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# A PROPOSAL FOR A WHOLESALE REFORM OF CALIFORNIA'S SENTENCING PRACTICE AND POLICY

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*Contributors to this report: Erwin Chemerinsky, Kevin Reitz,  
Jonathan Turley and Franklin E. Zimring*

In the spring of 2003, the primary drafters of this report began organizing a conference to mark ten years of experience with California's Three Strikes law.<sup>1</sup> Ultimately, we invited a select group of scholars to come together to discuss ideas for reform.<sup>2</sup> This

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1. See CAL. PENAL CODE §§ 667, 1170.12 (West 2002 & Supp. 2003).

2. Our speakers included Erwin Chemerinsky, Kevin Reitz, Jonathan Turley, and Franklin E. Zimring.

Erwin Chemerinsky is the Alston & Bird Professor of Law at Duke University School of Law. From 1983 to 2004, Chemerinsky taught at the University of Southern California School of Law, where he was the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. Chemerinsky has testified before the U.S. Senate Judiciary Committee, the California Senate Judiciary Committee, and the California Assembly Committee on the Judiciary. Chemerinsky has also been a frequent consultant for media sources. He has represented and written briefs for many defendants eligible for sentencing under California's Three Strikes law, recently before the U.S. Supreme Court in *Lockyer v. Andrade*. His regular column discussing the Supreme Court appears in *Trial Magazine*, *California Lawyer*, and the *Los Angeles Daily Journal*. From 1998 to 2003, the *Daily Journal* has included Chemerinsky in their list of the 100 most influential lawyers in California.

Article is a result of that conference. There has already been a robust debate about the law's effectiveness and wisdom.<sup>3</sup> The great weight

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Additionally, Chemerinsky has authored four books, over 100 law review articles and hundreds of essays appearing in magazines and newspapers.

Kevin Reitz has been a professor of law at the University of Colorado, Boulder Law School since 1988. In 1993, Reitz organized the pilot meeting for the National Association of Sentencing Commissions (NASC), which has since developed into a resource for states across the nation considering sentencing reform. Reitz continues to work with NASC as well as individual sentencing commissions. From 1989 to 1994, Reitz worked as co-reporter for the new edition of the ABA's Criminal Justice Standards for Sentencing. Reitz has also served on Colorado General Assembly Subcommittees dealing with sentencing and community sanctions issues. In 2001, the American Law Institute appointed Reitz to serve as reporter for the first revision of the Model Penal Code, a project addressing only the Code's sentencing and corrections provisions. He has prepared extensive materials in his capacity as a reporter. Reitz wrote *The Challenge of Crime: Rethinking Our Response* in 2003 (with co-author Henry Ruth), for which he won the National Council on Crime and Delinquency's "Prevention for a Safer Society" (PASS) award.

Jonathan Turley began his legal teaching career at Tulane Law School and then joined the George Washington Law School faculty in 1990, where he is the J.B. and Maurice Shapiro Professor of Public Interest Law. He teaches courses in constitutional law, constitutional criminal law, environmental law, litigation, and torts. Turley has appeared as a witness before the House and the Senate numerous times on constitutional and statutory issues. He founded and is the executive director of the Project for Older Prisoners (POPS), a volunteer program intended to offset prison overcrowding and provide assistance to geriatric prisoners, with programs now at law schools in several states. For a more detailed discussion, see *infra* note 253. He is also the director of George Washington Law School's Environmental Law Advocacy Institute.

Franklin E. Zimring directed the Center for Studies in Criminal Justice at the University of Chicago from 1973 to 1985. While there, Zimring held the Llewellyn Chair in jurisprudence. In 1985, he came to the University of California at Berkeley as the Director of the Earl Warren Legal Institute and its program for criminal justice. Zimring teaches family and criminal law at Boalt Hall, and also teaches in the Jurisprudence and Social Policy Doctorate program, Berkeley's Law and Society doctoral program. Zimring has served on the National Academy of Science Panel of Violence as well as the Director of Research for the Task Force on Violence of the National Commission on the Causes and Preventions of Violence. Zimring's books include *The Changing Legal World of Adolescence* (1982), *Capital Punishment and the American Agenda* (with Gordon Hawkins) (1987), *The Scale of Imprisonment* (1991), *The Search for Rational Drug Control* (1992), and, most recently, *Punishment and Democracy: Three Strikes and You're Out in California* (with Gordon Hawkins and Sam Kamin) (2001).

3. See, e.g., Symposium, 11 STAN. L. & POL'Y REV. 4 (1999) (examining the debate between politicians and academics regarding the impact of

of empirical studies discounts the role of Three Strikes in reducing crime.<sup>4</sup> Instead, Three Strikes adds to the prison population<sup>5</sup> but, in

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sentencing laws such as Three Strikes on crime rates and rates of incarceration); Symposium, *A Fork in the Road*, 23 S. ILL. U. L.J. 285, 540 (1998) (proposing that elected officials review “three strikes” laws and “truth in sentencing” laws); Symposium, *Three Strikes and You’re Out Legislation*, 26 UWLA L. REV. 239 (1995). For an exchange on the effectiveness of the Three Strikes law and the methodologies used in measuring its success, see Brian P. Janiskee & Edward J. Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California’s Three Strikes Law*, 39 DUQ. L. REV. 43 (2000) [hereinafter Janiskee & Erler, *Three Strikes Analysis*]; Franklin E. Zimring & Sam Kamin, *Rebuttal: Facts, Fallacies, and California’s Three Strikes*, 40 DUQ. L. REV. 605 (2002); Michael Vitiello, *Rebuttal: Somewhat Frantic: A Brief Response to Crime, Punishment, and Romero*, 40 DUQ. L. REV. 615 (2002); Brian P. Janiskee & Edward J. Erler, *Rebuttal: California’s Three Strikes Law: Symbol and Substance*, 41 DUQ. L. REV. 173 (2002) [hereinafter Janiskee & Erler, *Rebuttal*].

4. See, e.g., DARYL A. HELLMAN & NEIL O. ALPER, *ECONOMICS OF CRIME* 9–10 (4th ed. 1997) (noting that differences in crime rates may not be due to the Three Strikes law, but instead to changes in the number of agencies reporting such crimes or the willingness of victims to report offenses to police); FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY* 101 (2001) (stating the “decline in crime observed after the effective date of the Three Strikes law was not the result of the statute”); Linda S. Beres & Thomas Griffith, *Did “Three Strikes” Cause the Recent Drop in California Crime? An Analysis of the California Attorney General’s Report*, 32 LOY. L.A. L. REV. 101, 102 (1998) [hereinafter Beres & Griffith, *Analysis of AG’s Report*] (concluding “there is no evidence that Three Strikes played an important role in the drop in the crime rate”); Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 138 (1998) (finding that “[b]ecause most high-rate offenders are already imprisoned for most of their criminal careers, only a modest reduction in crime can be achieved by incarcerating them for longer terms”); Mike Males & Dan Macallair, *Striking Out: The Failure of California’s “Three Strikes and You’re Out” Law*, 11 STAN. L. & POL’Y REV. 65, 67 (2000) (finding that the “counties that vigorously and strictly enforce the Three Strikes law did not experience a decline in any crime category relative to more lenient counties”); David Schultz, *No Joy in Mudville Tonight: The Impact of “Three Strike” Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL’Y 557 (2000) (offering alternative explanations for the mid to late 1990’s crime rate drop); see also Michael Vitiello, *California’s Three Strikes and We’re Out: Was Judicial Activism California’s Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1081–96 (2004) [hereinafter Vitiello, *Judicial Activism*] (reviewing numerous empirical studies on the Three Strikes law and its relationship to the crime rate).

light of other sentencing provisions, does little to add to social protection.<sup>6</sup>

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5. ZIMRING ET AL., *supra* note 4, at 135–38 (describing the long-term impact of Three Strikes on the prison population).

6. *See id.* at 105 (finding that Three Strikes has a minimal impact on crime in California).

An occasional study claiming that Three Strikes is responsible for the sharp decline in crime rates in California has gained wide publicity. In 1998, for example, then Attorney General Dan Lungren published such a report. Office of the Atty. Gen., Cal. Dep't of Justice, "*Three Strikes and You're Out*" (1998) [hereinafter AG's Report] (discussing the impact on the criminal justice system after four years), available at [http://www.threestrikes.org/cag98\\_pgone.html](http://www.threestrikes.org/cag98_pgone.html). As more scholarly studies demonstrate, the AG's report lumped together crime data from several years before passage of Three Strikes in order to support its claim that Three Strikes was responsible for the decline in crime in the mid-1990's. But the decline had begun shortly before passage of Three Strikes and continued to decline at about the same rate after its passage. ZIMRING ET AL., *supra* note 4, at 88; Beres & Griffith, *Analysis of AG's Report*, *supra* note 4, at 107–08.

To mark the tenth anniversary of the law, Mike Reynolds, the father of the murder victim and the driving force behind the passage of Three Strikes, and Bill Jones, one of the early sponsors of the Three Strikes statute when he served in the legislature, published a report claiming that Three Strikes has saved California over \$28 billion. Cal. Dep't of Justice & Cal. Dep't of Corrections, *3-Strikes 1994 to 2004, A Decade of Difference* (Mar. 7, 2004), available at [http://www.threestrikes.org/tenyearstudy\\_pg1.html](http://www.threestrikes.org/tenyearstudy_pg1.html). But this new study shares the methodological flaws of earlier empirical reports that claim that Three Strikes is responsible for the down turn in crime rates. Page one of the new report demonstrates the major flaw in its methodology: it compares ten years before Three Strikes with the ten years after Three Strikes. *Id.* That allows its proponents to ignore the fact that prior to passage of Three Strikes, crime rates had begun to decline and that the rate of decline continued at the same pace after its passage.

The report ignores other problems with the data: for example, Three Strikes proponents claim that the law reduces crime by incarcerating high rate offenders. James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 31 (2000); Bill Jones, *Why the Three Strikes Law is Working in California*, 11 STAN. L. & POL'Y REV. 23, 24 (1999). But even before Three Strikes, California had spent the previous decade increasing criminal sentences dramatically. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11370.2 (West 2004) (enacted in 1985 and providing a three-year enhancement for defendants with specific prior drug convictions who suffer new convictions for specific drug offenses); CAL. PENAL CODE § 667.7 (West 2004) (imposing a sentence of twenty-years-to-life for those who have served two prior prison terms for specified violent offenses when the current conviction is for a felony with the intent to inflict great bodily injury, and life without the possibility of parole for those with three prior

We found only scant scholarly research to support the claim that Three Strikes caused the downturn in California's crime rates.<sup>7</sup> Those few reports that claim Three Strikes is responsible for the downturn in crime rates have serious methodological flaws.<sup>8</sup> We found even less theoretical support for the law among legal scholars.<sup>9</sup>

Despite the absence of scholarly support for the law, its proponents have successfully promulgated a legend about the law. As noted by the authors of *Punishment and Democracy: Three Strikes and You're Out in California*, many believe that Three Strikes represents a "watershed" change in penal policy from soft to hard on crime, leading to the downturn in crime.<sup>10</sup> Proponents

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prison terms); *id.* § 667.51 (providing a five-year enhancement for defendants with one prior conviction of a lewd act with a child, and fifteen-years-to-life for defendants with two prior convictions, who suffer the same as the current offense); *id.* § 667(a) (providing a five-year enhancement for defendants with prior serious felony convictions); Markus Dirk Dubber, Note, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193, 197-98 (1990) (detailing the history of the enactment of section 667(a) and noting that Proposition 8, passed by voters in 1982, established much harsher penalties for repeat offenders). If incarceration caused sharp declines in crime, we should have experienced the drop in crime even before three strikes. Instead, the data did not show any consistent pattern of decline. Franklin E. Zimring, *The Voodoo Economics of California Crime*, OVERCROWDED TIMES, Oct. 1994, at 3.

7. See Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two-and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159 (2002) (arguing that Three Strikes has deterred a significant amount of crime). For a rebuttal of that study, however, see Vitiello, *Judicial Activism*, *supra* note 4, at 1090-96.

8. Such reports include Jones, *supra* note 6, and AG's Report, *supra* note 8. Those reports also fail to explain why other states, like New York and Massachusetts, that did not enact three strikes laws during the 1990's when about half of all states did so, nonetheless experienced reductions in crime equivalent to California's lowered crime rates. Vitiello, *Judicial Activism*, *supra* note 4, at 1084.

9. Some of the public officials who supported Three Strikes have written articles in support of the law. See Jones, *supra* note 6; Ardaiz, *supra* note 6; Phil Wyman & John G. Schmidt, Jr., *Three Strikes You're Out (It's About Time)*, 26 UWLA L. REV. 249 (1995). We could not find support for the law among legal scholars. Two political scientists have written in support of the law. See Janiskee & Erler, *Three Strikes Analysis*, *supra* note 3; Janiskee & Erler, *Rebuttal*, *supra* note 3.

10. ZIMRING ET AL., *supra* note 4, at 221.

continue to promote that legend despite compelling evidence to the contrary.<sup>11</sup> Ardent belief has prevailed over empirical analysis.

In *Punishment and Democracy*, Professor Frank Zimring and his co-authors lament the decline of empiricism and expert influence in formulating criminal justice policy.<sup>12</sup> After offering examples of involvement of criminal law professors in formation of criminal justice policy, including their role in the singular accomplishment of drafting the Model Penal Code, *Punishment and Democracy* observed that the influence and involvement of experts in the process have declined:

[T]here is now a large gap between law professors and the legislative process, and not just in California . . . . Part of the problem is that most academic lawyers are not much interested in criminal justice policy processes. Most of the problem is that there is no demand for what experts have to offer, which is information about the implications and consequences of policy choices.<sup>13</sup>

The trade winds may now be shifting in favor of a more dispassionate and empirically grounded discussion of sentencing policy in California. Consider the following changes in the environment: First, California's budget woes provide an opportunity to reexamine policies that have led to dramatic prison increases.<sup>14</sup> The California budget has few areas of discretionary spending.<sup>15</sup> Further, the prison budget is the one budget item that has undergone

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11. Compare Jones, *supra* note 6, at 24–25 (attributing California's decline in crime rate to Three Strikes), with Vitiello, *Judicial Activism*, *supra* note 4, at 1081–96 (discussing a host of empirical studies finding that either Three Strikes did not cause all or most of the decline in the crime rate, or demanding a greater causal link between Three Strikes and the decline).

12. ZIMRING ET AL., *supra* note 4, at 13.

13. *Id.*

14. See Mark Martin, *Prison Budget Up, Despite No Raise*, S.F. CHRON., May 14, 2004, at A15 (discussing the “budget crunch,” including a proposal to eliminate some prison meals on weekends and holidays, as well as a request by Governor Schwarzenegger that the California Correctional Peace Officers Association “give up \$300 million in salaries and benefits”).

15. Robert Salladay, *Governor's Tough Task: Finding the Waste to Cut*, S.F. CHRON., Nov. 27, 2003, at A1; George Skelton, *Millions of Micro-Managers Share Blame for State's Crises*, L.A. TIMES, Sept. 25, 2003, at B8.

little scrutiny.<sup>16</sup> Budget discussions have a way of separating facts about dollars and cents from fiction.

Second, United States Supreme Court Justice Anthony Kennedy's speech to the American Bar Association was a national call to action.<sup>17</sup> He argued that Americans spend too much on prisons and that "our punishments [are] too severe [and] our sentences [are] too long."<sup>18</sup> He recommended that federal sentencing guidelines be revised downward and criticized the necessity for and the justice in mandatory minimum sentences.<sup>19</sup> Not only did he call for lowering sentences and for greater sentencing discretion for judges, but he also advocated the reinvigoration of pardon and clemency processes.<sup>20</sup>

The ABA responded to Justice Kennedy's challenge by establishing a commission to hold hearings around the country.<sup>21</sup> The Commission was charged with the responsibility to examine issues relating to mandatory minimum sentences, sentencing

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16. See, e.g., Mark Martin, *Prison Guards Open to Cutting Pay*, S.F. CHRON., Mar. 5, 2004, at A23 (discussing the lack of scrutiny that resulted in wasteful spending under the prison guards' labor contract); Jeffrey L. Rabin, *Corrections' 1,000 Hires Shock Senators*, L.A. TIMES, Feb. 12, 2004, at B10 (noting that "prison officials . . . had hired an extra 1,000 employees—mostly prison guards—without authorization or funding"); Corrections Independent Review Panel, *Introduction to Reforming California's Youth and Adult Correctional System*, (June 2004) [hereinafter Deukmejian Report] (noting the "out-of-control costs" of California's correctional system), available at <http://www.cpr.ca.gov/reports/indrpt/corr/index.htm>.

17. U.S. Supreme Court Justice Anthony M. Kennedy, Keynote Address at the American Bar Association Annual Meeting (Aug. 9, 2003) [hereinafter Kennedy Speech], available at <http://www.abanet.org/media/kencomm/amkspeech03.html>.

18. *Id.*

19. *Id.* No doubt, Justice Kennedy had in mind California's Three Strikes legislation when he criticized mandatory minimum sentences. See *id.* While he joined the majority in rejecting a constitutional challenge to the defendant's twenty-five-years-to-life sentence in *Ewing v. California*, 538 U.S. 11 (2003), no doubt he would argue that reforming criminal sentences is the legislature's responsibility, not the Court's.

20. Kennedy Speech, *supra* note 17, available at <http://www.abanet.org/media/kencomm/amkspeech03.html>.

21. Press Release, American Bar Association, California Officials to Discuss Prison Conditions, Sentencing and Rehabilitation Issues with American Bar Association Commission (Apr. 2, 2004), at <http://www.abanews.org/releases/news040204.html>.



guidelines, and judicial sentencing discretion.<sup>22</sup> The ABA also charged the Commission with assessing prisons, the pardon process, and related issues.<sup>23</sup> Thus, after decades of increasing prison populations, longer prison sentences, reduced sentencing discretion, and abandonment of rehabilitative programs, prominent members of the legal community have questioned the punitive attitudes that have led to draconian sanctions.<sup>24</sup>

On June 23, 2004, the Kennedy Commission submitted its report to the House of Delegates of the ABA for action at its August 2004 meeting.<sup>25</sup> Its recommendations are encouraging and are similar to some of the reforms advocated by participants in our conference.<sup>26</sup> Its recommendations are guided by two primary principles:

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22. Press Release, American Bar Association, Incoming ABA President Dennis W. Archer Calls on Lawyers to Evaluate Nation's Prison and Corrections System (Aug. 11, 2003), at [http://www.abanews.org/aug03/081103\\_3.html](http://www.abanews.org/aug03/081103_3.html).

23. Press Release, American Bar Association, ABA Forms New Commission to Review Mandatory Minimum Sentences, Prison Conditions and Pardons (Oct. 6, 2003), at [http://www.abanet.org/media/oct03/100603\\_1.html](http://www.abanet.org/media/oct03/100603_1.html).

24. See also Little Hoover Commission, *Back to the Community: Safe & Sound Parole Policies* (Nov. 2003), available at <http://www.lhc.ca.gov/lhcdir/172/report172.pdf>. The Little Hoover Commission concluded that California's parole program is an extraordinarily expensive failure which, despite large expenditures, fails to adequately protect public safety. The report notes the lack of accountability within the system and notes the need for proper evaluation of current programs. The report further observes that California's narrow focus on punishment has led the system to release inmates ill-prepared to assume productive and safe roles in the community, and has created a system too reliant on incarceration, the most costly alternative in a spectrum of possibilities for parole violators. The report offers specific, concrete suggestions on how to carry out its recommendations at all necessary levels: state correctional, local law enforcement, community-based programs, legislative support, and with the parolees themselves. Recurrent notions, such as cost-effective alternatives to incarceration for parole violators, the use of individual risk assessment to create programs tailored to individual parolees, as well as repeated evaluation of the system as a whole, run throughout its recommendations, aimed toward creating a more comprehensive and effective parole system.

25. AM. BAR ASS'N, JUSTICE KENNEDY COMMISSION, REPORT TO THE HOUSE OF DELEGATES (2004) [hereinafter KENNEDY REPORT], <http://www.abanet.org/media/kencomm/rep121a.pdf>.

26. For example, the Kennedy Commission's recommendation to repeal mandatory minimum sentence statutes mirrors the reforms of the three strikes

- (1) Lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses.
- (2) Alternatives to incarceration should be provided when offenders pose minimal risk to the community and appear likely to benefit from rehabilitation efforts.<sup>27</sup>

Its specific recommendations include an exhortation that states, territories, and the federal government repeal mandatory minimum sentence statutes; adopt sentencing systems that guide judicial discretion to avoid disparities in sentencing among offenders and offenses while permitting them to consider unique characteristics of offenses and offenders;<sup>28</sup> require courts to state their reasons for particular sentences and allow appellate review;<sup>29</sup> and create an entity charged with the responsibility for monitoring the sentencing system, with an eye towards recommending alternatives to incarceration for some offenders and assessing the financial impact of proposed legislation and the impact of such legislation on racial disparity and crime rates.<sup>30</sup>

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law suggested in our conference, *infra* note 286. Another of our suggested reforms includes establishing a blue ribbon commission on sentencing. A sentencing commission could provide guidance, yet still allow circumstance-based discretion. This proves consistent with the Kennedy Commission recommendation of using sentencing systems guided with judicial discretion, but also allowed to consider circumstances related to individual offenders and offenses. Furthermore, our proposed reform would also support the assignment of “an entity or agency with sufficient authority and resources” to monitor the sentencing system in a jurisdiction. KENNEDY REPORT, *supra* note 25, at 31, available at <http://www.abanet.org/media/kencomm/rep121a.pdf>. The discussion in this report of the success of various state sentencing commissions, *infra* notes 306, 312–345 and accompanying text, demonstrates that a sentencing commission can serve that function. We also propose that the experts of a blue ribbon commission be familiar with punishment alternatives to incarceration, consistent with the Kennedy Commission recommendation that treatment alternatives to incarceration be both studied and funded.

27. KENNEDY REPORT, *supra* note 25, at 1, available at <http://www.abanet.org/media/kencomm/rep121a.pdf>.

28. *Id.* at 27.

29. *Id.* at 30.

30. *Id.* at 31.

Justice Kennedy immediately endorsed the commission's recommendations.<sup>31</sup> The ABA's adoption of the commission's recommendations should go a long way towards putting sentencing and parole policy on the agenda in the near future.

Third, the recall of Governor Gray Davis and the election of Arnold Schwarzenegger created a mechanism for change in state re-sentencing policy.<sup>32</sup> Governor Davis counted on the support of California's most influential union, the California Corrections and Peace Officers Association.<sup>33</sup> Its influence was so great that even faced with a severe budget shortfall, Governor Davis agreed to a pay increase for members of the union.<sup>34</sup> Since his election, Governor Schwarzenegger has shown a willingness to challenge the union. Further, his appointment of Roderick Hickman to head the troubled California Youth and Adult Correctional Agency has received high

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31. Ann Gearan, Associated Press, *ABA: End Mandatory Minimum Prison Terms*, (June 23, 2004), available at <http://apnews.myway.com/article/20040623/D83CQ5R00.html>.

32. Michael Finnegan, *The Recall Election: Gov. Davis is Recalled; Schwarzenegger Wins; 'I Will Not Fail You,' The Republican Victor Promises*, L.A. TIMES, Oct. 8, 2003, at A1.

33. Fox Butterfield, *California's Prison System Blasted as \$1 Billion Failure*, HOUSTON CHRON., Nov. 16, 2003, at 12; Patt Morrison, *Union Knows All About Crime, but Nothing About Punishment*, L.A. TIMES, Feb. 10, 2004, at B3 (discussing the millions of dollars the Union contributed to the Davis campaign); see also Inst. of Governmental Studies, Univ. of Cal., *California Correctional Peace Officers Association* (June 2004) [hereinafter Cal., CCPOA] (discussing the Union's power and influence), available at <http://www.igs.berkeley.edu/library/htCaliforniaPrisonUnion.htm>.

34. Gregg Jones, *Union Backs Off on Talks Over Pay Concessions*, L.A. TIMES, Mar. 1, 2003, at B8 (reporting that the legislature approved a contract between Governor Davis and California's prison guards union that will increase guards' pay by as much as 37% over the next five years); see also Dan Morain, *Overtime Pays Off at Prisons, Some Guards Make More Than \$100,000 a Year*, L.A. TIMES, Feb. 10, 2003, at A1 (noting swelling overtime costs after Davis and the legislature approved a more lenient sick leave policy for prison guards; also observing that the union gave Davis \$1.4 million during his first term); Steve Schmidt, *Governor Proposes More Cash for Prisons, Lawmakers Question \$40 Million Increase*, SAN DIEGO UNION TRIB., Jan. 28, 2003, at A1 (discussing Governor Davis' plans to take money away from nearly every department but the Department of Corrections to address the budget deficit, noting that some critics "label it a classic example of political muscle" as the prison guards union generously contributed to Davis's campaign).

marks.<sup>35</sup> The appointment of Hickman, a Democrat and veteran staffer of the agency, surprised many observers and suggests that the Governor is willing to engage in meaningful change.<sup>36</sup> Finally, he has already appointed a blue ribbon commission “to expedite fundamental reform within California’s youth and adult correctional systems.”<sup>37</sup> Headed by former Governor George Deukmejian, this commission, the Independent Review Panel, received a broad mandate.<sup>38</sup>

The Deukmejian commission’s report is good news. While many of its proposals are beyond the scope of our inquiry, some of them overlap with ours. In fact, members of the commission attended our conference and specifically cite participant Jonathan Turley’s recommendations in its report.<sup>39</sup> The Report endorses the Project for Older Prisoners Program (POPS).<sup>40</sup> It also recommends a number of other significant reforms, such as shifting resources from warehousing offenders in prisons<sup>41</sup> to more intensive parole supervision and community-based sanctions, including in-home detention and close monitoring, and increased use of drug treatment,

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35. Gary Delsohn, *Surprise Choice For Top Prisons Post; Roderick Hickman’s a Veteran Staffer in the Troubled Agency*, SACRAMENTO BEE, Nov. 16, 2003, at A3; Jennifer Warren, *The State Senate Committee Backs 2 Top Corrections Appointees; The Panel’s Action All But Assures Their Confirmation to Run the State’s Troubled System*, L.A. TIMES, June 24, 2004, at B6; *Reform Prison System*, CONTRA COSTA TIMES, Mar. 22, 2004, at F4 (calling Schwarzenegger’s appointment of Hickman “a good first step”).

36. Delsohn, *supra* note 35 (calling the appointment a “move that could signal a housecleaning of top state corrections officials” and noting that Don Novey, retired head of the prison guards union, “called the appointment ‘bold’ and ‘a surprise’”); Don Thompson, *New Prisons Chief Denies Union Influence*, SAN JOSE MERCURY NEWS, Mar. 13, 2004 (noting Hickman’s move towards change in the prison system by his promise of a “zero tolerance” policy for the code of silence that existed among prison guards).

37. Press Release, Governor Schwarzenegger Announces Governor Deukmejian Will Lead an Independent Review Panel for Corrections Reform (Mar. 5, 2004), [www.schwarzenegger.com/en/news/uptotheminute/news\\_upto\\_en\\_duke\\_reform.asp?sec=news&subsec=uptotheminute](http://www.schwarzenegger.com/en/news/uptotheminute/news_upto_en_duke_reform.asp?sec=news&subsec=uptotheminute).

38. *See id.*

39. Deukmejian Report, *supra* note 16, sec. 7, Inmate and Parolee Population Management, available at <http://www.cpr.ca.gov/reports/indrpt/corr/index.htm>.

40. *Id.*

41. *Id.*

education, and rehabilitation for some offenders.<sup>42</sup> The report shares with our conference the premise that resources are finite and that the state can save money while achieving the same level of public safety.<sup>43</sup> A reexamination of the Three Strikes law was beyond the commission's mandate.<sup>44</sup>

Fourth, efforts of a number of reform-minded groups led to the placement of The Three Strikes and Child Protection Act of 2004 on the November 2004 ballot.<sup>45</sup> Early polls projected broad public support for the initiative that would have significantly narrowed the scope of Three Strikes.<sup>46</sup> That support evaporated in the last two

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42. *Id.*

43. *Id.*

44. *Id.*

45. While the Citizens Against Violent Crime (CAVC) drafted the measure, the group considered comments and suggestions from other organizations including, People to Amend California's Three Strike Law (PATS), Californian's To Amend The Three-Strike Law (CATS), Parents For Treatment and Healing (A NEW PATH), and representatives from the Riverside, Placerville, Orange County, Sacramento and San Jose chapters of Families to Amend California's Three Strikes (FACTS). Los Angeles Community Policing, *The Three Strikes and Child Protection Act of 2004: Citizens Against Violent Crime*, at <http://www.lacp.org/2004-Articles-Main/ThreeStrikes.Act.html> (last visited Oct. 15, 2004).

46. Early polling data suggested that over 60% of likely voters would vote to amend Three Strikes to limit it to violent felons. Two organizations, FACTS and CAVC, hired a well established firm, Fairbank, Maslin, Maullin and Associates, to conduct the survey. From January 4–7, 2002, the firm contacted 650 people likely to vote in the next election; the survey had a margin of error of 3.8%. The survey asked a series of questions, resulting in some important findings: about 74% “approve of the specific provision of the [proposed] initiative that would require mandatory increased sentences *only* when convictions are for violent felonies;” 73% disapprove of the current provisions that can give a third-time non-violent felon a life sentence; about 65% favor amending the current law. See Memorandum from Fairbank, Maslin, Maullin & Associates, to Interested Parties (Jan. 14, 2002); <https://www.amend3strikes.org/voters.htm> [hereinafter CAVC, Voter Survey]; FACTS, Home Page, available at <http://www.facts1.com> (last modified Apr. 30, 2004); Fairbank, Maslin, Maullin & Associates, Home Page, available at <http://fmma.com/> (last visited July 12, 2004). Similarly, the passage of Proposition 36, mandating treatment instead of incarceration for some drug offenders, suggests that Californians have been leery of wholesale incarceration as the only response to crime. Proposition 36 is codified at CAL. PENAL CODE §§ 1210, 1210.1 & 3063.1 (West Supp. 2004); CAL. HEALTH & SAFETY CODE §§ 11999.4–11999.13 (West Supp. 2004).

weeks prior to the November election, largely because of last minute advertisements featuring the Governor, which and led to the defeat of that measure.<sup>47</sup> The broad support for the initiative got the attention of District Attorneys and the Governor, however, and there now appears to be greater receptivity to considering more modest proposals to curb some of the excesses of the Three Strikes law.<sup>48</sup>

In light of these changed conditions, we have expanded our focus beyond calling for the reform of Three Strikes. Instead, we are convinced that California should revamp its criminal sentencing policy across the board. Reforming Three Strikes in isolation promises to be difficult for a number of reasons: Three Strikes' proponents have created a legend that the law is responsible for reduced crime rates in California.<sup>49</sup> Many politicians remain fearful of being labeled as soft on crime.<sup>50</sup> In addition, its reform will

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A poll released June 10, 2004, suggested that 76% of the public supported the initiative. Mark DiCamillo & Mervin Field, *The Field Poll*, (Field Research Corp., Released No. 2121, 2004) [hereinafter *Field Poll I*], <http://www.field.com/fieldpollonline/subscribers/RLS2121.pdf>. Subsequent reports, however, indicate that such support may have been the result of confusion caused by the pollsters' questions to those polled. Dan Walters, *Apparent Flaws Mar Poll That Showed Voters Ready to Dilute 'Three Strikes'*, SACRAMENTO BEE, June 25, 2004, at A3. For the Field Poll in more detail, see *infra* note 286.

On October 13, 2004, a new Field Poll was released addressing the concerns about voter confusion. This most recent poll showed that 65% of likely voters support the proposition amending Three Strikes. See Mark DiCamillo & Mervin Field, *The Field Poll*, 2141, Oct. 13, 2004, available at <http://www.amend3strikes.org/downloads/Field%20Poll&20Oct%2013th.pdf>.

47. See Andy Furillo, *Late Infusion of Cash Sank Proposition 66*, SACRAMENTO BEE, Nov. 4, 2004, at A3.

48. *Id.*; Mark Martin, *Proposition 66: Efforts to Reform 'Three Strikes' Law Likely to Be on Ballot Again*, S.F. CHRON., Nov. 4, 2004, at B5.

49. ZIMRING ET AL., *supra* note 4, at 221.

50. See Erwin Chemerinsky, *Commentary: 3 Strikes: Cruel, Unusual and Unfair*, L.A. TIMES, Mar. 10, 2003, at B11 ("[E]lected officials don't want to appear soft on crime, even when the crime is shoplifting. No politician wants to be vulnerable to a story of a shoplifter who was released and then committed a much worse crime."). One unintended and unfortunate consequence of term limitations may be the lack of political will to reform criminal sentencing laws. Even members of the legislature from safe districts must weigh political choices in light of the next highest office that they may seek.

require either a super-majority of the legislature or an initiative.<sup>51</sup> Efforts at reforming Three Strikes have failed over the past decade.<sup>52</sup>

Beyond the practical problems of reforming Three Strikes, the law is part of a larger problem: as one commentator has stated, California has created “drive by” criminal sentencing, with the legislature adding sentencing enhancements and other measures in

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51. See CAL. PENAL CODE §§ 667j, 1170.12 (West 2002 & Supp. 2003); see also *Amend California's 3 Strikes Law, Q & A* (explaining that “[a]ny legislative change would require a 2/3 vote of the legislature and the Governor’s signature. Anyone who is familiar with politics in California understands that getting a majority of the legislature to agree on anything, let alone two-thirds of them, is all but impossible”), at <http://www.amend3strikes.com/q&a.htm> (last visited Oct. 15, 2004).

52. Failed bills include Senate Bill (S.B.) 1517, A.B. 1790, and Assembly Bill (A.B.) 112. S.B. 1517 specified that certain non-violent felonies would not result in a sentence enhancement under Three Strikes for the current conviction. *Three Strikes Law—Nature of Current Convictions: Hearing of S.B. 1517, Before S. Comm. on Pub. Safety Analysis*, 2001–2002 Reg. Sess. (Cal. 2002). A.B. 1790 required that the current conviction be for a serious or violent felony in order to qualify for Three Strikes sentence enhancement. *Summary: Hearing of A.B. 1790 Before Assembl. Comm. on Appropriations*, 2001–2002 Reg. Sess. (Cal. 2002). A.B. 112 was identical to A.B. 1790, requiring that the current convictions be for serious or violent felonies to enhance a sentence. *Summary: Hearing of A.B. 112 Before Assembl. Comm. on Pub. Safety*, 2003–2004 Reg. Sess. (Cal. 2003). Additionally, former Governors Wilson and Davis each vetoed legislation calling for further study of Three Strikes. S.B. 2048 required an examination of the costs and benefits of the “Three Strikes” law. SENATE RULES COMMITTEE, SENATE FLOOR ANALYSIS OF S.B. 2048 (Cal. Aug. 28, 1998) (“this bill would require the Legislative Analyst . . . to examine the costs and benefits of the “Three Strikes” law and report their findings to the Legislature . . . .” Governor Pete Wilson vetoed this bill. Governor’s Veto of S.B. 2048 (Sept. 13, 1998), [http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_2001-2050/sb\\_2048\\_vt\\_199809](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_2001-2050/sb_2048_vt_199809). S.B. 873 also required a study on the costs of the “Three Strikes” law. *Study of the “Three Strikes” Law: Hearing on S.B. 873 Before S. Floor on Bill Analysis*, 1999 Reg. Sess. 1–2 (Cal. Sept. 9, 1999). Governor Gray Davis vetoed this bill. Governor’s Veto Message of S.B. 873 (Cal. Oct. 10, 1999), [http://info.sen.ca.gov/pub/99-00/bill/sen/sb\\_08510900/sb\\_873\\_vt\\_19991010.html](http://info.sen.ca.gov/pub/99-00/bill/sen/sb_08510900/sb_873_vt_19991010.html). Most recently, California voters rejected Proposition 66 during the 2004 election.

reaction to the crisis of the day.<sup>53</sup> The result is a Byzantine sentencing scheme without a coherent penal philosophy.<sup>54</sup>

We hope this article contributes to a renewed dialogue among those interested in prison reform generally, those interested in a rationalization of our sentencing laws, and those interested in responsible budgetary reform.

## II. THE NATURE OF THE PROBLEM

One might ask, in light of sharp decreases in crime over the past decade, what is wrong with California's sentencing scheme and its rate of incarceration. Three Strikes is symptomatic of a generation of dramatic increases in the length of criminal sentences and in the increase in the state's prison population. The great weight of empirical evidence concludes that Three Strikes is not the cause of much, if any, of the decline in crime rates.<sup>55</sup> It also comes with a high price tag, and the costs of warehousing aging felons will rise dramatically and add little social protection.<sup>56</sup> In addition, the law lacks coherent principles to guide sentencing decisions.<sup>57</sup> Much the same can be said of California's sentencing policy generally.<sup>58</sup>

Criminal sentencing in California is without a coherent penal theory, which is in part a result of multiple layers of criminal sentencing that have come about over almost thirty years of legislative changes to sentencing laws. A brief overview of that history may be helpful:

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53. Kevin Reitz, Presentation at Sentencing Practice and Policy: Dollars and Sense, McGeorge School of Law (Apr. 17, 2004) (on file with author).

54. For a discussion of California's complex sentencing scheme, see *infra* notes 77–134 and accompanying text.

55. *Supra* note 4.

56. *California's Aging Prison Population, Hearing Before the S. Select Comm. on the Cal. Corr. System of the Cal. S. Comm. on Pub. Safety, 2003–2004 S., Reg. Sess. (Cal. 2003)* [hereinafter *Turley Hearing*] (written statement of professor Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University Law School) (on file with author). For more on Turley, see *supra* note 2 and *infra* note 253.

57. ZIMRING ET AL., *supra* note 4, at 123–24.

58. For a more detailed discussion of the incoherency of California's sentencing policy, see *infra* notes 77–134 and accompanying text. See generally FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION* (1995) (discussing incapacitation and its effectiveness at restraining crime).



Prior to 1976, California, like much of the nation, provided for indeterminate sentences for criminal offenders. For example, a judge might sentence an offender convicted of a second act of indecent exposure<sup>59</sup> to a term of one-day-to-life in prison. Indeterminate sentencing was justified by the belief that the primary purpose of punishment was rehabilitation. In effect, an offender was in need of treatment and the length of the treatment depended on how well the patient responded to the cure.<sup>60</sup>

Commentators across a broad political spectrum rejected that model. Some questioned the morality of rehabilitation. Why, for example, should a criminal offender be given education not available to law-abiding citizens?<sup>61</sup> Influenced by conscientious objectors, others questioned the morality of the state attempting to force change upon an offender.<sup>62</sup> Others questioned whether rehabilitation worked at all.<sup>63</sup> Legitimate questions were raised about the potential for abuse of such a system, with illegitimate factors like race influencing the release dates of criminal offenders.<sup>64</sup> Additional questions were raised concerning the lack of proportionality between the underlying crime and the term of imprisonment.<sup>65</sup> For example, what if a person needs a long period of incarceration to be deterred from acts of petty theft or cured of the desire to commit such offenses, while a person

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59. 1961 CAL. STAT. 2147, § 7 (codified as amended at CAL. PENAL CODE § 314 (Deering 2004)); *In re Lynch*, 503 P.2d 921 (Cal. 1972).

60. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 89–90 (1973); *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* 10 (1971) (“Instead of building pride and self-confidence, [the rehabilitative process] tries to persuade its subjects . . . that they are sick.”); *see also id.* at 40–41.

61. *See* 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); Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 *YALE L.J.* 987, 1012–14 (1940), *reprinted in* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 124–25 (6th ed. 1995).

62. *See, e.g.*, *STRUGGLE FOR JUSTICE*, *supra* note 60, at 100–23 (discussing the repressive functions of the criminal justice system).

63. *See* FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 61–66 (1981).

64. *See, e.g.*, *STRUGGLE FOR JUSTICE*, *supra* note 60, at 71–72.

65. *In re Lynch*, 503 P.2d 921, 927–39 (Cal. 1972); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 67–70 (1976).

committing homicide does not? The system simply tolerated too much unchecked discretion: judges faced with similar offenders could and did impose wildly different sentences on the offender.<sup>66</sup> Beyond the courts, correctional authorities had unbridled discretion to determine release dates.<sup>67</sup>

By the mid-1970s, a number of states abandoned indeterminate sentencing. Giving far less prominence to rehabilitation, they reestablished retribution—and proportionality of punishment—as primary goals.<sup>68</sup> Operationally, they established determinate sentences designed to reduce the perceived inequality among offenders committing the same criminal act.<sup>69</sup>

California followed that route. In abandoning indeterminate sentencing, California stated its goal in no uncertain terms: “The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.”<sup>70</sup> California law provides for presumptive sentences, reducing the trial court’s discretion.<sup>71</sup> Rules of court state that the goals in sentencing are social protection, punishment, specific and general deterrence, incapacitation, restitution for victims, and uniformity among sentences.<sup>72</sup> Central to the 1976 changes is the view that the offense, not the offender, determines the length of a prison sentence.<sup>73</sup>

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66. M. FRANKEL, *supra* note 60, at 103–04.

67. *Id.*

68. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 979 (1999); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TULANE L. REV. 1011, 1027–32 (1991).

69. Kadish, *supra* note 68, at 981.

70. CAL. PENAL CODE § 1170(a)(1) (West 2004).

71. *Id.* (“The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.”).

72. CAL. R. CT. 4.410.

73. ZIMRING ET AL., *supra* note 4, at 114.

The change from indeterminate to determinate sentencing forced the legislature to compare different kinds of criminal conduct.<sup>74</sup> For example, it had to determine whether an offender convicted of robbery should receive more severe punishment than a burglar should. That is, presumably, the 1976 reform forced the legislature to attempt to rationalize criminal sentences.<sup>75</sup>

The 1976 sentencing law provided for presumptive terms of imprisonment for various crimes, with a lower, middle, and upper range. The law requires the court to sentence the offender to the middle term, unless it finds aggravating or mitigating factors that militate in favor of the upper or lower sentence.<sup>76</sup>

The numerous “drive by” sentencing laws have eroded whatever coherence was achieved in 1976.<sup>77</sup> That is, when the media have reported particularly heinous crimes or trends in criminal behavior,<sup>78</sup>

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74. This is not to suggest that determinate sentencing is ideal. One might debate the wisdom of any single determinate sentence or of determinate sentencing generally. For example, commentators have debated the focus on the offense, rather than on all of the circumstances, including the culpability of the offender. They have questioned whether a sentencing judge should have a greater role in assessing the appropriate sentence. See, e.g., Keith C. Owens, Comment, *California's "Three Strikes" Debacle: A Volatile Mixture of Fear, Vengeance, and Demagoguery Will Unravel The Criminal Justice System and Bring California to Its Knees*, 25 SW. U. L. REV. 129, 143 (1995).

75. In fact, the legislature took as the basis for its determinate sentences the average time served under the indeterminate system. Sheldon Messinger & Phillip E. Johnson, *California's Determinate Sentencing Statute: History and Issues*, in NAT'L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, DETERMINATE SENTENCING: REFORM OR REGRESSION? 13, 13 (Proceeding of the Special Conference on Determinate Sentencing, 1978). However, the drafters had to make a conscious choice about how to allocate prison terms.

76. CAL. PENAL CODE § 1170(b) (West 2004).

77. See Little Hoover Commission, *Executive Summary: Putting Violence Behind Bars; Redefining the Role of California's Prisons* (Jan. 1994) (“The goals of the [Determinate Sentencing Act of 1977] included equity, consistency and simplicity. But the current system, due to inherent flaws in the original law, changes in public policy and piecemeal revisions, is not working. The state’s tangle of sentencing statutes is so complex even experts make sentencing errors. It is a system that is inequitable to both victims and offenders, offering little in the way of certainty and nothing to a sense of fairness.”), available at <http://www.lhc.ca.gov/lhcdir/124es.html>.

78. STEVEN R. DONZIGER, *THE REAL WAR ON CRIME* 69–73 (1996) (examining the role of the media in shaping criminal justice policy).

the legislature has often enacted enhancement provisions.<sup>79</sup> Multiple enhancement statutes erode the principle articulated in Penal Code section 1170.

From 1984 to 1991, over 1,000 crime bills passed. Virtually none of them reduced sentences and many of them imposed sentence enhancements.<sup>80</sup> Often, the crime bill was a reaction to the “crime of the month,” a crime that was hyped in the media. For example, in 1987 the legislature enhanced an offender’s sentence for a murder that occurs when the shooter is inside a car.<sup>81</sup> Other legislation has enhanced sentences for a variety of crimes committed against certain classes of victims<sup>82</sup> or committed under specific circumstances.<sup>83</sup> The Little Hoover Commission summarized the state of California’s criminal law relating to sentence enhancements:

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79. David R. Ross provided an example in *The Clutter in Criminal Law*, CAL. J., Oct. 1, 1995, at 19:

In 1985, lawmakers turned their attention to sentence enhancements after a pregnant woman from Ventura County was struck in the abdomen, causing her to abort. The Legislature created a five-year enhancement for inflicting injury upon a pregnant woman which results in termination of the pregnancy. [CAL. PENAL CODE § 12022.9 (West 2004).] At the time, a three-year enhancement for intentionally inflicting ‘great bodily injury’ during the Commission of any felony already existed. [*Id.* § 12022.7(a).]

80. RICHARD SIMPSON, CAL. COUNTIES FOUND., *JAILHOUSE BLUES: HARD TIME FOR COUNTY TAXPAYERS; A STUDY OF RISING COSTS OF INCARCERATION IN CALIFORNIA* (1991).

81. CAL. PENAL CODE § 12022.55 (West 2004).

82. *Id.* § 422.75(a)–(c) (victimized because of race, color, religion, nationality, ancestry, gender, disability, or sexual orientation); *id.* § 667.9(a) (disabled, elderly, or child victim); *id.* § 12022.7(c)–(d) (victim seventy years of age or older, or child under five years of age).

83. *Id.* § 186.22(b)(1)(A)–(C) (while violating provisions against participating in a criminal street gang); *id.* § 289.5(d) (commission of designated felony sex offense committed after fleeing to California to avoid prosecution for sex offense in another state); *id.* § 593a(b) (causing bodily harm in commission of tree spiking); *id.* § 667(a)–(b) (kidnapping victim for purpose of committing sex offense); *id.* § 12022(a)–(c) (being armed with firearm, assault weapon or machine gun or personally using a deadly weapon); *id.* § 12022.85 (committing sex offense knowingly carrying AIDS virus); CAL. HEALTH & SAFETY CODE § 11353.1(a)(1)–(2) (West 2004) (using minor for drug transactions on grounds of church, playground or near school grounds). Many other enhancements are based on prior convictions of the same offense.

A sentence may be enhanced for weapons, injuries inflicted during the course of crime, extent of monetary loss, vulnerability of victims, narcotics, gangs, prior convictions, multiple victims and sex crimes.

For example, a one-year enhancement is added to the sentence of a second-degree robber if he uses a knife. A two-year enhancement is added to the sentence of a defendant who intentionally causes losses of more than \$150,000. The varying enhancements connected with prior convictions are particularly lengthy and complex.<sup>84</sup>

Numerous judges and commentators have questioned the wisdom of California's sentencing scheme. A state senator has described California's enhancement provisions as "the most complex and chaotic provisions in the Penal Code."<sup>85</sup>

One appellate court has criticized the state of the law even more forcibly:

As a sentencing judge wends [sic] his way through the labyrinthine procedures of section 1170 of the Penal Code [the Determinate Sentencing Act], he must wonder, as he utters some of its more esoteric incantations, if, perchance, the Legislature had not exhumed some long departed Byzantine scholar to create its seemingly endless and convoluted complexities. Indeed, in some ways it resembles the best offerings of those who author bureaucratic

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84. Little Hoover Commission, *Putting Violence Behind Bars: Redefining the Role of California's Prisons*, (Jan. 1994), available at <http://www.lhc.ca.gov/lhcdir/124rp.html>. If the state proves an enhancement, the court must impose the middle term unless additional circumstances mitigate or aggravate the offense. The imposition of the enhancement is mandatory unless the court strikes the additional term for enhancement. CAL. R. CT. 4.428(b).

85. See STATE OF CAL., CAL. LAW REVISION COMM'N, CRIMINAL SENTENCING: WEAPON AND INJURY ENHANCEMENTS (2001) (tentative recommendation) (quoting Senator Schiff's statement from the *Hearing on S.B. 1794 Before the S. Comm. on Public Safety 1997-1998 S., Reg. Sess.* (Cal. Apr. 28, 1998)), available at <http://www.clrc.ca.gov/pub/Misc-Report/TR-CrimSentencing.pdf>.

memoranda, income tax forms, insurance policies or instructions for the assembly of packaged toys.<sup>86</sup>

The complexity of the law causes confusion and wastes judicial resources. Judges resort to worksheets as complicated as IRS forms.<sup>87</sup> One company has developed software to guide judges and criminal attorneys through the law.<sup>88</sup> A Judicial Council study revealed that the most frequent basis of reversal on appeal is a sentencing error in the trial court.<sup>89</sup> In some instances, prosecutors fail to charge enhancements properly.<sup>90</sup> The failure to seek an

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86. *Cnty. Release Bd. v. Super. Ct.*, 154 Cal. Rptr. 383, 384 n.1 (Ct. App. 1979); *See also* Ross, *supra* note 79, at 18 (commenting that this statement was observed “less than two years after the enactment of the Determinate Sentencing Law . . . [and] [s]ince then, that law has continued to become more complex, and at an alarming rate”).

87. CAL. LAW REVISION COMM’N, *supra* note 85, at 2 (referring to then-Senator Bill Lockyer’s statements in a September 10, 1990, letter to then-Governor George Deukmejian, available at <http://www.clrc.ca.gov/pub/Misc-Report/TR-CrimSentencing.pdf>).

88. In response to difficulties experienced by practitioners, a company called The Placer Group developed computer software called *CrimeTime* to do the math for them. *Who is Placer Group, What is CrimeTime?*, available at <http://www.placergroup.com/pgcompanyInfo.htm> (last visited Oct. 16, 2004). As the company’s website once put it, “time and accuracy are at a premium in an overcrowded justice system. Conscientious practitioners require increasing amounts of time to make sure they ‘got it right,’ even as California’s sentencing rules grow more complex and the pressures of the court leave less time available.” Users input the relevant attributes of the defendant, and the program provides sentencing options. It calculates incarceration, fines, and collateral consequences and prints reports that explain a defendant’s exposure. The program also allows users to play “What if?” to evaluate the consequences of the options available. The program includes: all California crimes and enhancements; Three Strikes calculations; One Strike (sex offense) calculations; probation eligibility; pre-sentence custody credit calculation; jail and prison credits; fines, fees, and mandatory/optional orders; California Rehabilitation Center & California Youth Authority eligibility; registration requirements; lawful sentence checks; immigration consequences; mitigating and aggravating factors, and proposed dispositions; and offers reports in English and Spanish. *Id.* When sentencing law changes, subscribers receive a new version of the software’s updated database.

89. JUDICIAL COUNCIL OF CAL. ANN. REP. at 7 (1983) (finding that while approximately 80% of criminal appeals are upheld, 23% of the cases that are overturned involve sentencing errors).

90. *See, e.g.,* Bhavna Mistry, *Killer Gets 10 Years in Prison; Mistake Prevents Harsher Sentence; Drunken Driver Receives 10 Years*, DAILY NEWS L.A., Jan. 11, 2000 (describing case where prosecutor failed to file an

enhancement is not reviewable on appeal and may lead to disproportionate sentencing between similarly situated defendants.<sup>91</sup>

Apart from the complexity and inefficiency of the current law, enhancements may produce unfair results. For example, the law imposes a longer sentence on a person who commits murder from within a car.<sup>92</sup> One can question whether the law ought to distinguish between a person committing murder from within a car and one simply standing outside of the car. That is hardly the only example of unfairness. Additionally, the law imposes a variety of sentence enhancements for the use of a gun in the commission of a crime.<sup>93</sup> In most instances, those provisions apply only to the person using the weapon,<sup>94</sup> but the law imposes the enhancement on any participant in a crime if that participant is a gang member.<sup>95</sup> As a result, co-felons are subject to enhancements if they personally use a weapon in a crime, or if the state proves gang affiliation.<sup>96</sup>

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enhancement of fifteen-years-to-life in prison for the crime of gross vehicular manslaughter, for defendant with one or more specified priors); see CAL. PENAL CODE § 191.5(d) (West 2004). Because of this oversight, defendant with eight drunk driving convictions was sentenced to only ten years in prison for the death he caused. See *id.* § 191.5(c) (“Except as provided in subdivision (d), gross vehicular manslaughter while intoxicated is punishable by imprisonment in the state prison for 4, 6, or 10 years.”).

91. CAL. LAW REVISION COMM’N, *supra* note 85, at 2 n.11 (noting that in *People v. Latimer*, 858 P.2d 611 (Cal. 1993), because the prosecutor failed to plead and prove a kidnapping-for-the-purpose-of-rape enhancement that could not later be imposed on appeal, and also noting *People v. Hernandez*, 757 P.2d 1013 (Cal. 1988), which decided that imposing an enhancement that had not been plead or proved at trial violated due process), available at <http://www.clrc.ca.gov/pub/Misc-Report/TR-CrimSentencing.pdf>.

92. CAL. PENAL CODE § 12022.55 (West 2004).

93. *Id.* § 12022.53

94. *Id.* § 12022.53(a)–(d).

95. *Id.* § 12022.53(e)(2).

96. Gang enhancements are frequently used by prosecutors and easily proven by the expert testimony of peace officers. Expert detectives list the defendant’s criminal history, whether the defendant has “gang” tattoos, and if the defendant has ever admitted to gang involvement. Dave Myhra, *Three to Enter Pleas in Drive-by Shooting*, TRI-VALLEY HERALD, Nov. 22, 2002, at Local News. Many gang members are “documented” or “validated” based on such criteria. Once documented, conviction of a felony exposes a defendant to the gang enhancement. Irene McCormack Jackson, *S.D. Police to Target Violence by Gangs; Department Adds Personnel to Detail as Crime Rises Sharply*, SAN DIEGO UNION TRIB., Oct. 3, 2003, at B1. Many question the

Frustration with the current system has led some judges to call for wholesale sentencing reform. They have cited the “mind-numbing” complexity of the law, a result of “continued legislative tinkering.”<sup>97</sup> One appellate court summed up the concerns about California’s sentencing scheme as follows: “[T]he Legislature can and should undertake with the help of bench and bar a solid comprehensive overhaul of the system to help all potential defendants and the public generally.”<sup>98</sup>

Three Strikes goes well beyond the Byzantine sentencing scheme already in place before its passage. Three aspects of the law demonstrate its incoherence. The first is the flat inconsistency between the Three Strikes provision and the two strikes provision.<sup>99</sup> The second is the pervasivity of the results of sentencing different third strike offenders: the law requires a mandatory minimum of twenty-five years without regard to the culpability of the offender.<sup>100</sup> In that sense, the law is a status offense. The effect is that a person convicted of a third felony of possession of marijuana receives the same twenty-five year true mandatory minimum sentence as does a

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accuracy of these lists and the ever-changing standards employed by law enforcement. Megan Garvey and Richard Winton, *The Nation; Tracking of Gang-Related Crime Falls Short Without Accurate Data, Experts Say Los Angeles and Other Cities Can't Effectively Stem the Violence*, L.A. TIMES, Jan. 24, 2003, at A1. Some fear that existence of such enhancements “tempt law enforcement officials to label any young man from a tough neighborhood a gang member.” *Id.* They also voice concern when crimes are treated as “gang-related” when they may instead arise from drug use or domestic disputes. *Id.*

97. *People v. Reyes*, 260 Cal. Rptr. 846, 850 (Ct. App. 1989).

98. *See People v. Winslow*, 46 Cal. Rptr. 2d 901, 903–04 (Ct. App. 1995); *see also id.* at 903 n.1. (“We agree with the previously articulated criticism of the Determinate Sentencing Act of 1976. It is capable of trapping everyone, even those who profess expertise.” (citation omitted)); *People v. Sutton*, 169 Cal. Rptr. 656, 656 (Ct. App. 1980) (calling sentencing law “a legislative monstrosity, which is bewildering in its complexity”); Ross, *supra* note 79, at 20 (“Crimes, enhancements, mandatory sentences and other concepts should be simplified, easy to find and understand, and easy to apply. A commission could accomplish this without making substantive changes in current law.”); Little Hoover Commission, *supra* note 84 (recommending reform of sentencing law, which has grown too complex and inequitable through constant, uncoordinated alterations), available at <http://www.lhc.ca.gov/lhcdir/124rp.html>.

99. CAL. PENAL CODE §§ 667(e)(1)–(2), 1170.12(c)(1)–(2) (West 2004).

100. *See id.* §§ 667(e)(2)(A), 1170.12(c)(2)(A).



violent felon.<sup>101</sup> The third is the incoherence between the general penal philosophy reflected in Penal Code section 1170 and the third strike provisions of the law.<sup>102</sup>

The first problem arises when comparing the two strikes and three strikes provisions of the law. Three Strikes was enacted with little attention to the two strikes provisions,<sup>103</sup> but the two strikes provisions have had a more sweeping effect on lengthening prison terms than have the three strikes provisions.<sup>104</sup> As summarized in *Punishment and Democracy*:

[D]efendants with one residential burglary or violent felony conviction must receive prison terms double those mandated for the triggering offense and must also serve a significantly larger fraction of their total sentence prior to release after good time. The doubling of the nominal sentence and the increase from 50% to 80% in required time served effectively triple the penalty for the triggering offense.<sup>105</sup>

Apart from the wisdom of the two strikes provisions, they are inconsistent with the penal philosophy of the Three Strikes provisions of the law. Consistent with section 1170, the two strikes provisions bear some relationship to punishing an offender for the underlying conduct.<sup>106</sup> While a first time burglar may receive a shorter term than a burglar convicted of a second burglary, the enhancement under the two strikes provisions still ties the length of the sentence to the actor's offense.<sup>107</sup> One can make a plausible

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101. Compare *People v. Superior Court (Romero)*, 917 P.2d 628 (Cal. 1996) (third strike sentence of possession of crack), with *People v. Cartwright*, 46 Cal. Rptr. 2d 351, 357 (Ct. App. 1995) (upholding three strikes sentence of 428 years to life for rape).

102. See *infra* notes 118–123 and accompanying text.

103. ZIMRING ET AL., *supra* note 4, at 169–70.

104. *Id.* at 137–38.

105. *Id.* at 17.

106. See CAL. PENAL CODE § 667(e).

107. See *id.* (enhancing the punishment of the offender for his second strike); see also *id.* § 1170.12(c)(1) (voter initiative). Under subsection (e)(1), for an offender with a prior “serious” or “violent” felony conviction who has a current felony conviction, one that need not be serious or violent, the term of imprisonment “shall be twice the term otherwise provided as punishment for

argument that the second strike penalties are proportional to the underlying conduct<sup>108</sup> or at least bear a direct relationship to the nature of the offense. This is not so with third strike penalties.

Third strike sentences are, in effect, penalties for one's status as a multiple offender. An offender is not punished for the current conduct, but for having two qualifying prior criminal convictions.<sup>109</sup> The fact that the statute uses two definitions of what constitutes a strike exacerbates the problem. First and second strikes must be serious or violent felonies,<sup>110</sup> but the final strike may be any felony.<sup>111</sup> As a result, an offender such as Andrade<sup>112</sup> and the defendants whose cases have received national attention<sup>113</sup> receive long minimum terms for minor felony offenses.

There is nothing inherently wrong or improper in having a two strikes provision premised on a fundamentally different theory of sentencing than a three strikes provision. But the stark discontinuity between these two provisions does suggest a substantial measure of doctrinal incoherence. Comparing different third strike sentences demonstrates the second way in which the law is incoherent. Third

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the current felony conviction." *Id.* § 667(e)(1); *see also id.* § 1170.12(c)(1) (voter initiative).

108. ZIMRING ET AL., *supra* note 4, at 9.

109. *People v. Cooper*, 51 Cal. Rptr. 2d 106, 110–11 (Ct. App. 1996) ("Under the three strikes law, defendants are punished not just for their current offense but for their recidivism. Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses."); *Jones*, *supra* note 6, at 23 ("When three-strikers are finally put away, the punishment is consideration for a career of crime, not just the final offense.").

110. CAL. PENAL CODE §§ 667(d), 1170.12(b).

111. *See id.* §§ 667(e)(2)(A), 1170.12(c)(2)(A).

112. *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding two consecutive twenty-five-year-to-life sentences for stealing videotapes valued under \$200).

113. *E.g.*, *Crumby Crime: Life Sentence for Cookie Thief*, 82 A.B.A. J. 12 (1996) (discussing a 25-years-to-life sentence for entering a closed restaurant and stealing four cookies.); *60 Minutes: The Bicycle Thief* (CBS television broadcast, May 26, 2002) (transcript available from Burrelle's Info. Servs.) [hereinafter *60 Minutes*] (discussing a 25-years-to-life for stealing a \$300 bicycle.); *Rene Lynch & Anna Cekola, "3 Strikes" Law Causes Juror Unease in O.C.*, L.A. TIMES, Feb. 20, 1995, at A1 (discussing a life sentence for taking a \$15 cut in a cocaine deal); *Eric Slater, Pizza Thief Receives Sentence of 25 Years to Life in Prison*, L.A. TIMES, Mar. 3, 1995, at B9 (discussing a 25-years-to-life sentence for stealing a slice of pizza).

strike sentences of twenty-five-years-to-life have an inverse relationship to the offender's underlying conduct. For example, but for Three Strikes, a person convicted of rape would receive a presumptive middle term of six years in prison; if rape were his third strike, his minimum term of imprisonment would be twenty-five years, roughly four times greater than his non-Three Strikes sentence.<sup>114</sup> By comparison, a person whose final felony was burglary would have his minimum sentence increased twenty-five times his presumptive sentence under the burglary statute.<sup>115</sup> Thus, the statute is internally incoherent, with second strike penalties bearing some relationship to proportionality while third strike sentences may be inversely proportional to the underlying conduct.

In *Lockyer v. Andrade*, the defendant, who had a prior conviction, was charged with two felony counts of petty theft for stealing videotapes valued under \$200.<sup>116</sup> The Supreme Court upheld two consecutive twenty-five-year-to-life sentences, finding that the sentence was not grossly disproportionate.<sup>117</sup>

Faced with an offender like Andrade, the trial court could have sentenced him to: (1) one count of petty theft, with a maximum term of six months,<sup>118</sup> (2) two counts of petty theft, with a maximum term of one year,<sup>119</sup> (3) one count of petty theft with a prior, with a

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114. ZIMRING ET AL., *supra* note 4, at 120.

115. *Id.* The lack of proportionality is even more evident if an offender's third strike is possession of marijuana or petty theft with a prior. Nor are such cases rare. 57% of all third strike felons have received their third strike sentence for a non-violent offense. Cal. Dep't of Corrections, *Second and Third Strikers in the Institution Population*, at tbl. 1: Second and Third Strikers in the Institution Population by Offense Category, Offense Group and Admission or Return Status (Mar. 31, 2004), available at <http://www.corr.ca.gov/OffenderInfoServices/Reports/Quarterly/Strike1/STRIKE1d0403.pdf>. Other aspects of the law contribute to unfair and disproportionate sentences under the third strike provisions: for example, minimum sentences must be consecutive, not concurrent, CAL. PENAL CODE §§ 667(a)(1), 1170.12(a)(8) (West 2004); the law provides for no washout period, leaving an aging offender subject to an indeterminate life sentence for any felony committed long past his earlier criminal career, *see id.* §§ 667, 1170.12; and, as in *Andrade*, a prosecutor can choose to charge what would have been a misdemeanor as a felony and then use that as the offender's third strike.

116. *Andrade*, 538 U.S. at 66.

117. *Id.* at 76-77.

118. CAL. PENAL CODE § 490 (West 2004).

119. *Id.* § 666.

maximum term of three years,<sup>120</sup> (4) two counts of petty theft with a prior, with a maximum of three years and eight months,<sup>121</sup> (5) one count of petty theft with a prior under Three Strikes, with a minimum term of twenty-five years,<sup>122</sup> or (5) two counts of petty theft with a prior under Three Strikes, with a minimum term of fifty years.<sup>123</sup> Notwithstanding the Supreme Court's holding, the sentencing options available to the trial court in *Andrade* still demonstrate the previous point about disproportional punishment. Furthermore, those options demonstrate the inconsistency between section 1170 and Three Strikes.

In the previous example, the offender's underlying conduct remains the same, and yet the punishment options range from maximum terms of six months to fifty years. That is inconsistent with section 1170's command that the goal of punishment "is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances."<sup>124</sup>

Apart from the lack of a coherent penal philosophy, the law's application is problematic. The apparent intent of Three Strikes' drafters was to make the law mandatory.<sup>125</sup> Despite the state supreme court's holding to the contrary, the law did not allow judges to dismiss prior strikes to avoid enhanced sentences without a motion from prosecutors.<sup>126</sup> While the law appeared mandatory for prosecutors as well, it contained no sanctions for the failure to charge a Three Strikes case under the law.<sup>127</sup> As a result, even during the first two years after its passage, only about 10 percent of those eligible for penalties under the third strike provision were admitted to

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120. *Id.*

121. *Id.* §§ 666, 1170.1.

122. *Id.* §§ 667(c)(6), 1170.12(a)(6).

123. *Id.* §§ 667(c)(6), 1170.12 (a)(6). Alternatively, the prosecutor may choose how to file the charges.

124. *Id.* § 1170.

125. ZIMRING ET AL., *supra* note 4, at 9.

126. Michael Vitiello, *Three Strikes and the Romero Case: The Supreme Court Restores Democracy*, 30 LOY. L.A. L. REV. 1601, 1643, 1648-49 (1997).

127. ZIMRING ET AL., *supra* note 4, at 25-26.

the Adult Authority.<sup>128</sup> That figure has declined to only 5 percent in more recent years.<sup>129</sup> By comparison, the two strikes provision has been used more frequently (for about 60 percent of those eligible) and remains a powerful plea bargaining tool.<sup>130</sup>

The infrequent use of the third strike provisions may solve some problems because its non-use may prevent further expansion of the prison population. This relates to another problem, however: whether the law as applied has the predictability of the lottery. Within some jurisdictions, the district attorney may apply the law in a consistent manner, for example, only to third strike felons whose third felony is a violent one.<sup>131</sup> Elsewhere, the law is applied far more frequently.<sup>132</sup>

While some variation in punishment from county to county is inevitable, the current scheme produces gross variations that raise basic fairness concerns. One can see the dramatic inequities that arise under the law by reference to the Andrade example above.<sup>133</sup> Across the state, prosecutors are making the kinds of charging decisions described there: in some counties, someone charged with two petty thefts is charged with one or two counts of misdemeanor theft,<sup>134</sup> while *Andrade* demonstrates, elsewhere a prosecutor is willing to throw the book at the defendant. That kind of unbridled discretion should not be tolerated in a system that values proportionality, fairness and the rule of law.

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128. Franklin E. Zimring, Presentation at Sentencing Practice and Policy: Dollars and Sense, McGeorge School of Law (Apr. 16, 2004) (on file with author).

129. *Id.*

130. *Id.*

131. In Los Angeles County, for example, if none of the charged offenses are serious or violent felonies, then the case is presumed to be a second strike case rather than a third strike case. For the Three Strikes policy of the Los Angeles District Attorney's Office, see L.A. County District Attorney's Office, *Three Strikes Policy: Special Directive* (Dec. 19, 2000) [hereinafter *LA Three Strikes Policy*], <http://da.co.la.ca.us/3strikes.htm>.

132. Males & Macallair, *supra* note 4, at 67–68 (finding that Sacramento and Los Angeles counties applied the law approximately seven times more frequently than did Alameda and San Francisco counties).

133. See discussion *supra* text accompanying notes 118–124.

134. See *LA Three Strikes Policy*, *supra* note 131, <http://da.co.la.ca.us/3strikes.htm>; Males & Macallair, *supra* note 4, at 67–68.

## III. THREE STRIKES IN THE COURTS

Americans often look to the courts to protect individual rights,<sup>135</sup> especially when the legislative process fails.<sup>136</sup> California adopted Three Strikes, “the toughest law in America,”<sup>137</sup> when anti-crime sentiment was inflamed by the kidnapping and murder of Polly Klaas,<sup>138</sup> by the misperception that the crimes rate was on the rise, and by a misleading campaign in support of the Three Strikes initiative.<sup>139</sup> Three Strikes gained national attention for some of the extreme applications of the law, involving trivial third strikes that led to indeterminate life sentences.<sup>140</sup> Despite the public’s ambivalence about the law,<sup>141</sup> the courts have not provided much relief from its harshest effects.

Billing the law as one that would save lives and taxpayer dollars, Three Strikes’ backers promised it would keep “career criminals, who rape women, molest innocent children and commit murder, behind bars where they belong.”<sup>142</sup> Given severe penalties already

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135. Parties from across a broad political spectrum have advanced their causes in the courts. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (father of elementary school student challenged the constitutionality of a school district’s policy requiring teacher-led recitation of the Pledge of Allegiance); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (owner of beachfront property brought action alleging that application of South Carolina Beachfront Management Act to his property constituted a taking without just compensation); *Wash. County v. Gunther*, 452 U.S. 161 (1981) (female employee protesting employment and wage discrimination); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (State Farm petitioning the Supreme Court for review of punitive and compensatory damages awards in action brought against them by insureds).

136. As the Supreme Court has stated at times, the Court must intervene when “isolated excessive penalties may occasionally be enacted, e.g., through ‘honest zeal’ . . . generated in response to transitory public emotion.” *In re Lynch*, 503 P.2d 921, 931–32 (Cal. 1972) (quoting *Weems v. U.S.*, 217 U.S. 349 (1910)).

137. *60 Minutes*, *supra* note 113.

138. ZIMRING ET AL., *supra* note 4, at 5.

139. Vitiello, *supra* note 126, at 1637–43.

140. *60 Minutes*, *supra* note 113.

141. *See supra* note 46.

142. Mike Reynolds et al., *Arguments in Favor of Proposition 184*, in CAL. SEC’Y OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION, NOV. 8, 1994, at 36 (1994). The voter initiative, Proposition 184, was subsequently codified at CAL. PENAL CODE § 1170.12 (West 2004).

available for those crimes, Three Strikes does not add much in cases involving such serious criminal conduct.<sup>143</sup> Even if it were to succeed in protecting Californians from serious, violent offenders, however, the law does much more. Among those serving indeterminate life sentences under the law are 357 prisoners whose third strike was theft of property valued at less than \$400, and another 678 prisoners whose third strike resulted from the possession of a small quantity of drugs for personal use.<sup>144</sup> Overall, about one-half of all Three Strikes sentences are imposed on felons whose third strike was, within the meaning of Three Strikes, non-serious and non-violent.<sup>145</sup>

The following examples are cases handled by one of the drafters of this report and illustrate why many Californians are ambivalent about the law. A homeless man, with no prior violent offenses, received a twenty-five-years-to-life sentence for stealing an umbrella and two bottles of liquor on a cold, rainy night from a supermarket.<sup>146</sup> Another received a fifty-years-to-life sentence for two episodes of shoplifting videotapes valued at \$153.<sup>147</sup> He also had no history of violence in his criminal past.<sup>148</sup> Yet another man received a twenty-five-years-to-life sentence when he was convicted

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143. CAL. PENAL CODE § 264 (West 2004) (upper term of eight years for rape); *id.* § 667.5 (providing a three-year enhancement for every prior prison term served for violation of section 264, for defendants with current section 264 convictions); *id.* § 288 (upper term of eight years for lewd acts on a child); *id.* § 667.51 (providing a five-year enhancement for defendants convicted of violating section 288, with the same as a prior conviction, and fifteen-years-to-life for defendants with two prior convictions).

144. Cal. Dep't of Corrections, *supra* note 115, available at <http://www.corr.ca.gov/offenderInfoservices/Reports/Quarterly/Strike1/STRIKE1d0403.pdf>; see also CAL. PENAL CODE § 487 (West 2004) (defining grand theft as theft over \$400).

145. See Cal. Dep't of Corrections, *supra* note 115, available at <http://www.corr.ca.gov/offenderInfoservices/Reports/Quarterly/Strike1/STRIKE1d0403.pdf> (providing the breakdown of the triggering offenses for all 7372 third strikers: 3142 involving crimes against the person, and 3586 involving crimes against property or drug offenses); see also CAL. PENAL CODE § 1192.7 (West 2004) (providing the list of offenses that count as "serious" offenses for the purposes of the three strikes law); *id.* § 667.5 (providing the list of offenses that count as "violent" offenses for the purposes of the three strikes law).

146. *Durden v. California*, 531 U.S. 1184 (2001).

147. *Lockyer v. Andrade*, 538 U.S. 63 (2003).

148. *Id.* at 78.

of possession of an amount of cocaine so small that it would fit underneath one's pinky nail.<sup>149</sup> Yet another defendant with no violent prior crimes received an indeterminate life sentence for stealing a \$128 TV.<sup>150</sup>

Given extreme sentences like these one might have expected the courts to give the law a begrudging reading. That has not been the case. A few examples demonstrate the harshness of many of the California courts' decisions.

Three Strikes proponents argued in favor of truth in sentencing.<sup>151</sup> They were critical of a system that released prisoners long before they served the announced term of imprisonment. Instead of allowing release after as little as one-half of the sentence imposed by the trial court, the law's drafters included a provision that limited the amount of good time credit to 20% of a prisoner's sentence.<sup>152</sup> Many believed that provision would allow a third strike prisoner to secure release after serving twenty years if the mandatory minimum was twenty-five years.<sup>153</sup> This was not true according to the California Supreme Court, however.

In *In re Cervera*,<sup>154</sup> the court gave a technical reading of the Three Strikes law to limit the law's provision allowing good time credits only to determinate sentences.<sup>155</sup> As a result of *Cervera*,

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149. *Banyard v. Duncan*, No. CV99-11018-JSL, 2004 WL 2338149, at \*1 (C.D. Cal. Oct. 4, 2004).

150. *Rico v. Terhune*, 63 Fed. Appx. 394 (9th Cir. 2003).

151. See Pete Wilson, *California Strikes Back*, SAN JOSE MERCURY NEWS, Mar. 9, 1994, at B7 (praising the passage of Three Strikes as a step that will "restore Truth in Sentencing"); Greg Lucas, *Political Ad Watch*, S.F. CHRON., Oct. 7, 1994, at A2 (discussing an advertisement featuring Pete Wilson with the text "truth in sentencing" shown on the screen against a prison backdrop, praising Wilson's role in passing the three strikes statute).

152. CAL. PENAL CODE §§ 667(c)(5), 1170.12(a)(5) (West 2002).

153. See ZIMRING ET AL., *supra* note 4, at 135 (estimating the peak impact based on twenty years of experience with Three Strikes).

154. 16 P.3d 176 (Cal. 2001).

155. *Id.* at 182. The court held that the three strikes law does not authorize use of prison conduct credits, pursuant to California Penal Code art. 2.5, by a third-striker against his mandatory indeterminate term of life imprisonment. *Id.* at 178. In examining the language of the three strikes statute, the court found that it does not expressly prohibit application of Article 2.5 prison conduct credits against a defendant's mandatory indeterminate term of life imprisonment. *Id.* at 179. However, the language does not expressly authorize its application either. *Id.* The court determined that the reference in the three



prisoners must serve at least the mandatory minimum sentence of twenty-five years without any possibility of early release.<sup>156</sup>

The court has shown a similar harsh application of the law in other cases as well. For example, it has held that a person charged with multiple counts must serve the minimum sentences consecutively if the felony convictions do not arise from the same facts and are committed at different times.<sup>157</sup> That explains why in a case like *Lockyer v. Andrade*, the defendant, convicted of two counts of petty theft, faces a minimum term of fifty years in prison.<sup>158</sup>

Similarly, the court has held that even when an offender is charged with multiple counts arising out of separate transactions in a single criminal proceeding, the law treats each count as a separate strike.<sup>159</sup> Hence, if the police arrest an offender for a string of qualifying felonies and the state brings a single criminal proceeding, the offender now qualifies for an indeterminate life sentence upon the offender's release from prison. As with cases like *Andrade*, the third strike may be a minor felony.<sup>160</sup>

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strikes statute to Article 2.5 allows the application of prison conduct credits to determinate terms only. *Id.* at 180. Because the statute did not authorize unlimited application of prison conduct credits, they could not be applied against the mandatory indeterminate life sentence. *Id.* at 179. The court further noted that the purpose of the three strikes law, to impose longer terms of imprisonment on defendants with two strikes and three strikes, also supports prohibiting application of the prison conduct credits against the mandatory indeterminate life sentence. *Id.* at 180.

156. *Id.* at 182.

157. *People v. Hendrix*, 941 P.2d 64, 67 (Cal. 1997).

158. *See* 538 U.S. 63 (2003).

159. *People v. Benson*, 954 P.2d 557 (Cal. 1998).

160. Allowing multiple counts in the same proceeding to make a person eligible for a third strike twenty-five-year-to-life sentence upon his next conviction, perhaps for a minor felony like petty theft with a prior, seems inconsistent with the purpose of the law. Its proponents argued that the law was targeted at high-rate offenders; incarcerating them protected the public because of the view that a small number of high-rate offenders commit a disproportionate amount of crime. *See Jones, supra* note 6, at 24. A person convicted of two crimes, occurring over a short period of time, may be deterred from committing serious crimes in the future. Under the court's interpretation, such a person remains a target of the law, no matter how minor his third felony. *See supra* notes 151-159 and accompanying text.

One notable exception to this trend of harsh enforcement appeared in *People v. Superior Court (Romero)*.<sup>161</sup> There, the court held that a trial court had the discretion to strike a prior qualifying felony on its own, without awaiting a motion by the prosecution.<sup>162</sup>

While some of the law's supporters were initially critical of the court's decision,<sup>163</sup> others contended that *Romero* saves the law from charges of unconstitutionality.<sup>164</sup> For example, some Three Strikes proponents argued that trial courts would use their discretion to strike prior felonies in cases where an indeterminate life sentence otherwise appeared to be excessive.<sup>165</sup>

*Romero's* theoretical advantages have not been fulfilled in practice,<sup>166</sup> which is in part a result of the state supreme court's decision in *People v. Williams*.<sup>167</sup>

161. 917 P.2d 628 (Cal. 1996).

162. The California Supreme Court held that a court has the discretion to dismiss a prior charge that would operate as a strike to enhance sentencing under the three strikes statute. *Id.* at 630. This discretion is derived from California Penal Code Section 1385. Section 1385 allows a court to dismiss charges, either in entirety or in part, "in furtherance of justice." In the case of three strikes application, a court can dismiss a prior charge pursuant to section 1385 because there is nothing in the three strikes statute that limits section 1385 discretion. *Id.* The Court further determined that a court can dismiss a prior charge on its own motion. *Id.* at 630, 647. The court found that to require a prosecutor's approval to dismiss a charge would be a violation of the separation of powers doctrine. *Id.* at 634. The separation of powers issue arises because the process which leads to either sentencing or acquittal after the decision to prosecute has been made is only judicial in nature, and it is therefore the province of the courts. *Id.* at 635.

163. See Stephanie Simon, *Angry 'Three Strikes' Supporters Vow To Fight Back*, L.A. TIMES, June 21, 1996, at A20. Almost immediately after the *Romero* ruling, supporters of the three strikes law proposed pressuring the legislature "to find a way to reinstate the original intent of 'three strikes,' perhaps rewording it to eliminate judicial [discretion]." *Id.*

164. Janiskee & Erler, *supra* note 3, at 60-65.

165. *Id.*; see Rebecca Gross, Comment, *The "Spirit" of the Three Strikes Law: From the Romero Myth to the Hopeful Implications of Andrade*, 32 GOLDEN GATE U. L. REV. 169, 180-81 (2002).

166. Legislative Analyst's Office, *The "Three Strikes and You're Out" Law: An Update* (Oct. 14, 1997) [hereinafter LAO, *Update*] (noting that "[t]he number of second-strikers admitted to prison . . . has changed little since the *People v. Romero* court decision"), available at [http://www.lao.ca.gov/handouts/pre\\_1999/ho101497\\_3\\_strikes\\_update.html](http://www.lao.ca.gov/handouts/pre_1999/ho101497_3_strikes_update.html).

167. 948 P.2d 429 (Cal. 1998).

The state charged Williams with driving under the influence, with three prior DUI offenses.<sup>168</sup> Under California law, the prosecutor may charge the offense as a misdemeanor or as a felony.<sup>169</sup> In Williams' case, the prosecutor charged the DUI as a felony that could have resulted in the imposition of an indeterminate life sentence because of Williams' prior felony convictions.<sup>170</sup> The trial court struck a prior felony conviction because the offender's third strike was not violent and because he was going through drug rehabilitation,<sup>171</sup> but the appellate courts found that the trial court abused its discretion in striking the prior felony.<sup>172</sup>

Although it reviewed the trial court's order for an abuse of discretion, the supreme court affirmed the appellate court's holding that the trial court abused its discretion.<sup>173</sup> According to *Williams*, lower courts must balance the excessiveness of the sentence (in light of mitigating factors) against society's legitimate interest in the fair prosecution of properly charged crimes.<sup>174</sup> A lower court's discretion must be guided by the spirit of the law and not by factors extrinsic to the law, including concern about calendar congestion or antipathy to the particular statute.<sup>175</sup>

After *Williams*, courts of appeal have routinely reversed trial courts when they have dismissed a prior strike to avoid imposition of an indeterminate life sentence.<sup>176</sup> An empirical study of the case law suggests that *Romero*, if intended to avoid extreme sentences under Three Strikes, has had a negligible effect.<sup>177</sup>

One exception to the general trend of strict enforcement of the law was the decision of the district court of appeal in *People v.*

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168. *Id.* at 431.

169. *Id.*; see also CAL. VEH. CODE § 23160 (West 2004).

170. *Williams*, 948 P.2d at 431.

171. *Id.* at 434.

172. *Id.* at 439-40.

173. *Id.* at 438.

174. *Id.* at 437.

175. *Id.*

176. *People v. Wallace*, 93 P.3d 1037 (Cal. 2004); *People v. Gaston*, 87 Cal. Rptr. 2d 829 (1999); *People v. McGlothlin*, 79 Cal. Rptr. 2d 83 (1998); *People v. Strong*, 104 Cal. Rptr. 2d 490 (2001).

177. LAO, *Update*, *supra* note 164, available at [http://www/lao.ca.gov/handouts/pre\\_1999/ho101497\\_3\\_strikes\\_update.html](http://www/lao.ca.gov/handouts/pre_1999/ho101497_3_strikes_update.html).

*Carmony*.<sup>178</sup> There, the defendant's third felony was his failure to reregister as a sex offender.<sup>179</sup> Because he had recently reregistered, the police knew where he was living.<sup>180</sup> The record suggested that he was not evading the law.<sup>181</sup> Despite counsel's argument that his current offense was among the most passive of crimes and was *mala prohibitum*, the trial court refused to strike a prior felony and imposed an indeterminate life sentence.<sup>182</sup> A divided panel of the district court of appeal reversed and held that the trial court abused its discretion in refusing to strike a prior felony.<sup>183</sup>

The state supreme court reversed.<sup>184</sup> Before that court, the Attorney General argued that appellate courts have the power to review a trial court's decision to strike a prior felony, but unless the sentence violates the state or federal constitution, an appellate court lacks the authority to review a trial court's refusal to strike prior felony convictions.<sup>185</sup> The court rejected that argument and held that an appellate court has the power to review the trial court's decision refusing to strike a prior felony,<sup>186</sup> but the appellate court may reverse only if the trial court abused its discretion.<sup>187</sup> The supreme court disagreed with the court of appeal and held that the trial court did not abuse its discretion.<sup>188</sup> Thus, *Carmony* further limits any curative effect that *Romero* was to have.

Probably the most obvious challenge to a life sentence for a third felony of shoplifting or possession of traces of illegal drugs is that the sentence violates the prohibition against excessive criminal sentences.<sup>189</sup> The United States Supreme Court has held that the

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178. No. CO38802, 2003 Cal. App. LEXIS 1943 (Feb. 28, 2003), *rev'd*, 92 P.3d 369 (Cal. 2004).

179. *Id.* at \*1.

180. *Id.* at \*5–\*6.

181. *Id.* (noting that *Carmony* reported to the parole office as instructed once his parole officer discovered that *Carmony* had failed to re-register).

182. *Id.* at \*1, \*6–\*7.

183. *Id.* at \*1–\*2.

184. *People v. Carmony*, 92 P.3d 369 (Cal. 2004).

185. Reply Brief for Respondent at 2–3, *People v. Carmony*, 92 P.3d 369 (Cal. 2004) (No. S115090).

186. *Carmony*, 92 P.3d at 374.

187. *Id.*

188. *Id.* at 375.

189. U.S. CONST. amend. VIII; CAL. CONST. art. I, § 17.

Eighth Amendment's prohibition against cruel and unusual sentences does apply to grossly disproportionate sentences.<sup>190</sup> Even before the Supreme Court so held, the California Supreme Court found a similar protection in the state's constitutional provision against cruel or unusual punishment.<sup>191</sup>

Some state trial courts refused to impose life sentences under Three Strikes because they found the sentences to be excessive.<sup>192</sup> State appellate courts have uniformly found that Three Strikes sentences were constitutional.<sup>193</sup> The state supreme court has yet to address that question.<sup>194</sup>

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190. *Solem v. Helm*, 463 U.S. 277, 303 (1983).

191. *In re Lynch*, 503 P.2d 921, 922-23 (Cal. 1972).

192. *E.g.*, *People v. Smith*, 58 Cal. Rptr. 2d 9 (Ct. App. 1996) (reversing trial court's decision to strike prior serious felony convictions); *People v. Drew*, 47 Cal. Rptr. 2d 319 (Ct. App. 1995) (reversing trial court's decision to strike prior serious felonies to avoid Three Strikes sentence of twenty-five-years-to-life for possession of codeine); *People v. Patton*, 46 Cal. Rptr. 2d 702 (Ct. App. 1995) (modifying lenient sentence to twenty-five-years-to-life for possession of cocaine base in order to reflect correct Three Strikes sentence); *People v. Superior Court (Missamore)*, 45 Cal. Rptr. 2d 392 (Ct. App. 1995) (reversing sentence of probation for possession of marijuana when it was defendant's fourth felony); *People v. Gore*, 44 Cal. Rptr. 2d 244 (Ct. App. 1995) (reversing order to dismiss prior felony); *People v. Bailey*, 44 Cal. Rptr. 2d 205 (Ct. App. 1995) (reversing trial court's decision to strike prior offenses to avoid Three Strikes sentence of twenty-five-years-to-life for shoplifting items valued at \$250).

193. *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding two consecutive twenty-five-year-to-life sentences for stealing videotapes valued under \$200); *Ewing v. California*, 538 U.S. 11 (2003) (upholding twenty-five-year-to-life sentence for stealing nearly \$1200 worth of golf clubs); *People v. Barrera*, 82 Cal. Rptr. 2d 755 (Ct. App. 1999) (upholding twenty-five-year-to-life sentence for forging \$400 check); *People v. Cooper*, 51 Cal. Rptr. 2d 106 (Ct. App. 1996) (upholding twenty-five-year-to-life sentence for being ex-felon in possession of handgun); *People v. Kinsey*, 47 Cal. Rptr. 2d 769 (Ct. App. 1995) (upholding twenty-nine-year-to-life sentence for attempted injury on cohabitant, assault and battery); *People v. Cartwright*, 46 Cal. Rptr. 2d 351 (Ct. App. 1995) (upholding sentence of 428 years to life for rape); *People v. Superior Court (Romero)*, 37 Cal. Rptr. 2d 364 (Ct. App. 1995) (vacating lower court's order striking prior serious offenses allowing for Three Strikes life sentence for possession of controlled substance). Finally, in 2005, a divided panel of the Third District Court of Appeal held that a Three Strikes life sentence violated the Eighth Amendment and California's prohibition against cruel or unusual punishment. *People v. Carmony*, 26 Cal. Rptr. 3d 365 (2005).

194. *People v. Carmony*, 92 P.3d 369, 377 n.6. (Cal. 2004).

Finally, first in 1999 and then in 2001, four members of the United States Supreme Court questioned whether specific Three Strikes sentences violated the Eighth Amendment.<sup>195</sup> While the four Members of the Court disagreed whether to grant certiorari in the specific cases before the Court, their opinions issued along with the denial of certiorari left little doubt that four Members of the Court would strike down a Three Strikes sentence in the appropriate case.<sup>196</sup>

Influenced by the views of the four Justices, the United States Court of Appeals for the Ninth Circuit held that a specific Three Strikes sentence did violate the Eighth Amendment.<sup>197</sup> According to the Ninth Circuit, the fifty-years-to-life sentence imposed on Leonardo Andrade was excessive and the state appellate court was unreasonable in its application of existing settled Supreme Court precedent.<sup>198</sup> A different panel of the Ninth Circuit extended *Andrade* in two cases in which the defendants received twenty-five-year-to-life sentences and in which, unlike *Andrade*, both defendants had at least one prior violent felony conviction.<sup>199</sup>

Any thought that the Ninth Circuit might provide relief for those suffering from some of the more extreme Three Strikes sentences was short-lived. The Supreme Court reversed the Ninth Circuit's decision in *Andrade* based on federal law limiting the ability of state prisoners to challenge their criminal sentences in federal court,<sup>200</sup> but

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195. *Riggs v. California*, 525 U.S. 1114 (1999); *Durden v. California*, 531 U.S. 1184 (2001).

196. *Riggs*, 525 U.S. 1114; *Durden*, 531 U.S. 1184; see also Vitiello, *supra* note 4, at 1052.

197. *Andrade v. Att'y Gen. of Cal.*, 270 F.3d 743, 767 (9th Cir. 2001) (reversing defendant's sentence of fifty-years-to-life for stealing several videotapes from a K-Mart store on two separate occasions); see also *Brown v. Mayle*, 283 F.3d 1019, 1040 (9th Cir. 2002) (reversing sentences of twenty-five-years-to-life for two defendants, one for attempting to steal three videotapes and the other for attempting to steal a steering wheel alarm).

198. *Andrade*, 270 F.3d at 747.

199. *Brown*, 283 F.3d at 1034.

200. *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003). In the majority opinion, Justice O'Connor focused on whether relief was appropriate under the writ of habeas corpus. According to 28 U.S.C. § 2254(d)(1) (2000), a federal court can grant habeas corpus to a state prisoner only if the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by

held in a companion case that the offender's Three Strikes sentence did not violate the Eighth Amendment.<sup>201</sup>

*Ewing v. California* produced no majority opinion. Two justices would have held that the Eighth Amendment does not apply to terms of imprisonment.<sup>202</sup> Writing for a three justice plurality, Justice O'Connor agreed with the four dissenters that under some circumstances, a term of years may violate the Eighth Amendment.<sup>203</sup> While Justice O'Connor's opinion left open the possibility that some Three Strikes sentences may violate the Eighth Amendment, she did not leave much room for successful challenges.<sup>204</sup> For example, she rejected the argument that a court should look solely at the offender's current felony, but instead, consistent with the philosophy of Three Strikes, may look to the offender's entire criminal record.<sup>205</sup> Alternatively, she observed that the state had the latitude to sentence Ewing to a minimum term of twenty-five years for the crime of grand theft.<sup>206</sup> While the Ninth Circuit has found one case that may be the truly rare case to which Justice O'Connor alluded,<sup>207</sup> California cannot expect much help from the federal courts in curtailing Three Strikes' excesses, despite what appear to be gross inequities in the ways in which prosecutors

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the Supreme Court of the United States." O'Connor wrote that there was no clearly established federal law, distinguishing the facts of *Andrade* from the facts of *Solem v. Helm*, 463 U.S. 277 (1983), by noting that Helm had been sentenced to life without the possibility of parole, whereas Andrade would be eligible for parole, albeit after fifty years in prison at the age of eighty seven-years old. *Andrade*, 538 U.S. at 72-74. O'Connor wrote that the Eighth Amendment argument that the sentence was grossly disproportionate to the offense was only a general principle, not clearly established federal law. *Id.* at 73. O'Connor did not explain why the three-part test developed by the majority opinion in *Solem* was not clearly established federal law. She found error with the Ninth Circuit decision because it used the "clear error" test for determining if a court unreasonably applied clearly established federal law, when the appropriate test is whether the decision was "objectively unreasonable." *Id.* at 75.

201. *Ewing v. California*, 538 U.S. 11, 31 (2003).

202. *Id.* at 31-33 (Scalia, J. & Thomas, J., concurring in the judgment).

203. *Id.* at 21.

204. Vitiello, *Judicial Activism*, *supra* note 4, at 1058-59.

205. *Ewing*, 538 U.S. at 29.

206. *See id.* at 28-29.

207. *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004).

use their discretion around the state.<sup>208</sup> For example, data demonstrate wide variations in the law's application from county to county.<sup>209</sup> More importantly, the law has been led to significantly different application based on the race of the defendant; African-American and Latino defendants are more likely than white defendants to receive third strike sentences.<sup>210</sup>

One other judicial route may still be open. As mentioned above, shortly after the law's adoption, some state trial courts found specific life sentences excessive in violation of California's constitutional prohibition against cruel or unusual punishment.<sup>211</sup> With the exception of dictum from one case, the state appellate courts have been hostile to that argument.<sup>212</sup> Until 2005, the state appellate courts universally upheld the constitutionality of Three Strikes

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208. However, several possible arguments still remain to be made. One argument is based on the inequitable geographical variation resulting from the inconsistent application of Three Strikes throughout the state. However, there is no case law precedent for invalidating a sentence based on geographical variation. One case, now pending before the Ninth Circuit, involves a 225-years-to-life sentence for nine counts of burglary, leaving no chance for parole in defendant James Skinner's lifetime. A successful argument may exist because of the way the Supreme Court distinguished *Andrade*, 538 U.S. 63 (2003), from *Helm*, 463 U.S. 277, 303 (1983), which found that the Eighth Amendment's prohibition against cruel and unusual sentences does apply to grossly disproportionate sentences). In *Andrade*, the Court distinguished the facts from *Helm* because *Andrade* had a chance for parole after fifty years (even though *Andrade* would be eighty-seven years old when eligible), whereas a defendant sentenced to 225-years to life would never have a chance for parole in his lifetime. Additionally, a possible equal protection argument exists, based on the fact that African-Americans and Latinos are shown to be much more likely to be sentenced under the California Three Strikes law than a non-minority. See U.S. Sentencing Commission, Release 1: MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 12, 28 (2004), [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf). However, in order to make a successful equal protection argument, discriminatory intent or purpose behind the law must be proven, and that is not evident in this situation; disparate impact is not enough. See *Washington v. Davis*, 426 U.S. 229 (1976); see also *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

209. Males & Macallair, *supra* note 4, at 67-68.

210. *Id.* at 67, 70 tbl.4.

211. *Supra* note 192.

212. *People v. Cluff*, 105 Cal. Rptr. 2d 80 (Ct. App. 2001).



sentences no matter how extreme the facts of the case.<sup>213</sup> They have done so, arguably, in disregard of settled state supreme court precedent giving a more expansive interpretation to California's prohibition against cruel or unusual punishment than the United States Supreme Court has given to the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>214</sup>

The state supreme court recently avoided reaching the state constitutional issue in *People v. Carmony*.<sup>215</sup> It held that the trial court did not abuse its discretion in refusing to strike a prior felony.<sup>216</sup> It did not reach the state constitutional issue, but remanded that question to the court of appeal.<sup>217</sup> On remand, a divided panel of the Third District Court of Appeal did find that a 26 year-to-life sentence violated both the Eighth Amendment and California's prohibition against cruel or unusual punishment.<sup>218</sup>

Even if the state supreme court lets stand a finding that Carmony's sentence is excessive under the state constitution it is not likely to affect a broad reform of Three Strikes' excesses. Carmony's third strike, failure to register as a sex offender, is a passive offense, causing no direct harm to others.<sup>219</sup> Further, Carmony had recently reregistered, had not moved in the interim, and had no intent to evade the police.<sup>220</sup> Hence, his failure to register did not pose a risk of harm to the police or to others. As a result, even the ruling in Carmony's favor may be limited to its facts, not addressing the broader questions posed in cases like *Andrade* and other petty theft cases or cases involving felony possession of small quantities of drugs as the offenders' final strike. Hence, Californians cannot look to the courts for help in reforming Three Strikes' excesses.

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213. *Supra* note 194.

214. Vitiello, *Judicial Activism*, *supra* note 4, at 1028–29.

215. 92 P.3d 369, 377 n.6 (Cal. 2004).

216. *Id.* at 371.

217. *Id.* at 377 n.6.

218. 26 Cal. Rptr. 3d 365 (2005).

219. *People v. Carmony*, 2003 Cal. App. LEXIS 1943, at \*14, *rev'd*, 92 P.3d 369 (Cal. 2004).

220. *Id.* at \*14–\*15.

#### IV. THE OLDER PRISONS POPULATION: SPECIAL PROBLEMS AND A PARTIAL SOLUTION

Section II reviewed the lack of a coherent penal philosophy in California's sentencing scheme. One consequence of the haphazard way in which the legislature has created sentencing enhancement provisions is that many offenders receive sentences that are far longer than necessary for social protection and are often disproportionate to the severity of the offender's criminal conduct. Those sentences are too long when compared to the underlying conduct and when compared to sentences imposed on other felons in California.<sup>221</sup>

In addition to long prison sentences, California's parole system has not performed as well as it could. As identified by the Little Hoover Commission, California's parole policies have led to high recidivism rates.<sup>222</sup> The failure to do more than punish in our prisons returns parolees to the streets with little chance of successful integration back into society.<sup>223</sup> States with more successful parole systems reduce their prison populations more than does California, even if they impose similar, long criminal sentences, because fewer parolees return to prison.<sup>224</sup> California's high rate of parole failure means that prisoners will serve extremely long prison sentences, often unnecessarily.

Long prison sentences and parole failure create special problems for aging felons and cost California dearly, yet offer little, if any, additional protection to the public. One of the signers of this report has written and testified extensively on the special problems of aging prisoners.<sup>225</sup> The following are highlights of those special problems;

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221. See Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L.J. 243, 248-51 (1996) (providing an example under Three Strikes: a felon who commits a burglary, a theft, and a burglary does not qualify for a Three Strikes sentence. In contrast, an offender who is convicted of the same crimes, but is convicted of the two burglaries and then the theft, may be sentenced to 25-years-to life under Three Strikes).

222. Little Hoover Commission, *supra* note 24, at i, available at <http://www.lhc.ca.gov/lhcdir/172/report172.pdf>.

223. *Id.* at 55.

224. *Id.* at iv-v.

225. See *Turley Hearing*, *supra* note 56; Professor Jonathan Turley, Presentation at Sentencing Practices and Policies: Dollars & Sense (Apr. 16,

this report suggests some relatively cost free solutions to those problems.

Dramatic increases in the prison population are the result of a combination of the increased use of incapacitation rather than probation, longer sentences, reduced parole opportunities, and high recidivism rates.<sup>226</sup> Within that expanding population, the percentage of older prisoners is growing faster than the overall prison population. For example, in 1986, only 11.3 percent of all federal prisoners were fifty years or older.<sup>227</sup> That number rose to over 25 percent of the total population by 1989 and is projected to reach one third by 2010.<sup>228</sup> The number of California prisoners older than fifty-five is expected to increase from about 6,000 to over 30,000 in 2022, increasing more rapidly than the general prison population.<sup>229</sup>

Three Strikes is not the only law that has added significantly to the aging of the prison population, but it does its share. The authors of *Punishment and Democracy* identified some of the reasons why third strike felons are often aging felons. Among them, it takes time for a felon to build up the first two qualifying felonies.<sup>230</sup> Apart from the timing of the first and second arrests and successful prosecutions, the felon will have served some time in prison. As a result, many third strike felons are entering the prison system in their mid-thirties and will not be released until they are sixty years old or older.<sup>231</sup>

Prisons are expensive to maintain. Apart from construction costs, the cost of warehousing prisoners is rising rapidly.<sup>232</sup> That is

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2004) (on file with author); Jonathan Turley et al., Project for Older Prisoners: Report to the State of New York, 1994 (on file with author); Jonathan Turley, *A Solution to Prison Overcrowding*, USA TODAY MAG., Nov. 1992, at 80; Jonathan Turley, *Why Prison Health Care is a Crime*, CHI. TRIB., Mar. 19, 1991, at A19.

226. *Turley Hearing*, *supra* note 56.

227. Connie L. Neeley et al., *Addressing the Needs of Elderly Offenders*, CORRECTIONS TODAY, Aug. 1997, at 120.

228. *Id.*

229. California Legislative Analyst's Office, *Analysis of the 2003–2004 Budget Bill* (Feb. 19, 2003) [hereinafter LAO, *Analysis*], available at [http://www.lao.ca.gov/analysis\\_2003/crim\\_justice/cj\\_04\\_5240\\_anl03.htm#\\_Toc32742721](http://www.lao.ca.gov/analysis_2003/crim_justice/cj_04_5240_anl03.htm#_Toc32742721).

230. ZIMRING ET AL., *supra* note 4, at 146.

231. *See id.* at 58.

232. *Turley Hearing*, *supra* note 56, at 2–3; *see also* Deukmejian Report, *supra* note 16, sec. 7, Inmate and Parolee Population Management (identifying

especially true in California because wage concessions to the powerful California Corrections and Peace Officers Association make California prison guards the best paid in the nation.<sup>233</sup> Their pay raises have outstripped inflation and other measures of cost of living.<sup>234</sup>

Increased medical costs also add to the cost of maintaining a prison system. Subgroups of prisoners pose special problems. For example, warehousing HIV-positive prisoners present special challenges and entails added cost.<sup>235</sup> The largest and fastest growing segment of special needs prisoners, however, are geriatric prisoners. On average, the cost of warehousing an older prisoner is two to three times that of a younger prisoner. That cost approaches \$70,000 a year.<sup>236</sup>

Not only are older prisoners expensive to maintain, but their release into the general population—especially if done with meaningful parole supervision and opportunities—represents a

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the “growing cost of managing [California’s] adult prison population”), available at <http://www.cpr.ca.gov/reports/indrpt/corr/index.htm>.

233. Mark Gladstone, *Guard Union in Showdown*, MERCURY NEWS, June 22, 2004, at 1A (“Hefty salary increases that outpaced most state workers have made them among the highest-paid prison guards in the country.”).

234. *See id.*

235. *Turley Hearing*, *supra* note 56, at 17–18.

236. LAO, *Analysis*, *supra* note 229, available at [http://www.lao.ca.gov/analysis\\_2003/crim\\_justice/cj\\_04\\_5240\\_anl03.htm#\\_Toc32742721](http://www.lao.ca.gov/analysis_2003/crim_justice/cj_04_5240_anl03.htm#_Toc32742721). The highest costs result from medical care and maintenance, typical of any aging population. But costs rise in prisons that fail to segregate older prisoners into geriatric units where delivery of health care is more efficient than when older prisoners are scattered in the general prison population. Segregating older prisoners can reduce costs in a number of ways; one example is that earlier identification of medical problems, before they become chronic, may result in a geriatric unit. *Id.* *See also Turley Hearing*, *supra* note 56, at 24 (discussing the non-fiscal problems for maintenance and security associated with the increasing population of older prisoners)

Since roughly 50% of a prison’s operating costs are dedicated to officer salaries and benefits, efforts to extend prison resources and control costs have centered on the officer to inmate ratio. Older prisoners often frustrate such efforts by requiring special care and attention within the system. In addition to difficulties in mobility and interaction, older prisoners can be targets of abuse by younger prisoners. Older prisoners make ideal targets for theft, extortion, and even sexual assault . . . .

*Id.*

limited social risk of harm.<sup>237</sup> That is especially true when one compares the choices that their continued imprisonment force a state to make. One choice is to continue to build prisons and to overcrowd those already in existence. Both are costly and California has “maxed out” on its ability to increase prison budgets.<sup>238</sup> A second choice that California makes as a result of its decision to warehouse increasing numbers of older prisoners is to release or to impose shorter sentences on younger, more violent offenders.<sup>239</sup>

Any wholesale reform of California’s prison and sentencing systems must consider reforming its treatment of older prisoners.<sup>240</sup> Their proper management in prison and supervised early release into the general population can dramatically slash costs. Because the average cost of warehousing older prisoners is two to three times that of maintaining younger prisoners, the release of 500 older prisoners is equivalent to a reduction of 1,000 to 1,500 younger prisoners, about the number of prisoners in two mid-sized prisons.<sup>241</sup>

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237. See, e.g., LAO, *Analysis*, *supra* note 229, available at [http://www.lao.ca.gov/analysis\\_2003/crim\\_justice/cj\\_04\\_5240\\_an103.htm#\\_Toc32742721](http://www.lao.ca.gov/analysis_2003/crim_justice/cj_04_5240_an103.htm#_Toc32742721); Deukmejian Report, *supra* note 16, sec. 7, Inmate and Parolee Population Management, available at <http://www.cpr.ca.gov/reports/indrpt/corr/index.htm>.

238. See William Booth, *Calif. Budget Fix Is Easier Said than Done*, WASH. POST, Sept. 8, 2003, at A01.

239. *Turley Hearing*, *supra* note 56, at 20.

240. In addition to early release or release to a community based facility, California should also consider segregating older prisoners into geriatric units. LAO, *Analysis*, *supra* note 229, available at [http://www.lao.ca.gov/analysis\\_2003/crim\\_justice/cj\\_04\\_5240\\_an103.htm#\\_Toc32742721](http://www.lao.ca.gov/analysis_2003/crim_justice/cj_04_5240_an103.htm#_Toc32742721); Deukmejian Report, *supra* note 16, sec. 7 Inmate and Parolee Population Management, available at <http://www.cpr.ca.gov/reports/indrpt/corr/index.htm>; see CAL. PENAL CODE § 6267 (Deering 2004); 2003 Cal. Stat. 708 (providing in part, it “is in the best interest of the state to contract for skilled nursing facilities for the care of inmates with long-term care needs, thereby lessening the burden on the prison medical care system”).

241. *Turley Hearing*, *supra* note 56, at 21–22 (stating that in California, “[t]he cost of an older or geriatric inmate is likely between \$40,000 to \$70,000 per year. . . . [and] it is not uncommon to find geriatric inmates who cost the system in excess of \$100,000 per year”). *Turley* also notes that California faces “a major demographic shift in its correctional system that will sharply change the operational demands of its facilities and staff as well as contribute to a sharp increase in per capita prisoner costs. This shift is due to the large body of prisoners currently in or entering middle age.” *Id.* at 3–4.

Another way to understand the looming budgetary crisis posed by long term care of geriatric patients is to make some rough calculations of what California will spend to maintain its graying prison population in roughly twenty years. If the cost of maintaining an older prisoner rises modestly to only \$87,500 per year and that figure is multiplied by the number of prisoners over sixty years old, as projected by the Legislative Analyst's Office, the cost of maintaining those prisoners will exceed \$4 billion by 2025.<sup>242</sup> That is about the amount that California spent in 2002 to maintain its entire prison system.<sup>243</sup> gray

Faced with that kind of budgetary crisis, California is likely to face hard choices. The state must find a place to imprison younger, violent felons. Simply adding prison beds is limited by fiscal constraints.<sup>244</sup> Overcrowding may lead to judicial intervention and court ordered release, the least orderly form of prison reform.<sup>245</sup> Court ordered release is not likely to allow attention to the individual risk posed by the offender.<sup>246</sup> Emptying prisons willy-nilly increases the cost to the public and renews the hue and cry for punitive sanctions, but courts will do so if resources become scarce enough.

California can look to states that have a better track record in dealing with prison reform.<sup>247</sup> The focus in this section is on those reforms relating specifically to older prisoners. Above, this report discussed why older prisoners are expensive to maintain and made passing reference to the fact that their release represents a low risk to public safety. Here, we need to explain the latter proposition, that older prisoners represent a low risk to public safety.

As a general matter, older prisoners do not need to be incarcerated in conventional prisons. Numerous studies show that age is one of the most reliable predictors of recidivism.<sup>248</sup> The data show that recidivism rates drop significantly by the time an offender

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242. *Id.* at 22–23.

243. *Id.* at 23.

244. *See* Martin, *supra* note 14.

245. *Turley Hearing, supra* note 56, at 25.

246. *Id.*

247. *See infra* notes 311–345 and accompanying text.

248. *Turley Hearing, supra* note 56, at 27; Deukmejian Report, *supra* note 16, sec. 7, Inmate and Parolee Population Management, *available at* <http://www.report.cpr.ca.gov/indrpt/corr/>.

reaches thirty years old.<sup>249</sup> Likewise, the rate of recidivism among federal prisoners over the age of forty is approximately a third of that for prisoners under forty.<sup>250</sup> A couple of examples suggest the correlation between recidivism and age: some younger inmate populations have a 90 percent likelihood of committing a new offense upon their release from prison.<sup>251</sup> New York has an overall recidivism rate of 48 percent for all inmates, but only a 22.1 percent rate for inmates between fifty and sixty-five years old, and a 7.4 percent rate among those over sixty-five.<sup>252</sup> We underscore that not every older prisoner is low-risk. Yet, the application of appropriate selection criteria for release have proven that older prisoners can be released with virtually no risk of recidivism.

Created in 1989,<sup>253</sup> the Project for Older Prisoners (POPS) has received national recognition for the work that it has done in

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249. *Turley Hearing*, *supra* note 56, at 28 (“While academics often disagree on the specific cause, . . . [the decline in recidivism rates] is most likely due to a mix of physiological and cultural influences.”); *see also id.* at 29 (“Federal statistics reflect the difference of age in recidivism that POPS has found on the state level. Older federal prisoners are half as likely to commit new offenses as younger prisoners and the difference is even greater with younger prisoners in their late teens and early twenties.”).

250. U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, at tbl. 6.67. (2000) [hereinafter SOURCEBOOK] Most of the prisoners in this forty-plus category are ineligible for POPS, which uses fifty-five years as the threshold qualification. The rate of recidivism for those prisoners fifty-five years or older is even lower. Nationally, inmates between the ages of eighteen and twenty-nine experienced a recidivism rate of over fifty percent, while those fifty-five or older experienced a rate of only two percent. U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, TRENDS IN STATE PAROLE, 1990–2000, <http://www.ojp.usdoj.gov/bjs/pub/pdf/tsp00.pdf>. Illinois provides another example, where older prisoners were over twice as likely to succeed on parole than younger prisoners. *Turley Hearing*, *supra* note 56, at 31.

251. *See* sources cited *supra* note 250.

252. *Id.*

253. Jonathan Turley created Project for Older Prisoners (POPS) while a professor of constitutional criminal law at Tulane University in Louisiana. After Turley briefed and argued a case for a sixty-six-year-old man before the United States Court of Appeals for the Fifth Circuit, he discovered there were scores of older prisoners among Louisiana’s chronically overcrowded prison system. It surprised Turley to find so many statistically low-risk prisoners in a system releasing extremely high-risk prisoners in response to overcrowding and court orders. Turley solicited the aid of volunteer law students to address

developing criteria for evaluating older prisoners, isolating low-risk prisoners, and recommending policies to reduce the cost of caring for the members of this population while improving their care.<sup>254</sup>

With the cooperation of the state, POPS researchers interview prisoners over the age of fifty-five. The researcher evaluates the prisoner based on a comprehensive questionnaire that explores the prisoner's history.<sup>255</sup> The evaluation is based on additional information, including the person's prison file, interviews with correctional personnel and the court, and news files available online.<sup>256</sup>

POPS determines whether the prisoner represents a low risk based on two tests. If the organization decides to move forward it contacts any living victims as part of a victim consultation.<sup>257</sup> If the

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the issue. Two-hundred students signed up, and POPS began. This initial group discovered that older prisoner populations were increasing across the nation. They began developing approaches to identify low-risk prisoners, reduce the costs of care, and improve the level of care for this prison population segment. POPS now has offices in Louisiana, North Carolina, Michigan, and Washington, D.C., and seeks to educate the public as well as political leaders about the older prison population. POPS operates on a volunteer basis; there is no charge for its individual case services. POPS also consults with states, at their request, on issues related to the older prisoner population, as well as helping to draft legislation.

254. Jens Soering, *The Perils of Freedom*, AMERICA, July 512, 2004, at 20 (discussing how while few programs are available to former inmates as they transition back into society, POPS is one of a small number of programs easing the transition); Don Thompson, Associated Press, *Elderly Inmate Population and Costs Expected to Soar, Experts Say*, (Feb. 25, 2003), available at <http://www.cdaa.org/3StrikesCCNews0203.htm>; Tammerlin Drummond, *Cellblock Seniors*, TIME MAG., June 21, 1999, at 60 (calling POPS an "innovative program"), available at <http://www.mapinc.org/drugnews/v99/n653/a12.html>; Jennifer Warren, *The Graying of the Prisons*, L.A. TIMES, June 9, 2002, at A1.

255. See *Turley Hearing*, *supra* note 56, at 36. The questionnaire explores the prisoner's criminal history, chemical dependence history, health, employment background, and family background.

256. POPS uses the court and news files available on the online resources of Westlaw ([www.westlaw.com](http://www.westlaw.com)), and LexisNexis ([www.lexis.com](http://www.lexis.com)). Recidivism studies demonstrate that the data from these combined sources provide an indicator "of whether a prisoner can safely be released into the general population or placed in a program of supervised release." *Id.* at 36.

257. The victim/family member consultation has the potential to reveal inconsistencies in information obtained from the prisoner, as well as any violence or aggression not evident from the written record. POPS has



consultation does not derail the prisoner's release, the organization develops a plan for the prisoner's release, including a determination of available social benefits for which the person may qualify. After POPS members have collected the data and prepared a report, which includes a recommendation, the organization presents the report to the appropriate agency or board.<sup>258</sup> POPS has had a proven track record with virtually no instances of additional criminal conduct among those released pursuant to a POPS recommendation.<sup>259</sup>

Without adopting any other recommendation in this report, California could save significant amounts of money by adopting a POPS. For example, the Legislative Analyst's Office predicted that a POPS plan would remove between 200 to 300 inmates a year, for an annual savings of between \$9 and \$14 million.<sup>260</sup> It estimates that over a twenty-year period, the annual net savings to the CDC should be about \$530 million.<sup>261</sup>

To date, POPS has been conservative in its recommendations.<sup>262</sup> At a minimum, its continued effectiveness would be undercut if a prisoner released upon its recommendation committed a serious crime. For other older prisoners who represent a middle range risk, California should consider a wide array of alternatives to imprisonment in state prison. Intense parole supervision, the use of

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disqualified otherwise eligible candidates based on victim consultations. POPS was one of the first organizations to require victim consultations. *Id.* at 36–37.

258. *Id.* at 37–38.

259. Deukmejian Report, *supra* note 16, sec. 7, Inmate and Parolee Population Management (citing Jonathan Turley, Presentation at *Sentencing Practice and Policy: Dollars and Sense*, McGeorge School of Law (Apr. 16, 2004)), available at <http://www.cpr.ca.gov/reports/indrpt/corr/index.htm>; Soering, *supra* note 254.

260. *Turley Hearing*, *supra* note 56, at 40.

261. *Id.* But see Deukmejian Report, *supra* note 16, sec. 7, Inmate and Parolee Population Management (stating that implementation of POPS will likely result in fewer early releases than the Legislative Analyst's Office estimated, "because of its careful risk analysis and assessment of each inmate"), available at <http://www.report.cpr.ca.gov/indrpt/corr/>. The true savings, however, depend on the actual number of qualifying older felons.

262. *Turley Hearing*, *supra* note 56, at 42.

electronic bracelets, and home detention are all cost effective means of protecting the public.<sup>263</sup>

Finally, release is inappropriate for high-risk offenders. A number of states have created geriatric units.<sup>264</sup> Older prisoners prefer segregation from the general prison population for reasons of safety and improved care.<sup>265</sup> At a minimum, those prisoners will suffer fewer stress related illnesses.<sup>266</sup> Other savings result from consolidation of older prisoners. For example, prisons may be able to save by purchasing and dispensing special services in bulk, rather than dispensing them to small numbers of high-need prisoners in the general prison population.<sup>267</sup> Transferring older prisoners to a properly designed facility increases savings as well. A simple example is illustrative: older prisoners, especially those using walkers or wheelchairs, face difficulties in negotiating the typical multi-tiered cellblock and create additional problems for correctional officers. Additional savings may result from the creation of a specially trained staff. Correctional doctors and nurses are not well trained in the special problems of older prisoners.<sup>268</sup> Moving prisoners into geriatric units and training a small staff of health care providers allow early treatment that may prevent minor illness from becoming chronic and expensive disorders.<sup>269</sup>

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263. *Id.*; Deukmejian Report, *supra* note 16, sec. 7, Inmate and Parolee Population Management (endorsing similar recommendations), *available at* <http://www.cpr.ca.gov/reports/indrpt/corr/index.htm>.

264. For older prisoners, such units are in great demand. Facilities like Virginia's Staunton prison and North Carolina's McCain facility have long waiting lists of requested transfers. *Turley Hearing, supra* note 56, at 43.

265. *Id.*

266. *Id.*

267. *Id.* at 44.

268. *Id.* at 45.

269. *Id.* at 45-46. Turley states,

[t]he aging process creates a problem called 'masking' in which classic aging characteristics like sullen features and ashen color can mask illnesses with similar characteristics. For example, the symptoms of subclinical hypothyroidism include dry skin, cold intolerance, poor memory, weight gain, slow thinking, weak muscles, muscle cramps, puffy eyes, constipation, fatigue, apathy, and cognitive impairment. These are the same physical characteristics of aging and can be easily missed in a physical examination. By developing special programs and facilities for geriatric inmates,

The recommendations in this section should not be controversial. POPS has proven its effectiveness elsewhere, in some instances in states far more conservative than California. Some savings are immediate, but importantly, as its aging prison population swells, the failure to act now leaves California with a balloon payment that will come due in the future.

## V. SOLUTIONS

The system is broken. For much of the past decade, a strong economy allowed California to spend money in prison construction and prison system maintenance without making hard choices.<sup>270</sup> Those days are over.

Recent developments suggest that now is the time to address wholesale reform of the system. Californians seem to have tired of the excesses of Three Strikes<sup>271</sup> and draconian sentencing generally.<sup>272</sup> A detailed report by the non-partisan Little Hoover Commission has demonstrated the failure of California's parole system and offers a game plan for reform.<sup>273</sup>

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properly trained staff can develop greater expertise and dispense care in a more cost-efficient manner.

*Id.*

270. Michael Vitiello, *Reforming Three Strikes' Excesses*, 82 WASH. U. L.Q. 1, 4 (2004).

271. See CAVC, Voter Survey, *supra* note 45 <http://www.amend3strikes.org/voters.htm>. Even though the voters rejected Proposition 66 during the 2004 election, the initiative had strong support until right before the election when opposition materialized. See Furillo, *supra* note 47. That strong showing has gotten the attention of the state's district attorneys and the Governor, who have now indicated that they support modest reforms of Three Strikes. Mark Martin, *Efforts to Reform 'Three Strikes' Law Likely to Be on Ballot Again*, S.F. CHRON., Nov. 4, 2004, at B5.

272. The public seemed to tire of criminal sentences, at least for drug offenders, when a significant majority voted for Proposition 36. See CAL. PENAL CODE §§ 1210, 1210.1 & 3063.1 (West Supp. 2004); CAL. HEALTH & SAFETY CODE §§ 11999.4-11999.13 (West Supp. 2004). Proposition 36 mandates probation and treatment for certain nonviolent drug offenders. See CAL. PENAL CODE §§ 1210, 1210.1 & 3063.1; CAL. HEALTH & SAFETY CODE §§ 11999.4-11999.13.

273. Little Hoover Commission, *supra* note 24, available at <http://www.lhc.ca.gov/lhcdir/172/report172.pdf>.

On March 5, 2004, the Governor appointed a commission to study the prison system.<sup>274</sup> Published in late June 2004, the Commission's report makes many of the same recommendations stated in this report.<sup>275</sup> While reforming Three Strikes was beyond its mandate, the Commission's report recommends reconsideration of how California treats non-violent prisoners, with an eye towards using longer prison sentences primarily for violent offenders.<sup>276</sup> It expressly endorses the adoption of Turley's POPS for California.<sup>277</sup> It urges adoption of a variety of alternatives to imprisonment, including a wholesale reexamination of California's parole system.<sup>278</sup> It underscores the state's need for to reexamine its abandonment of rehabilitative measures, not because of a change in penal philosophy, but because many of those measures will reduce recidivism and the cost of maintaining its prison system.<sup>279</sup> These are welcome recommendations because they reflect informed thinking about the prison system, and if the Governor endorses them, his action will tell us a great deal about his willingness to take on the prison system, an entrenched, but troubled institution that has cost the state dearly.<sup>280</sup>

Nationally, Justice Kennedy has said, "Enough." While he voted to uphold indeterminate life terms in two cases before the Court last term,<sup>281</sup> his speech to the ABA does not mince words.<sup>282</sup> He does not mention Three Strikes by name, but he must have had in mind its draconian minimum sentences in his sweeping critique of the criminal justice system.<sup>283</sup> That the ABA was quick to appoint

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274. Press Release, *supra* note 37, [www.schwarzenegger.com/en/news/uptotheminute/news\\_upto\\_en\\_duke\\_reform.asp?sec=news&subsec=uptotheminute](http://www.schwarzenegger.com/en/news/uptotheminute/news_upto_en_duke_reform.asp?sec=news&subsec=uptotheminute).

275. Deukmejian Report, *supra* note 16, available at <http://www.cpr.ca.gov/reports/indrpt/corr/index.htm>.

276. *Id.* § 7, Inmate and Parolee Population Management.

277. *Id.*

278. *Id.*

279. *Id.*

280. *See id.* (detailing the soaring costs of the corrections system, which approaches \$6 billion).

281. *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing v. California*, 538 U.S. 11 (2003).

282. *See Kennedy Speech*, *supra* note 17, available at <http://www.abanet.org/media/kencomm/amkspeech03.html>.

283. *Id.*

the Kennedy Commission to study and make recommendations for reform demonstrates that the time for prison and sentencing reform is now.

Reform may take many different shapes. In his remarks at the McGeorge conference, Frank Zimring identified numerous ways in which the legislature or voters might reform Three Strikes.<sup>284</sup> One of the drafters of this report has written elsewhere about other possible reform measures.<sup>285</sup>

Early support for Proposition 66 suggests that the public wants reform to curb the excesses of the Three Strikes law.<sup>286</sup> Confusion

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284. One option identified by Zimring is to require that the offender's current offense, the final one which invokes three strikes eligibility, be a serious or violent offense. He suggests this option for both the second and third strikes provisions of the statute. Another option Zimring offers for both the second and third strike provisions is to systematically exclude certain enumerated felonies, minor felonies such as drug possession and theft, from qualifying an offender for three strikes eligibility. Zimring also offers the option to change the consequences of the third strike provision so that California triples the base sentence otherwise available for offenders with no strikes, makes prison mandatory, and possibly changes the good time release effect. Zimring, *supra* note 128.

285. See Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises*, 90 CAL. L. REV. 257 (2002) (book review); Vitiello, *supra* note 270.

286. See Furillo, *supra* note 47; see also Gary Delsohn, *Field Poll: Support for Easing '3-Strikes'*, SACRAMENTO BEE, June 10, 2004; Field Poll I, *supra* note 46. Delsohn cited how:

the Three Strikes Initiative question was posed to voters: "This initiative would amend the three strikes law to require increased sentences after a third offense only when the current conviction is for a specified violent or serious felony. Only prior convictions for specified violent or serious felonies would qualify for second and third strike sentence increases, and allows for re-sentencing of persons if prior convictions used to increase sentences no longer qualify as violent or serious felonies. It also increases punishment for specified sex crimes against children. Fiscal impact: unknown but significant savings to the state ranging from several tens of millions to several hundreds of millions of dollars annually. If the election were being held today, would you vote YES or NO on this proposition?"

Subsequently, the pollsters recognized the complexity of the questions undercut the validity of their conclusions. See Walters, *supra* note 46. After modifying the polling methodology to account for voter confusion, the poll still showed that over two-thirds of likely voters supported the proposition. See *id.*

over the number of felons who could have secured their release and the extent to which Proposition 66 would have applied to dangerous felons explains its defeat.<sup>287</sup> While Proposition 66 would have corrected many of Three Strikes' excesses, it failed to address the broader concerns identified in this Report, specifically the helter-skelter manner in which the legislature has enhanced criminal punishments.<sup>288</sup>

California's crisis is hardly unique. Other states have faced budgetary constraints and considered how to maximize social protection with finite prison resources. Our first recommendation is that California appoint a blue ribbon commission to study reform. Several states have adopted reforms that have not compromised public safety but have saved taxpayers substantial sums. Several states have experienced sharp declines in their crime rates without adopting laws like Three Strikes.<sup>289</sup> As developed below, some have created sentencing commissions and adopted sentencing guidelines that have led to cost savings without risking public safety.<sup>290</sup> A blue

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287. See Furillo, *supra* note 47; Martin, *supra* note 271 at B5.

288. See discussion *supra* notes 79–96 and accompanying text.

289. Beres & Griffith, *Analysis of AG's Report*, *supra* note 4, at 127–30 (finding that Massachusetts and New York experienced drops in crime rates similar to the decline in California, but did not enact three strikes statutes).

290. See discussion *infra* notes 307, 311–342 and accompanying text. In considering the adoption of a sentencing commission, a blue ribbon commission would need to determine whether allowing a sentencing judge to make certain factual findings, resulting in enhanced sentences, is a violation of the Sixth Amendment. As sentencing guidelines are currently administered, a judge determines the appropriate sentence by making findings that may result in a higher or lower sentence. During the 2003 term, a closely divided Supreme Court found that a state law that gave a judge the responsibility for making a finding that led to an increased prison sentence violated the defendant's Sixth Amendment right to a jury trial. *Blakely v. Washington*, 124 S. Ct. 2531 (2004). The Court explicitly avoided expressing an opinion whether the federal sentencing guidelines violated the Sixth Amendment. *Id.* at 2538 n.9. A number of lower federal courts have held that the sentencing guidelines violate the Sixth Amendment. See, e.g., *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004) (holding that application of the guidelines violated the Sixth Amendment); *United States v. Montgomery*, No. 03-5256, 2004 WL 1562904 (6th Cir. July 14, 2004) (holding that *Blakely* means that guidelines violate the Sixth Amendment). If the Court eventually holds that the Sixth Amendment requires a jury to decide facts necessary to make a proper sentencing decision, a guideline system may become unwieldy, adding to length and complexity of jury trials. But it is premature to assess whether

ribbon commission can survey existing reforms to assess what works best for California.

California has used blue ribbon commissions in the past, with some success. One such effort involved one of the primary drafters of this report.<sup>291</sup> In 1995, the Chief Justice and the Judicial Council created a blue ribbon commission to perform a comprehensive evaluation of the state's jury system and to make recommendations based on its findings.<sup>292</sup> The Commission's success is evidenced by the ongoing legal reforms based on its recommendations.<sup>293</sup> The Commission on Jury System Improvements is not the only successful blue ribbon commission in California.<sup>294</sup>

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the Court will so hold and whether even with the added burden of fact-finding by a jury guidelines are nonetheless worthwhile.

291. Professor J. Clark Kelso of the McGeorge School of Law, was a reporter for the deliberations of the Jury System Improvement Commission and the primary author of the its final report, FINAL REPORT OF THE BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT (1996), [http://www.mcgeorge.edu/government\\_law\\_and\\_policy/publications/ccglp\\_publications/blue\\_ribbon\\_commission\\_on\\_jury\\_system\\_improvement.pdf](http://www.mcgeorge.edu/government_law_and_policy/publications/ccglp_publications/blue_ribbon_commission_on_jury_system_improvement.pdf).

292. JUDICIAL COUNCIL, FACT SHEET: JURY SYSTEM IMPROVEMENT PROJECT (2004), <http://www.courtinfo.ca.gov/reference/documents/jurysys.pdf>.

293. Many of the Commission's recommendations are realized through their incorporation into the California Rules of Court and the California Standards of Judicial Administration. Judicial Council of Cal., *Task Force on Jury System Improvements*, [www.courtinfo.ca.gov/jury/taskforce.html](http://www.courtinfo.ca.gov/jury/taskforce.html); see also California Courts: Press Center: News Releases and Media Advisories, at [www.courtinfo.ca.gov/presscenter/newsreleases](http://www.courtinfo.ca.gov/presscenter/newsreleases) (providing access to court-related news releases, which offer examples of successful commission recommendations, including the plain-English civil jury instructions adopted by the Judicial Council on July 16, 2003, the 2003 Burton Award for Outstanding Reform, a national award honoring clear legal writing, presented on June 25, 2003 to the Judicial Council for its role in the rewriting of the California jury instructions, the implementation of the Blue Ribbon Commission on Jury System Improvement's recommendations on October 19, 1998, and legislation enacted on September 24, 1998, which implements the one-day, one-trial jury service system recommended by the Blue Ribbon Commission on Jury System Improvement.

294. See, e.g., Cal. Comm'n on Inmate Population Mgmt., STATE OF CAL., *Blue Ribbon Comm'n on Inmate Population Mgmt.: FINAL REPORT* (1990). Some of the Commission's conclusions prompted new legislation. See, e.g., CAL. PENAL CODE § 1174; *id.* § 8050. The California Commission on Crime Control and Violence Prevention's, *Ounce of Prevention: Toward an Understanding of the Causes of Violence: 1982 Final Report to the People of*

While not designated a blue ribbon commission, the Little Hoover Commission shares some of the best features of a successful commission. Created in 1962, the Little Hoover Commission is “a bipartisan, independent body whose function is to promote efficiency, effectiveness and economy in state programs.”<sup>295</sup> A number of its projects have been acclaimed.<sup>296</sup> Most recently, it published a highly regarded report critical of California’s parole system and provided a detailed plan for the implementation of concrete improvements.<sup>297</sup>

The success of any commission depends on its membership. The composition of the Little Hoover Commission is mandated by statute. The Commission consists of a balanced, bipartisan board composed of five citizen members appointed by the governor, four citizen members appointed by the legislature, two state senators, and two assembly members.<sup>298</sup> Once the commission decides on a topic for study, the commission members select a subcommittee to research a topic “by bringing key players together for discussions,

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*California* (1983), also produced a legislative response. See, e.g., CAL. PENAL CODE §§ 14110–14112, *id.* § 14114, *id.* § 14119.

295. Little Hoover Commission, Home Page, available at <http://www.lhc.ca.gov> (last visited Oct. 15, 2004).

296. Carla Rivera, *The State Foster Care Report Urges Statewide Boss Watchdog Agency Says ‘Muddle of Authority’ in California System Has Proved Fatal to Children*, L.A. TIMES, Feb. 5, 2003, at B9 (stating that “Child Welfare Advocates applauded . . . [the Commission’s 1999 foster care report] for pressing the question of accountability”); Diane Wedner, *California State Panel Faults Housing Policies for Growing Crisis Real Estate*, L.A. TIMES, May 9, 2002, at C2 (noting that “housing advocates applauded the commission’s [housing] report”); Jenifer Warren, *State Bid to Curb Youth Violence Criticized Services: Anti-Crime Effort is Haphazard and Underfunded, Report Says, Citing Studies Showing that Aggression is a Learned Behavior*, L.A. TIMES, June 13, 2001, at B1 (noting that crime prevention advocates “welcomed” the Little Hoover Commission’s youth violence report); Carl Ingram, *Legislature OKs Revival of Auditor General’s Office Government*, L.A. TIMES, May 4, 1993, at A3 (calling the Little Hoover Commission “a venerable research organization”); Virginia Ellis, *Doctors’ Work in Nursing Homes Scored*, L.A. TIMES, Feb. 17, 1989, at 3, 1989 WL 2,336,611 (noting that state regulators “applaud recommendations” from Little Hoover Commission’s report on treatment of elderly patients).

297. Little Hoover Commission, *supra* note 24, available at <http://www.lhc.ca.gov/lhcdir/172/report172.pdf>.

298. Little Hoover Commission, *About the Commission*, available at <http://www.lhc.ca.gov/lhcdir/about.html> (last visited Oct. 15, 2004).



contacting experts, reviewing academic literature and interviewing those most closely affected by the target topic.”<sup>299</sup> Appointing the major stakeholders is one important aspect of the success of any commission. Allowing a full airing of the topic is the second important component to success.

The recently appointed Deukmejian Commission demonstrates the wisdom of using a blue ribbon commission. The Commission’s mandate involved pressing social issues, not easily resolved by the legislature.<sup>300</sup> The commission’s report contains many sound recommendations that it may have been possible to make only out of the glare of public scrutiny, allowing for a meaningful, deliberative process.

We propose that California adopt a blue ribbon commission to study the possibility of the wholesale reform of California’s criminal sentencing scheme. As indicated above, prominent members of the legal community are calling for similar studies at the national level.<sup>301</sup> California’s system is, however, in even greater need of repair.<sup>302</sup> At a minimum, that commission should include members of the judiciary and the criminal bar, both prosecutors and defense lawyers. Efforts should be made to include prosecutors from different communities, reflecting various attitudes across the state towards the Three Strikes law.<sup>303</sup> Similarly, the commission should

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299. *Id.*

300. Press Release, *supra* note 37, at [www.schwarzenegger.com/en/news/uptotheminute/news\\_upto\\_en\\_duke\\_reform.asp?sec=news&subsec=uptotheminute](http://www.schwarzenegger.com/en/news/uptotheminute/news_upto_en_duke_reform.asp?sec=news&subsec=uptotheminute).

301. Kennedy Speech, *supra* note 17, available at <http://www.abanet.org/media/kencomm/amkspeech03.html>.

302. *See, e.g.*, Turley Hearing, *supra* note 56, at 4 (discussing the looming crisis posed by the increasing older prison population).

303. The San Diego District Attorney’s office prosecutes Three Strikes cases much more often than the San Francisco District Attorney’s office. This disparity may be due in part to the public’s view of Three Strikes in each respective area. Seventy-six percent of San Diego’s voters supported the Three Strikes initiative compared to just forty-three percent of San Francisco voters. Samara Marion, *Justice By Geography? A Study of San Diego County’s Three Strikes Sentencing Practices From July–December 1996*, 11 STAN. L. & POL’Y REV. 29, 40–41 (1999). Frequency of use of Three Strikes shows no correlation to the decline in crime rate. In fact, the crime rate in San Francisco, the county least likely to invoke Three Strikes, declined much more than the crime rate in Sacramento and Los Angeles Counties, where the law

include judges from different parts of the state and should reflect the real differences in judicial attitudes towards criminal sentencing. In addition, the commission should include representatives from both victims' rights groups and groups representing the families of those serving long prison sentences. Finally, the commission should also be comprised of scholars with expertise in criminal justice, including both criminal law professors and criminologists.<sup>304</sup>

The experts should have familiarity with empirical research dealing with a number of criminal justice issues. For example, they should be able to explain to the commission the impact of crime legislation on the prison population. They should also be able to explain the literature dealing with issues like recidivism. Lastly, they should have expertise in alternatives to prison and be able to explain successful rehabilitative programs and other community based options, such as in-house detention.<sup>305</sup>

One major reform that the commission should consider is the adoption of a sentencing commission. While sentencing commissions have produced mixed results,<sup>306</sup> a number of state systems have used the commission system successfully to solve

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was invoked seven times more frequently than in San Francisco. *See* Males & Macallair, *supra* note 4, at 67–68.

304. *See* MODEL PENAL CODE: SENTENCING 44–45 (Preliminary Draft No. 3, 2004) [hereinafter MPC PRELIMINARY DRAFT 3].

305. Part of the problem with our criminal justice system has been dramatic pendulum swings. At one point, America was convinced that rehabilitation was the key to reforming prisoners. When states soured on rehabilitation, they abandoned efforts at rehabilitation on the erroneous view that nothing works. Vitiello, *supra* note 68, at 1032. The pendulum swing towards incapacitation has led to massive prison increases that most experts recognize are wasteful. Many of the sentences are longer than necessary if our goal is protection of society, and less expensive alternatives to such prison sentences are available. ELLIOTT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* 164–72 (1998); *Turley Hearing, supra* note 56, at 42–43. Today, criminal justice experts recognize that society makes a mistake in treating all offenders as fungible. The appropriate disposition depends on many different factors. *See id.* at 36. A blue ribbon commission should have before it the full panoply of alternatives to incarceration in prison.

306. *See, e.g.,* Terence Dunworth & Charles D. Weisselberg, *Felony Cases And The Federal Courts: The Guidelines Experience*, 66 S. CAL. L. REV. 99, 100 (1992) (discussing criticism of the federal guidelines).

problems like those California faces.<sup>307</sup> The success of state sentencing commissions has gotten the attention of the American Law Institute. Primary among proposals for changes to the Model Penal Code are several provisions advocating the adoption of sentencing commissions.<sup>308</sup>

Although the Model Penal Code has been widely acclaimed,<sup>309</sup> its original sentencing provisions have been the least influential.<sup>310</sup> The American Law Institute is currently drafting proposed changes to those provisions. At the center of those changes is its proposal that states adopt a sentencing commission.<sup>311</sup> The working draft includes a model sentencing commission and recommends specific powers for the model commission. The success of several state sentencing commissions has influenced the ALI to make those recommendations.<sup>312</sup>

North Carolina is among those states that have successfully adopted a sentencing commission and guidelines.<sup>313</sup> In the 1970s and 1980s, North Carolina operated under a determinate sentencing scheme similar to that of California.<sup>314</sup> North Carolina often led the nation in incarceration rates<sup>315</sup> and eventually became subject to a

307. See AM. LAW INST., MODEL PENAL CODE; SENTENCING § 6A introductory cmt., at 40 (Preliminary Draft No. 1, 2002) [hereinafter MPC PRELIMINARY DRAFT 1] (noting Minnesota, Pennsylvania, Washington, Delaware, Oregon, Kansas, North Carolina, Virginia, and Ohio as states with successful sentencing commissions).

308. See MODEL PENAL CODE: SENTENCING; REPORT 49–50 (2003) [hereinafter MPC REPORT] (listing the “perceived advantages of the commission-guideline systems”).

309. See, e.g., Lance Liebman, *Foreword* to MPC REPORT, *supra* note 308 at xi (2003) (“The Model Penal Code stands at the summit of the ALI’s intellectual achievements.”).

310. See MPC REPORT, *supra* note 308, at 2–3.

311. *Id.*; MPC PRELIMINARY DRAFT 1, *supra* note 307; MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 2, 2003); PRELIMINARY DRAFT 3, *supra* note 304.

312. MPC PRELIMINARY DRAFT 1, *supra* note 307, § 6A introductory cmt., at 40–41; MPC REPORT, *supra* note 307, at 48–50.

313. MPC REPORT, *supra* note 307, at 48.

314. Reitz, *supra* note 53; see Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, 29 CRIME & JUST. 39, 78 (2002) (discussing the decentralization of North Carolina’s “nominally determinate” sentences under the Fair Sentencing Act from 1979 to 1988).

315. Wright, *supra* note 314, at 44.

federal court order to reduce prison overcrowding.<sup>316</sup> The need to create prison space led to both violent and non-violent offenders serving only about 15% of their sentences.<sup>317</sup>

North Carolina created a sentencing commission in 1990.<sup>318</sup> It began making recommendations for change over a two to three year period that were then adopted by its legislature.<sup>319</sup> The success of the North Carolina commission relates to the two policy choices under which it functioned. First, its recommendations had to fit within existing correctional capacity, but the use of that capacity had to be reprioritized.<sup>320</sup> Second, sentences for serious or violent crimes had to increase.<sup>321</sup> Those policies necessitated a third choice: to achieve greater sentences for the worst felons, the commission had to find offsetting reductions at the lower levels of crime severity.<sup>322</sup> Small reductions in punishment for lower level crimes free up significant prison space for violent and serious prisoners because lower level crimes are so much more numerous than violent and serious felonies.<sup>323</sup>

Pre and post-guideline comparisons demonstrate how North Carolina implemented those policy choices. Prior to the guidelines, North Carolina incarcerated 48 percent of those convicted of

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316. *Id.* at 49–50 (discussing *Small v. Martin* (No. 85-987-CRT) (E.D.N.C. April 3, 1989)); Carla Crowder, *The Carolina Answer*, ALBUQUERQUE J., Feb. 2, 1997, at A1 (noting that “three separate suits alleg[ing] that confinement in that state’s prisons amounted to cruel and unusual punishment because of overcrowding . . . were settled out of court. In order to comply with the settlements while new prisons were getting built, the state started placing caps on prison population”), <http://www.doc.state.nc.us/news/ANMJ/anmj1.htm>.

317. Reitz, *supra* note 53; see Wright, *supra* note 314, at 51 (noting that some felons served less than 20% of their sentences, and misdemeanants served only 6% of their sentences. Some felons with the most serious violent offenses served up to 35% of their sentences, while those with the least serious served only 19%).

318. N.C. SENTENCING & POLICY ADVISOR COMM’N, KAREN JONES & TAWANDA ETHERIDGE, *COMPENDIUM OF COMMUNITY CORRECTIONS PROGRAMS IN NORTH CAROLINA: FISCAL YEAR 2002–2003*, at 1 (2004), <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/compendium2002-2003.pdf>.

319. MPC REPORT, *supra* note 308, at 82; Wright, *supra* note 314, at 75–76.

320. Wright, *supra* note 314, at 71.

321. *See id.* at 78.

322. *Id.* at 67.

323. *Id.* at 42.

felonies.<sup>324</sup> After adoption of the guidelines, the state incarcerated between 28 percent and 34 percent of those convicted of felonies.<sup>325</sup> In addition, those found guilty of lower level property and drug offenses who did serve time in prison served less time than they would have without guidelines.<sup>326</sup> By design, however, those convicted of felonies at the top two levels of seriousness served longer prison sentences than they would have without the guidelines.<sup>327</sup>

North Carolina did not simply release to the community those who would otherwise have gone to prison. The commission planned that many of those offenders would be subject to a variety of intermediate punishment programs—that is, community punishment at a level of intensity greater than traditional probation.<sup>328</sup> Because the commission projected the number of offenders subject to intermediate punishment, programs and resources were available once courts began diverting offenders from state prison.<sup>329</sup> After implementation of the guidelines, intermediate punishment went up by 50 percent.<sup>330</sup>

Some commentators are hesitant to endorse sentencing commissions because of widespread criticism of the federal sentencing guidelines that increased punishments and expanded the prison population.<sup>331</sup> The experience of most states with sentencing

324. *Id.* at 87.

325. *Id.*

326. Reitz, *supra* note 53.

327. Wright, *supra* note 314, at 87.

328. *Id.* at 54–55, 67, 70, 78.

329. MPC REPORT, *supra* note 308, at 82. The report noted:

When such planning is absent, as in the recent example of Proposition 36 in California (a voter initiative to divert many classes of drug offenders from prison to drug treatment), large changes in sentencing law can produce great dislocations when newly-sentenced offenders appear in numbers that overwhelm the available program slots. At best, states are in a position of playing catch-up when this occurs. At worst, desired policy changes may collapse or be deemed a failure because of inadequate implementation.

*Id.* Whatever one thinks of the policy wisdom of Proposition 36, the state has been scrambling since it became effective to add required program capacity. *See also id.* at 122.

330. Reitz, *supra* note 53.

331. MPC REPORT, *supra* note 308, at 115.

commissions demonstrates that these are not necessarily a result of adopting a commission scheme.

States that have adopted sentencing commissions have not experienced the failures of the federal sentencing guideline scheme.<sup>332</sup> Ten of the fifteen states that have had guidelines for at least five years have experienced rates of incarceration growth lower than the national average.<sup>333</sup> Some of the success in slowing down increased prison populations in those states may be a result of insulation of the commission from partisan politics.<sup>334</sup>

Further, a choice to decrease the size of the prison population does not necessarily lead to increased crime rates.<sup>335</sup> For example, Virginia's sentencing commission measured recidivism rates within its offender population. Its study of those offenders resulted in the creation of a risk assessment instrument for use by sentencing courts and probation officers.<sup>336</sup> While a risk assessment instrument may

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332. *Id.* at 121.

333. Reitz, *supra* note 53. It is also the case that there is no necessary correlation between abolition of parole release and increased incarceration growth. Of the nine states that adopted sentencing guidelines and abolished parole release, all but one experienced growth of incarceration rates lower than the national average. Of the six states that abolished parole release but did not adopt sentencing guidelines, two of the six experienced growth of incarceration rates lower than the national average. Four of the states that abolished parole release and did not adopt sentencing guidelines experienced rates of incarceration growth higher than the national average; one of these states was California. *Id.*

334. *Id.*; see also Wright, *supra* note 314, at 84. Wright observed that in North Carolina

[a] consensus settled into place: the sentencing structure, like the sentencing commission itself, was perceived to be apolitical. It was a planning device that allowed the state to link its sentencing aspirations with the corrections resources at hand. This role as a credible and non-partisan technical advisor allowed the Sentencing Commission and the sentencing structure to remain intact even after the legislators who created them were no longer in leadership roles.

*Id.*

335. Reitz, *supra* note 53; see also Michael Vitiello, *supra* note 126, at 1638–39 (stating that proponents of Three Strikes argue that it will lead to reduced crime rates because of more incarceration. However, while the correlation between increased incarceration and decreased crime rates has “strong intuitive appeal,” the correlation is difficult to verify).

336. Brian J. Ostrom et al., NAT'L INST. OF JUSTICE, OFFENDER RISK ASSESSMENT IN VIRGINIA: A THREE STAGE EVALUATION; PROCESS OF

lengthen incarceration or increase the prison population, Virginia's goal was to identify the bottom 25 percent of offenders who would otherwise have gone to jail under previous sentencing practice but who are the lowest risk offenders.<sup>337</sup> Those offenders would then be placed in community punishment programs.

Virginia created a three-year pilot program to test the risk assessment instrument.<sup>338</sup> Judges consider the instrument a success. They often agree with the recommendation generated by the instrument and, as a result, have used it in about two-thirds of all cases.<sup>339</sup>

Sentencing guidelines and commissions may offer a number of advantages over current practices. Creating a guideline grid encourages those who create and implement it to think about proportionality.<sup>340</sup> A typical grid, with an offender's criminal history on the X-axis and the severity of the crime on the Y-axis, gives the user a visual perspective on proportionality.<sup>341</sup> While federal guidelines have reduced judicial discretion,<sup>342</sup> a state may preserve discretion by allowing downward departure from the recommended sentence. The commission process allows reasonably accurate forecasts of what will happen to a state's prison population once guidelines go into effect.<sup>343</sup> As a result, the state can make trade-offs in light of existing budgetary constraints.

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SENTENCE REFORM, EMPIRICAL STUDY OF DIVERSION & RECIDIVISM, BENEFIT-COST ANALYSIS 1 (2002), available at [http://www.vcsc.state.va.us/risk\\_off\\_rpt.pdf](http://www.vcsc.state.va.us/risk_off_rpt.pdf).

337. *Id.* at 9–10.

338. *Id.* at 1.

339. *Id.* at 3.

340. MPC PRELIMINARY DRAFT 3, *supra* note 304, § 6B.02 cmt., c at 130–31.

341. U.S. Sentencing Comm'n, *supra* note 208, available at [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf).

342. Reitz, *supra* note 53.

343. See, e.g., Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States and the Federal Court: A Twenty Year Retrospective*, 12 FED. SENTENCING REP. 69, 75 (1999) (guideline systems “now possess by far the best system-wide data on sentencing practices and correctional populations.”); Wright, *supra* note 314, at 84 (noting the accuracy of the North Carolina Commission's prison population projections); MPC REPORT, *supra* note 308, at 108–09.

Yet another advantage of a commission guideline system is the ability to monitor the way in which the guidelines are working in fact. The commission may be responsible for assessing how the guidelines are working and for recommending modifications where necessary.<sup>344</sup> Jurisdictions like Virginia and the United States Sentencing Commission have conducted studies to assess risk factors. For example, the federal commission has conducted a sophisticated study to determine how well an offender's criminal history (as used in the guidelines) predicts recidivism.<sup>345</sup>

At least as implemented in some states, sentencing commissions may lead to a rational allocation of prison resources. Commissions can use data to reduce the risk to the public from releasing certain classes of offenders.

## VI. CONCLUSION

Several events indicate that now may be the time to reform California's sentencing scheme.<sup>346</sup> The budget shortfall demonstrates that the state must make sound choices between competing institutions.<sup>347</sup> The prison budget has expanded with little responsible management.<sup>348</sup> The legislature has added sentencing enhancements that are complicated but often unnecessary to assure public safety.<sup>349</sup>

Outside of California, influential voices have raised concerns about the unchecked expansion of the prison population and the lack of resources devoted to effective alternatives to prison.<sup>350</sup> Concerns about California's prison system and its ineffective parole system

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344. Reitz, *supra* note 53.

345. U.S. SENTENCING COMM'N, *supra* note 208, available at [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf); U.S. SENTENCING COMM'N, RECIDIVISM AND THE "FIRST OFFENDER," (2004), [http://www.ussc.gov/publicat/recidivism\\_FirstOffender.pdf](http://www.ussc.gov/publicat/recidivism_FirstOffender.pdf).

346. *Supra* notes 17, 34, 47 and accompanying text.

347. *See supra* notes 14–16, 34 and accompanying text.

348. *See id.*

349. *See supra* notes 79–96 and accompanying text for a detailed discussion of sentencing enhancements.

350. KENNEDY REPORT, *supra* note 25, available at <http://www.abanet.org/media/kencomm/rep121a.pdf>.



have led to important recommendations for the state.<sup>351</sup> The public may have tired of draconian sentencing laws.<sup>352</sup>

The drafters of this report think that the Deukmejian Commission's *Reforming California's Youth and Adult Correctional System* report is a good start for reforming California's prison system. We urge further reforms. Three Strikes is an elephant in the living room that cannot be ignored. It guarantees excessive prison sentences both because the sentence does not reflect the culpability of many third strike prisoners and because the length of those sentences is unnecessary to guarantee public safety for offenders whose careers may not have involved crimes of violence and whose criminal careers were on the wane when they received their third strike sentences.<sup>353</sup> Even beyond Three Strikes, California should consider wholesale sentencing reform: the state has finite resources and careful allocation of those resources should be its highest priority. That allocation may result in longer sentences for some offenders but shorter sentences or alternatives to prison for other offenders.<sup>354</sup>

Assessing effective sentencing policy should be the task of a blue ribbon commission that can gain broad political support for reform.<sup>355</sup> One major reform for the commission's consideration should be the efficacy of adopting the sentencing reform commission model that has been successful elsewhere.<sup>356</sup>

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351. Little Hoover Commission, *supra* note 24, available at <http://www.lhc.ca.gov/lhcdir/172/report172.pdf>.

352. *Supra* notes 46, 272.

353. *See supra* Part III for a detailed discussion of Three Strikes and its harsh effects.

354. *Supra* notes 276–279 and accompanying text.

355. *Supra* notes 301–308 and accompanying text.

356. *See supra* notes 307, 313–345 and accompanying text for a discussion of successful sentencing commissions.