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# California's Three Strikes Law: Symbol and Substance

*Edward J. Erler\* and Brian P. Janiskee\*\**

## INTRODUCTION

In November 1999, the Institute of Governmental Studies at the University of California, Berkeley, released a study by Franklin Zimring, Sam Kamin, and Gordon Hawkins entitled *Crime and Punishment in California: The Impact of Three Strikes and You're Out*.<sup>1</sup> In the Fall 2000 issue of the *Duquesne Law Review*, we pub-

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1. FRANKLIN E. ZIMRING, ET AL., *CRIME AND PUNISHMENT IN CALIFORNIA: THE IMPACT OF THREE STRIKES AND YOU'RE OUT 4* (1999). Hereinafter "Zimring" will be used to identify the authors of this study and the *PUNISHMENT AND DEMOCRACY* book referred to *infra*. This study was revised and expanded for Oxford University Press in 2001 and appeared with a new title: *Punishment and Democracy: Three Strikes and You're Out in California*. The principal finding of the study was that California's Three Strikes law had failed to deter crime. The legislation, in the view of Zimring, simply established a punitive regime that was not grounded in any "explicit penal theory." FRANKLIN E. ZIMRING, GORDON HAWKINS, SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* 51 (2001). Indeed, the California Three Strikes law is the harshest in the nation. The first two strikes must be serious or violent felonies, but the third strike can be triggered by any felony. A second strike conviction carries double the normal sentence and a third strike conviction mandates a sentence of 25 years to life. The Three Strikes law (AB 971) was enacted by the legislature and signed by Governor Pete Wilson on March 7, 1994. AB 971 was passed as an urgency measure—requiring a two-thirds majority in each chamber—due, in large part, to the popularity of the impending statutory initiative proposal that eventually was passed as Proposition 184 in November 1994. The two measures were virtually identical.

Zimring arrived at his principal conclusion by means of an analysis of a sample of arrest records from the cities of Los Angeles, San Diego and San Francisco. They collected one pre-Three Strikes sample from March 1993 and two post-Three Strikes samples from April 1994 and April 1995. Within each sample, Zimring used incarceration records to classify each felon as having no prior strike, one strike, two strikes, or three strikes. They found that before the law went into effect 13.9 percent of the arrests in the samples involved felons specifically targeted by the law. After the law went into effect the number was 12.8 percent. According to Zimring, "[t]his difference is not statistically significant, so it is not prudent to assume there was any decline in the share of crime committed by those targeted in the new law." ZIMRING, *PUNISHMENT AND DEMOCRACY*, *supra*.

Furthermore, Zimring contended that "[t]here is a large gap between the substantial declines in crime in California that started in 1991 and have continued to 1999 and the detectable impact of three strikes. Whatever has reduced crime in California over the mid-1990s, it does not appear that the 1994 legislation played a major role." *Id.*

lished our critique of the Zimring Study.<sup>2</sup> In the Spring 2002 issue of the *Duquesne Law Review*, Zimring and Kamin responded to our critique.<sup>3</sup> Also in the Spring 2002 issue was a response to our critique by Professor Michael Vitiello.<sup>4</sup>

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2. Brian P. Janiskee and Edward J. Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law*, 39 DUQ. L. REV. 43 (2000).

We believed we had detected a series of methodological and analytical errors in the Zimring study that cast doubt on its reliability. The first involved the timing of the samples. The Three Strikes law went into effect in March of 1994. Zimring took his first post-Three Strikes sample only one month after the law's implementation and the second and final sample barely one year after the law was in place. We argued that the timing of the samples, which were taken so soon after the law went into effect, "set the bar unreasonably high for judging the success or failure of Three Strikes." *Id.* at 47. Zimring did not perform a standard test for lag effects, which is a common methodological safeguard in social and behavioral research.

Next, we took issue with their claim that Three Strikes had no incapacitation effect. Linda Beres and Thomas Griffith point out that any crime reduction as a result of incapacitation would be impossible to detect until 1997. *Id.* at 48 (citing Linda Beres and 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, 117(1998)). This is because most of the felons convicted under Three Strikes would still have received sentences under the old system that would have kept them in prison until 1997 or beyond.

Another problem with their study was what we called the conflation of arrests and crime. In their three-city sample, Zimring compared arrest records before and after the law's implementation. In these samples, they did not measure the number of actual crimes, but used arrests as a proxy for crime. We expressed concern that the use of such a proxy underestimated the deterrent effect of the law. Furthermore, several of the arrests in the April 1994 sample would almost certainly have been for crimes committed prior to the enactment of the law on Mar 7, 1994 and, therefore, could not be a valid measure of the deterrent impact of Three Strikes. In addition, Zimring, in what was purportedly an analysis of crime and punishment in California, did not collect statewide or even countywide data, but simply derived their conclusions from a sample of city data.

We also took issue with the main conclusion of Zimring that there was no deterrent effect of the law on either the targets of the legislation or in general. Using data from the Uniform Crime Report, we found that there was evidence of a precipitous and dramatic decline in crime in the years following the enactment of Three Strikes. In addition, we offered an analysis of Three Strikes jurisprudence in light of the *Romero* decision, concluding that Three Strikes was likely to survive constitutional challenge. We argued that, contrary to the hopes of many Three Strikes opponents, the law was more defensible *after* the *Romero* decision than before.

3. Franklin E. Zimring and Sam Kamin, *Facts, Fallacies, and California's Three Strikes*, 40 DUQ. L. REV. 605 (2002).

4. Michael Vitiello, *Somewhat Frantic: A Brief Response to Crime, Punishment and Romero*, 40 DUQ. L. REV. 615 (2002). In the course of our analysis, we described much of the academic opposition to Three Strikes as "somewhat frantic," as it heatedly decried the influence of "public panic" on crime policy. In doing so, we cited Professor Vitiello as a prime example of the prevailing frenetic character of the Three Strikes literature. According to Professor Vitiello, we displayed a fundamental misunderstanding of the institutional structure of the American regime because we failed to understand the extent to which legislative deliberation—as opposed to direct democracy—is the core of republican government. What particularly piqued his ire, however, was the fact that we characterized him and Zimring as "radical reformers" who wanted to replace the Three Strikes regime with the regime of experts. According to Vitiello, the influence of "mob rule" in the passage of Three Strikes was palpable. And it was, after all, the fear of "mob rule" that inspired the

The fundamental defect of the Zimring study and all similar statistical studies is that the world of probability is substituted for common sense. Zimring found that Three Strikes had no deterrent effect. This "finding" was widely reported by a sympathetic media. The message was simple: harsher sentences meted out to habitual criminals do not have a significant impact on crime. Therefore, the public's "anti-offender sentiments"<sup>5</sup> are unscientific and consequently illegitimate. Crime *and* punishment have been deconstructed. Following the logic of this deconstruction, punishment has no relation to crime or the crime rate. Indeed, the punitive regime of Three Strikes is wholly irrational and therefore somehow immoral. The commonsense conclusion, however, offers a different prospect. When a small class of habitual criminals who commit a disproportionate number of crimes is incarcerated for long periods, it is inevitable that crime will decline and that the crime rate among these criminals will fall nearly to zero (some will, of course, continue to commit crimes against fellow inmates and guards while incarcerated). Even Zimring is forced to admit that while "[t]he specially targeted groups in the Three Strikes system may not commit different types of offenses than the general offending population, . . . they certainly do commit a larger number of felonies."<sup>6</sup> Whether Three Strikes deters other felons within or outside "the specially target groups" is a moot point since the purpose of Three Strikes "is to remove repeat offenders from society for long periods of time, if not for life."<sup>7</sup>

## I. PROGRESSIVISM AND ACADEMIC ORTHODOXY

Professors Zimring and Vitiello represent academic orthodoxy in the debate over Three Strikes. Academic defenses of Three Strikes are rare; critics, on the other hand, are legion.<sup>8</sup> At the

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framers of the Constitution to institute republican government. *Id.* at 616. Republican government, so the argument goes, was designed to insulate lawmakers and policymakers from direct public influence. Whenever the public intrudes upon lawmaking or policymaking "mob rule" is the inevitable result. Professors Vitiello, Zimring and Kamin therefore see themselves as supporters of republican government, standing as a vital line of defense against the irrational impulses of the masses and their "popular passions." *Id.*

5. Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on 'Three Strikes' in California*, 28 PAC. L.J. 243, 255 (1996).

6. ZIMRING, PUNISHMENT AND DEMOCRACY, *supra* note 1, at 51.

7. Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two-and Three-Strikes Legislation*, 31 J. LEGAL STUDIES 159, 160 (2002).

8. A LEXIS/NEXIS search of law review articles for the past two years (Aug. 2, 2002 ["Three Strikes"]) registered 272 responses. Six articles contained supportive statements about Three Strikes, representing 2.21 percent of the sample. Discounting the two articles

same time we are justified in calling these scholars “radical reformers” because, their protestations to the contrary notwithstanding, they wish to replace the founding regime with the administrative state.<sup>9</sup> The founding regime was based on the principle that the “just powers” of government are derived from the “consent of the governed.”<sup>10</sup> The supporters of the administrative state wish to minimize the role of consent and establish a regime of experts who are insulated from the democratic process. Among the intellectual elites, support for the administrative state has become the prevailing orthodoxy. It is therefore only an *apparent* paradox to say that “radical reform” is the orthodoxy.

## II. CRIME AND PUNISHMENT: THE “THICKER THEOLOGY” OF THREE STRIKES

It has become a staple argument among the defenders of the administrative state that state initiative procedures violate the Republican Guarantee Clause of the United States Constitution. Initiatives are examples of direct democracy and bypass the deliberative process, which is the hallmark of republican government. The framers, we are told, rejected direct democracy because they feared “mob rule” and substituted in its stead republican government based on the principle of legislative representation. Legislatures are designed to be deliberative institutions—the give and take of coalition building in legislative bodies prevents the kind of extreme politics that is characteristic of direct democracy. Had

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written by the co-authors of this essay (one-third of the total), a scant four articles make positive references to Three Strikes. It is little wonder then that Professors Vitiello, Zimring and Kamin are eager to exclude us from the debate. Franklin Zimring, Sam Kamin, *Facts, Fallacies, and California's Three Strikes*, 40 DUQ. L. REV. 605, 614 (2002); Vitiello, *supra* note 4, at 626.

9. Vitiello, *supra* note 4, at 615.

10. DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776), listed as the first of “The Organic Laws of the United States of America” in the United States Code. USC, DECLARATION OF INDEPENDENCE (U.S. 1776):

We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

*Id.* para 2. On the appearance of the Declaration of Independence in the United States Code, see RICHARD H. COX, FOUR PILLARS OF CONSTITUTIONALISM: THE ORGANIC LAWS OF THE UNITED STATES 14-16, 58-71 (1998).

Three Strikes been the product of legislative bargaining—which Zimring seems to equate with “deliberation”—it would have been less extreme. Legislative deliberation might have produced the Three Strikes regime that Zimring seems to favor—one “designed to have maximum symbolic impact while not making major changes in case outcomes.”<sup>11</sup> The “symbolic impact” of the law would gratify the anti-offender ire of the public, while at the same time reserving the actual “case outcomes” to penologists and judges. According to Zimring, the California law contrasts sharply with Three Strikes laws in other States and “federal proposals” for Three Strikes. The strategy of “loud bark, small bite” would provide enough symbolism for politicians to appear tough on crime while at the same time allowing experts animated by “an ideology of rehabilitation”<sup>12</sup> to soften the punitive aspects of the law. Zimring complains that the Three Strikes regime in California combines a loud bark with a large bite. As experts, Zimring and Vitiello feel betrayed by this elevation of substance over symbol.<sup>13</sup>

The elevation of symbol over substance might possibly provide the “thicker theology”<sup>14</sup> necessary to transform the Three Strikes regime into one informed by the “ideology of rehabilitation.” A “thicker theology” is required by justice and fairness. Zimring, no less than Vitiello, expressed a belief that Three Strikes carries penalties that violate Kantian principles because they are disproportionate to the crimes. This is principally due to the fact that any felony can constitute a third strike—including misdemeanors elevated to felonies because of prior convictions. This disproportionality carries costs for the community that are “not insubstantial.” Citing a work that Zimring and Hawkins had published some years ago, Zimring warns that a punishment should not exceed “that required to express collective feelings of outrage.”<sup>15</sup>

The authors also cite Jeremy Bentham—“who has often been accused of crude utilitarianism”—in support of the “ideology of rehabilitation.” Bentham wrote that

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11. ZIMRING, PUNISHMENT AND DEMOCRACY, *supra* note 1 at 27; see 168, 227-28.

12. *Id.* at 213.

13. *Id.* at 28; see 168; 169 (“loud bark, small bite” has “succeeded brilliantly” in the “federal proposal.”); 176; 195-96; 197 (“A penal system that barks louder than it bites may in fact be more efficient than one that attempts to average symbolic and instrumental concerns into a single punishment value.”); 227-28 (“what we call the loose connection between symbolic and operational content is an inherent feature of the democratic politics of criminal justice.”).

14. *Id.* at 213.

15. *Id.* at 191-92.

[i]t ought not be forgotten, although it has been too frequently forgotten, that the delinquent is a member of the community, as well as any other individual . . . and that there is just as much reason for consulting his interest as that of any other. His welfare is proportionately the welfare of the community—his suffering the suffering of the community.<sup>16</sup>

Two more unfortunate sources could not have been picked in the search for a “thicker theology.” Apart from the fact that Kant and Bentham take *opposing* views on the issue of punishment, the framers of the American Constitution rejected the view of citizenship and punishment represented by both philosophers.<sup>17</sup>

Kant wrote that “punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it.”<sup>18</sup> Indeed, “[j]udicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime.”<sup>19</sup> Thus, Kant believed that punishment is intrinsic to the crime itself; punishment is an end in itself.

Bentham, on the other hand, did not argue that there was anything inherently good about punishment. For Bentham, morality did not emanate from the categorical imperative but from a utilitarian calculus of pain and pleasure. “All punishment,” Bentham wrote, “in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”<sup>20</sup> “The business of government,” Bentham argues, “is to promote the happiness of the society, by punishing and rewarding.” What is more important for our purposes, however, is that Bentham famously rejected social contract as the ground of citizenship and the moral obligations of

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16. ZIMRING, PUNISHMENT AND DEMOCRACY, *supra* note 1 at 192.

17. See RONALD J. PESTRITTO, FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA 68-75, 85-89 (2000).

18. Immanuel Kant, *The Metaphysical Elements of Justice* 100 (John Ladd, trans.) (1965) [originally published in 1797].

19. *Id.*

20. JEREMY BENTHAM, *THE PRICIPLES OF MORALS AND LEGISLATION* 170 (1970) [originally published in 1789].

citizens. For Bentham, the principle of utility was sufficient to establish obligations.<sup>21</sup>

The framers of the American Constitution, on the other hand, grounded citizenship and its attendant obligations in social contract. One commentator has recently argued that “[t]he idea of compact is at the heart of American constitutionalism. It is at the heart of the philosophical statesmanship that made the Revolution, of which the Constitution is the fruit.”<sup>22</sup> Social contract meant that obligations were derived from the consent of the governed and were thus freely incurred. Obligations were simply the mutual recognition of the rights of other citizens or, one might say, a mutual recognition of the human dignity of fellow citizens. From the point of view of the theory of social contract, every crime is a failure to perform the freely-incurred obligations that proceed from the mutual recognition of this humanity. Thus, it can be argued that obligations are not, as Bentham would have it, imposed by government and enforced by a calculus of rewards and punishments, but freely incurred and grounded in social compact. It was the theory of social contract that provided the basis for citizenship in the American Constitution.<sup>23</sup>

Rehabilitation has an important role to play in punishment—those willing and able to reacquire their capacity for recognizing the humanity of others should be given a chance to reenter civil society. But those who by their repeated acts have demonstrated an unwillingness or incapacity to do so should be treated severely because their crimes undermine the basis of civil society itself. Crime, as Kant argued, is the solvent of civil society because every crime is an act of individual will, and, to that extent, dissolves the social contract and reinstates the state of nature. It is the social compact that replaces the individual will of the state of nature with the rule of law. Three Strikes targets recidivists, those who have been given the opportunity to resume their place in the scheme of reciprocal obligations that characterizes the social compact, but have either failed or refused to do so.

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21. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 149-156 (1948) [originally published in 1776].

22. HARRY V. JAFFA, A NEW BIRTH OF FREEDOM, ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR 37 (2000).

23. See Edward J. Erler, *From Subjects to Citizens: The Social Compact Origins of American Citizenship*, to be published in THOMAS G. WEST AND RONALD J. PESTRITTO, EDS., *THE AMERICAN FOUNDING AND THE SOCIAL COMPACT* (2003).



The criticism of Zimring that Three Strikes targets an older criminal cohort and therefore is not an effective deterrent is utterly beside the point.<sup>24</sup> This is a wholly utilitarian argument. The question should not be one of deterrence, but (to use Kant's language) one of punishment and justice. Deterrence theory accepts a certain level of crime. Three Strikes, on the other hand, focuses on just punishment and looks forward, in the words of one of its principal architects, to a regime of "zero tolerance for crime."<sup>25</sup> This is how we perceive the "thicker theology" of Three Strikes.

### III. MOB RULE AND THE REPUBLICAN GUARANTEE CLAUSE

Three Strikes is proof to Vitiello and Zimring that the people as a whole are incapable of deliberation. While they may be competent to judge the deliberation of legislators, the people do not have the deliberative capacity to craft legislation themselves. One commentator has noted that "[t]he Framers of our Constitution, the theory goes, rejected direct democracy in favor of a representative—republican—government. A considerable amount of historical literature supports this theory, much of it focusing on the distrust that Madison and others had of factions and popular prejudices."<sup>26</sup> The Federal courts have always ruled that questions under the Guarantee Clause are nonjusticiable because they present essentially political questions.<sup>27</sup>

The Constitution, of course, does not define what constitutes a "Republican Form of Government." James Madison had argued in *The Federalist* that only the republican form of government was "reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all

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24. ZIMRING, PUNISHMENT AND DEMOCRACY, *supra* note 1 at 56.

25. Bill Jones, *Three Strikes and You're Out*, 26 U. WEST L.A. L. REV. 243, 245 (1995). See Bill Jones, *Symposium: Why the Three Strikes Law is Working in California*, 11 STAN. L. & POL'Y REV. 23 (1999).

26. Ernest L. Graves, *The Guarantee Clause in California: State Constitutional Limits on Initiatives Changing the California Constitution*, 31 LOY. L.A. L. REV. 1305 (1998).

27. See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1911). Justice Hans Linde of the Oregon Supreme Court is an enthusiastic supporter of state enforcement of the federal Guarantee Clause, but his advocacy has so far failed to produce results. Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 39-40 (1993). See Edward J. Erler, *Californians and Their Constitution: Progressivism, Direct Democracy and the Administrative State*, 6 NEXUS 240, 243-44 (2001).

our political experiments on the capacity of mankind for self-government."<sup>28</sup> The central reference—"the fundamental principles of the Revolution"—clearly points to the Declaration of Independence as an authoritative statement of those principles that must animate the republican form of government. The main argument of the Declaration is that governments derive "their just powers from the consent of the governed." Consent is a principle of natural right because it is said to be an irrefragable conclusion from "the Laws of Nature and of Nature's God."<sup>29</sup> Consent is required not only for the establishment of government but for its operation as well. It is, as Lincoln famously stated, "government of the people, *by the people*, for the people."<sup>30</sup> Eliminating the necessity for that republican government to be "by the people," would result in the conclusion that the people need not participate in their own governance; they can safely entrust their welfare to the bodies of the administrative state who will pursue the common good in a way that self-absorbed and interested majorities cannot. This conclusion obviously flies in the face of the principles of the founding.

One of the basic fallacies upon which much of the opposition's argument rests is that legislative decisions are necessarily a product of deliberation. As two leading scholars recently noted, "[l]egislation drafted in representative bodies is, in fact, routinely drafted by special-interest groups and their lobbyists, not necessarily with an eye for the welfare of the general public."<sup>31</sup> A leading California political observer noted, "In practice, committees in the California Legislature and other bodies rarely function as precisely or as effectively as law-makers claim . . . . Purely political factors—special interest campaign contributions, directions from legislative leaders and vote trading—are often more influential than logic or even ideology."<sup>32</sup> It would be as foolish to suggest that all legislative action embodies deliberation as it would be to suggest that all initiatives are devoid of deliberation. Deliberation should be judged by the result, not the process.

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28. THE FEDERALIST NO. 39, at 240 (Madison) (Clinton Rossiter ed., 1961).

29. See Edward J. Eler, *Natural Right in the American Founding*, 23 INTERPRETATION 458-462 (1996).

30. 7 COLLECTED WORKS OF ABRAHAM LINCOLN 23 (1953) (emphasis added); HARRY V. JAFFA, HOW TO THINK ABOUT THE AMERICAN REVOLUTION 110-112 (1978).

31. Craig B. Holman and Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1248 (1998).

32. Dan Walters, *Committee System No Longer Relevant*, INLAND VALLEY DAILY BULL., Aug. 29, 2002, at A14.

IV. REPUBLICAN GOVERNMENT, DIRECT DEMOCRACY AND  
REVOLUTION

The issue of government "by the people" was addressed by Madison in *The Federalist* in discussing whether the Constitutional Convention had exceeded its authority in writing an entirely new constitution instead of merely revising the Articles of Confederation.<sup>33</sup> The Convention had been charged by Congress to revise the Articles and make them "adequate to the exigencies of the Union."<sup>34</sup> Madison argued that the charge was inconsistent—no amount of revision could make the Articles "adequate." Thus, *The Federalist* concluded, "there is an absolute necessity for an entire change in the first principles of the system."<sup>35</sup>

Madison argued that making the Union adequate to meet the exigencies facing it was far more important than the injunction that all changes must be merely revisions of the Articles of Confederation. Thus, adhering to the form of the Articles would simply be sacrificing substance to form. And, as Madison subtly noted, "in all great changes of established governments forms ought to give way to substance."<sup>36</sup> The rigid adherence to forms "would render nominal and nugatory the transcendent and precious right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness."<sup>37</sup> And in case any reader failed to recognize the quotation, Madison supplied a reference to the Declaration of Independence. It is not an exact quotation, of course, but it does render the sum and substance of the Declaration's doctrine of the right of revolution understood as a necessary conclusion from the fact that the "just powers" of government are derived from the "consent of the governed." Madison's argument here is a straightforward and bold assertion of the right of revolution. If the Convention had in fact violated its instructions to adhere to the form of the Articles of Confederation, approval by the people will "blot out antecedent errors and irregularities"<sup>38</sup> for the simple reason that "THE CONSENT OF THE PEOPLE" . . . is the "pure, original fountain of all legitimate authority."<sup>39</sup>

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33. THE FEDERALIST No. 40 (Madison).

34. THE FEDERALIST No. 40, at 247 (Madison) (Clinton Rossiter, ed., 1961).

35. *Id.* No. 23, at 154 (Hamilton).

36. THE FEDERALIST No. 40 (Madison).

37. *Id.*

38. *Id.* No. 40 at 253 (Madison).

39. *Id.* No. 22, at 153 (Hamilton) (emphasis in original); see No. 49, at 313 (Madison).

The same reasoning would support the Convention's decision to bypass the Congress and the state legislatures in the ratification process. The Articles of Confederation required unanimous consent of all the states for any substantial changes or amendments to the Articles. The Convention believed that greater legitimacy—and a greater prospect of change—would be derived from ratification by the people than by the states. Thus, the right of revolution—the ultimate resort of the people—is the right that guarantees every other right and is the ultimate ground of the “Safety and Happiness” of the people.

It is true that the Framers argued that the resort to revolution should be only “for certain great and extraordinary occasions.”<sup>40</sup> The Declaration of Independence cautions that “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed.”<sup>41</sup> Jefferson nevertheless argued that the threat of revolution should be an ordinary ingredient—indeed perhaps the moving principle—of electoral politics. As Professor Harry Jaffa has recently noted, Jefferson in his first inaugural address saw

the right of free election as the normal and peaceable fruit of the right of revolution. But by Jefferson's theory, the right of revolution would forever underlie the right of free election and would supply a compelling reason why governments ought to have such elections as authentic expressions, not only the people's will, but also of those rights that are the authority for the people's will.<sup>42</sup>

Elections might then be regarded as in some sense substitutes for revolution—repeated renewals of the people's consent as the foundation of the “just powers” of government. But republican

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40. *Id.* No. 49, at 313 (Madison).

41. DECLARATION OF INDEPENDENCE, para.2 (U.S. 1776).

42. *Supra* note 37, at 8; see 280, 416. In 1787 Jefferson wrote that

I am persuaded that the good sense of the people will always be found to be the best army. They may be led astray for a moment, but will soon correct themselves. The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of the institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty.

Letter to Edward Carrington, Jan. 16, 1787, in JEFFERSON: WRITINGS, M. PETERSON, ED., 880 (1984).

government, we are told, excludes any form of direct democracy. Its core is legislative deliberation—the people are incapable of deliberation in mass. Indeed, it has been argued by a prominent supporter of the administrative state that “[t]he Declaration of Independence demanded government by the consent of the governed, not by the governed.”<sup>43</sup>

In *The Federalist*, Madison defined republican government as “a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior.”<sup>44</sup> “It is *essential*,” Madison continues, that “such a government... be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it.”<sup>45</sup> Madison’s principal concern in recommending a republic over “pure democracy” was not, as Vitiello insists, because he feared “mob rule.” Mob rule would be excluded by the forms of constitutional government itself. Rather, Madison’s concern was the problem of “majority faction.” Majority faction, unlike “mob rule,” could destroy republican government by using the forms of the Constitution itself as an instrument of its force and violence. In other words, majority faction simply used the forms of republican government—majority rule—to destroy the ends of republican government, the security of the rights of every individual. The solution to the problem of majority faction was “constitutional majorities” as opposed merely to “numerical majorities.” Constitutional majorities would rule in a manner that was consistent with the public good and the rights of minorities because such majorities were not actuated by a sense of their own interest *as a majority*. Indeed, the majority would be composed of a multiplicity of different interests that would “render an unjust combination of a majority of the whole very improbable, if not impracticable.”<sup>46</sup> The object of Madison’s constitutional jurisprudence was “[t]o secure the public good and private rights against the danger of [majority]

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43. Hans A. Linde, *When Initiative Lawmaking is Not “Republican Government”: The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 23 (1993). See Edward J. Erlner, *Californians and their Constitution: Progressivism, Direct Democracy and the Administrative State*, 6 NEXIS 240, 243-44 (2001).

44. THE FEDERALIST No. 39, at 241 (Madison).

45. *Id.* (emphasis original).

46. *Id.*, No. 51, at 324 (Madison).

faction," while "at the same time" preserving "the spirit and form of popular government."<sup>47</sup>

Madison compared republican government, not with direct democracy, but with "pure democracy." Pure democracy is "a society consisting of a small number of citizens, who assemble and administer the government in person."<sup>48</sup> Pure democracies thus "can admit of no cure for the mischiefs of faction" because a "common passion or interest will, in almost every case, be felt by a majority of the whole . . . and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual."<sup>49</sup> Pure democracies, because of their small size and resulting lack of diversity, are prone to majority faction. Republics, on the other hand, can encompass a larger territory and embrace a greater diversity. A "scheme of representation" distinguishes a republic from a pure democracy. Without representation popular government could not attain the requisite size and diversity. It is true that representation will have the additional benefit of refining and enlarging the public view "through the medium of a chosen body of citizens, whose wisdom may discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."<sup>50</sup> Indeed, Madison argues, "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose." Madison is quick to caution, however, that "the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people."<sup>51</sup> The scheme of representation is thus truly a "great mechanical device" that can be used for well or ill. It is most likely, however, to be used for salutary purposes in extensive and diverse republics where the competition between factions or interests will most likely produce moderate majorities. Thus, it is clear that Madison regarded representation as a *necessary* but not a *sufficient* condition of republican government.

In one of the most cited passages of *The Federalist*, Madison wrote that "a dependence on the people is, no doubt, the primary

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47. *Id.*

48. *Id.*

49. THE FEDERALIST No. 10, at 81 (Madison) (Clinton Rossiter, ed., 1961).

50. *Id.*

51. *Id.* at 82.

control on the government; but experience has taught mankind the necessity of auxiliary precautions."<sup>52</sup> Representative government is not enough. The "auxiliary precautions" afforded by the separation of powers and checks and balances are necessary not only for non-tyrannical government, but for good government as well. The people in mass cannot deliberate. The people are, however, perfectly competent to judge the deliberation of elected representatives. One need not be an expert to judge the putative expertise of others—the one who wears the shoe is a better judge of the shoe than the shoemaker. And, frequent elections are the means by which the people judge. What makes the people safe judges of government is the fact that the extended republic, with its multiplicity of competing interests, renders them capable of self-government. If there is not enough virtue—both moral and intellectual—in the people, as both Vitiello and Zimring suggest, then republican government in any form is impossible. Whether the best alternative is the administrative state or some other form of non-republican government we leave to another occasion.

#### V. REPUBLICAN GOVERNMENT MUST BE LIMITED GOVERNMENT

The framers believed that the principled foundations of republican government, as outlined in the Declaration of Independence, required limited government. By the theory of the Declaration, government was limited to securing the conditions necessary to the exercise of rights and liberties. When the people establish government they delegate certain powers to government to be exercised for their benefit. The powers not delegated by the people are retained by the people. On this view, sovereignty resides in the people, not the government, and the just or legitimate powers of government can only be delegated by the people. This view of the sovereignty of the people was, of course, an innovation—indeed revolutionary. Madison had noted that "rights . . . are reserved by the manner which the federal powers are delegated."<sup>53</sup> Residual sovereignty always remains with the people. The powers not delegated to the federal government and not forbidden by the Constitution to the states belong to the states or to the people.<sup>54</sup>

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52. *Id.*, No. 51, at 322 (Madison).

53. Letter to Thomas Jefferson, Oct. 17, 1787, in WILLIAM T. HUTCHINSON, ET AL., *THE PAPERS OF JAMES MADISON* 11: 297 (1977).

54. U.S. CONST, amend. X.

The people in the various states have delegated power in a variety of ways. Article VI of the Constitution makes the federal Constitution the supreme law of the land and in the exercise of its delegated powers the federal government must prevail over the states in cases of conflict. But in the exercise of its policy powers, the states are sovereign—limited, of course, by the federal Bill of Rights and the requirement that the states must have a republican form of government.

Can the people in the states, in the exercise of their sovereign powers, retain some legislative powers in the form of initiatives without violating the Republican Guarantee Clause? Madison cited two provisions as “proof” of the “republican complexion” of the Constitution. The first, which Madison calls “the most decisive,” is the “absolute prohibition of titles of nobility, both under the federal and the State governments.”<sup>55</sup> The second provision that Madison offered as “proof” of the republican character of the Constitution was “its express guaranty of the republican form” to state governments.<sup>56</sup> In his final word on the Guarantee Clause, Madison notes that it will allow the federal government “to defend the system against aristocratic or monarchical innovations.”<sup>57</sup> In this sense, the Guarantee Clause, as Madison indicated, is the counterpart to the prohibition on titles of nobility. In sum, the Guarantee Clause, according to Madison, is a “restriction imposed” on the states “that they shall not exchange republican for anti-republican Constitutions.”<sup>58</sup> The leading authority on the Guarantee Clause, William Wiecek, drew the irresistible conclusion: The Guarantee Clause “was designed to prohibit monarchical or aristocratic institutions in the states.”<sup>59</sup> Indeed, Wiecek concluded that the Guarantee Clause was intended to insure “that state governments would remain responsive to popular will.”<sup>60</sup>

It is true that Madison expected majority factions to be more likely at the state level simply because the States lacked the requisite size and diversity. Indeed, it was Madison’s view that the

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55. THE FEDERALIST No. 39, at 242 (Madison). Hamilton, in a later paper, remarks that this prohibition “may truly be denominated the cornerstone of republican government; for so long as [titles of nobility] are excluded there can never be serious danger that the government will be any other than that of the people.” *Id.*, NO. 84, at 512 (Hamilton).

56. *Id.*, No. 39, at 242 (Madison).

57. *Id.*, No. 43, at 274 (Madison).

58. *Id.* at 275.

59. WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION 62 (1972).

60. *Id.* at 63.



states under the Articles were dominated by such majorities and that state legislatures had become merely the instruments of majority faction. Madison argued that the extended republic, with its greater diversity, coupled with the institutional constraints imposed by separation of powers and checks and balances, would produce a government that was responsive only to the "cool and deliberate sense of the community."<sup>61</sup> The separation of powers was designed to insure that "the reason alone, of the public" would inform the deliberations of the different branches of government.<sup>62</sup> The public good is the object of deliberation and the separation of powers was intended to render those who occupy constitutional offices, by pitting "ambition against ambition," to pursue that end. Contrary to Professor Vitiello, the purpose of the separation of powers was not to create cadres of experts.<sup>63</sup> It would make little or no sense to pit the ambition of experts against the ambition of experts as a vehicle for "supplying . . . the defect of better motives."<sup>64</sup> The "better motives" of experts is guaranteed simply by the fact of their expertise. Rather, the framers understood constitutional government in its full political sense, not the narrow and truncated sense of administration or expertise—the vision that inspires Zimring and Vitiello.

California has more than ten times the population the United States had in 1790, and the population represents a greater diversity of interests as well. It is hardly credible that such a diverse population could produce majority factions—the very thing that critics of "direct democracy" say is a regular feature of the initiative process. Indeed, as the case of Three Strikes illustrates, it is much more likely that the legislature will be paralyzed by interest group brokering and special interest pleading. Genuine deliberation becomes impossible when the voice of the public good is drowned by the cacophony of special interests clamoring for ascendancy in the legislature. When legislatures are incapable of acting in the public interest, the people must have some resort that falls short of revolution. This was the role originally assigned to the initiative but which today is viewed by some as the antithesis of progress. Indeed, these proponents of the administrative

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61. THE FEDERALIST No. 63, at 384 (Madison) (Clinton Rossiter, ed. 1961).

62. *Id.*, No. 49, at 317 (Madison).

63. Vitiello, *supra* note 4, 623-24.

64. THE FEDERALIST No. 51, at 322 (Madison).

state are driven to argue that direct involvement by the people—even for republican ends—is inherently anti-republican.

In the oft-quoted case of *Kadderly v. Portland* (1903), the Oregon Supreme Court ruled that the initiative and referendum amendment at issue in the case did “not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power ....”<sup>65</sup> The initiative and referendum are thus legislative powers reserved to the people. The *Kadderly* decision pointed out that state initiatives exist within the context of—and are limited by—state constitutions. Statutory and Constitutional initiatives must conform to the state constitution as well as the federal constitution. In California, most initiatives fail to meet constitutional standards and are held unconstitutional by the courts. The simple reservation of a portion of legislative power to the people can hardly be called a violation of the Republican Guarantee Clause. Initiatives are a direct reminder of the fact that in republican government the people are the sole source of legitimate power. To argue that the limited exercise of direct democracy violates the Republican Guarantee Clause is simply to elevate form over substance.

It is certainly true that initiatives are often poorly written, deceptive and of dubious constitutionality. By the same token, however, we believe that some of the important initiatives in California’s recent history—most notably the Three Strikes initiative and the California Civil Rights Initiative—have served the public interest in a way that the legislature was unable or unwilling to do. Whether or not the public interest has been served should be determined by substance, not form. Most initiatives are rejected by the voters—even a significant majority of constitutional amendment initiatives placed on the ballot by the legislature are rejected. The people of California seem quite willing to defer to the “deliberative process” when they have evidence that deliberation has actually taken place. But it would strain credulity to maintain that the “deliberative process” always results in genuine deliberation or deliberation animated by a sense of the public good. Whenever California voters are uncertain or confused they tend to

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65. *Kadderly v. Portland*, 74 P. 710, 719 (Or. 1903).

indulge a healthy skepticism.<sup>66</sup> And although, as Zimring noted, initiatives can only be voted up or down and that once proposed no compromise is possible, to say that the "all or nothing" characteristic of the vote excludes the possibility of deliberation is to confuse "deliberation" with interest group brokering.

## VI. DELIBERATION AND "PUBLIC PANIC"

Zimring and Vitiello describe the process whereby Three Strikes came into law as "unusual."<sup>67</sup> The normal legislative process was bypassed in favor of "populist preemption" that displaced the influence of experts.<sup>68</sup> Aggrieved father Mike Reynolds and Assemblyman Bill Jones crafted the Three Strikes proposal and simultaneously submitted it as a ballot initiative and legislative bill. Both efforts were met with initial difficulty. The Public Safety Committee in the Assembly refused to approve the bill and, despite an immediate burst of support, the initiative petition process became bogged down. The brutal murder and kidnapping of Polly Klaas changed the scenario. It was this tragedy, according to Vitiello and Zimring that stampeded the public into acceptance of an irrational policy that was animated solely by anti-offender ire.

But clearly the public had come to realize that the regime of experts was failing dismally in the area of crime. Polly Klaas' killer was a career criminal who would still have been in prison had the Three Strikes regime been in place. He was on parole because a parole panel had certified him as no longer a danger to society. Polly Klaas' brutal murder was only the proximate cause of the public's overwhelming support for Three Strikes. Tired of being victimized by career criminals, public support was overwhelming and almost unprecedented when Governor Wilson signed the Three Strikes bill on March 7, 1994.

Zimring and Vitiello marvel at the lack of involvement by Assembly Speaker Willie Brown in the face of such "populist preemption." They describe the powerful Speaker as passive in the face of an "outside the beltway" onslaught from marginal pressure

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66. Holman & Stern, *supra* note 31, at 1249. Voters tend to be very cautious and thus are reluctant to approve initiatives at the ballot box. Historically, California's initiatives average a one-third approval rate. This reluctance dramatically increases when voters are uncertain about a measure. When uncertain, the voter generally casts a vote against an initiative in order to maintain the existing public order. *Id.*

67. Vitiello, *supra* note 4, at 618; ZIMRING, PUNISHMENT AND DEMOCRACY, *supra* note 1, at 3.

68. ZIMRING, PUNISHMENT AND DEMOCRACY, *supra* note 1, at 3.

groups.<sup>69</sup> However, the account offered by Zimring and Vitiello is somewhat superficial. It does not take into account the influence of Assembly leadership on the committee process. Brown, through Public Safety Committee members John Burton, Tom Bates, and Barbara Lee, exercised considerable influence in bottling up the initial bill. If there was no support for the measure on the floor, then why not let the bill come up for a vote? The actions of Brown and his allies on the Public Safety Committee implied that the bill would receive significant floor support and would likely pass. Brown exercised legislative discretion and prevented the initial attempt to pass the bill. A full and fair debate might very well have led to its passage much earlier—and perhaps in a different form. This account is wholly at odds with that offered by Zimring and Vitiello.

There was nothing unusual about the passage of Three Strikes as Zimring and Vitiello would have us believe. The legislative elite opposed the bill. They had prevented earlier versions of it from passing until public demand proved overwhelming. The fact that a proposed initiative was the immediate cause does not make the Three Strikes process unusual. When legislators sense that the public overwhelmingly supports a measure they do not always enact it. However, when legislators sense that the public is aware of the fact that a cadre of legislative elites has consistently derailed popular proposals, they almost always change course and adopt the new measure.<sup>70</sup> This is true even at the federal level, where there are no direct democracy provisions. And it is also true in California. Support for the initiative was an indicator of constituent sentiment. A rational respect for the wishes of one's constituents is the more formal cause of legislative deliberation. Such respect is not unusual in a free government—it is the hallmark of free government.

## VII. A COMEDY OF ERRORS

Much of our effort in this essay has been devoted to what Zimring, Kamin, and Vitello identify as their primary argument: our misunderstanding of the role of expertise in America's republican regime. However, before concluding we would like to take the opportunity to address the responses by Zimring and Kamin to our

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69. *Id.* at 5. Vitiello, *supra* note 4, at 617.

70. For a detailed discussion of "salience effects" on legislative behavior, see JOHN KINGDON, *CONGRESSMEN'S VOTING DECISIONS* (1989).

critique of their methodology. As stated in the notes to the introduction, our critique was focused on: 1) the timing of the samples; 2) the claim of no incapacitation effect; 3) the conflation of arrests and crime; 4) the lack of statewide data; and 5) the claim of no deterrent effect.

With respect to our critique of the timing of their samples, Zimring and Kamin argue that

the literature on deterrence suggests that because publicity and public concern are generally at their maximum around the time of legal change, the closer the observation to the change, the greater the chance that the effect of the legal change will be detected. . . . Thus, the timing of our two large samples was not only orthodox by the standards of deterrence research, but in fact demanded by convention.<sup>71</sup>

However, the "literature" cited by Zimring and Kamin consists of two articles, one on the 1967 British Road Safety Act by H. Laurence Ross and another on drug laws co-authored by Kamin. One would think that "convention" would require a greater showing than two articles. In addition, the British Road Safety study is inapplicable because it tried to determine the effect of a law that criminalized certain behavior for the first time; whereas Three Strikes was designed to enhance penalties for existing crimes. Thus, the British study is wholly irrelevant to any Three Strikes analysis.

The image conjured up by Zimring is scarcely credible: felons intensely following legislative debate and calculating with uncanny precision, not only the results of the debate, but its likely adverse effect upon them.<sup>72</sup> Vitiello seems to offer an entirely different experience. He recounts some conversations he had with "a number of intelligent people at different times since the passage of Three Strikes."<sup>73</sup> Vitiello reports that "the respondents are almost universally shocked" at the reach and extent of the Three Strikes regime.<sup>74</sup> "Their confusion," he laments, "is understandable."<sup>75</sup> One is left to ponder how "intelligent people" can be so utterly confused when the ordinary criminal in Zimring's universe understands

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71. Zimring & Kamin, *supra*, note 3, at 609-610.

72. C. W. Kohfeld, *Rational Cops, Rational Robbers, and Information*, 11 J. CRIM. JUST. 459 (1983).

73. Vitiello, *supra* note 4, at 619.

74. *Id.*

75. *Id.*

with prescient lucidity? Either Vitiello's interlocutors are not as intelligent as he believes or the criminals described by Zimring are far more intelligent than ordinary experience would lead us to believe. In any case, the two Professors present something of a conundrum: the mass of the voters were simply irrational in their demand for Three Strikes, but criminals were able to calculate with Euclidian precision the future effects of the new law even before its passage. Since Zimring and Vitiello maintain that the Three Strikes law is wholly irrational, how is it possible to calculate its logical effects?

There are many reputable studies that test for lag effects on public policy innovations that were ignored by Zimring. Testing for lag effects is standard methodology in policy studies.<sup>76</sup> It is Zimring who appears to be unaware of the literature on research design.

In responding to our claim that some of the April 1994 arrests could have come from crimes committed before March 7, 1994, Zimring and Kamin cite a small body of literature to bolster their argument that, for most crimes, arrests occur close in time to the offense. While we may be inclined to accept this on its face, we find it strange that Zimring and Kamin chose to cite outside sources rather than their own data set. Our criticism could have been easily dismissed by a recounting of the relevant information from their own data. Why not simply check the arrest records

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76. James A. Fox, *Crime Trends and Police Expenditures: An Investigation of the Lag Structure*, 3 EVALUATION Q. 41-58 (1979); Henry N. Pontell, *Deterrence: Theory Versus Practice*, 16 CRIMINOLOGY 3 (1978); Scott H. Decker and Carol W. Kohfeld, *The Deterrent Effect of Capital Punishment in the Five Most Active Execution States: A Time Series Analysis*, 15 CRIM. JUST. REV. 173 (1990); Donald F. Green, *Measures in Illegal Behavior in Individual-level Deterrence Research*, 26 J. RESEARCH CRIME & DELINQ. 253 (1989); Edward L. Wells, *Self-Enhancement Through Delinquency: A Conditional Test of Self-Derogation Theory*, 26 J. RESEARCH CRIME & DELINQ. 226 (1989); Raymond Paternoster, *Examining Three-Wave Deterrence Models: A Question of Temporal Order and Specification*, 79 J. CRIM. LAW & CRIMINOLOGY 135 (1988); Kirk. R. Williams and Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 LAW & SOC'Y 545 (1986); Scott H. Decker and Carol W. Kohfeld, *A Deterrence Study of the Death Penalty in Illinois, 1933-1980* 12, J. CRIM. JUST. 367 (1984); William C. Bailey, *Murder and Capital Punishment in the Nation's Capital*, 1 JUST. Q. 211 (1984); C. W. Kohfeld, *Rational Cops, Rational Robbers, and Information*, J. CRIM. JUST. 459 (1983); Yih Wu Liu, *Modeling Criminal Activity in an Area of Economic Decline*, 42 AM. J. ECON. & SOC. 385 (1983); William W. Minor and Harry Joseph, *Deterrent and Experiential Effects in Perceptual Research: A Replication and Extension* 19 J. RES. CRIM. & DELINQ. 190 (1982); Lee H. Bowker, *Crime and the Use of Prisons in the United States: A Time Series Analysis* 27 CRIM. & DELINQ. 206 (1981); Terrence E. Jones, *The Impact of Crime Rate Changes on Police Protection Expenditures in American Cities*, 11 CRIMINOLOGY 516 (1974); Leroy C. Gould, *The Changing Structure of Property Crime in an Affluent Society*, 48 SOC. FORCES 50 (1969).

they collected and answer our rather straightforward question from the information they claim to possess?

With respect to our point about the limitations of the incapacitation effect prior to 1997, Zimring and Kamin argue that they did in fact address this issue. They claim to have accomplished this by demonstrating that the rate of increase in total incarcerations did not radically change after Three Strikes.<sup>77</sup> The logic here is that since there was no real change in the number of sentences there could be no incapacitation effect resulting from the new law. Once again, this fails to address the point made by Professors Beres and Griffith that any attempt to examine incapacitation before 1997 is pointless.<sup>78</sup> As stated above, most of the felons convicted under Three Strikes would still have received sentences under the old system that would have kept them in prison until 1997 or beyond. Therefore, we concur with Beres and Griffith that any meaningful test of incapacitation must take place after 1997. Zimring and Kamin steadfastly refuse to examine or address this crucial point.

Zimring and Kamin also take issue with our criticism that they have conflated arrests and crime, thus skewing the results toward a null finding. We argued that there may be different arrest rates for different crimes and that this disparity might render any interpretation of crime from arrest data unreliable. Zimring and Kamin respond by arguing that:

[I]f the odds of being caught were twice as high for third strike eligible defendants than for those without any strikes on their record, their 3.3 percent share of all arrests in April of 1993 would be evidence that they committed only 1.7 percent of California crime during that period. . . . this would strengthen the case against Three Strikes as a major crime prevention tool.<sup>79</sup>

However, this response betrays a fundamental difference that we have with Zimring and Kamin. They argue that because a category of criminals is only 3.3 or, for the sake of argument, even 1.7 percent of the population, somehow these criminals are not

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77. ZIMRING, PUNISHMENT AND DEMOCRACY, *supra* note 1, at 91-94.

78. Linda Beres and 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, 117 (1998).

79. Zimring & Kamin, *supra* note 3, at 608.

worthy of serious public concern. Consider the following. What if there were only two types of criminals: jaywalkers and serial killers. What if serial killers were only 0.5 percent of all criminals. Would a reasonable person suggest that serial killing is not a serious problem because it only comprises 0.5 percent of all crime?

There is a more fundamental methodological problem, however, with the conflation of arrests and crime. Zimring lumped the three cities together, ignoring the fact that each of the cities is likely to have a different arrest to crime ratio.<sup>80</sup> An arrest in one city may not prove to be a proxy of the same weight in another city. During the time period in which Zimring conducted his study, the arrests to crime ratio was rising because, while the number of arrests was stable, the crime rate, as even Zimring noted, was declining significantly. According to data provided by the California Department of Justice, the arrests to crime ratio increased in San Francisco County, Los Angeles County, and San Diego County.<sup>81</sup> Granted, these are county data, but San Francisco is both a city and a county, while the cities of Los Angeles and San Diego are the largest entities within their respective counties and undoubtedly drove the results. The data give reason to cast suspicion on the conflation of arrests and crime because clearly the arrests to crime ratio changed significantly while Zimring's model posits no change. And if the connection between arrests and crime is not valid, the remaining conclusions of the Zimring study are similarly tainted. Using correct arrest to crime ratios, it is clear beyond cavil that an arrest in 1994 or 1995 represents less crime than it did in 1993. Therefore, as we hypothesized, the conflation of arrests and crime further depresses the measurement of a potential deterrent effect of Three Strikes.

In response to our critique that they did not have a single statewide datum in a monograph entitled *Crime and Punishment in California*, Zimring and Kamin argue that monthly city data from nine of California's ten largest cities is a better measure because 84 monthly data periods are superior to seven annual statewide data points.<sup>82</sup> According to Zimring and Kamin, their analysis confirms that the downward trend in crime rates that began in 1991 did not accelerate after Three Strikes went into ef-

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80. Roland Chilton, *Analyzing Urban Crime Data: Deterrence and the Limitations of Arrest Per Arrest Ratios*, 19 CRIMINOLOGY 590 (1982).

81. California Judicial System Statistical Tables, available at [http://justice.hcdcojnet.state.ca.us/cjcs\\_stats/prof00/](http://justice.hcdcojnet.state.ca.us/cjcs_stats/prof00/) (last visited 8-14-2002).

82. Zimring & Kamin, *supra*, note 3, at 611-12.



fect. However, they offer no statistical test to back up their claim, not even the rudimentary t-test we offered in our article. We believe, however, that we proved that a significant acceleration of the rate of decline occurred after 1994. Are we simply to take their word for it and be satisfied with their conclusion?<sup>83</sup>

Finally, we would like to take the opportunity to correct a mistaken impression given by Zimring and Kamin in their reply to our article. They accused us of making "demonstrably false" statements regarding their positions on prison sentences and the deterrent effect of the law.<sup>84</sup> With respect to prison sentences, we made the point in our original article that Zimring argued that the "the law had a statistically meaningless impact on criminal sentences."<sup>85</sup> We made this point based upon conclusions derived from Zimring: "Thus, the principal mechanism for increasing the punishment of three-strikes-eligible defendants could not have been the sentencing provisions in the three strikes law."<sup>86</sup> Furthermore, Zimring discussed the number of prison sentences meted out before and after the law: "there was no discontinuous shift in incarceration trends that tracked the change in crime trends. . . . The 5.9 percent increase in 1994 is within a tenth of a percentage point of the median increase for the 1990s."<sup>87</sup> How can Zimring and Kamin say that our characterization of these two statements is "demonstrably false?" We will let the quotations speak for themselves. The clearest example of obfuscation is contained in their argument on deterrence: "A second misstatement appears in the first paragraph of the article where readers are told, 'the thesis of the study is that California's Three Strikes law

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83. In a related matter, we would like to address the rather crude methodological point made by Zimring and Kamin in their argument against general deterrence. They assert that a measurement with 84 data points is inherently superior to one with only seven. While 84 years would be better than seven years when comparing a trend, the 84 *months* of the Zimring study is not presumptively better than the seven *years* of aggregated statistical evidence we offered in rebuttal. Zimring and Kamin seem to imply that 84 observations are better because the higher number solves the small *n* problem in statistical theory. But this places the rules of statistical formality ahead of substantive meaning, something we think is at the heart of their entire argument. Why not collect data on the 2,555 days over the period in question to ensure that the number of observations is as high as possible? This is the classic case of maximizing internal validity at the expense of external validity.

84. Zimring & Kamin, *supra* note 3, at 612.

85. Janiskee & Erler, *supra* note 2, at 45.

86. ZIMRING, CRIME AND PUNISHMENT IN CALIFORNIA, *supra* note 1, at 52. See PUNISHMENT AND DEMOCRACY, *supra* note 1, at 73.

87. ZIMRING, CRIME AND PUNISHMENT IN CALIFORNIA, *supra* note 1, at 73. See PUNISHMENT AND DEMOCRACY, *supra* note 1, at 93.

has failed to deter crime.”<sup>88</sup> In response to this claim we offer an extended quote from Zimring:

Before three strikes came into effect, 13.9 percent of adult felony arrests involved the specially targeted group, compared to 12.8 percent after the new punishments were operative. This difference is not statistically significant, so it is not prudent to assume there was any decline in the share of crime committed by those targeted in the new law . . . We found no evidence of spillover deterrence, the 45.4 percent of all felony arrests that involve previously convicted felons after three strikes is not significantly different from the 44.8 percent of all arrests in this category before the law was passed.<sup>89</sup>

We find it disingenuous that Zimring and Kamin would accuse us of misrepresenting their statements.

In the most sophisticated statistical analysis of Three Strikes to date, Joanna Shepherd regards the Zimring study with considerable skepticism.<sup>90</sup> According to Shepherd, the study is flawed because it is “based on the raw data before and after enactment of the law instead of regression analysis.”<sup>91</sup> Regression analysis controls for other effects on crime besides the particular hypothesized factor in question. In addition, Shepherd finds the Zimring study flawed because it assumes “that the only deterrence possible under strike laws is partial deterrence.”<sup>92</sup> That is, Zimring only focuses on those specifically targeted by the law. As Shepherd argues, “[t]his assumption is fundamentally wrong; strike laws may also deter individuals contemplating their first strike.”<sup>93</sup> Echoing our own concerns about Zimring’s methodology, Shepherd notes that a “study that limits the deterrent effect to this group will necessarily understate the legislation’s effectiveness.”<sup>94</sup> Following the baseball metaphor of Three Strikes, Shepherd uses the example of a batter. A batter is concerned with the first strike because it puts him closer to the third strike. The same logic might apply to those considering whether or not to commit a strike-eligible offense: “This may result in early strike offenders substituting out of

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88. Zimring and Kamin, *supra* note 3, at 613.

89. ZIMRING, CRIME AND PUNISHMENT IN CALIFORNIA, *supra* note 1, at 4.

90. Shepherd, *supra* note 7.

91. *Id.* at 161.

92. *Id.*

93. *Id.*

94. *Id.*

the harshly penalized crimes and into the nonstrikeable crimes with lesser penalties."<sup>95</sup> This would apply to those with no strikes or one strike on their record. Those with two strikes, given the realities of California's policy, should be concerned about committing *any* felony. Shepherd finds that sentences meted out under the law have a significant deterrent effect on murder, aggravated assault, robbery, and burglary: "Fearing initial strikes, potential criminals commit fewer crimes that qualify as initial strikes."<sup>96</sup>

### VIII. THREE STRIKES AND THE CONSTITUTION REBORN

It is a matter of some curiosity that neither Zimring, Kamin, or Vitiello challenged our constitutional analysis of Three Strikes. We devoted significant attention to the *Romero* case because this decision seemed to be at the heart of efforts by Vitiello and other like-minded opponents of Three Strikes to weaken the law. We did demonstrate, however, that Vitiello had utterly misread the holding in *Romero*. Contrary to what Vitiello had implied, the California Supreme Court did not rule on constitutional separation of powers grounds—that the power to act in the interest of justice was inherent in the judiciary—but on statutory grounds. The Three Strikes legislation had simply not repealed in unequivocal terms an earlier law allowing judicial discretion. The court clearly stated, however, that legislation specifically directed at repealing the discretion of judges would not offend the separation of powers requirements of the California Constitution.<sup>97</sup>

In a footnote, Vitiello complains that we failed to consider whether Three Strikes could be invalidated under the California Constitution. We have, Vitiello claims, ignored independent state grounds and "developed case law interpreting the California Constitution."<sup>98</sup> Vitiello relies on several pre-Three Strike cases which putatively carved out independent state ground interpretations for the California Constitution's prohibition on "cruel or unusual punishment." In one case, *In re Lynch* (1972), the court noted that a punishment violates the California Constitution "if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and of-

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95. Shepherd, *supra* note 7 at 175.

96. *Id.* at 190.

97. Erler & Janiskee, *supra* note 2, at 61-63.

98. Vitiello, *supra* note 4, at 615.

fends fundamental notions of human dignity.”<sup>99</sup> One of the authorities frequently cited in the court’s opinion was *People v. Anderson*, a decision handed down earlier in the same year. In *Anderson*, the court had declared the death penalty unconstitutional on independent state grounds, holding that capital punishment was “unnecessary to any legitimate goal of the state and incompatible with the dignity of man and the judicial process.”<sup>100</sup> The *Anderson* decision provoked a storm of protest, ultimately resulting in a constitutional amendment initiative overturning the decision. The initiative was eventually upheld in *People v. Frierison* (1979), in which the court concluded that “[t]he clear intent of the electorate . . . was to circumvent *Anderson* by restoring the death penalty to the extent permitted by the Federal Constitution.”<sup>101</sup>

In 1982, another initiative, the Victims’ Bill of Rights, mandated that the exclusion of evidence in criminal trials proceed on federal grounds rather than independent state grounds. This initiative was similarly upheld by the California Supreme Court. In 1990, the people of California passed another initiative, Proposition 115 (the Crime Victims’ Justice Reform Act), withdrawing independent state ground powers in almost all areas touching upon the rights of criminal defendants. This wholesale attempt to curtail the power of California courts did not, however, survive judicial scrutiny. The California Constitution allows constitutional *amendment* by initiative, but constitutional *revisions* can only be made by a specially appointed commission. The California Supreme Court in *Raven v. Deukmejian* (1990) declared Proposition 115 unconstitutional as a revision, rather than an amendment, of the Constitution.<sup>102</sup> The revision “would substantially alter the substance and integrity of the state constitution as a document of independent force and effect.”<sup>103</sup> Thus, the initiative “substantially alters the preexisting constitutional scheme or framework.”<sup>104</sup> The court determined that the piecemeal withdrawal of independent state grounds survived the constitutional challenge as an amendment; however, any wholesale attempt to do so necessarily amounted to a revision. Vitiello’s characterization that Three

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99. *In re Lynch*, 8 Cal.3d 410, 424 (1972).

100. *People v. Anderson*, 6 Cal.3d 628, 656 (1972).

101. *Id.* at 185 (emphasis in original).

102. *Raven v. Deukmejian*, 52 Cal.3d 353 (1990).

103. *Id.*

104. *Id.*

Strikes could be challenged using “developed case law” is surely a gross exaggeration. An initiative would be mounted in short order to withdraw the independent state grounds authority in the area of Three Strikes and *on the basis of well developed case law* it would almost certainly be upheld.

Since our original article was published, the Ninth Circuit Court of Appeals has declared that some sentences meted out under the Three Strikes regime are “grossly disproportionate” and therefore constitute a violation of the Eighth Amendment’s ban on cruel and unusual punishment. In *Andrade v. California* (2001), the court stressed that the issue was not the constitutionality of the Three Strikes law, but only whether some sentences that result from “quirks” in the law violate the Eighth Amendment. “At issue here,” the court noted, “is whether [the Eighth] amendment proscribes a sentence of 50 years to life for two shoplifting offenses involving videotapes worth a total of \$153.54 by a defendant with several previous convictions for non-violent offenses.”<sup>105</sup> Andrade had an extensive criminal history: “five felonies, two misdemeanors, and one parole violation.”<sup>106</sup> Prosecutors took advantage of every discretion in Andrade’s case: “Because he had a prior theft offense” his current petty theft charges “were elevated to petty theft with a prior—a ‘wobbler’ offense punishable either as a misdemeanor or felony . . . The prosecution’s decision to charge the petty thefts as felonies qualified the offenses as his third and fourth strikes.”<sup>107</sup> Because of this “unique quirk” in California law, “Andrade’s recidivism was double counted, first enhancing his misdemeanor offenses to felonies and then enhancing them again to third and fourth strikes.”<sup>108</sup> Since the California law does not allow for concurrent sentencing, Andrade received two consecutive 25 years to life sentences. And since the minimum Three Strike sentences cannot be reduced by credit for good behavior, “Andrade therefore must serve a minimum of 50 years in prison before he is eligible for parole.”<sup>109</sup> He will be 87 years old when he is first eligible for parole and, given that “[t]he life expectancy of a 37-year-old American male is 77 years,” this sentence “more likely than not” will mean that “Andrade will spend the remainder of his life

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105. *Andrade v. California*, 270 F.3d 743, 754 (9<sup>th</sup> Cir. 2001).

106. *Id.* at 760.

107. *Id.*

108. *Id.*

109. *Id.* at 758.

in prison without ever becoming eligible for parole.”<sup>110</sup> In effect, Andrade received the equivalent of a life in prison without parole for a misdemeanor crime—and it is this “quirk” of the California law that the court found grossly disproportionate.

The court rightly noted that the Supreme Court has been badly split on the question of the appropriate standards for proportionality review—and even whether proportionality review is required by the Eighth Amendment. Yet, as the court noted, at one time or another seven members of the current Supreme Court have agreed that some form of proportionality review is required and the opinion most often agreed to is Justice Kennedy’s concurring opinion in *Harmelin v. Michigan* (1991), an opinion joined only in part by Justices O’Connor and Souter.<sup>111</sup> This “rule of *Harmelin*,” according to the Ninth Circuit, adopted *Solem* factors as the appropriate standard of review.<sup>112</sup> Using *Solem* factors, the court concluded that the 50 years to life sentence for “two misdemeanor thefts of nine videotapes, even when we consider his history of non-violent offenses” was “grossly disproportionate.”<sup>113</sup>

Judge Joseph Sneed mounted a spirited dissent. He denied that disproportionate weight should be given to Kennedy’s concurring opinion in *Harmelin*.<sup>114</sup> Furthermore, he argued that the majority had simply ignored the limited reach of Kennedy’s opinion. Kennedy had cautioned that “outside the context of capital punishment,” successful challenges would be “exceedingly rare.” And in several places Kennedy averred to the necessity of granting “sub-

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110. *Andrade*, 270 F.3d at 759.

111. *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991).

112. *Solem v. Helm*, 463 U.S. 277 (1983). According to the Court in *Solem*, the factors which must be considered as part of a proportionality review are “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.” *Id.* at 292.

113. *Andrade*, 270 F.3d at 767.

114. Some California court of appeals decisions have questioned whether the Ninth Circuit is correct in regarding Kennedy’s concurring opinion in *Harmelin* as authoritative. *People v. Gholar*, No. F037654, 2002 WL 1360315, at \*7 (Cal. App., June 20, 2002). (“We also are sure that *Solem*, despite Justice Kennedy’s attempt at reconciliation, does not represent the current state of Eighth Amendment jurisprudence”); *People v. Anderson*, 2002 WL 1722392, at \*5, n. 2 (Cal. App. July 25, 2002) (noting that *Solem* “did not retain the support of a majority of the court in *Harmelin*. . . it is clear that a majority of the Supreme Court would agree that a sentence is constitutional if it does not appear to be grossly disproportionate based on an analysis of the gravity of the offense and harshness of the penalty alone”); *People v. Vargas*, 2002 WL 1764180, at \*3 (Cal. App. July 31, 2002) (“*Harmelin* leaves the current state of Eighth Amendment jurisprudence unclear . . . We are also confident that *Solem*, despite Justice Kennedy’s attempt at reconciliation, does not represent the current state of Eighth Amendment jurisprudence”).

stantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes."<sup>115</sup> Judge Sneed reminded the court that "[t]he sentencing scheme in the instant case was the result of both popular vote (Proposition 184 was approved by 71.84 percent of the electorate) and legislative action. Our deference should be at its apex."<sup>116</sup> Indeed, Sneed concluded, the holding in *Harmelin* was "narrow"—a "prohibition on grossly disproportionate sentences."<sup>117</sup> The reason Kennedy's opinion must be read narrowly, according to Sneed, was Kennedy's own warning that the "precise contours" of the "proportionality principle" are "unclear."<sup>118</sup> Because the principle is "unclear," deference to state legislatures is mandated as is the necessity of relying on "objective factors" in determining proportionality.

Sneed noted that "[i]t has long been the law of this Circuit that 'generally, as long as the sentence imposed on a defendant does not exceed statutory limits, this court will not overturn it on Eighth Amendment grounds.'"<sup>119</sup> As long as there is a rational basis for legislation, deference should be given to state legislatures. And such deference "is particularly appropriate with regard to treatment of recidivist offenders."<sup>120</sup> In view of Andrade's long history of recidivism, "it is rational for a sentencing court to determine that a term of twenty-five years to life is not a grossly disproportionate sentence for each of Appellant's current crimes."<sup>121</sup>

A subsequent case from the Ninth Circuit, *Brown v. Mayle* (2002), used the analysis in *Andrade* to invalidate a 25 year to life Three Strikes sentences as "grossly disproportionate" when applied to "a petty theft offense . . . even in light of the criminal records" of the defendants.<sup>122</sup> The facts of this case were almost identical to those in *Andrade*. Defendants were career criminals

115. *Andrade*, 270 F.3d at 768 (Sneed, J., dissenting).

116. *Id.* at 768-69.

117. *Id.* at 770.

118. *Id.* (citing *Harmelin v. Mich.*, 501 U.S. 957, 998 (1991)).

119. *Id.* at 768 (quoting *U.S. v. Parker*, 241 F.3d 1114, 1117 (9th Cir. 2001)).

120. *Andrade*, 270 F.3d at 771.

121. *Id.* at 772. In a footnote Sneed argued that the majority mischaracterized the facts of the case:

It should be emphasized that Andrade's sentence is not one fifty-year sentence for thefts totaling \$153.54. Appellant, in fact, is facing two consecutive twenty-five year sentences for two separate felony offenses. The Majority's comparison of Andrade's sentence to other "Three Strikes" defendants misses this point. Appellant's sentence is 'twice as long' as the sentences of these other defendants because he has committed twice the number of offenses.

*Id.* at 772, n. 4.

122. *Brown v. Mayle*, 283 F.3d 1019, 1039 (9th Cir. 2002).

who had misdemeanor offenses elevated to felonies because of their prior records. Both were convicted of third strike offenses and sentenced to the mandatory 25 years to life. The court concluded that “[i]t bears noting... that the standard we are applying is one of proportionality—the relationship of the conviction to crime. If Andrade’s 50-year-to-life sentence for two petty theft convictions was grossly disproportionate, it follows that a 25-year-to-life sentence is grossly disproportionate to one petty theft conviction.”<sup>123</sup> But as Judge Sneed pointed out in *Andrade*, this language utterly ignores—or certainly minimizes—the element of recidivism which was the proximate cause of the harsh sentences. It also ignores the fact that in *Andrade* the inference of “gross disproportionality” was initially based on the fact that a 50 years to life sentence for Andrade amounted to a virtual death sentence.

Both *Andrade* and *Brown* underplay the significance of recidivism in the assignment of punishment. Since we are convinced that a two-strikes law, counting only violent or serious felonies as strikes, would survive constitutional muster, we wonder why there is so much emphasis on the character of the third strike in the California law. The law targets recidivism and does not calculate strikes in isolation from prior criminal history. A California court of appeal decision noted that the “penological theory” of Three Strikes is long prison sentences for repeat offenders.<sup>124</sup> The Ninth Circuit—along with Zimring and Vitiello—did not like this theory, but it cannot be repealed by judicial fiat, especially in a federal republic where, in matters of criminal law, state legislatures are owed considerable deference.

The *Andrade* case has been granted certiorari and will be heard “in tandem” with *Ewing v. California*, a case involving grand theft.<sup>125</sup> These two cases will not provide the occasion for the Supreme Court to consider the constitutionality of Three Strikes, but it may provide the opportunity for a badly fractured Court to resolve the issue of whether proportionality review is required and what constitutional principles animate that review.

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123. *Id.* at 1027.

124. *People v. Mantanez*, 98 Cal. App. 4<sup>th</sup> 354, 364 (2002)

125. *Andrade v. Attorney General of California*, 270 F.3d 743 (9th Cir. 2002), cert. granted Apr. 1, 2002, No. 01-6978, \_\_\_ U.S. \_\_\_ [122 S. Ct. 1434 (2002)]; *People v. Ewing* (Apr. 25, 2001, B143745) [nonpub. opn.], cert. granted Apr. 1, 2002, No. 01-6978, \_\_\_ U.S. \_\_\_ [122 S. Ct. 1434 (2002)].



