

2000

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Brian P. Janiskee

Edward J. Erler

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Recommended Citation

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).

Available at: <https://dsc.duq.edu/dlr/vol39/iss1/4>

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Crime, Punishment, and *Romero*: An Analysis of the Case Against California's Three Strikes Law

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

INTRODUCTION

In November 1999, the Institute of Governmental Studies at the University of California, Berkeley, released a study by Franklin E. Zimring, Sam Kamin, and Gordon Hawkins entitled *Crime and Punishment in California: The Impact of Three Strikes and You're Out*.¹ The thesis of the study is that California's Three Strikes law has failed to deter crime.² Although it seems counterintuitive to conclude that increased sentences for habitual criminals do not have a significant impact on crime, sophisticated statistical analysis, according to the study's authors, reveals a different reality. The underlying assumption of this study—and all similar statistical studies—is that the abstract world of probability is more reliable as a basis for public policy than experience and common sense.³ It is as if some pre-Socratic philosopher—perhaps Heraclitus—were to put forth the paradox that probability is Being. The Zimring report was widely circulated and received an enthusiastic reception among the news media. And by the sheerest coincidence, it was released while an initiative proposal to weaken the Three Strikes law was under review by the California Secretary of State.⁴ Final approval for supporters to begin collecting signatures for the

* Assistant Professor, Department of Political Science, California State University, San Bernardino.

** Professor, Department of Political Science, California State University, San Bernardino; Member, California State Advisory Commission on Civil Rights; Member, California Constitutional Revision Commission, 1996.

1. FRANKLIN E. ZIMRING ET AL., *CRIME AND PUNISHMENT IN CALIFORNIA: THE IMPACT OF THREE STRIKES AND YOU'RE OUT* (1999) [hereinafter *CRIME AND PUNISHMENT IN CALIFORNIA*].

2. *Id.* at 4.

3. In October 1999, Governor Gray Davis stated the common sense of the matter when he remarked that “no study, or series of studies, can resolve contentious philosophical and ideological disagreements over the purpose of imprisonment or the appropriate penalty for repeat felons.” Editorial, *Law-and-Order Image Is a Davis Priority*, S. F. CHRON., Oct. 12, 1999, at A26 (quoting Gov. Gray Davis).

4. Secretary of State, State of California, Restricting Application of Three Strikes Law to Violent and Serious Felonies (Initiative Statute (2000)).

initiative was granted on January 3, 2000.⁵ We believe we have demonstrated in this article that Zimring, Kamin and Hawkins⁶ have not provided sufficient statistical evidence to prove that Three Strikes does not deter crime. We do not undertake to demonstrate that Three Strikes does deter crime; rather, we merely limit our argument to a critique of *Crime and Punishment in California*.

Zimring gathered a sample of felony arrests that occurred before and after the Three Strikes law went into effect in March of 1994.⁷ The study constructed one pre-Three Strikes sample from April 1993 and two post-Three Strikes samples from April 1994 and April 1995.⁸ The samples were drawn from three cities: Los Angeles, San Diego, and San Francisco. These three cities were selected for their "size and prosecutorial reputation."⁹ Los Angeles is the "largest criminological entity" in California.¹⁰ San Diego has a reputation for aggressive prosecution, whereas, San Francisco is infamous for its leniency.¹¹

Within these samples, criminal records were used to identify those with no strikes, one strike, two strikes, or three strikes.¹² The pre-Three Strikes sample was a retroactive assignment of strikes. In constructing the samples, Zimring conflates arrests with crime; he assumes that if "persons with a single strike were ten percent of all felony arrests" then persons with a single strike are responsible for "ten percent of all felonies committed."¹³ Based on this sampling technique, Zimring addressed the following questions: "[1] how much crime in California was caused by the specially targeted groups; [2] how much difference the new law made in criminal sentences; [3] and whether the new law was responsible for a significant decline in crime."¹⁴

In the pre-Three Strikes (April 1993) sample, Zimring found that "13.9 percent of adult felony arrests involved the specifically targeted group, compared to 12.8 percent after the new

5. *Bid to Curb 3-Strikes Law OK'd*, SAN DIEGO UNION-TRIBUNE, Jan. 4, 2000, at A3.

6. Hereinafter "Zimring" will be used to identify all three authors of CRIME AND PUNISHMENT IN CALIFORNIA.

7. CRIME AND PUNISHMENT IN CALIFORNIA, *supra* note 1, at 12.

8. *Id.* at 13.

9. *Id.*

10. *Id.*

11. *Id.* at 13-16.

12. See CRIME AND PUNISHMENT IN CALIFORNIA, *supra* note 1, at 17.

13. *Id.* at 17-18.

14. *Id.* at 1.

punishments were operative.”¹⁵ While the post-Three Strikes figure was lower, it was statistically insignificant. The study also makes the almost incredible discovery that the law had a statistically meaningless impact on criminal sentences.¹⁶ Finally, Zimring found no evidence of so-called “spillover effects,” a general deterrent effect on all criminals.¹⁷ Before the law went into effect, 44.8 percent of those arrested had a previous felony conviction, whether a Three Strikes offense or not. After the law, 45.4 percent of those arrested had a previous felony conviction. According to Zimring, the irrefragable conclusion is 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.¹⁸

I. ANECDOTAL EVIDENCE OF THE IMPACT OF THREE STRIKES

Many active observers of the California legal system have tendered a plethora of anecdotal evidence concerning the effectiveness of Three Strikes. Gregory Gaines, a two-strike parolee from Folsom Prison remarked upon his release that “a lot of people” at Folsom are frightened by the Three Strikes Law. Gaines said, “I’ve flipped 100 percent, It’s a brand new me, mainly because of the law. It’s going to keep me working, keep my attitude adjusted.”¹⁹ Indeed, there is ample qualitative evidence that parolees are leaving the state in increasing numbers since the passage of Three Strikes. Before Three Strikes, California was a magnet for out of state parolees. After Three Strikes, this changed dramatically; California became a net exporter of paroled felons. According to Attorney General Dan Lungren “in the last year before ‘three strikes’ became law in 1994, 226 more paroled felons chose to move to California than moved out. After ‘three strikes’ took effect, the flow reversed: 1,335 more paroled felons chose to leave California in 1995 than to enter.”²⁰ Prosecutors in Los Angeles routinely report that “felons tell them they are moving out of the

15. *Id.* at 4.

16. *Id.* at 42-44.

17. CRIME AND PUNISHMENT IN CALIFORNIA, *supra* note 1, at 4, 69.

18. *Id.* at 4.

19. Andy Furillo, *Future of “Three Strikes” Hinges on Issue of Deterrence*, SACRAMENTO BEE, Apr. 1, 1996, at A1.

20. Dan Lungren, *Three Cheers for 3 Strikes*, 80 POL’Y REV. 36 (1996).

state because they fear getting a second or third strike for a nonviolent offense.²¹ Edward R. Jagels, District Attorney for Kern County, related that "I go to prisons and do classes for inmates on 'three strikes.' There is no other topic of conversation within the institutions other than the impact of this statute. 'Am I a two-striker? Am I a three-striker? What if you've got one of these, is that a strike?' And they're intently interested in it. Many of them are talking about moving out of the state."²²

Since the inception of Three Strikes in 1994, 50,967 felons have been incarcerated as the result of a second or third-strike conviction.²³ Intuitively, the non-statistical mind knows that a significant amount of crime has been prevented by the enhanced sentences meted out to a class of habitual criminals. After all, the unsophisticated mind understands that a criminal behind bars is not stalking the streets. Zimring, however, has serious doubts about the conclusions reached by the unsophisticated mind. The unsophisticated mind is susceptible to self-delusion and too often mistakes the appearance of things for reality. Thus, according to Zimring, "a study ought to be done that requires real precision in definition and measurement that hasn't been applied to crime data before. What we've been getting instead are after-dinner speeches."²⁴ Presumably *Crime and Punishment in California* is the study that provides the "real precision in definition and measurement" that was lacking in the "after-dinner-speech" account of the impact of Three Strikes. But does the report of Zimring really dispel the common sense understanding that enhanced punishment does in fact deter crime?

II. STATISTICAL EVIDENCE OF THE IMPACT OF THREE STRIKES?

While the goal to provide "real precision" is a laudable one, *Crime and Punishment* falls woefully short of this goal. One of the most obvious defects in its research design is the inexact placement of the longitudinal samples. The Three Strikes law went into effect in March 1994. Zimring took the first post-Three Strikes

21. Rene Sanchez, *A Movement Builds Against 'Three Strikes' Law*, WASH. POST, Feb. 18, 2000, at A3.

22. Furillo, *supra* note 19, at A1.

23. Data supplied to the authors by Laverne Low-Nakashima, Research Program Specialist, Offender Information Services Branch, Department of Corrections, State of California, Feb. 2000. See also Sanchez, *supra* note 21, at A3 ("Few doubt the law's impact. At last count, nearly 50,000 criminals have received severe sentences under the statute.")

24. Furillo, *supra* note 19 (quoting Franklin E. Zimring).

sample from April 1994, only one month after the effective date of the legislation, and the second sample from April 1995.²⁵ The conclusion derived from this methodology is that the substantial declines in California crime that began in 1991 cannot be ascribed to the impact of Three Strikes legislation.²⁶ To posit the notion that the law could have had such an immediate effect upon criminal behavior, however, rests on preposterous assumptions. In an oft quoted aphorism, Oliver Wendell Holmes, Jr. remarked that “the life of the law has not been logic: it has been experience.”²⁷ Zimring deliberately minimized the role of “experience” and presupposed that habitual felons are “logical” and possess “perfect information.”

In other words, the Zimring study presupposes that all two and three-strike-eligible felons had perfect information so that they became at once rational actors, calculating the full cost-benefit ratio of any and all future criminal activity on their part. It is an absurd assumption that information spreads instantly throughout a community regarding a new policy or that those in charge of executing a new policy immediately change their old habits. Zimring seems not to allow for the well-established lag effect, which is common in time series studies in economics, political science, sociology and, presumably, criminal justice. It takes time for the knowledge and effect of a new policy to work its way through the system.

By taking samples so soon after the law went into effect, Zimring set the bar unreasonably high for judging the success or failure of Three Strikes. The study seems therefore to be designed to show no effect for the new law—otherwise how can this unorthodox research design be explained? One is inevitably confronted with the nagging suspicion that the results would have been different had the samples been taken in 1997 or 1998. Zimring gave no credible explanation as to why such a truncated longitudinal data set was chosen.

As stated above, 50,967 felons have been incarcerated as the result of a second or third strike since March 1994. Each of them received the enhanced sentence prescribed by the Three Strikes law. Several years’ experience under the law surely has had some impact on those in the criminal community who are potential second and third strike felons. It is illogical to assume that these

25. CRIME AND PUNISHMENT IN CALIFORNIA, *supra* note 1, at 13.

26. *Id.* at 72.

27. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

numbers can remain outside the criminal consciousness forever. Yet Zimring maintains that "the new penalty threats and new penalties actually imposed were not an important influence on crime in California in the mid-1990s."²⁸ The study simply assumes that the truncated period under examination is a valid extrapolation for the entire future of the Three Strikes legislation.²⁹ Indeed, Zimring rashly concludes that "our findings suggest that most of these crime declines had nothing to do with three strikes."³⁰

From his analysis, Zimring claims that there was no "three strikes incapacitation impact in 1994 and 1995."³¹ This is not a surprising conclusion because no possible incapacitation effect could occur before 1997, well outside the time series analyzed by Zimring. Linda Beres and Thomas Griffith, in a recent law review article, found that "[a]ny influence of Three Strikes on the drop in crime from 1994-1996, however, must have resulted from deterrence alone."³² The reason for their conclusion is simple: "most offenders imprisoned under Three Strikes would have been incarcerated during this period even if Three Strikes had never been enacted."³³ Their examination of sentencing data reveals that "even if only the average sentences were imposed, most felons convicted under Three Strikes in 1994 and early 1995, and all felons convicted in 1996 and late 1995, would have been imprisoned until 1997 or longer even without Three Strikes."³⁴ Thus no incapacitation effect could possibly be detected in the years Zimring selected for his study. Thus his conclusion that there was no measurable impact must be considered a revealing anomaly of

28. CRIME AND PUNISHMENT IN CALIFORNIA, *supra* note 1, at 84.

29. *Id.* at 84.

30. *Id.*

31. *Id.* at 73.

32. Linda 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, 117 (1998).

33. *Id.* at 119.

34. *Id.* at 117-19. See Michael Vitiello, "Three Strikes" and the Romero Case: The Supreme Court Restores Democracy, 30 LOY. L.A. L. REV. 1643, 1679 (1997) (reporting that any decrease in California's crime rate "must be because of the law's deterrent effect, not from the enhanced prison sentences, since offenders imprisoned under 'three strikes' have yet to begin serving the enhanced term of years."). See also Daniel Kessler & Steven Levitt, *Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation*, NAT'L BUREAU OF ECON. RESEARCH WORKING PAPER NO. 6484, 8 (1998) ("The deterrence effect associated with sentence enhancements increases over time. The explanation for this result is that initially some of those who could be deterred are incarcerated and therefore cannot respond to the change in incentives. Over time, those agents will be released from prison and deterred thereafter.").

his research strategy.

A similar methodological defect in the study derives from the statistical conflation of arrests and crime. Zimring notes that “[t]he strategy of our research design is to use the distribution of felony arrest rates among different classes of offenders as an estimate of the share of the crime rate that each group is responsible for committing.”³⁵ Thus, if ten percent of those arrested already had a single-strike, Zimring “estimate[ed] that [the single strike arrestees] are responsible for ten percent of all felonies committed, even though most reported crimes do not result in an arrest.”³⁶ Zimring’s explanation for this unorthodox operational definition of crime is based on the assumption that if ten percent of arrests were for a particular crime or type of offender, then that is a reasonable representation of the patterns of actual crime in the community.³⁷

Some questions, however, are provoked by this sampling method. It is unreasonable, we believe, to assume that second and third-strike offenders are arrested at the same rate as those who are first time perpetrators of crime. While the rate of arrest may be the same, there is no warrant to conflate the different categories. Many of the second and third strike arrestees will have been on parole and have arrest records that make it easier for the police to arrest them as suspects. It is virtually certain that two and three strike felons are arrested at a higher rate than first time perpetrators. And there may also be a lack of parallelism based on the type of crime committed—as Zimring admits.³⁸ Zimring argues that if there is a bias in this sampling procedure it is a bias that applies both to pre-Three Strikes and post-Three Strikes samples, and, therefore, no substantial distortion has occurred in conflating arrests with crime.³⁹ Zimring concedes, however, that second and third strike offenders “face larger risks of arrest earlier in their careers when they are accumulating the conviction records that set them apart from the others in our sample.”⁴⁰

An even more serious objection to the conflation of arrest with crime is the simple fact that arrests do not always occur immediately after a crime has been committed. It is not uncommon for an arrest to occur many months—even years—after the fact. It

35. CRIME AND PUNISHMENT IN CALIFORNIA, *supra* note 1, at 17.

36. *Id.* at 18.

37. *Id.* at 17-18.

38. *Id.* at 18.

39. *Id.*

40. CRIME AND PUNISHMENT IN CALIFORNIA, *supra* note 1, at 18.

is almost certain that a percentage of arrests in the two post-Three Strikes samples involved crimes committed *before* the enactment of Three Strikes. How is a potential perpetrator of crime to be deterred by a law that has yet to be enacted? It seems, in this case at least, that Zimring assumes more than perfect information on the part of potential perpetrators. He assumes potential perpetrators have clairvoyant information. It is our conclusion that there is a downward bias in the measurement of a Three Strikes deterrent effect in the post-Three Strikes samples. The severity of the bias can be determined by the extent to which the post-Three Strikes samples include crimes committed *before* the law went into effect. Unfortunately—but not surprisingly—Zimring does not provide such data.

The principal conclusion of Zimring is that the Three Strikes legislation fails to provide any measurable deterrent effect on the target groups. In coming to this conclusion, Zimring violates the first principle of policy analysis—that any law or policy must be understood in terms of its intent. It is a palpable fact that the California legislature did not intend the principal purpose of the law to be deterrence, but rather “to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.”⁴¹ Mandatory sentence enhancement and the reduction of judicial discretion in meting out punishments were the primary means of effecting this goal. At least one legal scholar has cogently observed that:

California’s three strikes legislation was initiated in response to two senseless murders committed by recidivists in 1992 and 1993. However, the movement itself had been long in the making. Throughout the country, many people lived in fear of rising crime rates, senseless gang-related crimes, children carrying guns, crimes committed by recidivists, and children being targeted by drug dealers. The public blamed sentencing procedures and judicial discretion for allowing violent criminals to walk free.⁴²

41. CAL. PENAL CODE § 1170.12 (West 1988 & Supp. 1998); See Lisa Cowart, Comment, *Legislative Prerogative vs. Judicial Discretion: California’s Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615, 620-21, 626 (1998) (Stating that the Three Strikes law “was unquestionably aimed at enhancing mandatory sentences for convicted criminals with a history of serious or violent felony convictions. Furthermore, it was designed to provide a ‘no questions asked’ policy in sentencing a career criminal to life imprisonment for his or her third felony conviction.”).

Zimring analyzes the law as if its purpose were deterrence alone, this inevitably distorts the phenomenon under consideration. The legislative goal was to punish recidivist criminals. No one can possibly deny that the Three Strikes law has fulfilled its legislative purpose. Any criticism of the law's lack of deterrent effect—even if true—is beside the point. Several studies have shown that a fraction of the population is responsible for an overwhelming majority of crime.⁴³ Consequently, it is certain that if a greater percentage of that small fraction is incarcerated for long periods, the crime rate will decline at a steadily increasing rate.

III. IS THERE EVIDENCE OF DETERRENCE?

Zimring maintains that the Three Strikes law has no measurable deterrent effect on crime.⁴⁴ He notes that crime in California began to decline in 1991, well before the advent of Three Strikes.⁴⁵ Moreover, Zimring contends that, while the decline continued after the effective date of Three Strikes, there is no evidence of any increase in the rate of decline after 1994.⁴⁶ "The drop in crime levels is just as abrupt prior to the effective date of the legislation," Zimring argues, "as at any time after the new law took effect. So the effective date is not a marker for either a beginning or an intensification of a crime rate decline."⁴⁷ Zimring does, however, inject an involuntary caveat into his assurances that Three Strikes has had no general deterrent effect by stating that:

On the other hand, the majority of the crime reduction that has occurred in California has happened since the new law came into effect, and there is no guarantee that the decline

42. Cowart, *supra* note 41, at 626 (citations omitted); see generally Vitiello, *supra* note 34, *passim* for an exhaustive history of the politics surrounding the passage of Three Strikes.

43. See, e.g., PAUL E. TRACY ET AL., DELINQUENCY CAREERS IN TWO BIRTH COHORTS (1990); MARVIN WOLFGANG & PAUL TRACY, THE 1945 AND 1958 COHORTS, presented at the Conference on "Public Danger: Dangerous Offenders and the Criminal Justice System," Kennedy School of Government, Harvard University, Feb. 11-12, 1982; ROBERT TILLMAN, PREVALENCE AND INCIDENCE OF ARRESTS AMONG ADULT MALES IN CALIFORNIA, BUREAU OF CRIMINAL STATISTICS AND SPECIAL SERVICES, CALIFORNIA DEPARTMENT OF JUSTICE; MARK PETERSON ET AL., DOING CRIME: A SURVEY OF CALIFORNIA PRISON INMATES, RAND CORPORATION STUDY NUMBER R-2200-DOJ. These sources were brought to the attention of the authors by Patrick A. Langan, Senior Statistician, Bureau of Justice Statistics, U.S. Department of Justice.

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

45. *Id.* at 69.

46. *Id.* at 72.

47. *Id.* at 69.

that started in the early 1990s would have persisted in the pattern observed without the effect of the new legislation. So the lack of a tight fit between the start of California's crime decline and the three strikes era is neither a proof nor a decisive rejection of a three strike theory of crime rate decline.⁴⁸

A cursory examination of the aggregate statistics from the FBI's *Uniform Crime Reports* ("UCR") suggests that the reservations expressed in this caveat are well-founded. The data listed in the statistical tables included at the end of this article demonstrates that the rate of decline in crime for the entire State of California and for most of its metropolitan areas was significantly greater *after* the Three Strikes law went into effect. In using the UCR data, the pre-Three Strikes statistics were calculated from 1992-1993 because crime in California began to decline in October 1991. The post-Three Strikes statistics were calculated from the years 1995-1998.⁴⁹ The mean rate of change for Total Crime, Violent Crime, and Homicide were calculated for both time periods. Table 1 presents the Mean Annual Rate of Change in the Total Crime Index for 1992-1998. For the entire State of California, the pre-Three Strikes rate of decline for 1992-1993 in the Total Crime Index was 2.35 percent. The post-Three Strikes rate of decline for 1995-1998 was 8.39 percent. These figures represent a marked acceleration in the rate of decline for the post-Three Strikes years. A simple difference of means analysis employing a straightforward *t* test reveals at the very minimum, that this acceleration in the rate of decline is statistically significant at the 99.5 percent level of probability:

48. *Id.*

49. Data from 1994 was excluded because the law went into effect in March of 1994. Part of the year fell into the new Three Strikes regime and part of the year did not. In order to take into account any potential lag effects, 1994 was not included.

$$t = \frac{(\bar{x}_1 - \bar{x}_2)}{\sqrt{S_p^2 \left(\frac{1}{n_1} + \frac{1}{n_2} \right)}}$$

Where

$$S_p^2 = \frac{(n_1 - 1)S_1^2 + (n_2 - 1)S_2^2}{n_1 + n_2 - 2}$$

Where

S_1^2 = Variance of Pre-Three Strikes Rate of Change

S_2^2 = Variance of Post-Three Strikes Rate of Change

\bar{x}_1 = Pre-Three Strikes Mean Rate of Change

\bar{x}_2 = Post-Three Strikes Mean Rate of Change

n_1 = Number of Years in Pre-Three Strikes Sample

n_2 = Number of Years in Post-Three Strikes Sample

Table 2 exhibits the Mean Annual Rate of Change in the Violent Crime Index for 1992-1998. As was the case with the Total Crime Index, the rate of decline for violent crime was sharper after Three Strikes than before. In the pre-Three Strikes period, the rate of decline was 0.50 percent; whereas, in the post-Three-Strikes period, the rate was 8.66 percent. A *t* test analysis results in the same 99.5 level of significance.

Table 3 presents the mean annual rate of change in the Homicide Rate for 1992-1998. For the entire State of California the pre-Three-Strikes rate of change in the Homicide Rate was a 1.57 percent *increase*. This runs counter to the impression left by Zimring that crime has been in a steady decline since 1991. The post-Three Strikes figure for 1995-1998, however, is a dramatic 13.36 percent *decline* in the Homicide Rate. A *t* test reveals that this decline is statistically significant at the 99.5 percent level of

probability. This is irrefutable evidence, not of a mere steady decline in crime rates, but of a precipitous and dramatic decline.⁵⁰ Zimring admits that “properly cautious interrupted time series analysis would require a distinct and sharp downward slope in crime rate proximate to the new penal regime before concluding that crime reductions were a result of increased deterrence.”⁵¹ We have proven, however, from the above data, that a “distinct and sharp” decline did indeed occur after the Three Strikes legislation went into effect.

It is a matter of some curiosity that Zimring could not find a general deterrent effect that matched his own criterion. It is a further matter of curiosity that Zimring, in a piece entitled *Crime and Punishment in California*, did not collect a single datum that was statewide in scope. In constructing a figure that represented statewide criminal activity, Zimring used data only from the ten most populous cities and discontinued the analysis in 1996 even though data was available for 1997-98.⁵² One is left to wonder whether the data from 1997-98, if included in their time series, might have proved embarrassing to the Zimring thesis, as our figures indicate that they may have.

IV. PROSPECTS FOR THREE STRIKES REFORM

Support for Three Strikes continues to be very strong among both Democratic and Republican politicians. These politicians are merely responding to the widespread public perception that Three Strikes is the major factor in the dramatic downward spiral in crime rates during the previous decade. Most academic scholarship, on the other hand, stridently opposes the Three Strikes regime. Indeed, much of the opposition must be described as somewhat frantic. Professor Michael Vitiello, for example, argues that the passage of Three Strikes represents the failure of democracy, because it “passed as a result of public panic, flamed by politicians who spurned rational debate.”⁵³ “While many tout the initiative

50. Homicide statistics are the most reliable because homicides “almost always are reported to the police due to the seriousness of the crime.” Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 105 n.13 (1998). If homicide rates are the most reliable crime statistics, then the results of Table 3 are particularly troublesome for the Zimring thesis.

51. CRIME AND PUNISHMENT IN CALIFORNIA, *supra* note 1, at 11.

52. *Id.* at 68.

53. Vitiello, *supra* note 34, at 1652.

process as democracy in action,” Vitiello writes, “politicians extravagant rhetoric prevented the electorate from making a fully informed decision on ‘three strikes.’”⁵⁴ Indeed, Zimring laments the “populism” of Three Strikes legislation because, in its zeal to punish recidivist criminals, the public did not defer to “criminal justice experts.” In a revealing statement Zimring posits that:

[i]t may be that the social authority accorded criminal justice experts provided insulation between populist sentiments (always punitive) and criminal justice policies at the legislative, administrative, and judicial levels. This insulation prevented the direct domination of policy by anti-offender sentiments that are consistently held by most citizens at most times Three Strikes was an extreme, but by no means isolated, example of the kind of law produced when very little mediates anti-offender sentiments.⁵⁵

Both Vitiello and Zimring place ultimate blame for the “irrational” character of Three Strikes on the initiative process that produced it.⁵⁶ Such fundamental issues as “crime and punishment” should be left to experts, not “soundbite populism” or “direct popular pressures.”⁵⁷ Zimring concludes that in the area of criminal justice the public has grown to distrust the experts.⁵⁸ But, he argues that it is the experts who stand as mediators between the uninformed public with its “anti-offender sentiments” and sound policymaking.⁵⁹ “[T]he decline of expert authority is a social circumstance that makes responsible policy more difficult to achieve. It is not an excuse for abandoning the criminal justice system to populist preemption.”⁶⁰

54. *Id.* See Michael Vitiello & Andrew J. Glendon, *Symposium on the California Initiative Process: Article III Judges and the Initiative Process: Are Article III Judges Hopelessly Elitist?* 31 *LOY. L.A. L. REV.* 1275 (1998) (arguing that the California initiative process rarely reflects the true will of the majority because of misrepresentation and the ambiguous language of initiatives).

55. 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).

56. *Id.*; Vitiello, *supra* note 34, at 1652.

57. Zimring, *supra* note 55, at 255.

58. *Id.*

59. *Id.*

60. *Id.* at 255. We will not quibble with Zimring about the definition of “expertise” but merely point out that the Three Strikes initiative was originally drafted by a California Court of Appeals Judge in consultation with other judges. Vitiello, *supra* note 34, at 1654. Zimring, no doubt, would reply that their legal experience notwithstanding, these judges could not be criminal justice experts because they displayed “anti-offender sentiments.” “Expertise” is,

Until the rule of experts replaces democracy, however, radical reformers are confined by the forms of democracy. Currently, signatures are being gathered to qualify an initiative that would ameliorate the "anti-offender sentiments" embodied in the Three Strikes law.⁶¹ This initiative provides that sentence enhancements will be applied only for a "serious or violent felony such as rape, robbery or burglary."⁶² It also provides for retroactive re-sentencing for "persons currently sentenced pursuant to 'Three Strikes' law if the offense for which they were sentenced or prior convictions used to increase their sentences do not qualify under this measure as serious or violent felonies."⁶³ Thus, the proposed initiative addresses the most frequently voiced criticisms of criminal justice experts—that the California Three Strikes law allows a third strike to be earned by a non-violent or non-serious felony and thus imposes disproportionate punishment for the commission of these "lesser" or "trivial" felonies. As Zimring has explained, "[a]ny trivial felony by a twice-convicted burglar will call down a larger sentence for a three-time loser than a nonaggravated second-degree murder will generate for a non-three-strikes defendant."⁶⁴ Professor Lisa Cowart reports that "only fifteen percent were sentenced for violent crimes, and six percent were sentenced for serious crimes. Thus, a disproportionate eighty percent of criminals sentenced under three strikes law were incarcerated for nonviolent crimes. The majority of nonviolent criminals sentenced under three strikes laws are drug users and petty thieves."⁶⁵

Some commentators have argued that this "disproportionality" violates federal and state prohibitions against "cruel and unusual punishment." Both the United States Constitution and the California Constitution forbid criminal penalties that are "grossly disproportionate" to the crime.⁶⁶ This is a simple recognition of "a precept of justice that punishment for crime should be graduated and proportioned to the offense."⁶⁷ In 1980, the United States

therefore, to be understood exclusively in ideological terms.

61. *See Bid, supra* note 5.

62. *Id.* at A3.

63. *Id.*

64. Zimring, *supra* note 55, at 248.

65. Cowart, *supra* note 41, at 658.

66. U.S. CONST. amend. VIII; CAL. CONST. art. I, § 17. A curious difference between the Eighth Amendment to the U. S. Constitution and the corresponding California Constitution provision should be noted: The Eighth Amendment forbids "cruel and unusual punishment" whereas the California Constitution refers to "cruel *or* unusual punishment."

67. *Weems v. United States*, 217 U.S. 349, 367 (1910).

Supreme Court explained this “precept” in *Rummel v. Estelle*.⁶⁸ The Court stated that, “one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.”⁶⁹ In *Rummel*, the petitioner had received a mandatory life sentence under a Texas state “recidivist statute” for non-violent felonies and was eligible at some point for parole consideration.⁷⁰

Three years later, however, the Court in *Solem v. Helm*⁷¹ significantly qualified its willingness to defer to “legislative prerogative.”⁷² The Court argued that the statement in *Rummel* quoted above was merely a speculative one (“one could argue . . .”) and not a necessary part of the holding.⁷³ The Court argued that a mandatory life sentence without possibility of parole as punishment for seven non-violent felonies was “significantly disproportionate . . . and is therefore prohibited by the Eighth Amendment.”⁷⁴ The Court did concede, however, that “[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional.”⁷⁵

The Court is substantially divided on the question of how much deference should be granted to legislatures. This is evidenced by its fractured opinion in *Harmelin v. Michigan*.⁷⁶ Justice Scalia, announcing the judgment of the Court and writing an opinion joined only by the Chief Justice, observed that “[i]t should be apparent . . . that our 5-to-4 decision eight years ago in *Solem* was scarcely the expression of clear and well accepted constitutional law *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.”⁷⁷ In *Harmelin*, the “[p]etitioner was convicted of possessing 672 grams of cocaine and sentenced to a

68. 445 U.S. 263 (1980).

69. *Id.* at 274.

70. *Id.* at 266.

71. 463 U.S. 277 (1983).

72. *Id.* at 289.

73. *Id.* at 307.

74. *Id.* at 303.

75. *Id.* at 290 (footnotes omitted).

76. 501 U.S. 957 (1991).

77. *Id.* at 965.

mandatory term of life in prison without possibility of parole.⁷⁸ The petitioner argued that the mandatory sentence violated the “cruel and unusual punishment” provision of the Eighth Amendment because it did not allow the consideration of “mitigating circumstances.”⁷⁹ The mitigating circumstance proffered by the petitioner was his lack of prior felony convictions.⁸⁰ Justice Scalia concluded that “[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history.”⁸¹ This statement reaffirms at least one strain of the *Solem* decision where the Court noted that “ ‘[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare.’ This does not mean, however, that proportionality analysis is entirely inapplicable in noncapital cases.”⁸² Furthermore, Scalia noted that, “a State is justified in punishing a recidivist more severely than it punishes a first offender.”⁸³

Under Three Strikes, no one can be sentenced to an indeterminate life sentence without having committed at least two serious or violent felonies.⁸⁴ This fact would make it extremely unlikely that an application of the *Solem* factors would result in a finding of disproportionality.⁸⁵ The fact that a third strike can be earned by “non-serious” or “trivial” felonies is wholly irrelevant to proportionality review. Given the fact that California courts have repeatedly affirmed that the principal target of Three Strikes is the recidivist offender,⁸⁶ one cannot imagine the grounds for invalidating the legislation under current Supreme Court doctrine. In denying a challenge to Three Strikes because the third strike was “essentially a minor shoplifting and a ‘wobbler’ which could have been prosecuted as a misdemeanor,”⁸⁷ the California court of appeal stressed the “[a]ppellant’s recidivism”⁸⁸ and the fact that

78. *Id.* at 961.

79. *Id.* at 1006.

80. *See id.* at 1025.

81. *Harmelin*, 507 U.S. at 994-95.

82. *Solem*, 463 U.S. at 289-90 (quoting *Rummel*, 445 U.S. at 272).

83. *Id.* at 296.

84. CAL. PENAL CODE § 667(e)(2)(A) (West 1998 & Supp. 1998).

85. *See Solem*, 463 U.S. at 307.

86. *People v. Deloza*, 957 P.2d 945, 950 (Cal. 1998).

87. *People v. Goodwin*, 69 Cal. Rptr. 2d 576, 581-82 (Cal. Ct. App. 1997).

88. *Id.* at 582.

"[p]rior attempts at rehabilitation and deterrence have failed."⁸⁹

Three members of the United States Supreme Court, Justices Stevens, Souter and Ginsburg, have recently expressed their concerns about the California legislation on *Solem* grounds. In *Riggs v. California*,⁹⁰ a case in which a criminal was assigned a third strike for stealing a bottle of vitamins, a crime that was described as "a petty theft motivated by homelessness and hunger,"⁹¹ the three justices joined in a denial of certiorari.⁹² Justice Stevens conceded that "[i]f this had been petitioner's first offense, it would have been treated as a misdemeanor punishable by fine or a jail sentence of six months or less."⁹³ He further noted that "[t]his question is obviously substantial, particularly since California appears to be the only State in which a misdemeanor could receive such a severe sentence."⁹⁴ Stevens did explain, however, that "this Court has traditionally accorded to state legislatures considerable (but not unlimited) deference to determine the length of sentences 'for crimes concededly classified and classifiable as felonies.'"⁹⁵ Petty theft, Justice Stevens admitted, "does not appear to fall into that category."⁹⁶ Nevertheless, Justice Stevens recognized that, in light of the Court's consistent pronouncements that States can punish recidivists more severely than first time offenders, "there is some uncertainty about how our cases dealing with the punishment of recidivists should apply."⁹⁷

In *People v. Garcia*,⁹⁸ however, the California Supreme Court ruled that judges have the discretion to strike "prior conviction allegations with respect to a relatively minor current felony."⁹⁹ The court concluded that this discretion was authorized by Section 1385 of the California Penal Code¹⁰⁰ which allows judges to act "in the

89. *Id.*

90. 119 S.Ct. 890 (1999).

91. *Id.* at 891 (citation omitted).

92. *Id.*

93. *Id.* at 891.

94. *Id.*

95. *Riggs*, 119 S. Ct. at 891 (quoting *Rummel*, 445 U.S. at 274).

96. *Riggs*, 119 S. Ct. at 891.

97. *Id.* See *Parke v. Raley*, 506 U.S. 20, 26-28 (1992) ("Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times. . . . 'Tolerance for a spectrum of state procedures dealing with [recidivism] is especially appropriate' given the high rate of recidivism and the diversity of approaches that States have developed for addressing it" (quoting *Spencer v. Texas*, 385 U.S. 554, 566 (1967)).

98. 976 P.2d 831 (Cal. 1999).

99. *Id.* at 836.

100. *Id.* at 834.

furtherance of justice."¹⁰¹ Surely, in light of *Garcia*, even Justice Stevens' concerns should be considerably allayed. It is unlikely that the present Supreme Court will hold the California Three Strikes law to be a violation of the Eighth Amendment's proscription on "cruel and unusual punishment," and any assertion that the law is a violation of the Eighth Amendment, both facially and as applied, is merely an undifferentiated expression of anti-"anti-offender" ire.¹⁰²

The fact that the California legislature—and the people of California through the initiative process—have deemed it necessary to treat habitual criminals by a different standard hardly provokes any claim of disproportionality that would offend the prohibition against cruel or unusual punishment.¹⁰³ California Secretary of State Bill Jones, who as a member of the California Assembly was a principal author of the Three Strikes Bill, stated in 1995 that:

Three Strikes is an anti-crime law, not just an anti-violent crime law. It was our intent in enacting Three Strikes, not only to keep dangerous repeat felons in prison (that is why the third strike can be *any* felony), but also to begin moving toward the concept of zero tolerance for crime.¹⁰⁴

This statement expresses both the legislative intent and the legislative competence to enact the criminal justice regime of Three Strikes.

V. THE *ROMERO* DECISION

Professor Vitiello argues that in *People v. Superior Court* ("*Romero*")¹⁰⁵ "the court has given California the opportunity to correct its excesses. Rather than frustrating democracy, the court has given the legislature an opportunity to bring rationality back to California's sentencing policy."¹⁰⁶ Professor Vitiello quotes Judge Mudd, the trial judge in *Romero*: "[J]udges are the conscience of the community and should be free to evaluate what type of sanction is appropriate."¹⁰⁷ This is precisely the kind of judicial attitude that the Three Strikes legislation was designed to curtail.

101. CAL. PENAL CODE § 1385(a) (WEST 1999).

102. See generally Albert Menaster, *Eighteen Ways to Avoid Three Strikes*, 26 U. WEST L.A. L. REV. 243, 299-301 (1995).

103. See Vitiello, *supra* note 34, at 1646-47.

104. Bill Jones, *Three Strikes and You're Out*, 26 U. WEST L.A. L. REV. 243, 245 (1995).

105. 917 P.2d 628 (Cal. 1996).

106. Vitiello, *supra* note 34, at 1653; see also Cowart, *supra* note 41, at 666.

107. Vitiello, *supra* note 34, at 1649 n.21.

Proponents argued that the initiative would limit the discretion of “soft-on-crime judges . . . [who] care more about violent felons than they do victims.”¹⁰⁸ Judge Mudd would have been on solid ground had he said that the judiciary is the conscience of the constitution or the rule of law. And, had Judge Mudd further understood the word “conscience” in its original meaning—with knowledge—it would have been an unremarkable statement because in the system of separated powers each branch has a constitutional obligation to guard the constitution against encroachments of the other branches. The constitution is superior law—it is organic law—and any attempt on the part of the legislative, executive, or judicial branch to overstep its constitutional bounds must be opposed by one or more branches—and ultimately by the people.¹⁰⁹

At trial, Judge Mudd had, *sua sponte* and in clear violation of the Three Strikes law, struck a prior felony over the objections of the prosecutor.¹¹⁰ This allowed the defendant to escape a mandatory third strike sentence.¹¹¹ In *Romero*, the California Supreme Court was confronted with the question of whether the Three Strikes legislation which allows the dismissal of a prior felony conviction only on the motion of the prosecuting attorney violates separation of powers.¹¹² Three Strikes had provided that “[t]he prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385.”¹¹³ Section 1385(a) of the Penal Code had previously provided that “[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in the furtherance of justice, order an action to be dismissed.”¹¹⁴ Having determined that requiring the prosecutor’s approval of the court’s dismissal would present serious constitutional issues, the court attempted to adopt a valid construction of Section 667(f)(2) that would not pose constitutional concerns.¹¹⁵ The question, therefore,

108. BALLOT PAMPHLET, REBUTTAL TO THE ARGUMENT AGAINST PROPOSITION 184, 37 (NOV. 8, 1994).

109. See ERLER, *THE AMERICAN POLITY: ESSAYS ON THE THEORY AND PRACTICE OF CONSTITUTIONAL GOVERNMENT* 39-57, 59-89 (1991); Erler, *Judicial Legislation, reprinted in L. LEVY, ET. AL., ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 3:1040-43 (1986).

110. See Vitiello, *supra* note 34, at 1649 n.21.

111. See *Romero*, 917 P.2d at 632.

112. *Id.* at 633. The court found that if California Penal Code § 667(f)(2) was construed to permit the court to exercise discretion to dismiss only with the prosecutor’s consent, it would violate the separation of powers doctrine. *Id.*

113. CAL. PENAL CODE § 667(f)(2) (West 1998 & Supp. 1998).

114. CAL. PENAL CODE § 1385(a) (West 1998 & Supp. 1998).

115. *Romero*, 917 P.2d at 634.

became whether Three Strikes, in its attempt to curtail judicial discretion, had repealed section 1385.¹¹⁶ The court reasoned that there was no clear evidence that repeal was any part of the intent of Three Strikes; indeed the fact that the prosecutor could move to dismiss pursuant to 1385 was an indication that the intent was to retain that section.¹¹⁷ The court reasoned that “we cannot conclude that the Three Strikes law discloses a ‘clear legislative direction’ eliminating the court’s power to act on its own motion pursuant to section 1385.”¹¹⁸

The court did concede, however, that “the judicial power to reduce a defendant’s sentence by striking a sentencing allegation in furtherance of justice is statutory. Because the power is statutory, the Legislature may eliminate it.”¹¹⁹ In other words, a court’s power to strike a prior felony conviction in “the furtherance of justice” is not a power that is “inherent” in the judiciary, but only a statutory creation. If a court has “the power to strike . . . an allegation on its own motion . . . the power must be granted in a statute, either expressly or by implication. This is because . . . the court has no such extra-statutory power.”¹²⁰ Once the power is granted, however, as it was in section 1385, then the exercise of that power cannot be conditioned by the approval of the prosecuting attorney without violating the constitutional doctrine of the separation of powers.¹²¹ The legislature does not have to grant statutory authority to the judiciary to “act in the furtherance of justice,” but once it does it cannot make that judicial power depend upon or be conditioned by actions of the executive branch:

[D]ismissal—for whatever reason—is a judicial rather than an executive function That the Legislature and the electorate may eliminate the courts’ power to make certain sentencing choices may be conceded It does not follow, however, that having given the court the power to dismiss, the Legislature may therefore “condition its exercise upon the approval of the district attorney.”¹²²

The court did caution, however, that the “[t]rial court’s power to

116. *See id.* at 640.

117. *Id.* at 641-42.

118. *Id.* at 646.

119. *Romero*, 917 P.2d at 640.

120. *Id.*

121. *See id.* at 638.

122. *Id.* at 638 (*quoting* *People v. Navarro*, 7 Cal.3d. 248, 260 (1972)).

dismiss an action under section 1385, while broad, is by no means absolute. Rather it is limited by the amorphous concept which requires that the dismissal be in furtherance of justice.¹²³ “[T]his requires a consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People.*” At a bare minimum, the dismissal must be “reasonable.”¹²⁴ Any dismissal motivated by “judicial convenience” or to relieve “court congestion,” or as a reward for a guilty plea or simple “antipathy for the effect that the three strikes law would have on [a] defendant” would be “unreasonable” and therefore not in “furtherance of justice.”¹²⁵ But it is the purpose of the law that governs the use of judicial discretion—the power to act in “the furtherance of justice”—not some amorphous and constitutionally unrecognized duty to act as the “conscience of the community.”

The court’s statutory construction, although somewhat abstruse and labored, is defensible. The telling point is that Three Strikes allows the prosecutor to move to strike in the furtherance of justice under 1385. Yet if the judge had no power to act under 1385—as if Three Strikes had repealed 1385—Three Strikes would merely authorize the prosecutor to ask the judge for what he cannot grant.¹²⁶ As the court sardonically remarked, “[n]o rational drafter would give the prosecutor express permission to bring a motion the court may not grant.”¹²⁷ At least one commentator, after remarking that “the court’s statutory construction is certainly open to question,” argues that “more importantly, six justices agreed that had the legislature denied judges’ discretion, the statute would violate the separation of powers doctrine.”¹²⁸ But, of course, the court explicitly stated that the power to dismiss was statutory, not constitutional.¹²⁹ The court was emphatic in arguing that the power to act “in the furtherance of justice” was not an inherent or intrinsic part of “judicial power.”¹³⁰ The irrefragable conclusion must be that what the legislature gives it can take away without violating the separation of powers. The separation of powers argument made its appearance in *Romero* only as an argument

123. *Romero*, 917 P.2d at 648.

124. *Id.*

125. *Id.*

126. *See id.* at 646.

127. *Id.* at 640.

128. Vitiello, *supra* note 34, at 1649.

129. *Romero*, 917 P.2d at 639-40.

130. *Id.*

against the legislature's attempt to condition a grant of judicial power on the actions of the executive branch.¹³¹ Presumably, if the legislature wanted to eliminate the courts' power to strike prior convictions—and did so in clear and unequivocal terms—then the *Romero* court would find no separation of powers violations for the simple reason that they held that the power to dismiss was a judicial power, but it was not inherent in the judiciary.¹³²

The holding in *Romero* has generally been misstated by commentators. Professor Lisa Cowart, for example, remarks that "California's three strikes law completely removed judicial discretion in sentencing. *Romero's* holding affords a necessary return to that historical principle. Therefore, *Romero* must be viewed as an opportunity to actively pursue sentencing alternatives to incarceration."¹³³ But the Three Strikes law, *as construed by the court*, was said not to be an explicit or clear delimitation of judicial discretion. *Romero* is not a return to "historic principle," if "historic principle" is meant to refer to an inherent power to dismiss on the part of the judiciary. This interpretation was confirmed in *Garcia*.¹³⁴ Justice Chin, writing the opinion of the court, remarked that:

Our holding in *Romero* flowed directly from the plain language of the Three Strikes law, which expressly authorizes prosecutors to move to strike prior allegations "pursuant to" section 1385 We reasoned that, because the Three Strikes law makes express reference to section 1385 and does not anywhere bar courts from acting pursuant to that section, the drafters of the law must have intended that section to apply without limitation in Three Strikes cases."¹³⁵

The *Garcia* court took very seriously *Romero's* warning that discretion is limited to fulfilling "the purpose of the Three Strikes law."¹³⁶ Under *Garcia*, there is absolutely no warrant for predicting that courts will move to implement "alternatives to incarceration."

One unintended—if perhaps maliciously ironic—consequence of *Romero* is to provide some insulation against due process challenges. Judicial discretion softens the mandatory aspect of sentencing that might otherwise provoke due process

131. *See id.* at 638.

132. *Id.*

133. *See* Cowart, *supra* note 43, at 663.

134. *See Garcia*, 976 P.2d at 835.

135. *Id.*

136. *Id.* at 839.

considerations.¹³⁷

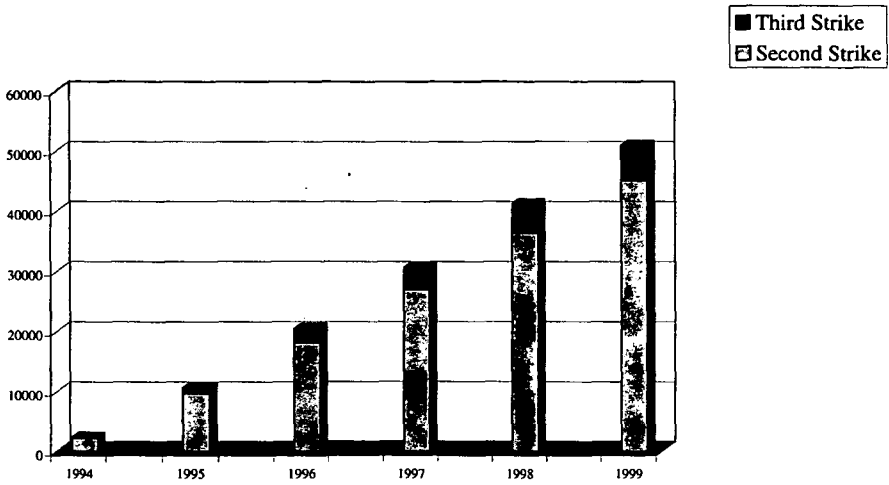
CONCLUSION

From all available evidence it seems clear beyond cavil that Three Strikes is not only an effective deterrent to crime, but that it is likely to survive any constitutional challenge. It is unlikely that the current legislature will act to curtail judicial discretion, and perhaps it would be politically unwise to do so. Three Strikes is a much more defensible law after *Romero's* construction. Crime rates continue to fall at a precipitous rate as prison populations soar. Rather than tamper with judicial discretion, the legislature may want to consider revising the Three Strikes law to a Two Strikes law while including only serious or violent felonies on the list of strike eligible crimes. This would avoid the problem expressed in Justice Stevens' *Riggs* opinion of having the third strike triggered by a "minor" felony or a misdemeanor that is elevated to a felony because of prior strikes.¹³⁸ There is little doubt that a Two Strikes law would be constitutional, especially if it included judicial discretion to strike prior felonies under Section 1385. After all, "three strikes" is a baseball metaphor; it has no constitutional status.

137. See Erler, *Transcript: The Fourth Driker Forum for Excellence in the Law*, 45 WAYNE L. REV. 1412-17 (1999).

138. See *Riggs*, 119 S. Ct. at 891.

Figure 1. Number of Inmates in California Prisons as a Result of a Second or Third Strike



Source: Laverne Low-Nakashima, Research Program Specialist, Offender Information Services Branch, Department of Corrections, State of California, Feb. 2000

Table 1. Mean Annual Rate of Change, Total Crime Index,
Before and After Three Strikes

(rates are listed as percent figures)

Area	Pre- 3 Strikes	Post- 3 Strikes	t Score	t Significance
California	-2.35	-8.39	4.07	99.5
Bakersfield	-0.17	-6.37	1.74	90.0
Chico	+2.44	-4.55	1.50	not significant
Fresno	-5.64	-8.97	1.09	not significant
Los Angeles	-3.83	-9.33	2.76	95.0
Merced	+10.30	-1.82	4.29	99.5
Modesto	+4.63	-5.15	2.17	95.0
Orange County	-4.23	-11.85	4.50	99.5
Oakland	-0.28	-3.52	0.74	not significant
Redding	+0.74	-5.15	0.82	not significant
Riverside_San Bern.	-3.38	-10.87	2.25	95.0
Sacramento	-1.17	-7.52	1.25	not significant
Santa Barbara	-0.99	-7.67	2.22	95.0
Santa Cruz	+1.49	-10.17	3.41	97.5
San Diego	-4.94	-8.99	2.02	90.0
San Francisco	-0.59	-6.89	2.95	97.5
San Jose	-4.01	-6.13	1.33	not significant
Salinas	+2.45	-4.71	1.65	90.0
Santa Rosa	+3.21	-5.69	1.97	90.0
Ventura County	-6.27	-7.48	0.59	not significant
Vallejo-Fairfield-Napa	-1.20	-6.83	2.00	90.0
Visalia	-1.65	-3.83	0.87	not significant
Yuba City	+6.07	-10.78	4.08	99.5

Source: FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORT, 1992-1998.

Note: The metropolitan areas listed are Statistical Metropolitan Areas as defined by the United States Census Bureau.

Note: The pre- and post-law values were compared using a one-tailed *t*-test. The levels of significance expressed in the table are multiples of 100 from the probability complement of the *p*-value of the *t*-statistic calculated in each case. The higher the number, the more certain we are of effect of the Three Strikes law. Cases that are labeled "Not Significant" did not yield *t*-scores that allow us to say, with any confidence, that there is an effect from the Three Strikes law.

Table 2. Mean Annual Rate of Change, Violent Crime Index,
Before and After Three Strikes

(rates are listed as percent figures)

Area	Pre- 3 Strikes	Post- 3 Strikes	t Score	t Significance
California	-0.50	-8.66	3.93	99.5
Bakersfield	-1.15	-9.00	1.29	not significant
Chico	-1.54	-8.47	0.92	not significant
Fresno	+3.08	-7.96	4.43	99.0
Los Angeles	-3.19	-9.20	3.58	97.5
Merced	+16.36	8.26	0.55	not significant
Modesto	+11.31	-6.30	6.23	99.5
Orange County	-2.80	-10.68	2.84	97.5
Oakland	+4.75	-4.77	2.63	95.0
Redding	+7.76	+6.20	0.18	not significant
Riverside_San Bern.	-3.95	-10.41	5.32	99.5
Sacramento	+0.71	-8.18	2.33	95.0
Santa Barbara	+2.23	+0.40	0.69	not significant
Santa Cruz	+17.18	-5.06	4.11	99.0
San Diego	-4.78	-9.11	1.97	90.0
San Francisco	+5.30	-8.84	4.81	99.5
San Jose	+0.23	-3.47	0.69	not significant
Salinas	+8.41	-5.23	1.88	90.0
Santa Rosa	+8.81	-7.87	5.46	99.5
Ventura County	-2.52	-9.35	1.45	not significant
Vallejo-Fairfield-Napa	+2.59	-3.87	1.03	not significant
Visalia	-6.96	-1.64	-1.24	not significant
Yuba City	+6.07	-10.78	1.60	90.0

Source : FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORT, 1992-1998.

Note: The metropolitan areas listed are Statistical Metropolitan Areas as defined by the United States Census Bureau.

Note: The pre- and post-law values were compared using a one-tailed *t*-test. The levels of significance expressed in the table are multiples of 100 from the probability complement of the *p*-value of the *t*-statistic calculated in each case. The higher the number, the more certain we are of effect of the Three Strikes law. Cases that are labeled "Not Significant" did not yield *t*-scores that allow us to say, with any confidence, that there is an effect from the Three Strikes law.

Table 3. Mean Annual Rate of Change, Homicides,
Before and After Three Strikes

(rates are listed as percent figures)

Area	Pre- 3 Strikes	Post- 3 Strikes	<i>t</i> Score	<i>t</i> Significance
California	+1.57	-13.36	4.46	99.5
Bakersfield	+10.68	-12.06	1.63	90.0
Chico	-15.67	+9.01	-0.72	not significant
Fresno	+21.82	-17.15	4.09	99.0
Los Angeles	+1.93	-12.60	3.00	97.5
Merced	+70.85	+12.82	1.62	90.0
Modesto	+8.87	-2.36	0.57	not significant
Orange County	+11.28	-17.02	4.06	99.0
Oakland	+0.06	-15.61	3.43	97.5
Redding	+7.59	-11.87	1.57	90.0
Riverside_San Bern.	+8.96	-13.31	17.24	99.5
Sacramento	+13.36	-12.56	1.89	99.0
Santa Barbara	-18.15	-0.39	-2.87	not significant
Santa Cruz	-1.17	+28.11	-0.67	not significant
San Diego	-7.47	-19.04	1.71	90.0
San Francisco	+5.69	-7.86	1.17	not significant
San Jose	-10.55	-4.36	-0.45	not significant
Salinas	+12.81	-5.21	0.99	not significant
Santa Rosa	+112.29	-12.01	1.92	90.0
Ventura County	+10.12	-3.20	0.81	not significant
Vallejo-Fairfield-Napa	-7.11	-23.20	1.41	not significant
Visalia	-11.16	-12.02	0.05	not significant
Yuba City	-34.59	+2.39	-1.91	not significant

Source: FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORT, 1992-1998.

Note: The metropolitan areas listed are Statistical Metropolitan Areas as defined by the United States Census Bureau.

Note: The pre- and post-law values were compared using a one-tailed *t*-test. The levels of significance expressed in the table are multiples of 100 from the probability complement of the *p*-value of the *t*-statistic calculated in each case. The higher the number, the more certain we are of effect of the Three Strikes law. Cases that are labeled "Not Significant" did not yield *t*-scores that allow us to say, with any confidence, that there is an effect from the Three Strikes law.

