIGGERING EVENTS: | <i>Three Strikes</i> TRIGGERING CONVICTION: Felony conviction as defined below under <i>Current Convictions</i> . PRIOR CONVICTIONS REQUIRED: Two prior felony convictions, only one of which need be a <i>Prior Conviction</i> as defined below. |
| DISCRETION: | No judicial discretion. The state is not mandated to prosecute under this statute. |
| SENTENCING PROVISIONS: | Life imprisonment. The statute does not address the issue of probation or parole. |
| SERIOUS/VIOLENT CRIMES DEFINED: | <i>Current conviction:</i> Aggravated sexual assault, Aggravated kidnapping inflicting bodily injury or sexual abuse, Burglary of a habitation and entry with intent to commit a felony other than theft including indecency with a child and sexual assault. <i>Prior convictions:</i> Sexual performance by a child, Possession or promotion of child pornography, Indecency with a child, Sexual assault, Aggravated sexual assault, Prohibited sexual conduct, Aggravated kidnapping inflicting bodily injury or sexual abuse, Burglary of a habitation and entry with intent to commit a felony other than theft including indecency with a child and sexual assault. |
| NOTES: | Upon three felony convictions of any felony not mentioned above (also excluding <i>state-jail felonies</i> [non-violent felonies]), a defendant shall be sentenced to a term of not more than 99 years or less than 25 years. OTHER STRIKES THAT DO NOT COUNT: Juvenile convictions. |

STATE: VIRGINIA

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| STATUTE: | VA. CODE ANN. § 19.2-297.1 (Michie 1995) <i>Sentence of person twice previously convicted of certain violent felonies.</i> |
| EFFECTIVE: | October 13, 1994 |
| TRIGGERING EVENTS: | <i>Three Strikes:</i> TRIGGERING CONVICTION: Conviction of an <i>Act of Violence</i> . PRIOR CONVICTIONS REQUIRED: Two prior convictions of an <i>Act of Violence</i> . |
| DISCRETION: | No judicial discretion. The state is not mandated to prosecute under this statute. |

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|---------------------------------|--|
| SENTENCING PROVISIONS: | Life imprisonment without parole. PAROLE EXCEPTION: Except those offenders convicted of criminal sexual assault, any defendant who has reached the age of 65 and who has served at least five years of the imposed sentence, or who has reached the age of 60 and has served at least ten years of the sentence, may petition for parole. |
| SERIOUS/VIOLENT CRIMES DEFINED: | <i>Act of Violence:</i> Murder 1°, Murder 2°, Voluntary manslaughter, Mob-related felonies, Kidnapping or abduction felony, Malicious felonious assault or bodily wounding, Robbery and carjacking, Criminal sexual assault, or Conspiracy to commit or Accessory before the fact for any of the aforementioned offenses. |

STATE: WASHINGTON

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|---------------------------------|---|
| STATUTE: | WASH. REV. CODE ANN. § 9.94A.392 (West Supp. 1996) <i>Findings and intent - 1994 c.1 Initiative Measure No. 593 (also known as the Persistent Offender Accountability Act)</i> |
| EFFECTIVE: | December 2, 1993 |
| TRIGGERING EVENTS: | <i>Three Strikes:</i> TRIGGERING CONVICTION: Conviction of a <i>Most Serious Offense</i> . PRIOR CONVICTIONS REQUIRED: Two prior such convictions of a <i>Most Serious Offense</i> . |
| DISCRETION: | No judicial discretion. The prosecutor is not mandated to charge defendant as an habitual offender. |
| SENTENCING PROVISIONS: | Life imprisonment without parole. |
| SERIOUS/VIOLENT CRIMES DEFINED: | <i>Most Serious Offense:</i> Any felony defined under any law as a class A felony or criminal solicitation or criminal conspiracy to commit a class A felony, Assault 2°, Assault of a child 2°, Child molestation 2°, Controlled substance homicide, Extortion 1°, Incest when committed against a child under age of 14, Indecent liberties, Kidnapping 2°, Leading organized crime, Manslaughter 1° or 2°, Promoting prostitution 1°, Rape 3°, Robbery 2°, Sexual exploitation, Vehicular assault, Vehicular homicide when caused by driving under influence of liquor or any drugs or by the operation of any vehicle in a reckless manner, Any other felony with a deadly weapon, Any class B felony offense with a finding of sexual motivation, Any other felony with a deadly weapon verdict, Attempt to commit any of the aforementioned offenses. <i>See</i> WASH. REV. CODE ANN. § 9.94A.030 (West Supp. 1996). |

NOTES: **GOVERNOR'S POWERS:** The governor has the power to grant a pardon or clemency to any offender on a case-by-case basis. However, "the people recommend" that the governor not exercise this power until the defendant is at least 60 years old and is judged to be no longer a threat to society. The people further recommend that sex offenders be held to the utmost scrutiny regardless of age. *See* WASH. REV. CODE ANN. § 9.94A.394 (West Supp. 1996).
ADDITION OF NEW FELONIES: New felonies can be added to the list of *Most Serious Offenses*.

STATE: WEST VIRGINIA

STATUTE: W. VA. CODE § 61-11-18 (Supp. 1995)
Punishment for second or third offense of felony.

EFFECTIVE: 1994

TRIGGERING EVENTS: *Three Strikes:*
TRIGGERING CONVICTION: Conviction of a felony as described below.
PRIOR CONVICTIONS REQUIRED: Two prior convictions for felonies as described below.

DISCRETION: No judicial discretion.

SENTENCING PROVISIONS: Life imprisonment.

SERIOUS/VIOLENT CRIMES DEFINED: *Current and Prior Convictions:*
 Must be a felony punishable by confinement in a penitentiary.

NOTES: A defendant currently convicted of Murder 1°, Murder 2° or Sexual assault 1°, who has one previous such conviction, shall be imprisoned for life without eligibility for parole.

STATE: WISCONSIN

STATUTE: WIS. STAT. ANN. § 939.62 (West 1996)
Increased penalty for habitual criminality

EFFECTIVE: June 11, 1994

TRIGGERING EVENTS: *Three Strikes:*
TRIGGERING CONVICTION: Conviction of a *Serious Felony*, as described below.
PRIOR CONVICTIONS REQUIRED: Two prior *Serious Felony* convictions, as described below.

DISCRETION: No judicial discretion.
 The state is not mandated to charge defendant under this statute.

SENTENCING PROVISIONS: Life imprisonment without parole.

SERIOUS/VIOLENT CRIMES
DEFINED:

Serious Felony:

Murder 1° intentional, Murder 1° reckless, Felony murder, Murder 2° intentional, Homicide by intoxicated use of vehicle or firearm, Battery causing great bodily harm, Mayhem, Sexual assault 1° or 2°, Taking hostages, Kidnapping, Tampering with household products if it results in death of another, Manufacture or delivery or possession of controlled substances, Arson of buildings, Burglary while armed with a dangerous weapon or with commission of a battery upon a person lawfully therein, Intentionally taking a vehicle with a dangerous weapon and/or causing great bodily harm and/or death, Robbery with use of dangerous weapon or article that could reasonably lead victim to believe it was a dangerous weapon, Assault by prisoners, Sexual assault of a child 1° or 2°, Engaging in repeated acts of sexual assault on the same child, Physical abuse of a child which intentionally causes great bodily harm or a high probability of great bodily harm, Sexual exploitation of a child, Incest with a child, Child enticement, Soliciting a child for prostitution, Abduction of another's child for unlawful purposes, Solicitation of a child to commit a felony, Use of a child to commit a class A felony.

TABLE 2

| STATE | STATUTE | STATE | STATUTE |
|----------------------|-----------------------|----------------|--------------------|
| Alabama | § 13A-5-9 | Missouri | § 558.016 |
| Alaska | § 12.55.125 | Montana | § 46-18-219 |
| Arizona | § 13-604 | Nebraska | § 29-2221 |
| Arkansas | § 5-4-501 | Nevada | § 207.010 |
| California | PENAL CODE § 667 | New Hampshire | § 651:6 |
| Colorado | § 16-13-101 | New Jersey | §§ 2C:43-7.1 |
| Connecticut | § 53a-40 | New Mexico | § 31-18-23 |
| Delaware | tit. 11 § 4214 | New York | PENAL LAW § 70.08 |
| District of Columbia | § 22-104 | North Carolina | §§ 14-7.7 |
| Florida | § 775.084 | North Dakota | § 12.1-32-09 |
| Georgia | § 17-10-7 | Ohio | § 2929.11 |
| Hawaii | § 706-606.5 | Oklahoma | tit. 21 § 51 |
| Idaho | § 19-2514 | Oregon | § 161.725 |
| Illinois | ch. 720 § 5/33B-1 | Pennsylvania | ch. 42 § 9714 |
| Indiana | § 35-50-2-8.5 | Rhode Island | § 12-19-21 |
| Iowa | §§ 902.8, 902.9 | South Carolina | § 17-25-45 |
| Kansas | § 21-4504 | South Dakota | § 22-7-8 |
| Kentucky | § 532.080 | Tennessee | §§ 40-35-120 |
| Louisiana | § 15:529.1 | Texas | PENAL CODE § 12.42 |
| Maine | tit. 17-A § 362(3)(B) | Utah | § 76-8-1001 |
| Maryland | art. 27 § 643B | Vermont | tit. 13 § 11 |
| Massachusetts | ch. 279 § 25 | Virginia | § 19.2-297.1 |
| Michigan | § 769.12 | Washington | § 9.94A.392 |
| Minnesota | None | West Virginia | § 61-11-18 |
| Mississippi | § 99-19-83 | Wisconsin | § 939.62 |
| | | Wyoming | § 6-10-201 |