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"Three Strikes" and the Romero Case: The Supreme Court Restores Democracy

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“THREE STRIKES” AND THE *ROMERO* CASE: THE SUPREME COURT RESTORES DEMOCRACY

*Michael Vitiello**

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I. INTRODUCTION

"Three strikes and you're out" may be good baseball. In 1994, however, it turned out to be a case study of sound bite electioneering, substituting for careful analysis of complex social and penological problems.

In 1992 Mike Reynolds, father of murder victim Kimber Reynolds,¹ began a campaign to secure passage of one of the nation's most draconian multiple-offender statutes.² When Reynolds first proposed "three strikes" to the legislature, the Assembly Public Safety Committee soundly defeated the bill.³ Reynolds's subsequent efforts may have failed but for the kidnapping and murder of twelve-year-old Polly Klaas, whose plight galvanized the nation.⁴

Richard Allen Davis, Polly's admitted killer and a repeat offender, symbolized the failure of the criminal justice system;⁵ Polly's

1. See George Skelton, *A Father's Crusade Born from Pain*, L.A. TIMES, Dec. 9, 1993, at A3. Convicted felon Joe Davis shot and killed Kimber Reynolds when she resisted him after he attempted to take her purse. See *id.*

2. See Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 400-01 & nn.25-36 & app. A (1997) (detailing the provisions of various state habitual offender statutes). Six of the 22 states that have enacted "three-strikes" laws have had no convictions, while California's stringent law has led to the imprisonment of 15,000 offenders. See *Only California Using '3 Strikes' Law Widely*, SACRAMENTO BEE, Sept. 10, 1996, at A3. The California law considers any of the state's 500 felonies—both violent and nonviolent—as a third strike. See *id.* A University of Wisconsin study found that 85% of the second- and third-strike convictions were for nonviolent offenses. See *id.*

"Three strikes" is used in this Article to describe both the statute adopted by the legislature, Act of Mar. 7, 1994, ch. 12, 1994 Cal. Legis. Serv. 56 (West) (amending CAL. PENAL CODE § 667), and the voter initiative, Proposition 184, in California Ballot Pamphlet, General Election, Nov. 8, 1994 [hereinafter California Ballot Pamphlet] (codified at CAL. PENAL CODE § 1170.12 (West Supp. 1997)). Unless otherwise noted, all statutory references in the text are to the California Penal Code.

There is some debate whether the two provisions are identical. For example, at least one trial court found significance in minor variation in the language of the two laws. See *People v. Hazelton*, 48 Cal. Rptr. 2d 730, 731-32 (1995) (reversing trial court's ruling that the voter initiative differed from the legislative version in the context of extra-jurisdictional prior convictions), *review granted and opinion superseded*, ___ Cal. 4th ___, 911 P.2d 429, 50 Cal. Rptr. 2d 242 (1996), *aff'd*, 14 Cal. 4th 101, 926 P.2d 423, 58 Cal. Rptr. 2d 443 (1996).

3. See Skelton, *supra* note 1, at A3.

4. See *infra* notes 55-72 and accompanying text.

5. Richard Allen Davis's rap sheet was eleven pages long, including two prior kidnapping convictions. See Richard Price, *Town Angry at a System that Failed*, USA TODAY, Dec. 8, 1993, at 1A. In his most recent stay in prison—a 16-year sentence for kidnapping, assault, and burglary—he had served only half of his sentence

death was a critical moment for "three strikes."⁶ Within days of reports of her murder, "three strikes" gathered 50,000 signatures and was on its way to becoming the fastest qualifying voter initiative in California history.⁷ The public's support for the "three-strikes" initiative assured new interest in the legislature when the bill's proponents resubmitted it.⁸

From the inception of "three strikes,"⁹ commentators along a

before early release for good behavior. *See id.* Davis would have been in jail on the day Polly Klaas was abducted if he had served his entire sentence. *See id.* at 1A.

6. If there was any doubt about the intensity of the anger at Davis, Governor Pete Wilson's loss of control during an interview with a reporter was telling. Wilson said: "I mean, when I think of that son of a bitch, you cannot help but be angered. Did you see the picture of him on the front page of the [San Francisco] Chronicle? Smirking? Jesus, boy. I wanted to just belt him right across the mouth." George Skelton, *Wilson Seizes the Day After Polly's Murder*, L.A. TIMES, Dec. 13, 1993, at A3. After the arrest politicians scurried to respond to the fears of their constituencies. *See* Dan Morain, *A Father's Bittersweet Crusade*, L.A. TIMES, Mar. 7, 1994, at A1. Mike Reynolds's growing initiative was the perfect answer. His initiative, had it been prior law, would have kept Richard Allen Davis in prison. *See* Price, *supra* note 5, at 1A. The phrase "three strikes and you're out" was the perfect sound bite for legislators anxious to capitalize on the publicized murder of Polly Klaas. *See* Morain, *supra*, at A1.

7. *See* Richard Kelly Heft, *Legislating with a Vengeance*, INDEPENDENT (LONDON), Apr. 26, 1995, at 27.

8. *See infra* notes 71-72 and accompanying text.

9. The legislative intent in enacting "three strikes" was to "ensure longer prison sentences and greater punishment" for those who have committed prior felonies. CAL. PENAL CODE § 667(b) (West Supp. 1997).

By enacting "three strikes" the legislature has mandated longer sentences as follows: the law eliminates limitations on aggregate terms of imprisonment, *see id.* § 667(c)(1); *see also id.* § 1170.12(a)(1) (codifying the analogous provision of the voter initiative); amended section 667 prohibits probation for second- or third-time felons within its provisions, *see id.* § 667(c)(2); *see also id.* § 1170.12(a)(2) (voter initiative); and the law withdraws judicial discretion to have offenders covered by its provisions committed to diversion programs or to the California Rehabilitation Center, *see id.* § 667(c)(4); *see also id.* § 1170.12(a)(4) (voter initiative); further, it reduces the amount of good-time credits that may be awarded to a maximum of one-fifth the total term of the imposed sentence, *see id.* § 667(c)(5); *see also id.* § 1170.12(a)(5) (voter initiative); and requires courts to sentence certain defendants to consecutive, rather than concurrent, terms of imprisonment, *see id.* § 667(c)(6)-(8); *see also id.* § 1170.12(a)(6)-(8) (voter initiative).

Several other key provisions demonstrate the commitment to long terms of imprisonment for a wide array of criminal defendants. Subsection 667(c)(3) provides that "[t]he length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence." *Id.* § 667(c)(3); *see also id.* § 1170.12(a)(3) (voter initiative). That is, there is no "wash-out" period, leaving older offenders liable for violent or serious felonies committed during the height of their criminal careers.

Subsections 667(d), (e), and (f) include the key provisions of the "three-strikes" legislation. Subsection (d) identifies what is colloquially called a "strike." *See id.* § 667(d); *see also id.* § 1170.12(b) (voter initiative). Specifically, subsection

wide political spectrum raised serious questions about the legislation.¹⁰ Nevertheless, the legislature passed "three strikes" by size-

667(d)(1) states that any offense listed in subsections 667.5(c) and 1192.7(c) is "a prior conviction of a felony" for purposes of amended section 667, in other words, one that will serve to trigger the law's enhancement provisions. *Id.* § 667(d)(1); see also *id.* § 1170.12(b)(1) (voter initiative). Subsection 667.5(c) lists what are considered "violent" felonies and subsection 1192.7(c) lists "serious" felonies. See *id.* § 667.5(c); see also *id.* § 1192.7(c) (voter initiative).

Subsection 667(e) enhances punishment of the offender for his second strike. See *id.* § 667(e)(1); see also *id.* § 1170.12(c)(1) (voter initiative). Under subsection (e)(1), for an offender with a prior "serious" or "violent" felony conviction who has a current felony conviction, one that need not be serious or violent, the term of imprisonment "shall be twice the term otherwise provided as punishment for the current felony conviction." *Id.* § 667(e)(1); see also *id.* § 1170.12(c)(1) (voter initiative).

Subsection 667(e)(2)(A) is the "three strikes" provision of the law. See *id.* § 667(e)(2)(A); see also *id.* § 1170.12(c)(2)(A) (voter initiative). It provides that if a defendant has two or more prior "serious" or "violent" felony convictions, the term of imprisonment for the current felony conviction "shall be an indeterminate term of life imprisonment." *Id.* § 667(e)(2)(A); see also *id.* § 1170.12(c)(2)(A) (voter initiative). The minimum sentence shall be the greater of three times the term of imprisonment provided for each current felony, twenty-five years, or the term of imprisonment determined by application of section 1170 plus other enhancement provisions. See *id.* § 667(e)(2)(A)(i)-(iii); see also *id.* § 1170.12(c)(2)(A)(i)-(iii) (voter initiative). Under this provision, in conjunction with subsection 667(c)(5), which limits good time credits to one-fifth of the imposed sentence, the best that a "three-strikes" defendant can hope for is a real term of twenty years in prison.

Subsection 667(f) is especially important in light of the realities of the criminal justice system. See *id.* § 667(f)(2); see also *id.* § 1170.12(d)(2) (voter initiative). That provision was at issue in *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996), and is discussed in detail below, *infra* notes 294-318 and accompanying text.

10. An excerpt from a letter directed to Governor Pete Wilson from the San Diego County District Attorney's Office is telling in this regard: "[Three strikes] is not a good bill; it is a *bad* bill. It is bad in concept, and it is bad in drafting. Inevitably it will produce bad results. These bad results will be both harmful to the criminal justice system and embarrassing to the bill's proponents." Letter from Charles E. Nickel, Chief, Training Division, Office of the District Attorney, County of San Diego, to Pete Wilson, Governor, State of California 1 (Mar. 7, 1994) (on file with the *Loyola of Los Angeles Law Review*). At the other end of the spectrum, the San Francisco Public Defender wrote an article delineating the numerous flaws of the legislation and warned that "Californians will witness repeated and accumulating instances of unnecessary incarceration of non-dangerous offenders, as well as examples of severe punishment for trivial offenses." Jeff Brown, *Why California's "Three Strikes Law" Is Terrible Legislation*, 26 U. WEST L.A. L. REV. 269, 281 (1995). In fact, Polly Klaas's father, although initially a proponent of the legislation, publicly opposed "three strikes" and advocated narrow legislation targeting only violent criminals. See John Matthews, *Klaas Father Opposes New '3 Strikes' Law*, SACRAMENTO BEE, Mar. 10, 1994, at A3.

Even more telling is that the chief assistant to Attorney General Dan Lungren, George Williamson, also voiced concerns regarding the legislation: "I knew there were going to be some big, big problems. . . . We were aware that there were some drafting concerns which were significant." Dan Morain, *Citing '3 Strikes,'*

able majorities in both houses,¹¹ and Californians voted in favor of the initiative in overwhelming numbers.¹²

Critics focused on numerous issues, some related to technical drafting problems.¹³ But commentators also identified two substantial state constitutional problems with both the legislation and the initiative. First, subsection 667(e)(2)(A), the law's most controversial provision, targets a defendant who has committed two prior "violent" or "serious" felonies; when charged with a third felony, the defendant must be sentenced to a minimum term of twenty-five years to life.¹⁴ Critics argued that because the third "strike" may be *any* felony, punishments under the law may violate the state constitutional prohibition against cruel or unusual punishment.¹⁵

Second, critics questioned the balance of power between the judge and prosecutor under "three strikes." Typical sentencing schemes give judges some discretion, allowing them to avoid excessive sentences. "Three strikes" was different. Despite seeking the assistance of a state appellate court judge in drafting the legislation,¹⁶

Lawyers to Shun Plea Bargains, L.A. TIMES, Mar. 9, 1994, at A1. One Los Angeles Superior Court judge gave an insightful summary of the general disdain toward "three strikes": "I've never seen something before where D.A.s, defense lawyers and judges agree. This thing is not working. . . . I've been a Republican all my life, and I'm afraid I'm starting to sound like a Democrat." Jill Smolowe, *Going Soft on Crime*, TIME, Nov. 14, 1994, at 63, 63.

11. Assembly Bill 971 (A.B. 971) passed the Assembly by a 63-9 margin on January 31, 1994. See 1 ASSEMBLY FINAL HISTORY, 712 (Cal. 1993-1994 Reg. Sess.). The Senate passed it by a 29-7 margin on March 3, 1994. See *id.*

12. Proposition 184, the "three-strikes" ballot initiative, received 72% of the vote. See *State Propositions*, S.F. CHRON., Nov. 10, 1994, at B4.

13. See, e.g., William M. Thornbury, *What Is the Meaning of Three Strikes and You Are Out Legislation?*, 26 U. WEST L.A. L. REV. 303 (1995) (noting the poor draftsmanship of the legislation and discussing its numerous ambiguities). For an objective description of the technical deficiencies of the "three-strikes" initiative, see GRACE LIDIA SUAREZ, SAN FRANCISCO PUBLIC DEFENDER'S GUIDE TO THREE STRIKES (1994).

14. See CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1997).

15. The California judiciary came to a consensus in this regard at a 1994 California Judges Association seminar. At the convention judges agreed that some sentences under the provisions of "three strikes" would be struck down as cruel and unusual punishment. See Scott Graham, *Trial Judges Trying to Determine Their Role in 'Three Strikes' Cases*, RECORDER (San Francisco), Sept. 27, 1994, at 3; see also Albert J. Menaster, *Eighteen Ways to Avoid Three Strikes*, 26 U. WEST L.A. L. REV. 283, 299-301 (1995) (arguing that the "three-strikes" statute is cruel and unusual both *per se* and as applied).

16. Judge James A. Ardaiz, presiding justice of the Fifth District Court of Appeal, and two other Fresno Municipal Court judges cooperated in drafting an initial outline of the "three-strikes" measure. See Dan Morain, *Judge Admits His Role in '3 Strikes' Law*, L.A. TIMES, Nov. 3, 1994, at A3.

Reynolds distrusted judges even more than he distrusted legislators.¹⁷ “Three strikes” was drafted to eliminate judicial discretion while allowing a prosecutor to refuse to follow the sentencing provisions “in the furtherance of justice.”¹⁸

Although not without ambiguity,¹⁹ the law placed a judge in a difficult position: if the judge believed that a prior conviction should be “struck” in the interest of justice, the judge could do so only upon motion of the prosecutor. Based on a line of cases beginning in

17. In an article addressing the recent California Supreme Court’s decision in *Romero*—returning discretion to the judiciary in “three-strikes” cases—Mike Reynolds, leery of the judicial system, suggested that a list of specific conditions under which a judge may strike a prior conviction be established in order to restrict judicial discretion. See Daniel M. Weintraub, *Pringle Out to Restore ‘3 Strikes’*, ORANGE COUNTY REG., June 21, 1996, at A1. Reynolds stated that “[t]hen what you’ve done is painted the judges into a box. But it has to be a pretty tight box. These guys are crafty. If you leave a crack in the door they’ll drive a truck through it.” *Id.*

18. CAL. PENAL CODE §§ 667(f)(2), 1170.12(d) (West Supp. 1997) (providing that a prosecuting attorney may strike a prior felony conviction in the furtherance of justice pursuant to section 1385 of the California Penal Code).

In analyzing the provisions of “three strikes,” the California Senate Judiciary Committee noted some of the constitutional problems of A.B. 971 and concluded that in some cases “three strikes” would, in fact, impose cruel and unusual punishment. See CALIFORNIA SENATE JUDICIARY COMM. ANALYSIS OF A.B. 971, 1993-1994 Reg. Sess. 8 (Feb. 17, 1994) (visited Mar. 15, 1997) <http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_0951-1000/ab_971_cfa_940210_160740_sen_comm> [hereinafter SENATE JUDICIARY, ANALYSIS OF A.B. 971]. Nevertheless, the purpose behind subsection 667(f)(2) was to remove judicial discretion. The appellate justices in *Romero* expounded on the legislative purpose of this provision and noted that “the clear intent of the electorate was to limit the power of the court.” *People v. Superior Court (Romero)*, 37 Cal. Rptr. 2d 364, 377 (Ct. App. 1995), *aff’d in part, rev’d in part*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996). The appellate court further recognized the electorate’s indignation with the “judicial system’s revolving door” and noted that the proponents’ ballot argument claimed that the measure was brought to the voters as a reaction to “soft-on-crime judges” who “spend all of their time looking for loopholes” to reduce punishment for defendants. *Id.*

19. Confronted with the issue of whether section 667 of the California Penal Code empowers the court to strike prior felony allegations on its own motion pursuant to section 1385 of the California Penal Code, the California Supreme Court wrote a 43-page opinion in which it concluded, in part, that the ambiguity of the statute—which does not expressly prohibit trial courts from exercising their traditional power to strike prior felony convictions pursuant to section 1385—in and of itself prohibits elimination of judicial discretion in this regard. See *Romero*, 13 Cal. 4th at 517-22, 917 P.2d at 639-48, 53 Cal. Rptr. 2d at 801-09; see also *id.* at 522, 917 P.2d at 642, 53 Cal. Rptr. 2d at 803 (“The drafter’s express invocation of section 1385 in the Three Strikes law, together with the absence of any language purporting to bar courts from acting pursuant to it, virtually compels the conclusion no such prohibition was intended.”). *But see infra* notes 319-20 and accompanying text (doubting *Romero*’s statutory construction).

1970,²⁰ critics argued that subsection 667(f)(2) violated the state constitutional separation-of-powers doctrine.²¹

Critics of "three strikes" proved to be right on at least one count. On June 20, 1996, the California Supreme Court held that subsection 667(f)(2) did not eliminate judicial discretion.²² Despite a unanimous decision in *People v. Superior Court (Romero)*,²³ the court's statutory construction is certainly open to question.²⁴ More importantly, six justices agreed that had the legislature denied judges' discretion, the statute would violate the separation-of-powers doctrine.²⁵

Public reaction to *Romero* is mixed. While some commentators praise the decision,²⁶ many target the court for undermining the will

20. See *People v. Tenorio*, 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970).

21. Trial court judge William Mudd, who in the face of a newly enacted "three-strikes" law insisted on striking Romero's prior felony convictions sua sponte, rendered a principled decision based on precedent established by cases such as *Tenorio*. "Judges are the conscience of the community," said Judge Mudd, "and should be free to evaluate what type of sanction is appropriate." Anne Krueger, *State High Court to Rule on '3 Strikes'*, SAN DIEGO UNION-TRIB., Mar. 31, 1996, at A1. At Romero's sentencing hearing, Judge Mudd wrote the following: "I think this is a significant piece of Legislation that basically castrates a judge. It takes away all of the discretion and it places it squarely in the hands of the D.A. and that's the reason it's a separation-of-powers argument." *Romero*, 37 Cal. Rptr. 2d at 371. Several other trial court judges followed the same line of reasoning to strike prior felony convictions. See, e.g., *People v. Superior Court (O'Donnell)*, 49 Cal. App. 4th 194, 47 Cal. Rptr. 333 (1995) (vacating trial court's decision to strike a prior felony conviction to render defendant eligible for parole); *People v. Petty*, 46 Cal. App. 4th 723, 44 Cal. Rptr. 2d 34 (1995) (holding that the "three-strikes" provision did not give trial court power to dismiss serious felony obligations); *People v. Glaster*, 45 Cal. App. 4th 299, 45 Cal. Rptr. 2d 65 (1995) (reversing trial court's decision to strike a prior felony).

22. See *Romero*, 13 Cal. 4th at 529-30, 917 P.2d at 647, 53 Cal. Rptr. 2d at 808.

23. 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996).

24. See *infra* notes 318-21 and accompanying text.

25. See *Romero*, 13 Cal. 4th at 513-17, 917 P.2d at 636-39, 53 Cal. Rptr. 2d at 797-800.

26. "The mindless and inexorable demand for a life sentence for minor offenses has become a bit more mindful." Carey Goldberg, *California Judges Ease 3-Strike Law*, N.Y. TIMES, June 21, 1996, at A1 (quoting Vincent Schiraldi, Executive Director, Center on Juvenile and Criminal Justice). One reporter noted that "[j]udicial discretion provides a safety valve, for defendants and for society. The law shouldn't be a cliché that divides people; it should be an expression of our collective will, reasonably enforced." *Remodeling '3 Strikes'*, S.F. EXAMINER, June 23, 1996, at B10. Notably concise, the ACLU stated that "[i]f you take sentencing discretion away from a judge, you may as well use a computer." Tom Rhodes, *'Three-Strikes' Law Ruled Illegal by California Court*, TIMES (London), June 22, 1996, at 16 (quoting Ramona Ripston, ACLU).

of the people.²⁷ During hearings on proposed amendments to “three strikes” that would narrow judicial discretion, for example, some witnesses and legislators suggested that liberal judges are at the root of society’s crime problem.²⁸ As observed by one commentator, “three strikes” “came about because the judiciary dictated too much leniency toward criminals.”²⁹

The court’s critics also attacked *Romero* as antidemocratic.³⁰ Like frequent conservative criticism of the United States Supreme Court,³¹ commentators have lambasted the court for frustrating the will of the people. Typical is the statement of one writer that “[*Romero*] is another blow to a core principle of democracy—rule by the people[; *Romero*] . . . limit[s] the power of the people in favor

27. Several commentators fervently argue that the judiciary should not interfere with the will of the people in cases where the legislation does not conflict with constitutionally guaranteed rights. One reporter wrote that “[judges] should either administer [the law] or find new jobs, perhaps in the Legislature, where they could pursue their legislating goals.” David Kline, *High Court Delivers a Wild Pitch Against Three Strikes*, CAPITOL NEWS SERVICE, June 24, 1996, at 11, available in LEXIS, News Library, Papers File. “The court’s decision is a bad one,” he continued, “and not just because it ignores the will of the people. . . . [T]he ruling represents an attempt by the supreme court to seize law-making authority from the legislative branch.” *Id.* California’s Secretary of State, Bill Jones, responded with disdain to the *Romero* decision and accused the judiciary of preserving its own territory at the expense of Californians. “In publishing their decision,” he stated, “the justices showed they are more interested in protecting the turf of the bench than they are in protecting the safety of Californians.” Bill Ainsworth, *Senate GOP Leader Urges Justices’ Ouster*, RECORDER (San Francisco), June 21, 1996, at 1.

28. Senate Minority Leader Rob Hurtt advanced such a position at an Assembly Public Safety Committee hearing in which he stated that “he wants to eliminate the ‘horrifying reality that liberal judges can resume their practice of failing to get tough on career criminals,’” and that “recidivists can go shopping for liberal judges.” John Jacobs, *More Posturing on Three Strikes*, SACRAMENTO BEE, June 30, 1996, at F4. During this same hearing, Reynolds asserted that but for a liberal judge’s sentencing decision, Richard Allen Davis would have been in prison at the time he killed Polly Klaas. See Letter from J. Charles Kelso, Director, Institute for Legislative Practice, McGeorge School of Law, to Michael Vitiello (June 30, 1996) (on file with the *Loyola of Los Angeles Law Review*). The prosecutor who handled the earlier case against Davis corrected Reynolds, explaining that the judge sentenced Davis to a maximum term and that Davis was released because of good-time credits. See *id.*

29. Steven Lawrence, *Three Strikes, The People Are Out*, RECORDER (San Francisco), June 26, 1996, at 4.

30. “Once again, democracy is thwarted. The people have spoken, and judges have thwarted their will.” *African-Americans Slam California Supreme Court for Elitist Interpretation of ‘Three Strikes, You’re Out,’* PR NEWSWIRE, June 21, 1996, available in LEXIS, News Library, Wires File [hereinafter *Elitist Interpretation*] (quoting a member of Project 21, an African-American leadership group).

31. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA* 130 (1990) (commenting that for the past half-century the United States Supreme Court has invariably legislated items on the liberal agenda).

of rule by judges, the philosopher kings."³²

The criticism is unfortunate and unfounded. Politicians frequently engage in court-bashing, contributing to cynicism about an important public institution.³³ Constrained by ethical rules,³⁴ judges are not in a position to fight back. Lawyers and law professors, who otherwise share similar institutional values, are often among the loudest critics.³⁵

32. Lawrence, *supra* note 29, at 4.

33. "It's time to get the liberal judges out of there," stated a member of Project 21, an African-American leadership group. *Elitist Interpretation*, *supra* note 30. "We need judges who will fight for the people and not the liberal elite. This country is built on 'We the people' not 'we the judges, we the criminals.'" *Id.*; see also Gilbert S. Merritt, *Judge-Bashing Only Undermines Public Confidence in Judiciary*, NASHVILLE BANNER, July 3, 1996, at A11 (Chief Judge Merritt, United States Court of Appeals for the Sixth Circuit, noting some of the frequent criticisms hurled at the judiciary: judges are "soft on crime," "against the death penalty," "corruptly protecting criminals," "losing the war on drugs," and "refusing to protect citizens against violence").

Public confidence in the judiciary is the touchstone of judicial independence, and continued denigration of the system undermines this confidence and weakens the shield that protects Americans from the tyranny of the majority. The tendency for politicians to jump on the bandwagon and engage in judge-bashing may be attributed to the public's growing distrust of the judiciary. Chief Judge Merritt noted that "[t]he distrust index is up, and it is clear that the public is now down on the judiciary. . . . Polls tell politicians that the public lacks confidence in judges. So politicians attack judges because they think that is where the votes are." *Id.* The *Romero* decision, in particular, brought about an abundance of political criticism of the judiciary. Governor Wilson, who appointed the judge who wrote the *Romero* opinion, stated that "[w]e cannot tolerate a situation which permits judges who are philosophically unsympathetic or politically disinclined to 'three strikes' to reduce the strong sentences that the voters intended to impose on habitual criminals." Rhodes, *supra* note 26, at 16 (quoting Governor Pete Wilson). He further stated that the decision was "potentially dangerous to public safety." *Id.* Senator Quentin L. Kopp (Ind.-San Francisco) noted the importance of an independent judiciary and expressed, in this regard, that "[s]ome of these statements by the executive and legislative leaders, who ought to know their civics better, are unworthy of them and their offices, and they're damaging to our democracy. . . . They're threatening the judiciary." Greg Krikorian & Dan Morain, *State GOP Opens Drive to Thwart '3 Strikes' Ruling*, L.A. TIMES, June 22, 1996, at A1.

34. The *Model Code of Judicial Conduct* permits a judge to discuss the law, the legal system, or the administration of justice *subject* to the requirements of the *Code*. See MODEL CODE OF JUDICIAL CONDUCT Canon 4B (1990). The *Code* requires that a judge must "respect and comply with the law and . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.* at Canon 2A. If judges were to publicly attack those critical of their decisions, such behavior could put judges' impartiality in question. See, e.g., *In re Schenck*, 870 P.2d 185 (Or. 1994).

35. Legal scholarship, for example, often focuses on the inadequacies of judicial decisions. See Robert L. Bard, *Legal Scholarship and the Professional Responsibility of Law Professors*, 16 CONN. L. REV. 731, 738-39 (1984).

Far from an attack on democracy, *Romero* demonstrates why we need independent judges. The claim that *Romero* has frustrated the will of the people is simply wrong. This Article reviews the passage of the "three-strikes" law and argues that democracy failed.³⁶ "Three strikes" passed as a result of public panic, flamed by politicians who spurned rational debate.³⁷ Powerful lobbying groups, beneficiaries of "get tough on crime" legislation, actively supported "three strikes."³⁸ A number of politicians had doubts about the efficacy of "three strikes"; few were willing to slow its course through the legislature.³⁹ While many tout the initiative process as democracy in action,⁴⁰ politicians' extravagant rhetoric prevented the electorate from making a fully informed decision on "three strikes." For example, political maneuvering prevented a less draconian alternative from appearing on the ballot.⁴¹ Proposition 184's proponents were also able to publish misleading information about its provisions as part of the initiative process.⁴²

Reliance on the initiative process makes reform of bad legislation difficult. No doubt that was the intent of its supporters.⁴³ Re-

36. See *infra* Part II.A-B.

37. See *infra* notes 98-102 and accompanying text.

38. See *infra* notes 106-22 and accompanying text.

39. See *infra* notes 144-77 and accompanying text.

40. For example, the Republican Office of Assembly Research published a pamphlet supporting the "three-strikes" measure, stating that

[o]nly when we formulate our punishments on the basis of what is just and equitable is there a role for the democratic process. . . . In the case of crime legislation in 1994, California's citizens recognized the outrageous disproportion between crimes and punishments; they participated in the democratic process to effect the appropriate changes.

Last year's anti-crime measures did much to restore the principle of democracy to its rightful place in our state's criminal-justice system.

RONALD J. PESTRITTO, JR., CAL. LEGISLATURE, REPUBLICAN OFFICE OF ASSEMBLY RESEARCH, IN DEFENSE OF THREE-STRIKES: ANALYZING THE IMPACT OF CALIFORNIA'S 1994 ANTI-CRIME MEASURES 13.

41. See *infra* notes 197-201 and accompanying text.

42. See *infra* notes 202-49 and accompanying text.

43. Reynolds went forward with his initiative because he was afraid one of the competing measures would supersede A.B. 971. The competing bills could have replaced A.B. 971 if they received Wilson's subsequent signature, but such an occurrence was improbable. Another reason Reynolds pushed forward was to make it more difficult to "water down" the legislation with subsequent amendments. See Dana Wilkie, *Senate OKs Tough '3 Strikes'*, SAN DIEGO UNION-TRIB., Mar. 4, 1994, at A1. The initiative expressly provided for legislative amendment, but only by a two-thirds majority in each house. See CAL. CONST. art. 2, § 10(c) (prohibiting legislative amendments to a voter initiative unless the amendment itself is approved by the voters, or the original initiative provides otherwise); CAL. PENAL Code § 667 (j) (West Supp. 1977). Relying on the initiative process, however, did not bolster the

quiring a supermajority for amendment of "three strikes" almost guaranteed that future reform efforts would fail.⁴⁴ This Article argues that *Romero* was faithful to both precedent and principle, and that by following principle the court has given California the opportunity to correct its excesses.⁴⁵ Rather than frustrating democracy, the court has given the legislature an opportunity to bring rationality back to California's sentencing policy.⁴⁶

II. "THREE STRIKES" BECOMES LAW

On June 29, 1992, convicted felon Joe Davis tried to grab Kimber Reynolds's purse.⁴⁷ In the words of her father, Fresno photographer Mike Reynolds, "[s]he resisted, but not that much. It wasn't a big struggle. He pulled a .357 magnum out of his waistband, stuck it in her ear and pulled the trigger."⁴⁸ Kimber Reynolds died twenty-six hours later.⁴⁹

Shortly after the murder, Mike Reynolds told Governor Pete Wilson, "I'm going after these guys in a big way, the kind of people who would murder little girls in this way."⁵⁰ Reynolds could not have imagined what an effect he would have on California and the nation.⁵¹

immunity of "three strikes" to subsequent amendment because A.B. 971 already contained a provision which prohibited amendments except by a two-thirds vote by the legislature. *See id.*

44. Subsection 667(j) of the California Penal Code limits the legislature's ability to correct the law's excesses as it requires that all amendments be supported by a two-thirds vote of each house. *See* CAL. PENAL CODE § 667(j). As long as crime remains an important political issue, few politicians will be able to urge reform. Securing a two-thirds majority in the Republican-controlled Assembly is highly unlikely. Even in the Senate, where Democrats are still in the majority, reform is dubious. Democrats do not have the requisite votes without some Republican support. Of course, this assumes that all Democrats would vote for reform, an unlikely assumption.

45. *See infra* notes 322-78 and accompanying text.

46. *See infra* notes 356-78 and accompanying text.

47. *See* Skelton, *supra* note 1, at A3.

48. *Id.* Joe Davis shot and killed Kimber Reynolds in front of at least 24 witnesses. *See id.*

49. *See id.*

50. Morain, *supra* note 6, at A1.

51. Since 1993 at least 23 states have either enacted "three-strikes" statutes or have amended existing habitual offender statutes to require harsher punishment and less leniency for defendants. For a list of the habitual offender statutes enacted since 1993, see Vitiello, *supra* note 2, app. A.

What distinguishes California from other states is the legislation's severe sentencing scheme and denial of judicial discretion. Although the *Romero* decision restored some of the judiciary's sentencing discretion, the fact that California's "three-

Reynolds solicited the assistance of James Ardaiz, the presiding justice for the California Fifth District Court of Appeal, in drafting the original "three-strikes" legislation.⁵² In 1993 Reynolds prevailed on Bill Jones, then a Republican assemblyman from Fresno, to sponsor Assembly Bill 971 (A.B. 971).⁵³ Jones enlisted Democratic Assemblyman Jim Costa for support in the then Democratically controlled legislature.⁵⁴

On April 20, 1993, Reynolds and four busloads of supporters showed up for the first hearing on the bill before the Assembly Public Safety Committee.⁵⁵ After Reynolds's impassioned plea for stiffer sanctions for habitual offenders, the Committee soundly defeated the bill.⁵⁶ The Assembly's inaction forced Reynolds to turn to

strikes" provision is triggered by *any* third felony—violent or nonviolent—makes it one of the most extreme laws of its kind. *See id.* at nn.25-36.

52. *See Morain, supra* note 16, at A3. Two other Fresno Municipal Court judges cooperated with Judge Ardaiz in drafting an initial outline of the "three-strikes" measure. *See id.* While it would appear that Mike Reynolds would have wanted to use judicial authorship as a selling point, he did not reveal the authors until October 1994. *See Dan Morain, Sponsor Says Judges Helped Write '3 Strikes', L.A. TIMES*, Oct. 19, 1994, at A3. During a debate in San Francisco, Reynolds was challenged to reveal the identity of the authors of "three strikes." *See id.* Vincent Schiraldi, the director of the Center on Juvenile and Criminal Justice in San Francisco and an outspoken critic of "three strikes," made an unfounded accusation that the National Rifle Association (NRA) had authored the bill. *See id.* In response, Reynolds said, "I'm going to tell you who was responsible for this. . . . They were judges that did the actual pen to paper, the initial draft." *Id.* Reynolds also said that the measure was then circulated among deputies in the state Attorney General's office. *See id.* Reynolds refused to name the judges and stated that the judges had requested anonymity. *See id.* The reason they wanted to remain anonymous, according to Reynolds, was because they may need to "rule on a 'three strikes' case and they didn't want to [be] placed in a position of partiality." *Id.*

Judge Ardaiz admitted his involvement in response to the publicity over the drafting and sharp criticism from other judges, who suggested that the judicial canon of ethics required coming forward. *See Morain, supra* note 16, at A3. Questions were raised on whether participation in drafting legislation was violative of the judicial responsibility to forego the practice of law. *See id.* One appellate justice criticized Ardaiz's involvement as "being very pro-law enforcement." *Id.* The judge also received criticism from Catherine Campbell, the organizer of a May 1994 forum on "three strikes," on which Ardaiz was a panelist. She described Ardaiz as an "outright advocate" of the measure, but the judge responded that nothing he said amounted to an endorsement. *Id.* Ardaiz further stated that he had intended to recuse himself from appeals involving "substantive" legal questions regarding the measure. *See id.* In defense of his action of drafting "three strikes," Ardaiz said only, "I want to see [California] be a better place to live." *Id.*

53. *See Phil Wyman & John G. Schmidt, Jr., Three Strikes You're Out (It's About Time)*, 26 U. WEST L.A. L. REV. 249, 253 (1995).

54. *See id.*

55. *See Morain, supra* note 6, at A1.

56. *See id.*

the initiative process to bypass the legislature.⁵⁷

Qualifying an initiative is no mean feat, requiring collection of nearly 385,000 signatures.⁵⁸ Reynolds received financial support from the National Rifle Association (NRA) and the California Correctional Peace Officers Association (CCPOA).⁵⁹ Even with that backing, Reynolds could not have succeeded but for Polly Klaas's kidnapping on October 1, 1993.⁶⁰

Before Polly's death was discovered, the efforts of her family to locate her galvanized the nation. Her parents were able to humanize Polly by getting a videotape of her into the public spotlight.⁶¹ They formed the Polly Klaas Foundation to keep her in the public eye.⁶² That organization was able to channel efforts of innumerable volunteers.⁶³

Millions of Californians were outraged when they learned that her admitted killer, Richard Allen Davis, was a repeat offender.⁶⁴ That fact may have assured passage of "three strikes."⁶⁵

Shortly after Polly's murder was discovered, Reynolds showed

57. *See id.* In disgust, Reynolds stated: "They figured they'd listen to me, pat me on the head, say, 'I'm sorry about your daughter,' and send me home." *Id.*

58. *See* CAL. CONST. art. 2, § 8(b) (requiring signatures equal in number to 5% of the "votes for all candidates for Governor at the last gubernatorial election" to certify a petition for placement on the ballot).

59. *See* Tupper Hull, *A Father's Crusade to Lock Up Criminals*, S.F. EXAMINER, Dec. 8, 1993, at A1. Reynolds also reportedly placed his life savings of \$60,000 in the "Three Strikes and You're Out" kitty. *See* Amy Wallace, *Unz TV Ad Says Wilson Failed L.A. During Riots*, L.A. TIMES, Apr. 24, 1994, at A3; Dana Wilkie, *Three Strikes and You're Out: Felons Face a Hardened Public Attitude*, SAN DIEGO UNION-TRIB., Feb. 6, 1994, at A1. Reynolds's personal investment was augmented originally by a \$40,000 donation from the NRA. *See* Hull, *supra*, at A1. Prior to the murder of Polly Klaas, the most significant other financial support came from the CCPOA, which made a \$51,000 donation. *See id.*

60. *See* Heft, *supra* note 7, at 27.

61. *See* John Carman, *Why Polly Was So Special*, ORLANDO SENTINEL, Dec. 9, 1993, at A19.

62. *See id.*

63. *See id.* Having responded immediately after Polly's abduction by getting videotape of her into the public spotlight, her parents prevented Polly from becoming just another girl on a milk carton. *See id.* Their strategy was to saturate our living rooms with Polly's youthful charm. *See id.* The volunteer efforts of the Foundation were successful by all accounts, except in the final result. *See id.*

64. *See supra* note 5.

65. California State Senator Phil Wyman contended that but for Polly Klaas's murder by Richard Allen Davis—a recidivist by all counts—the Assembly Public Safety Committee, described by Senator Wyman as the "graveyard of criminal justice bills," would have let the "three-strikes" measure die. *See* Wyman & Schmidt, *supra* note 53, at 253 n.22.

up at the Polly Klaas Foundation with ballot petitions.⁶⁶ He introduced himself to Marc Klaas, Polly's father, as "the father of a murdered daughter."⁶⁷ Klaas immediately signed the petition and, for a time, joined Reynolds's campaign.⁶⁸ It was not lost on Klaas or the public that, had "three strikes" been in place when Davis committed his last felony, he would have been in prison at the time of Polly's murder.⁶⁹

Despite weeks of campaigning, Reynolds had collected only 20,000 signatures for the initiative prior to the news of Polly's death.⁷⁰ Within days of the reports of her murder, "three-strikes" supporters had gathered 50,000 signatures and the initiative was on its way to becoming the fastest qualifying voter initiative in California history.⁷¹

A. Reynolds's Sway with the Legislature and Governor

After Polly Klaas's death, Reynolds's reception in the legislature was decidedly different from the response only months earlier. The Klaas murder and public perception that crime was on the rise created overwhelming popular support for tough anticrime legislation.⁷² Reynolds gave the legislature a choice: pass A.B. 971 or the voters will do it for you. In an election year, Reynolds had the legis-

66. See Peter Hecht, *Two Grieving Fathers Part Ways on '3 Strikes' Crusade*, SACRAMENTO BEE, July 10, 1994, at A1.

67. *Id.*

68. *See id.*

69. The media fanned the political flame by accusing politicians of having failed the electorate in refusing to pass the "three-strikes" measure proposed by Mike Reynolds in 1993. Talk show hosts proclaimed that "the blood of Polly Klaas' is on the hands of the committee members [who killed the bill]." Eric Bailey, *Assembly Public Safety Committee Turns Tough*, L.A. TIMES, Jan. 25, 1994, at A3.

70. *See Heft, supra* note 7, at 27.

71. *See id.*

72. The coordination of Reynolds's efforts and Polly Klaas's death led to a tone decidedly different from that of the politicians who had only months before rejected A.B. 971. Bruce Cain, a University of California, Berkeley professor who specializes in California politics, described the upturn for "three strikes." He said: "A dramatic event has to coincide with a huge consensus out there. There was a big consensus. Remember, we're in an election year. That is going to quicken the pace of any idea. It's a matter of timing." Morain, *supra* note 6, at A1. The mixture of Polly Klaas's murder, public perception that crime was on the rise, and election year rhetoric was the potion that Mike Reynolds and his backers used to put the legislature under a spell. Mike Reynolds harnessed the fears and frustration of an electorate ready for a widespread overhaul of politics-as-usual and at once became California's new guru of criminal justice policy.

lature's attention.⁷³

Prior to the passage of A.B. 971, a variety of observers with widely different political agendas highlighted the bill's drafting flaws. Reynolds, however, refused to allow amendments to the bill.⁷⁴ Further, Reynolds's sway with the legislature was almost unprecedented. As one commentator observed, "[t]o argue against a policy position offered by [Reynolds] is somehow taken to be a denial of the legitimacy of [his] pain."⁷⁵ Reynolds was especially adept in using the press to intimidate those who raised questions about the legislation. Reynolds's judgment that a politician was soft on crime promised to be devastating.⁷⁶

A number of legislators presented alternative proposals to A.B. 971.⁷⁷ Reynolds's own advisers suggested revisions of A.B. 971 that would have narrowed the legislation to target only violent offenders.⁷⁸ Law enforcement officials gave Reynolds a list of what they

73. See Dan Walters, *Politicos Fail to Do It Right*, SACRAMENTO BEE, Apr. 13, 1994, at A3 (stating that legislators were in a "panicky rush to do exactly what Reynolds wanted").

74. See Ken Chavez, *Victims' Kin Rally at Capitol*, SACRAMENTO BEE, Jan. 5, 1994, at A1. Despite knowledge that A.B. 971 contained flaws that could be considered as only embarrassing drafting errors, Reynolds refused to allow any amendments whatsoever. See *id.* Reynolds stated that "[w]e are not going to allow politicians to take this life-and-death issue and turn it into a political football just because it is an election year and they want to get re-elected." *Id.*

After A.B. 971 was amended to conform with the language of the initiative, it underwent only one further significant amendment. This amendment codified A.B. 971 provisions as subdivisions (b) through (i) of section 667, rather than as a new section. See *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 505, 917 P.2d 628, 630, 53 Cal. Rptr. 2d 789, 791 (1996).

75. Daniel M. Weintraub, *Lone Justice*, L.A. TIMES, Feb. 14, 1995, at E1 (quoting L. Paul Sutton, Professor of Criminal Justice Administration, San Diego State University).

76. See *infra* notes 82-85 and accompanying text.

77. The alternative proposals were A.B. 1568 (Rainey), 1993-1994 Reg. Sess. (Cal. 1994) (A.B. 1568); A.B. 167 (Umberg), 1993-1994 Reg. Sess. (Cal. 1994) (A.B. 167); A.B. 2429 (Johnson), 1993-1994 Reg. Sess. (Cal. 1994) (A.B. 2429); and A.B.X1 9 (Johnson), 1993-1994 Reg. Sess. (Cal. 1994) (A.B.X1 9). In the wake of tragedies like that of Polly Klaas and Kimber Reynolds, revision of current sentencing laws was appropriate for debate. Most of the legislators who proposed "three-strikes" legislation, however, had an added incentive because of the upcoming election. Bill Jones was poised to become California's next Secretary of State. See Dana Wilkie, *Is It Fame? With Three Strikes at Issue, Two Key Dads Are on the Outs*, SAN DIEGO UNION-TRIB., June 13, 1994, at A3. Jim Costa was preparing to exit the Assembly for a state senatorship. See *id.* Tom Umberg was preparing to run for Attorney General against Dan Lungren. See *id.* Finally, Republican Richard Rainey, a former sheriff, was running for higher office at the time. See Rick Del Vecchio et al., *Term-Limit Law Reshuffles State Ballot*, S.F. CHRON., Dec. 30, 1995, at A1.

78. See James Richardson, *'Three Strikes' Supporters Divided*, SACRAMENTO

considered flaws in the proposed initiative.⁷⁹ Reynolds, however, was unrelenting. Even after the legislature passed the bill, he feared that lawmakers would undermine it.⁸⁰ As a result, he reneged on an earlier promise to abandon the initiative process if A.B. 971 became law.⁸¹

Reynolds's sway with the legislature is a political anomaly.⁸² He had a unique ability to reach the press with a perfect sound bite that threatened to destroy any politician who stood in his way. The three simple words were "soft on crime."⁸³

Reynolds demonstrated his power at the final Senate Committee hearing before passage of A.B. 971. After state fiscal analysts

BEE, Feb. 12, 1994, at A4.

79. See *id.* (reporting law enforcement's concern that "three strikes" did not contain a life without parole provision and that possibly "three strikes" "superseded the death penalty"); see also SENATE JUDICIARY, ANALYSIS OF A.B. 971, *supra* note 18, at 7-8 (indicating the concern of critics that "three strikes" poses a cruel and unusual punishment problem); CALIFORNIA ASSEMBLY PUBLIC SAFETY COMM. ANALYSIS OF A.B. 1568, 1993-1994 Reg. Sess. 2 (Jan. 6, 1994) (visited Mar. 15, 1997) <http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_1551-1600/ab_1568_cfa_940120_134410_asm_comm> [hereinafter ASSEMBLY PUBLIC SAFETY, ANALYSIS OF A.B. 1568] (indicating that the California District Attorneys Association supported an alternative to "three strikes"); Bill Ainsworth, *Why DAs Don't Like 'Three Strikes'*, RECORDER (San Francisco), Jan. 18, 1994, at 1 (indicating that some critics perceived an equal protection problem in "three strikes").

80. See Dan Morain, *'Three Strikes' Bill Clears State Legislature*, L.A. TIMES, Mar. 4, 1994, at A1.

81. See *id.* Even after the Legislature passed A.B. 971 and Governor Wilson signed it into law, Reynolds was distrustful of the politicians who voted for "three strikes." See *id.* Reynolds feared that lawmakers would undermine the Jones/Costa version of "three strikes." See *id.* Reynolds stated that the legislators had held the four alternative bills "like a trump card. They've forced our hand." *Id.* Because of his fear, he rescinded his promise to abandon the initiative process. See *id.* He wanted to put the nail in the coffin for any challenger bill. He remarked that his victory was a "house of straw, easily changed or dismantled." Dana Wilkie, *Prop. 184: '3 Strikes' Already on Books*, SAN DIEGO UNION-TRIB., Oct. 12, 1994, at A1. He wanted to send a message to lawmakers that attempts to change his bill would be political suicide. See *id.*

82. L. Paul Sutton, Professor of Criminal Justice Administration at San Diego State University, described the phenomenon of someone like Mike Reynolds:

Everybody wants to hear what these people have to say, as if somehow the misfortune they suffered makes them some sort of messiah. . . . To argue against a policy position offered by a victim is somehow taken to be a denial of the legitimacy of their pain. Nobody wants to be seen in that light.

Weintraub, *supra* note 75, at E1.

83. Prior to passage of A.B. 971, Assemblyman Phil Isenberg (D.-Sacramento) addressed the issue of politicians' fears of voting against "three strikes." See Dan Walters, *Few Challenge Speeding Train*, SACRAMENTO BEE, Feb. 1, 1994, at A3. "We so fear the voters," he said, "we are afraid to talk openly." *Id.* One reporter noted that "[t]he popular fear of crime is matched only by the fear of politicians that they will be accused of softness in their approach." *Id.*

had projected that A.B. 971 would cost California billions of dollars, the Committee amended the bill to allocate some funds for crime prevention.⁸⁴ Reynolds arose from the audience and stated: "When we start adding amendments . . . it's going to open a Pandora's box. . . . It will also demonstrate to me at least the inability of the Legislature to act in a responsible way."⁸⁵ He reminded the Committee of the upcoming elections.⁸⁶ One senator objected to what he termed a "threat," but minutes later the amendment was repealed.⁸⁷ Senator Quentin Kopp remarked on the failure of his colleagues to exercise their authority despite Reynolds's objections, "They feel threatened in an election year and they're afraid of being denounced as trying to subvert his initiative."⁸⁸

Reynolds distrusted not only legislators but also prosecutors and criminal justice experts who argued in favor of a more focused bill. Even though Reynolds's goal was to keep violent criminals locked up, he would not listen to advisers who told him that revisions would ensure that violent felons would be the target of the bill.⁸⁹ Even Bill Jones, one of the bill's sponsors, insinuated that A.B. 971 had room for improvement.⁹⁰ Reynolds rejected a list of suggestions from law enforcement officials who identified flaws in the original bill.⁹¹ As observed by Marc Klaas, "[w]hat's driving Mike is his passion. . . . Mike doesn't want to be reasoned with."⁹²

The eventual split between Klaas and Reynolds demonstrated Reynolds's enormous power. As developed below, various legislators proposed alternatives to "three strikes."⁹³ After studying the alternatives, Klaas withdrew support for A.B. 971 because it put too many nonviolent criminals behind bars.⁹⁴ As Klaas stated, "[i]n the depth of despair which all Californians shared with my family immediately following Polly's murder, we blindly supported the [Reynolds] initiative in the mistaken belief that it dealt only with

84. See Morain, *supra* note 6, at A1.

85. *Id.*

86. See *id.*

87. See *id.*

88. Hecht, *supra* note 66, at A1.

89. See Richardson, *supra* note 78, at A4.

90. See Morain, *supra* note 6, at A1.

91. See Richardson, *supra* note 78, at A4.

92. Dan Morain, 'Three Strikes': A Steamroller Driven by One Man's Pain, L.A. TIMES, Oct. 17, 1994, at A3.

93. See *infra* notes 135-43 and accompanying text.

94. See Heft, *supra* note 7, at 27.

violent crimes.”⁹⁵

Despite the role of Polly’s death in generating public support for “three strikes,” Klaas’s defection had little impact. By then, Reynolds had obtained sufficient signatures to place the initiative on the ballot.⁹⁶ He had also enlisted the support of prominent politicians, including Governor Pete Wilson, both major Democratic gubernatorial candidates, and the Attorney General.⁹⁷ Reynolds dismissed Klaas’s stated concerns with the potentially staggering costs of “three strikes” and questioned his motives.⁹⁸

Reynolds was not the only “three strikes” proponent unwilling to compromise. Governor Wilson used the occasion of Polly Klaas’s funeral to make a political speech, announcing his support for “three strikes.”⁹⁹ Even after its flaws became apparent, but during a difficult reelection campaign, Wilson resisted compromise in order to preserve his position as the candidate toughest on crime.¹⁰⁰ His unyielding attitude is reflected in the following anecdote: According to Klaas, Wilson indicated at Polly’s funeral that he would support a number of the alternative bills.¹⁰¹ When Klaas switched his position, he called the Governor to solicit support for Assembly Bill 1568 (A.B. 1568), a narrower proposal supported by Assemblyman Richard Rainey.¹⁰² By then, Wilson was fully committed to Reynolds’s

95. Lou Cannon, *A Dark Side to 3-Strikes Laws*, WASH. POST, June 20, 1994, at A15.

96. Mike Reynolds had gathered the requisite number of signatures necessary to qualify the initiative for the November 8, 1994, general election by early April of that year. See Memorandum from Elections Division, Office of the Secretary of State, State of California, to All County Clerks/Registrars of Voters (94089) (Apr. 6, 1994) (on file with the *Loyola of Los Angeles Law Review*).

97. See Dan Morain, *Lawmakers Jump on ‘3 Strikes’ Bandwagon*, L.A. TIMES, Jan. 31, 1994, at A3.

98. Reynolds was surprised by Klaas’s challenge to his bill, and he responded as other victims groups did by questioning Marc Klaas’s motives. See Bill Ainsworth, *‘Three Strikes’ Spokesman Has Change of Heart*, LEGAL TIMES, Apr. 4, 1994, at 7. Reynolds’s public comments about Marc Klaas ranged from benign to venomous. See *id.* Reynolds realized that the strength of his support was severely diminished by the loss of Klaas’s support and speculated that Klaas had been “either lied to or misinformed.” *Id.* In contrast, Klaas was voicing legitimate debatable concerns. “It’s too expensive. . . . If you start taking money out of social programs, then you aren’t going to meet the goal of the Polly Klaas Foundation, which is to make America safe for children.” *Id.* That Klaas could consider the costs and alternate proposals was laudable, but he was unable to convince Reynolds to enter into any sort of meaningful debate regarding his bill or any other.

99. See Hecht, *supra* note 66, at A1.

100. See *id.*

101. See *id.*

102. See *id.*

bill and told Klaas that he would not support A.B. 1568 because he "didn't know how the crime victims felt."¹⁰³ Klaas responded, "I don't think you remember who you're talking to."¹⁰⁴

B. Other Political Players

A recent report by the National Criminal Justice Commission (NCJC) identified several myths about violent crime that have influenced public policy for over a decade.¹⁰⁵ For example, the report found that politicians and the media have misled the public into believing that crime rates and violent crime are soaring, despite contrary evidence.¹⁰⁶ The report identified the threat posed by groups that benefit from the perception of a crime wave, such as the so-called "prison-industrial complex," comprising groups which profit from prison construction and maintenance.¹⁰⁷

A number of those groups were active supporters of Reynolds and "three strikes." Among Reynolds's financial backers were the California Correctional Peace Officers Association (CCPOA), the National Rifle Association, the California Gun Owners Association, the Republican Party, and the campaign committees of Republican senatorial candidate Michael Huffington and Governor Wilson.¹⁰⁸ All of these entities had a political stake in the passage of "three

103. *Id.*

104. *Id.*

105. See NATIONAL CRIMINAL JUSTICE COMM'N, THE REAL WAR ON CRIME 63-67 (Steven R. Donziger ed., 1996). The NCJC report identified five myths concerning crime which are demonstrably false, yet continue to have a profound impact on criminal justice policy. See *id.* The five myths are: (1) *Street crime is increasing*—street crime in fact dropped slightly in 1993 and 1994; (2) *Street crime is more violent today*—the reality is that serious violent crime is 16% below the peak level of the 1970s; (3) *More police officers are being killed*—bulletproof vests have contributed to a 50% drop in killings of law enforcement officers between 1973 and 1993; (4) *Street crime costs more than corporate crime*—the Justice Department reported that in 1991, white-collar crime cost 7 to 25 times as much as street crime; and (5) *Criminals are different from the rest of us*—many citizens have in fact committed a crime punishable by a sentence in jail, such as drunk driving or filing a false expense report. See *id.*

106. See *id.* at 68-98 (discussing the myriad factors that artificially inflate the public's fear of crime despite empirical data reflecting the opposite).

107. See *id.* at 85-98. Alarming is that government spending on crime control has increased at more than twice the rate of defense spending. See *id.* at 85.

108. See Bill Ainsworth, *A Marriage of Convenience*, RECORDER (San Francisco), Nov. 30, 1994, at 1; Wilkie, *supra* note 81, at A1. Notably, Michael Huffington's donation made him a co-chair of the Three Strikes You're Out Committee. See Pamela J. Podger, *'Three Strikes' Campaign Leaves Ballot Organizers \$200,000 in the Hole*, FRESNO BEE, Nov. 29, 1994, at B1.

strikes" but none so large as that of the CCPOA.

CCPOA has become one of the most powerful lobbying groups in Sacramento during the tenure of its president Don Novey. Between 1985 and 1990 the number of California prison guards nearly doubled from 7570 to 14,249.¹⁰⁹ By 1994 the increase was threefold, to 22,547.¹¹⁰ Not only are there more guards, but they are well paid. A prison guard with only a high school diploma and six years of experience earns \$45,000 a year.¹¹¹ Wages for California guards are fifty-eight percent higher than those of their counterparts in other states.¹¹² "Three strikes," therefore, represents a bonanza for CCPOA.

Through strategic alliances, Don Novey has influenced lawmakers to favor his union. For example, the CCPOA contributed a total of \$1.4 million to Pete Wilson's 1990 and 1994 gubernatorial campaigns.¹¹³ After his election in 1990, Wilson launched the most expensive prison construction plan any state has ever undertaken.¹¹⁴

CCPOA has also had close associations with victims' lobby groups. In 1990 CCPOA provided funds to Harriet Salarno, a victims' rights activist, to protest the release of her daughter's killer.¹¹⁵ The following year Salarno and Novey agreed that his organization would fund a victims' lobbying organization and victims' political action committee.¹¹⁶ CCPOA has transformed various victims' groups from a fringe movement into a political force.¹¹⁷ In 1994 victims' groups contributed to the passage of 102 bills that increased prison sentences for convicted criminals.¹¹⁸

109. See John Jacobs, *California's Growth Industry*, SACRAMENTO BEE, Aug. 11, 1994, at B8.

110. See *id.*

111. See *id.*

112. See CENTER ON JUVENILE AND CRIMINAL JUSTICE, *TRADING BOOKS FOR BARS: THE LOPSIDED FUNDING BATTLE BETWEEN PRISONS AND UNIVERSITIES* (1994).

113. See Ainsworth, *supra* note 108, at 1.

114. See W. John Moore, *Locked in*, 26 NAT'L J. 1784, 1788 (1994).

115. See Ainsworth, *supra* note 108, at 1.

116. See *id.* Salarno was Wilson's controversial 1995 appointment to the Commission on Judicial Performance. See Harriet Chiang, *Judges Fear Review Panel Partisanship*, S.F. CHRON., May 24, 1995, at A1. This committee is supposed to provide impartial review of judicial misconduct, and judges have been vocal in criticizing Salarno's appointment because of her agenda. See *id.*

117. See Ainsworth, *supra* note 108, at 1 (stating that the CCPOA has contributed over \$1 million to victims' rights groups since 1986, excluding pro bono lobbying and one-dollar annual rent for office space to the Doris Tate Crime Victims Bureau).

118. See *id.*

CCPOA has wielded political power by targeting politicians who challenge its agenda. The organization targeted Assembly Ways and Means Chairman John Vasconcellos for defeat after he failed to support its position on prison bonds.¹¹⁹ Although Vasconcellos prevailed, he learned a hard lesson from the experience: "I have no desire to get into another fight with Don Novey. . . . It was obvious that they spent an inordinate amount of money in an attempt to unseat me. . . . I'm not about to fan the embers."¹²⁰

CCPOA was more successful in its bid to unseat Assemblyman Bob Epple, who headed the Assembly Public Safety Committee. CCPOA opposed Epple even though he supported most of its bills; it opposed him because CCPOA's leaders believed that he was orchestrating hearings to defeat its bills.¹²¹

CCPOA demonstrated similar power politics during the "three-strikes" campaign. For example, when Los Angeles District Attorney Gil Garcetti supported Rainey's A.B. 1568, a CCPOA lobbyist reminded Garcetti that a CCPOA endorsement was crucial to his reelection and that the CCPOA would oppose him unless he supported "three strikes."¹²² The lobbyist suggested that Garcetti would suffer when he refused to switch his support.¹²³

C. *The Legislature's Knowledge of A.B. 971's Flaws*

California politicians cannot claim surprise about A.B. 971's flaws. The Senate Judiciary Committee prepared an analysis demonstrating some of the bill's more serious flaws.¹²⁴ Legislators also had available detailed reports of the comparative merits of various competing "three-strikes" measures.¹²⁵

119. See Craig Marine, *Up from 'The Hole'*, S.F. EXAMINER, June 26, 1994, at B4.

120. *Id.*

121. See Ainsworth, *supra* note 108, at 1.

122. See *id.*

123. See *id.* It is not surprising that the CCPOA wanted to silence a high profile district attorney like Garcetti as the CCPOA stood to gain 49,218 additional jobs from "three strikes" in the next 35 years—compared to only 14,391 in the same period under the Rainey bill. See *id.*

124. See SENATE JUDICIARY, ANALYSIS OF A.B. 971, *supra* note 18, at 4-12.

125. For example, the Rainey bill, A.B. 1568, mandated a sentence of life imprisonment without possibility of parole for defendants with a present conviction for a "serious" felony and two prior convictions for "violent" felonies or for defendants with a present conviction for a violent felony and two prior convictions for any combination of serious or violent felonies. See A.B. 1568 (Rainey), 1993-1994 Reg. Sess. § 2 (Cal. 1994). An indeterminate sentence with a minimum of 25 years was reserved for defendants convicted of a third serious felony. See *id.* Defendants convicted of a serious or violent felony with one prior violent conviction would have had their sen-

Like other committees, the Senate Judiciary Committee was aware of A.B. 971's excesses.¹²⁶ The Judiciary Committee knew, for example, that "three strikes" might require imposition of a sentence of twenty-five years to life in prison on a repeat felon who had never committed a violent felony.¹²⁷

Elsewhere in the legislature, the Assembly was unwilling to tackle the financial problems posed by A.B. 971. In January, 1994, the Assembly Ways and Means Committee approved all of the "three-strikes" bills despite its failure to procure any final reports outlining the cost of the legislation¹²⁸ and a preliminary Legislative Analyst's Office report estimating the cost to be in the billions.¹²⁹ Despite serious questions about the cost of sentencing reform, the

tences doubled. *See id.*; *see also* SENATE JUDICIARY, ANALYSIS OF A.B. 971, *supra* note 18, at 8 (stating that "A.B. 971 . . . call[s] for an indeterminate life sentence, with a base of at least 25 years"); CALIFORNIA ASSEMBLY PUBLIC SAFETY COMM. ANALYSIS OF A.B. 971, 1993-1994 Reg. Sess. 2-5 (Jan. 6, 1994) (visited Mar. 15, 1997) <http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_0951-1000/ab_971_cfa_940120_132758_asm_comm> (discussing the relevant provisions of A.B. 1568).

126. *See* SENATE JUDICIARY, ANALYSIS OF A.B. 971, *supra* note 18, at 4-11.

127. The Judiciary Committee's report specifically stated that A.B. 971 "would make no distinction in severity [of sentencing] between different felonies." *Id.* at 4. To further demonstrate consciousness of the harsh effects A.B. 971 would have upon nonviolent or no longer violent offenders, the Committee provided the following examples:

[(1)] A person who was convicted of breaking into a neighbor's attached garage on two occasions in order to steal a bicycle . . . would have two serious prior offenses. Any third felony, such as theft of \$400 worth of property, would result in a life term . . . regardless of whether or not he or she had ever acted violently or dangerously; and (2)] forgery of a \$10 check, petty theft with a prior, or possession of a stolen radio with two prior serious felonies would result in a life sentence.

Id.; *see also* Bill Jones, *Three Strikes and You're Out*, 26 U. WEST L.A. L. REV. 243, 245 (1995) ("[Opponents] are correct that this law will cast a broad net, but that is certainly not an unintended provision. 'Three Strikes' is an anti-crime law, not just an anti-violent crime law.").

In addition, the Senate Judiciary Committee highlighted some of the ambiguity in the statute and raised concerns about the constitutionality of the statute as written. *See* SENATE JUDICIARY, ANALYSIS OF A.B. 971, *supra* note 18, at 8 (noting that "this bill appears to be constitutionally infirm in that it would require cruel and unusual punishment in some cases, with no option for a lesser sentence in the interest of justice").

128. *See* CALIFORNIA ASSEMBLY, ASSEMBLY THIRD READING (A.B. 971), 1993-1994 Reg. Sess. 2 (Jan. 27, 1994) [hereinafter ASSEMBLY FLOOR (A.B. 971)] (failing to provide a fiscal analysis, yet passing the measure).

129. *See* CALIFORNIA ASSEMBLY WAYS AND MEANS COMM. ANALYSIS OF A.B. 971, 1993-1994 Reg. Sess. 1 (Jan. 26, 1994) (visited Mar. 15, 1997) <http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_0951-1000/ab_971_cfa_940128_155310_asm_comm> (acknowledging the Legislative Analyst's Office cost projections); Dan Morain, *Assembly Panel OKs Five '3 Strikes' Bills*, L.A. TIMES, Jan. 27, 1994, at A3.

Assembly approved all five "three-strikes" bills by the end of January, 1994, and sent them to the Senate without a fiscal analysis.¹³⁰

Three days before the Senate voted on A.B. 971, the California Department of Corrections (CDC) distributed its report to key legislators.¹³¹ The CDC projected that the legislation would add \$5.7 billion per year in operating costs by fiscal year 2027-2028 and would require twenty new prisons in addition to the twelve prisons already planned for fiscal year 2003-2004 and the sixteen new prisons constructed during the past ten years.¹³² The total cost of construction would be \$21.3 billion.¹³³

The legislature failed to explain how it would finance the increased costs. Later Governor Wilson stated that "[o]bviously, we build prisons by passing [prison] bonds."¹³⁴ That solution may be illusory; for example, in 1990 Californians defeated a proposed bond issue of \$450 million for prison bonds.¹³⁵ While fear of crime has increased since 1990, so too have the stakes in light of the \$21 billion estimate for the cost of prison construction alone.

D. Better Alternatives to A.B. 971

During passage of "three strikes," sounder alternatives were readily available.¹³⁶ As legislators must have known, Reynolds's bill

130. See ASSEMBLY FLOOR (A.B. 971), *supra* note 128, at 2 (exemplifying the failure to include a fiscal analysis); Morain, *supra* note 129, at A3.

131. See Memorandum from Richard S. Welch, Chief, Offender Information Services Branch, Department of Corrections, to James H. Gomez, Director of Corrections 1 (Feb. 28, 1994) [hereinafter Welch Memorandum] (on file with the *Loyola of Los Angeles Law Review*).

132. See *id.* at 9.

133. See *id.*; CENTER ON JUVENILE AND CRIMINAL JUSTICE, *supra* note 112.

134. Gordon Smith, *Crime Measure Seen as Pricey Proposition*, SAN DIEGO UNION-TRIB., Oct. 16, 1994, at A1.

135. See John Hurst, *Full Cells and Empty Pockets*, L.A. TIMES, May 8, 1991, at A1; see also Jon Matthews, *Wilson Still Pitching for 'Three Strikes' Law*, SACRAMENTO BEE, Mar. 3, 1994, at A1 (stating that Wilson believed that Californians would be willing to bear the costs of "three strikes"). There has been further evidence that the proposed bond financing may not work. In the June 1994 primary election, voters rejected a bond measure for earthquake recovery, a proposal to buy park land, a proposal to improve college campuses, and a proposal for public school construction. See Virginia Ellis, *Defeat of Quake Relief Bonds Adds to Budget Crisis*, L.A. TIMES, June 9, 1994, at A1. Bruce Cain, Professor at the University of California, Berkeley stated that "[t]he election . . . shows that bond measures, which were the panacea of the '80s for public finance, are not going to be a panacea in the 1990s." Susan Yoachim & John Wildermuth, *Californians Voted Against Spending*, *Crime*, S.F. CHRON., June 9, 1994, at A1.

136. See *infra* notes 135-43 and accompanying text.

imposes severe sentences for petty criminals at an enormous expense to the public. In contrast, several of the alternatives struck a more reasonable balance between tough sanctions and fiscal responsibility. Assemblyman Richard Rainey's A.B. 1568, for example, carried the harshest sentences for the state's most serious offenders without the same financial consequences.¹³⁷

The Rainey bill provided life sentences for three-time felons, with particularly harsh parole provisions reserved for those most violent.¹³⁸ The bill further mandated a sentence of life imprisonment without possibility of parole in two instances: (1) a present conviction for a "serious" felony with two prior convictions for "violent" felonies; or (2) a present conviction for a violent felony with any combination of prior serious or violent felony convictions.¹³⁹ The bill also provided for indeterminate sentences, with a minimum of twenty-five years, for defendants convicted of a third serious felony or a conviction for a serious or violent felony and one violent felony.¹⁴⁰

137. See CALIFORNIA SENATE APPROPRIATIONS COMM. ANALYSIS OF A.B. 971, 1993-1994 Reg. Sess. 1-2 (Feb. 28, 1994) [hereinafter SENATE APPROPRIATIONS, ANALYSIS OF A.B. 971] (implicitly admitting that lower costs would arise from residential burglary not being a qualifying prior as proposed by A.B. 1568); SENATE JUDICIARY, ANALYSIS OF A.B. 971, *supra* note 18, at 9-11. See generally PETER W. GREENWOOD ET AL., RAND CORP., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY-SENTENCING LAW (1994) (analyzing the cost of reducing crime rates using the "three-strikes" law and other alternative measures).

138. See A.B. 1568 (Rainey), 1993-1994 Reg. Sess. § 2 (Cal. 1994).

139. See *id.* The California District Attorneys Association (CDAA) and the California State Sheriffs Association worked with Rainey to "fashion a bill which [was] tighter, tougher, and more appropriately crafted" than A.B. 971. ASSEMBLY PUBLIC SAFETY, ANALYSIS OF A.B. 1568, *supra* note 79, at 2.

140. The Assembly Committee on Public Safety analysis provided the following example contrasting A.B. 1568 with the voter initiative:

[A] first time rapist . . . could be subject to the same eight years maximum sentence as under current law. However, he would serve eight years due to the provision of the bill which eliminates conduct . . . credits. Under the initiative he would serve approximately four years because it does not effect first time offender credits.

A second time rapist would be sentenced to 18 years under this bill, and serve 18 years. Under the initiative he would serve fourteen and a half years.

Finally, a third time rapist would be sentenced to life without possibility of parole under this bill. . . . Under the initiative he would receive a life sentence, eligible for parole after 20 years.

ASSEMBLY PUBLIC SAFETY, ANALYSIS OF A.B. 1568, *supra* note 79, at 6.

The Rainey bill focused more carefully on serious and violent felons than did "three strikes." Rainey's bill did not contain the myriad drafting flaws present in A.B. 971. Rainey's bill quickly accumulated the support of legislators and various

The Rainey bill promised to provide protection at a more realistic cost than would "three strikes." One obvious savings came from the requirement that the third felony must be serious or violent to trigger a long prison term,¹⁴¹ thereby eliminating the widely publicized cases of defendants whose third felony is minor, such as drug possession or petty theft.¹⁴² A.B. 1568 also did not include residen-

law enforcement organizations, and it proved to be the most viable alternative to A.B. 971 and the Reynolds initiative. See Kevin Fagan, *Call for Changes Fails to Resonate in the East Bay Legislation Contests*, S.F. CHRON., Oct. 23, 1994, at 18.

141. See Cal. A.B. 1568 § 2.

142. See *id.* Several "three-strikes" cases decided before the California Supreme Court decision in *Romero* yielded sentences that appear disproportionate to the triggering felony. Ricky Valadez, for example, was sentenced to 25 years to life for stealing a drill from a garage. See Rene Lynch & Anna Cekola, '3 Strikes' Law Causes Juror Unease in O.C., L.A. TIMES, Feb. 20, 1995, at A1. With two prior burglary convictions, including one dating back to the 1970s, his third minor felony struck him out. See *id.* Jerry Dewayne Williams received a similar sentence for stealing a slice of pizza—this third strike provided him with a 25-year bunk reservation in state prison. See Eric Slater, *Pizza Thief Receives Sentence of 25 Years to Life in Prison*, L.A. TIMES, Mar. 3, 1995, at B9. Duane Silva, who has an IQ of 70 and was previously convicted of setting trash barrels and a car's glove compartment on fire, was sentenced to 30 years to life for stealing a neighbor's video recorder and coin collection. See *id.* Billy Sharod, who had previous convictions for robbery and petty theft, received a life sentence for selling \$10 worth of rock cocaine to an undercover officer. See Anna Cekola, *\$10 Cocaine Sale Becomes 'Third Strike'*, L.A. TIMES, Feb. 1, 1995, at B1.

This trend defined defendants convicted under "three strikes." During the first eight months of the law, approximately 70% of all second- and third-strike defendants were convicted of nonviolent and nonserious offenses. See DAVID ESPARZA, LEGISLATIVE ANALYST'S OFFICE, THE "THREE STRIKES AND YOU'RE OUT" LAW—A PRELIMINARY ASSESSMENT 8 (1995). The number of second- and third-strike offenders convicted for nonviolent offenses soared to 85% after two years of implementation of the law. See CHRISTOPHER DAVIS ET AL., CENTER ON JUVENILE AND CRIMINAL JUSTICE, "THREE STRIKES": THE NEW APARTHEID 2 (1996). Ironically, in the two years since the "three-strikes" law soared through the legislature as a response to public fear and anger over violent crime, the law has led to life imprisonment for 192 marijuana users who previously would have served little or no time, while only 40 convicted murderers, 25 rapists, and 24 kidnapers have received life sentences. See Giles Whittell, *Small-Time Drug Crooks Clog California Prisons*, TIMES (London), Mar. 9, 1996, at 12 (citing figures released by the California Department of Corrections). As of January 1996, out of the 14,497 convicted second-strike offenders, approximately 80% were committed to prison for a nonviolent offense; furthermore, of the 1342 convicted third-strike offenders, approximately 62% were committed to prison for a nonviolent offense. See LEGISLATIVE ANALYST'S OFFICE, THE IMPACT OF THE "THREE STRIKES AND YOU'RE OUT" LAW ON CALIFORNIA'S JUSTICE SYSTEM 5 (1996).

The prosecutorial power under "three strikes" to impose such disproportionate sentencing without regard to judicial opinion came to an end with the California Supreme Court decision in *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996). At the age of 32, the time of his last offense, Romero was convicted of his third felony. See *People v. Superior Court (Romero)*,

tial burglary among qualifying prior felonies.¹⁴³ One report has projected a savings of as much as seventy-five percent of the cost of “three strikes” by that change alone.¹⁴⁴

E. A Failure of Political Courage

With alternative bills before them, legislators had the opportunity to evaluate the economic impact of the “three-strikes” proposals. Despite what they learned, no influential politician took a leadership role in favor of a more measured bill than “three strikes.”¹⁴⁵

On January 26, 1994, prior to passage of A.B. 971, the RAND Corporation issued a disclaimer regarding the proposed legislation.¹⁴⁶ It specifically challenged the use of an earlier RAND study to estimate the savings generated by incarcerating large numbers of criminals.¹⁴⁷ “Three strikes” proponents had used the earlier RAND study to estimate the average number of offenses committed by each repeat offender, between 187 and 287 crimes per year.¹⁴⁸ Those estimates distort the benefits gained by incarcerating each new, mar-

37 Cal. Rptr. 2d 364, 371, 380 (Ct. App. 1995), *aff'd in part, rev'd in part*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996). In the face of five prior nonviolent felonies—burglary in the second degree in 1980, attempted burglary in the first degree in 1984, burglary in the first degree in 1986, and possession of a controlled substance in 1992 and in 1993—the trial court judge refused to impose the harsh provisions of “three strikes” and stated that the law “is a significant piece of Legislation that basically castrates a judge.” *Id.*

143. See Cal. A.B. 1568 § 2 (proposing to amend California Penal Code § 667.5(c)(1)-(22) by excluding residential burglary from the list of “violent felonies,” which trigger the sentence enhancement provisions).

144. See Vincent Schiraldi, *Corrections and Higher Ed Compete for California Dollars; Corrections Winning*, OVERCROWDED TIMES, June 1994, at 7, 7.

145. When asked whether he could have used his power to create rational debate, Assembly Speaker Willie Brown responded: “I got out of the way of this train because I am a realist.” Jerry Gillam, *Legislators Fear Public on ‘3 Strikes,’ Brown Says*, L.A. TIMES, Mar. 2, 1994, at A3. Brown, distancing himself from all of the measures, said, “Put everything on the governor’s desk and let him deal with it. . . . And that’s a pure, unadulterated, practical political approach.” Richardson, *supra* note 78, at A4.

146. See CALIFORNIA ASSEMBLY PUBLIC SAFETY COMM. ANALYSIS OF A.B. 971, 1993-1994 Reg. Sess. 2 (Jan. 26, 1994) (visited Mar. 15, 1997) <http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_0951-1000/ab_971_cfa_940128_155310_asm_comm> [hereinafter ASSEMBLY PUBLIC SAFETY, ANALYSIS OF A.B. 971].

147. In response to numerous studies citing that the average repeat offender commits between 187 and 278 crimes per year at an average cost of \$430,000, the RAND Corporation provided a correction to “the erroneous references to RAND data and findings’ related to the three-strikes debate.” *Id.* In rebuttal to the cost of crime, RAND stated: “There is, as yet, no commonly accepted framework for estimating such costs. . . . RAND’s studies contained no cost figures whatsoever.” *Id.*

148. See *id.*

ginal, repeat offender¹⁴⁹ because, as documented in a number of important studies, a small percentage of the criminal population commits an extremely high number of offenses.¹⁵⁰ Hence, using the average number of offenses per year—180—rather than the median number of offenses per year—15—inflated the projected savings.¹⁵¹

Typical of the legislature's unwillingness to deal with the economic realities of A.B. 971 was the Senate Appropriations Committee's handling of the various bills. A month after the Ways and Means Committee analysis was available, the Senate Committee convened to discuss the fiscal impact of the various "three-strikes" measures.¹⁵² The Committee had available the fiscal analysis of A.B. 971 but did not have similar projections for Rainey's or Umberg's bills.¹⁵³ Nevertheless, members of the Committee recognized that residential burglary was not a strike under those measures and must

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

150. See, for example, MARVIN E. WOLFGANG ET AL., *DELINQUENCY IN A BIRTH COHORT* (1972), a widely cited study on offender crime rates, which reviewed records of 9945 boys from their tenth through eighteenth birthdays. While approximately one-third had a record of involvement with police, 627 boys had five or more arrests during those years. See *id.* at 88. That small group committed over one-half of the recorded delinquencies and two-thirds of the violent offenses. See *id.*; see also MARK H. MOORE ET AL., *DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE* 38-39 (1984) (implying that a portion of high-rate offenders are so active—committing more than 50 robberies per year—that incapacitation would be wholly justified based on deterrence, rehabilitative, or retributivist theories of punishment). See generally JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 24-26 (1985) (discussing patterns in criminality).

151. See ASSEMBLY PUBLIC SAFETY, *ANALYSIS OF A.B. 971*, *supra* note 146, at 2.

152. See CALIFORNIA SENATE APPROPRIATIONS COMM. *ANALYSIS OF A.B.X1 9*, 1993-1994 Reg. Sess. 1 (Feb. 28, 1994) [hereinafter *SENATE APPROPRIATIONS, ANALYSIS OF A.B.X1 9*]; CALIFORNIA SENATE APPROPRIATIONS COMM. *ANALYSIS OF A.B. 167*, 1993-1994 Reg. Sess. 1 (Feb. 28, 1994), available in LEXIS, Cal Library, Cacomm File [hereinafter *SENATE APPROPRIATIONS, ANALYSIS OF A.B. 167*]; *SENATE APPROPRIATIONS, ANALYSIS OF A.B. 971*, *supra* note 137, at 1; CALIFORNIA SENATE APPROPRIATIONS COMM. *ANALYSIS OF A.B. 1568*, 1993-1994 Reg. Sess. 1 (Feb. 28, 1994) [hereinafter *SENATE APPROPRIATIONS, ANALYSIS OF A.B. 1568*]; CALIFORNIA SENATE APPROPRIATIONS COMM. *ANALYSIS OF A.B. 2429*, 1993-1994 Reg. Sess. 1 (Feb. 28, 1994) [hereinafter *SENATE APPROPRIATIONS, ANALYSIS OF A.B. 2429*].

153. See Welch Memorandum, *supra* note 131, at 1-9.

have known, therefore, that those bills would offer significant savings over A.B. 971.¹⁵⁴ The Committee approved all of the measures despite the estimated cost of A.B. 971.¹⁵⁵

Some legislators attempted to distance themselves from the predicted future consequences of the measures. Senator Leroy Greene's actions exemplified the unwillingness to fight the "three-strikes" measures generally or A.B. 971 specifically. Greene did not vote on the bills during the Appropriations Committee hearing because he was "not prepared to vote for a blank check."¹⁵⁶ Shortly thereafter he changed his view, stating, "I'm going to vote for these turkeys because constituents want me to."¹⁵⁷ No doubt other senators bailed out as well; A.B. 971 passed on the floor vote by a twenty-nine to seven margin.¹⁵⁸

Even though A.B. 971 had strong political support, most importantly from Governor Wilson,¹⁵⁹ the lack of support for more carefully drafted alternatives is surprising. The lack of support is especially odd in light of political pressure in favor of alternatives, particularly the Rainey bill, and against A.B. 971, brought by various law enforcement groups immune from the "soft-on-crime" label.¹⁶⁰

The Rainey measure offered even tougher sentences for some of the worst offenders and would have been far less expensive than "three strikes."¹⁶¹ Legislators could have easily backed A.B. 1568 in-

154. See SENATE APPROPRIATIONS, ANALYSIS OF A.B. 167, *supra* note 152. The Committee cited the CDC's estimate of the cost of incarceration under the "three-strikes" initiative, stating that excluding burglary as a strike would cost "\$22 million in 1993-94, increasing annually to the year 2003-04, and \$1.6 billion annually thereafter." *Id.* In comparison, the Committee noted that when burglary is included as a prior strike, the costs amount to "\$75 million in 1995-96, increasing annually with a full-year fiscal impact in 2027-28 at \$5.7 billion." *Id.*

155. See generally SENATE APPROPRIATIONS, ANALYSIS OF A.B.X1 9, *supra* note 152 (policy vote: 9-0); SENATE APPROPRIATIONS, ANALYSIS OF A.B. 167, *supra* note 152 (policy vote: 8-2); SENATE APPROPRIATIONS, ANALYSIS OF A.B. 971, *supra* note 137 (policy vote: 8-3); SENATE APPROPRIATIONS, ANALYSIS OF A.B. 1568, *supra* note 152 (policy vote: 10-0); SENATE APPROPRIATIONS, ANALYSIS OF A.B. 2429, *supra* note 152 (policy vote: 10-0).

156. Vlae Kershner, '3 Strikes' Initiative—A Vast, Expensive Plan, S.F. CHRON., Mar. 1, 1994, at A1.

157. Morain, *supra* note 80, at A1.

158. See *id.*

159. See Hecht, *supra* note 66, at A1.

160. See ASSEMBLY PUBLIC SAFETY, ANALYSIS OF A.B. 1568, *supra* note 79, at 3 (indicating that the California District Attorneys Association and the California Sheriffs Association supported the Rainey measure).

161. See SENATE JUDICIARY, ANALYSIS OF A.B. 971, *supra* note 18, at 9-11;

stead of A.B. 971 by arguing that the former was tougher on crime and more fiscally responsible, two issues that predominated the politics of 1994.¹⁶² That did not happen for a number of reasons, dealing largely with election year politics. Wilson was outspoken in his support of Reynolds. Even before his chief economist produced a methodologically flawed report, grossly inflating the savings from the initiative,¹⁶³ Wilson argued that the economic concerns of opponents of "three strikes" were overstated.¹⁶⁴ Had Wilson distanced himself from Reynolds or had Reynolds been willing to work with Rainey, better legislation might have resulted.¹⁶⁵

Frustrated with Wilson and Reynolds, Assembly Speaker Willie Brown threatened that the legislature would approve all five bills and "[p]ut everything on the governor's desk and let him deal with

GREENWOOD ET AL., *supra* note 137, at xiii-xiv. See generally SENATE APPROPRIATIONS, ANALYSIS OF A.B. 971, *supra* note 137 (implicitly admitting that lower costs would result if residential burglary was not a qualifying prior).

162. Crime was a hot issue for the 1994 California gubernatorial race with 27% of Californians saying it was the election's most important issue. See Bill Stall, *Brown Ads Target Job Losses, Crime*, L.A. TIMES, July 8, 1994, at A3 [hereinafter Stall, *Ads Target Losses*]. Governor Wilson and the Republican Party quickly seized on the crime issue making it the dominant theme of a three-day GOP convention in San Francisco. See Bill Stall, *GOP Pins '94 Hopes on Crime Issue*, L.A. TIMES, Feb. 28, 1994, at A3 [hereinafter Stall, *GOP Pins Hopes*]. The Republican Party adopted a "tough-on-crime" plank that was intended to propel Republicans to victories in the state legislative elections as well as the gubernatorial race. See *id.*

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

163. See *infra* notes 180-94 and accompanying text.

164. Governor Wilson balked at any suggestion that the "three-strikes" bills would not be economically feasible. See Matthews, *supra* note 135, at A1. Wilson said, "There's really no dispute that these reforms will require considerable additional expense. . . . That is an expense, I submit, that the public is willing to pay. . . . We cannot afford not to pay." *Id.* Wilson also stated, "We're producing . . . capital improvements for future generations, and they rightly can be called upon to help pay for it." Daniel M. Weintraub, *'3 Strikes' Law Goes Into Effect*, L.A. TIMES, Mar. 8, 1994, at A1.

165. Brown stated, "If the three-strikes sponsors would come to the reality of the defects in their measure, they probably would embrace the Rainey measure and that would reach the governor's desk." Richardson, *supra* note 78, at A4.

it. . . . And that's a pure, unadulterated, practical political approach."¹⁶⁶ The Assembly did just that.¹⁶⁷

A similar strategy almost developed in the Senate that would have forced Wilson to make the choice among competing alternatives. Wilson wanted the legislature to combine competing measures, casting the "widest net," and he threatened to sign all of the bills passed by the Senate, allowing the courts to determine which law was in effect.¹⁶⁸ The drafters of the four alternatives to A.B. 971 added a provision automatically repealing the measure if any other measure was subsequently enacted.¹⁶⁹ The provision would have forced Wilson to decide which bill to sign last.

The Senate ultimately refrained from passing all of the bills simultaneously. Instead, the Senate delayed action on the four competitors to A.B. 971, averting Wilson's need to make a choice.¹⁷⁰ Despite the overwhelming support for A.B. 971, when the legislature ultimately voted on it,¹⁷¹ A.B. 971 passed in an atmosphere of political distrust. Reynolds would neither compromise nor work with Rainey on an alternative bill.¹⁷² In reaction to what he saw as the unsavory nature of the political process and fearful that the legislature might later weaken A.B. 971, Reynolds pursued the initiative process despite an earlier promise to the contrary.¹⁷³

166. *Id.*

167. See Morain, *supra* note 129, at A3.

168. See Daniel M. Weintraub, *Wilson Calls for Unified Crime Bill*, L.A. TIMES, Mar. 3, 1994, at A3.

169. Section 9 of Rainey's bill, A.B. 1568, provides an example of the voiding provision:

The provisions of this act shall become operative on April 1, 1994, unless either Assembly Bill 167, Assembly Bill 971, or Assembly Bill 2429 of the 1993-94 Regular Session, or Assembly Bill 9 of the 1993-94 First Extraordinary Session, or any combination thereof, are enacted after this act, in which case this act shall not become operative.

A.B. 1568 (Rainey), 1993-1994 Reg. Sess. § 9 (Cal. 1994). For analogous provisions, see A.B. 167 (Umberg), 1993-1994 Reg. Sess. § 14 (Cal. 1994); A.B. 2429 (Johnson), 1993-1994 Reg. Sess. § 4 (Cal. 1994). The measures also contained provisions which would void them if the voter initiative, Proposition 184, was passed by the voters in November of that year. See, e.g., Cal. A.B. 1568 § 10.

170. See Morain, *supra* note 80, at A1. The other measures were sent to committee for possible incorporation into a future crime package. See *id.*

171. A.B. 971 passed through four committees and two floor votes in 59 days. See Jones, *supra* note 127, at 244. The bill passed the Assembly by a vote of 63-9 and passed the Senate by a vote of 29-7. See 1 ASSEMBLY FINAL HISTORY, 712 (Cal. Reg. 1993-1994 Reg. Sess.).

172. See Hecht, *supra* note 66, at A1 (reporting Reynolds's refusal to allow amendments).

173. See Wilkie, *supra* note 81, at A1.

The Governor, who had highly politicized the crime issue,¹⁷⁴ cried foul often when the legislature questioned the fiscal soundness of the bill and when it did not combine the bills into a single, even tougher bill.¹⁷⁵ Senator Lockyer wanted to revisit the alternatives once A.B. 971 had been passed.¹⁷⁶ Reynolds asked Assembly Speaker Brown to use his leadership to improve on the law with elements of Rainey's bill. But Brown smelled a political rat and was convinced this was a ploy to attack Democrats for trying to weaken the law during the election campaign.¹⁷⁷ Few in the legislature were willing to take on Reynolds or Wilson, who would have portrayed opponents as soft on crime, a tough label to wear in 1994. The irony was that legislators like Rainey were in some ways tougher on crime than Reynolds, and certainly more fiscally responsible.¹⁷⁸

F. A "Spectacular" Savings for California

Even after the legislature passed A.B. 971, Democrats were unsuccessful in minimizing crime as an election issue. Republicans stood to gain by placing "three strikes" in the election spotlight.¹⁷⁹

174. Governor Wilson strengthened his position as the "tough-on-crime" candidate by holding a two-day crime summit in Hollywood, California, which was attended by over 1000 state politicians, crime victims, and law enforcement officials. See Dan Morain & Daniel M. Weintraub, *Wilson Crime Summit to Have Hard-Line Focus*, L.A. TIMES, July 30, 1994, at A28.

175. See Weintraub, *supra* note 168, at A3. Wilson attacked the senate for failing to combine the "toughest provisions" of each of the competing bills. See *id.* He said: "We have the opportunity to give the public all the protection it needs. . . . We shouldn't play political games." *Id.*

176. Bill Lockyer stated, "Maybe when [the Jones/Costa bill] is behind us, we can move on to a more comprehensive discussion of crime in a less impassioned or less political atmosphere." Morain, *supra* note 80, at A1 (also reporting that Lockyer voted for A.B. 971 even though he opposed much of its content).

177. See James Richardson, *Brown Won't Touch "3 Strikes" This Year*, SACRAMENTO BEE, Mar. 16, 1994, at A4. When asked if he would respond to Reynolds's request to craft a better bill, the Speaker stated:

Mr. Reynolds is not going to run me out there on that tree and saw it. . . . I know exactly what Mr. Reynolds and people like that would like to do. They have a measure on the ballot in the fall, and they absolutely need to have that to try to defeat [United States Senator] Dianne Feinstein and to get Wilson a leg up.

Id.

178. See *supra* note 160 and accompanying text.

179. See Morain, *supra* note 92, at A3. The report stated that Michael Huffington was the largest contributor to the YES on 184 Committee with a donation of \$350,000. See *id.* According to a consultant to the committee, Huffington "wanted very much to use it as a campaign issue." *Id.* (quoting Charles Cavalier, political consultant for Mike Reynolds and Proposition 184).

Wilson, involved in a tough race, used crime as a campaign issue.¹⁸⁰ After Wilson signed A.B. 971 into law, his chief economist, Philip Romero, issued a report arguing that “three strikes” would save California billions of dollars.¹⁸¹ The report contended that the public debate over the cost of “three strikes” was one-sided. Romero claimed to balance the debate by fully discussing the benefits that “three strikes” would generate.¹⁸²

Romero calculated the benefits of the law by quantifying (1) crime victims’ direct out-of-pocket costs; (2) lost earnings and pain and suffering; and (3) savings in costs associated with prevention of crime, no longer necessary because “three strikes” would prevent the crimes in the first instance.¹⁸³ Romero was correct—both when he recognized that the latter two categories are “softer” figures and that, nevertheless, both have real value.¹⁸⁴

Without acknowledging important methodological questions about a RAND Corporation study from the early 1980s,¹⁸⁵ Romero relied on self-reports by prison inmates concerning the number of crimes committed when the incarcerated offender was on the street.¹⁸⁶ Despite a median of only fifteen reported crimes per offender, Romero based his calculations on a “highly conservative” estimate that each offender incarcerated as a result of “three strikes” would otherwise commit between 20 and 150 crimes per year.¹⁸⁷ The RAND report, consistent with other studies, indicated that some offenders commit in excess of 600 offenses per year, making the average far greater than the median of fifteen crimes per year.¹⁸⁸

180. See Weintraub, *supra* note 168, at A3.

181. See PHILIP J. ROMERO, GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA, *HOW INCARCERATING MORE FELONS WILL BENEFIT CALIFORNIA’S ECONOMY* 2-5 (1994).

182. See *id.* at 2-4.

183. See *id.* at 2.

184. See *id.* at 3. There is a certain irony to Governor Wilson’s reliance on pain and suffering as a measure of the cost of crime. In 1992 the Governor, along with a coalition of business and medical groups, attempted to extend the limits on pain and suffering under the Medical Injury Compensation Reform Act of 1975 to all civil liability cases. See Philip Hager, *Civil Liability System Faces Uncivil War*, L.A. TIMES, Dec. 6, 1992, at A3.

185. For a discussion of methodological problems with a survey like the RAND Study, see FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 80-86 (1995).

186. See ROMERO, *supra* note 181, at 2.

187. See *id.*

188. RAND data reports that the average repeat offender commits between 187

Romero also relied on estimated savings in unnecessary security services rendered obsolete if crimes were not committed. Admitting that the figures were arbitrary, Romero used a range of between twenty-five to seventy-five percent in reduction of actual spending on crime prevention.¹⁸⁹ He estimated upper and lower ranges based on estimates that between 20 and 150 crimes would be prevented and that society would reduce the amount spent on security measures between twenty-five and seventy-five percent.¹⁹⁰ The savings, he said, would range from \$137,000 to \$515,000.¹⁹¹

The report concluded that a reasonable estimate of savings to society would be between \$200,000 and \$300,000 for each year an offender was incarcerated, adding up to a total benefit of \$29 billion by the year 2000.¹⁹² The savings in 2028 alone were projected to be \$54 billion.¹⁹³ These figures, Romero asserted, were based on conservative estimates and represented minimum social benefits to be realized as a result of "three strikes." His estimates were far in ex-

and 278 crimes per year. See ASSEMBLY PUBLIC SAFETY, ANALYSIS OF A.B. 971, *supra* note 146, at 2. Extremely active offenders, however, composing approximately 10% of the group, commit more than 600 crimes apiece. See *id.*

189. See ROMERO, *supra* note 181, at 2.

190. See *id.*

191. See *id.* at 3. To calculate the savings for crimes avoided, Romero looked at the fraction of a single crime's share of crime prevention costs that would be actually avoided. See *id.* at 3, 6. The study admittedly chose an "arbitrar[y]" range of between 25% and 75% in actual spending reduction. See *id.* From this, Romero surmised that if the upper range of 150 crimes were avoided, the social costs reduced would be between \$302,000 and \$515,000. See *id.* If only 20 crimes were avoided, the social costs reduced would be between \$137,000 and \$248,000. See *id.* at 3. Romero legitimized his calculations by citing a 1990 study from the BOTEK Analysis Corporation which reported a range of social costs reduced between \$390,000 and \$2.8 million. See *id.* (citing BOTEK ANALYSIS CORP., A COST BENEFIT ANALYSIS OF PRISON CELL CONSTRUCTION AND ALTERNATIVE SANCTIONS (1990)).

192. See *id.* at 5. In order to project the "savings," Romero merely took the California Department of Corrections (CDC) figures for increased inmate years with "three strikes" and multiplied it by \$200,000. See *id.* at 4. Romero agreed with the CDC that there would be in excess of 272,000 "three-strikes" inmates incarcerated in 2028. See *id.* at 5. Therefore, Romero projected a \$54-billion savings. See *id.* The costs in that year, amortizing the costs of capital construction, were just \$6 billion. See *id.* Therefore, California would receive a windfall of \$48 billion in 2028, and for every year thereafter. See *id.* The \$29 billion figure was calculated adding the savings for the first five years of additional incarceration. See *id.* Romero projected that the total costs for the first five years of "three strikes" would add up to \$6 billion, thereby yielding a savings of \$23 billion. See *id.* The Three Strikes Committee used this figure in the voter pamphlet in part to show that trying this system out could not hurt the state financially as opponents claimed. See California Ballot Pamphlet, *supra* note 2, at 37.

193. See ROMERO, *supra* note 181, at 5.

cess of the estimated cost of \$6 billion.¹⁹⁴

Experts lambasted Romero's report.¹⁹⁵ Wilson and the Three Strikes You're Out Committee stuck by the report's claims. For example, Wilson stated that the report "underscores the costs all of us bear when crimes are committed: higher medical costs, higher insurance premiums, business flight, and the loss of choice about where to work, live or shop because of fear of crime."¹⁹⁶ Despite legal challenges, the Three Strikes You're Out Committee succeeded in including the claimed savings in the ballot pamphlet.¹⁹⁷

194. For costs, Romero relied on the CDC projections, but he assumed that the costs would be amortized over 30 years through the use of bonds. *See id.* at 6. As stated above, the reliance on bonds might well be an illusory proposition. Without the bond passage, the costs in the first ten years for capital outlay are dramatically increased, that is, \$21 billion 1994 dollars would be needed to complete all of the prison construction. *See Welch Memorandum, supra* note 131, at 9.

195. Peter Greenwood, one of the authors of the RAND study cited in Romero's report, stated, "I do not in any way, shape or form see it as conservative." *See Dan Morain, Wilson Adviser Says '3 Strikes' Will Save Money, L.A. TIMES*, Apr. 7, 1994, at A3. Greenwood indicated that the average out-of-pocket expense for a crime is between \$1000 and \$2000. *See id.* If a felon commits 20 crimes per year, the cost would only be \$20,000 to \$40,000 per year. Mark Kleiman, a Harvard professor who co-authored a second study cited in the report, stated that Romero was "just plain wrong." *Id.* Kleiman took issue with Romero's unfounded assumption that every person imprisoned under "three strikes" would be committing the same number of crimes at age 60 as at age 20. *See id.*; Franklin E. Zimring, *The Voodoo Economics of California Crime*, *OVERCROWDED TIMES*, Oct. 1994, at 3. Zimring referred to the crime estimates and cost numbers as "back-of-a-napkin" guesses which have no empirical support. *Id.* He supported his criticism through an examination of California's history of increased incarceration since 1980. *See id.* California has confined 140,000 more offenders in prisons and jails than were incarcerated in 1980. At the \$200,000 per year cost of incarceration projected by Romero, California should *already* be saving at least \$28 billion every year. *See Morain, supra*, at A3. Zimring also took issue with Romero's claim that savings would come in the form of "lower insurance premiums, less medical care, reduced theft losses, and higher property values." Zimring, *supra*, at 3. He noted that none of these expected savings have materialized in the past decade. *See id.* Furthermore, Zimring demonstrated that if 20 crimes per year were actually avoided, "the crime rate should now be zero." *Id.* If California's craze over incarcerating criminals in the last decade had worked, the significant expenditures from "three strikes" would not be necessary. *See id.*

196. Dana Wilkie, *Three-strikes Law Seen as an Economic Boon*, *SAN DIEGO UNION-TRIB.*, Apr. 7, 1994, at A3.

197. *See e.g.*, 3 STRIKES AND YOU'RE OUT COMMITTEE, JUDGE RULES "3 STRIKES SAVES \$23 BILLION" IS O.K. FOR BALLOT PAMPHLET (Press Release Aug. 15, 1994) (on file with the *Loyola of Los Angeles Law Review*). Superior Court Judge James T. Ford ruled that the claim of savings of \$23 billion by the year 2000 could stay on the ballot. *See Peter Hecht, '3 Strikes' Fight Rages Inside, Outside Court, SACRAMENTO BEE*, Aug. 16, 1994, at B1.

G. The Initiative and a Failed Alternative

After passage of A.B. 971, the Senate briefly considered reviving the Rainey measure and placing it on the ballot.¹⁹⁸ Wilson opposed the alternative measure because it would mislead the voters and because he had touted the virtues of the original bill as a primary campaign issue.¹⁹⁹ He threatened to veto the alternative proposal.²⁰⁰ In light of the threatened veto, Rainey refused to champion the bill despite broad support from various law enforcement groups like the CDAA,²⁰¹ officials including state sheriffs and police chiefs,

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

199. See George Skelton, *Pete (Give 'em Hell) Wilson Strikes Back*, L.A. TIMES, Mar. 21, 1994, at A3. In support of applying "three strikes" in a famous case where a defendant mugged a homeless person for 50 cents, Wilson said:

The editorial writers, the pundits are claiming this thug is a victim of a misguided law. . . . The 'victim' has a rap sheet that is 52 pages long. . . . The critics say that's proof of everything that is wrong with the 'three strikes' law. Well, the hell with that. I say it's proof of everything that's *right* with 'three strikes.'

Id.

200. See *Wilson Says He Will Block Try to Weaken '3 Strikes'*, S.F. CHRON., June 10, 1994, at D3.

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

In support of the alternative, Garcetti pleaded, "[l]et the taxpayers of California decide how their tax dollars are spent in prosecuting violent criminals." Carl Ingram, *Support Sought for '3 Strikes' Alternative*, L.A. TIMES, June 10, 1994, at A3. Co-author of A.B. 971, Jim Costa, who was running for a state senate seat, responded: "Voters have a choice in November. They can vote for ['three strikes'] or they can vote against it." *Id.*

In addition, Garcetti and district attorneys supporting him were made to look like the enemy. Chuck Cavalier, a consultant with the Three Strikes You're Out Committee, accused Garcetti and like-minded district attorneys of only being concerned with plea bargaining and clearing caseloads. See Peter Hecht, *Case Merits '3 Strikes'? Depends on the DA*, SACRAMENTO BEE, Aug. 7, 1994, at A1. He said "[t]hat they simply don't like the fact that they will be held accountable." *Id.* This accusation did not comport with the fact that, despite his personal opposition, Garcetti was prosecuting every possible third-strike case coming through his office. See *id.*

and private citizens like Polly Klaas's father and grandfather. Wilson's opposition effectively killed the chances of an alternative appearing on the ballot. The Rainey bill died in the Assembly Public Safety Committee on June 21, 1994.²⁰²

Without an alternative proposition and without significant funding, opponents of Proposition 184 could not get their message out. Left unchecked, proponents of "three strikes" were able to engage in a major propaganda campaign of embarrassing proportions. In the published argument for Proposition 184, proponents stated that the measure would "keep[] career criminals, who rape women, molest innocent children and commit murder, behind bars where they belong."²⁰³ They repeated the chimerical savings argument, that "3 STRIKES SAVES LIVES AND TAXPAYER DOLLARS!"²⁰⁴ The literature answered three main counterarguments. First, in response to a claim that the prison system would be full of nonviolent offenders, it claimed that "three strikes" targets only career criminals—those with a history of committing serious or violent crimes.²⁰⁵ Second, in response to the claim that taxes would be increased, it stated that taxpayers would save money because California citizens "will no longer have to pay the outrageous costs of running career criminals through the judicial system's revolving door."²⁰⁶ Third, it rebutted the claim that essential services would have to be cut, citing again the savings created by the initiative.²⁰⁷

202. See Hallye Jordan, *Alternative to '3 Strikes' Killed*, L.A. DAILY J., June 22, 1994, at 3.

203. California Ballot Pamphlet, *supra* note 2, at 36.

204. *Id.*

205. *See id.* at 37.

206. *Id.*

207. *See id.* In order to illustrate how taxpayer dollars would be saved, the pamphlet reported that "3 STRIKES WILL SAVE TAXPAYERS \$23 BILLION over five years." *Id.* at 36. Relying on Romero's report, the committee further explained that "[e]very repeat felon returned to our streets costs nearly \$200,000 annually in direct losses to victims and the enormous expense of running the same criminals through the police stations, courts, and prisons time and again." *Id.* at 36. Opponents of the measure strongly objected to the use of Romero's study in the "Pro" argument because it had been disparaged by its sources, notably the RAND Corporation. *See Judge Rules "3 Strikes Saves \$23 Billion" is O.K. for Ballot Pamphlet*, *supra* note 197. The opponents filed suit to enjoin supporters of the initiative from disseminating Romero's study as if it were fact. *See id.* However, Sacramento Superior Court Judge James T. Ford ruled that the claim of \$23 billion in savings from "three strikes" would be allowed. *See id.*

H. Proposition 184: Misleading the Voters

The Romero study contains serious methodological flaws that grossly overstate the benefits of Proposition 184. Nonetheless, proponents of Proposition 184 relied heavily on the report in campaigning for the ballot initiative.²⁰⁸ This Section reviews some of the ways in which voters were misled.

Claims that "three strikes" will reduce crime are premised on two straightforward propositions. First, repeat offenders will not be able to commit additional crimes when they are in prison.²⁰⁹ That is, "[u]nlike probation and parole, incarceration makes it physically impossible for offenders to victimize the public with new crimes for as long as they are locked up."²¹⁰ Second, long prison sentences will deter other criminals from committing crimes.²¹¹

208. See *supra* notes 179-96, 203-07 and accompanying text.

209. For example, the president of the California Police Chiefs' Association wrote, "[b]y depriving these recent offenders of a future life of crime, we have helped create a brighter future for law-abiding residents." Ronald E. Lowenberg, '3 Strikes' Costs Money but Pays Off, L.A. TIMES, Apr. 28, 1996, at B9.

At a 1995 University of West Los Angeles symposium on the "three-strikes" law, Governor Pete Wilson stated that the law "is not only emotionally attractive, but it is also a judicially sound policy for the simple reason that the repeat, violent offenders, targeted by the legislation, have shown that they are beyond reform and that they will only continue to bring terror to our citizens." Pete Wilson, *Justice Demands and California Needs—Three Strikes*, 26 U. WEST L.A. L. REV. 239, 240 (1995). At the same symposium, California Secretary of State Bill Jones stated that "Three Strikes" is an anti-crime law, not just an anti-violent crime law. It was our intent in enacting 'Three Strikes,' not only to keep dangerous repeat felons in prison (that is why the third strike can be any felony), but also to begin moving toward the concept of zero tolerance for crime." Jones, *supra* note 127, at 245.

An article addressing concerns regarding the type of offenders being caught in the wide net of California's "three-strikes" law reported that "[i]f the past [criminal record] is a prologue, then the statute is removing hundreds of offenders who most predictably would commit more felonies if they weren't in prison." Andy Furillo, *Most Offenders Have Long Criminal Histories*, SACRAMENTO BEE, Mar. 31, 1996, at A1. This reasoning, however, is not without criticism. A county assistant public defender stated: "I don't see much difference between that and just running a record check on the people that have two strikes and going off and arresting them and sending them to prison. Why go through the process of waiting until they commit a minor offense?" *Id.*

210. OFFICE OF POLICY DEV., U.S. DEP'T OF JUSTICE, THE CASE FOR MORE INCARCERATION I (1992).

211. California State Senator Phil Wyman wrote: "Three Strikes is not aimed solely at those who have already committed violent or heinous crimes. . . . The primary purpose of [the law] is not simply to punish serious or violent felons, but also to deter other such felons from committing future crimes." Wyman & Schmidt, *supra* note 53, at 257.

Proponents have stated that "three strikes" has lowered crime rates. See Edgar Sanchez, *Crime Declines in State's Big Cities*, SACRAMENTO BEE, Mar. 13, 1996,

The premise that incarceration will reduce the crime rate has strong intuitive appeal. However, empirical verification of this premise is difficult. Professor Franklin Zimring and Dr. Gordon Hawkins offer some sobering observations in a book published after the adoption of "three strikes." In *Incapacitation: Penal Confinement and the Restraint of Crime*, Zimring and Hawkins examined the effect of California's increased use of long prison sentences during the 1980s.²¹² Upon examining the data, the authors questioned the causal link between incarceration and the crime rate. California did experience a drop in the crime rate, but the rate for most crimes—including homicide, robbery, assault, and auto theft—declined only slightly.²¹³ Burglary and larceny declined sharply;²¹⁴ however, this decline occurred among juvenile offenders, while the increase in incarceration was among adult offenders.²¹⁵

Other problems exist with the cost-benefit analysis of studies like the Romero study. Such analysis purports to identify offenders' rates of crime and the cost of the crimes prevented and then multiplies one by the other to determine the benefit of incarcerating those offenders.²¹⁶ The savings are then compared with the cost of incarcerating those offenders. However, measurement of crimes

at B4 (reporting an 8.5% decrease in the number of major crimes reported in California's largest law enforcement jurisdictions and quoting Attorney General Dan Lungren as saying that very strong case can be made that three strikes has been a big part of the reduction). If that is the case, it 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. For example, a robber arrested after "three strikes" became law would have been sentenced to a term of years even without "three strikes" and almost certainly would still be serving that term today. See, e.g., EDWARD R. JAGELS, OFFICE OF THE DISTRICT ATTORNEY, COUNTY OF KERN, RUMINATIONS ON "THREE STRIKES": A REPORT TO THE KERN COUNTY BD. OF SUPERVISORS ON THE LOCAL IMPACT OF A.B. 971 AND PROPOSITION 184 3 (1995) (on file with the *Loyola of Los Angeles Law Review*) (explaining that any reduction in the crime rate of Kern County may not be attributed to the incapacitation of offenders pursuant to "three strikes" because every third-strike defendant presently incarcerated already would have been incarcerated under prior law anyway).

212. See ZIMRING & HAWKINS, *supra* note 185. Authors Zimring and Hawkins attribute the shift from rehabilitation theory in the 1970s to incapacitation policies in the 1980s and beyond to the numerous opponents of rehabilitation who attacked the ideal without advancing a specific alternative penological theory. See *id.* at 6-14. The authors explain that "[h]aving begun the period as a stepchild without a supporting academic constituency, *incapacitation* has remained so until the present time." *Id.* at 13.

213. See *id.* at 100-01.

214. See *id.* at 101.

215. See *id.*

216. See *id.* at 136.

prevented and cost of crimes committed are problematic because estimates of crime rates are notoriously imprecise. Studies attempting to measure the number of crimes prevented for each year of incarceration demonstrate profound difficulties in quantification. The estimates of the number of crimes prevented per year vary from 3.3 to 187 crimes per offender.²¹⁷

Different methodologies used by researchers may explain the disparities in the various studies. For example, some studies focused on self-reporting by incarcerated individuals.²¹⁸ Self-reporting is problematic because the motives and memories of the offenders may distort the results.²¹⁹ Further, questioning offenders arrested at the height of their criminal careers skews the benefits of long-term incarceration.²²⁰ Any measurement flaws become grossly exaggerated when numbers are projected over a significant term of years.

Further, measuring individual crime rates, rather than community impact,²²¹ overstates the benefits of incarceration.²²² Studies of individual crime rates typically ignore that offenders often commit crimes in groups. Incarceration of one member of a group may have little effect on the overall crime rate because a group member can be replaced.²²³ Once the criminal returns to the street, not only may he²²⁴ return to committing crime, but, in the meantime, his group may have enlisted another offender.²²⁵ Hence, incarceration may increase the number of offenses. At a minimum, it explains why if one burglar who will commit twenty burglaries per year with two associates is incarcerated while his two associates remain active on the street, the crime rate will not decline.

Additional considerations affect crime rates. Opportunities to commit crime may be "unlimited and undifferentiated."²²⁶ For example, drug interdiction has failed because other suppliers simply

217. *See id.* at 38, 50, 145.

218. *See id.* at 81 (discussing surveys conducted by the RAND Corporation between 1976 and 1980).

219. *See id.* at 82.

220. *See id.* at 83.

221. *See id.* at 43 (defining community impact as the net effect of the absence of criminal activity in the community setting).

222. *See id.* at 53-54.

223. *See id.*

224. It is the general policy of the *Loyola of Los Angeles Law Review* to use gender-neutral language. The author, however, has chosen not to conform to this policy.

225. *See id.* at 54.

226. *Id.* at 56.

fill the void left upon the arrest of a drug dealer.²²⁷ Incarcerating one person for selling drugs does not reduce the crime rate if five other sellers are available. By contrast, reducing demand, by treating or incarcerating one drug user, may have a measurable effect on the crime rate.²²⁸

Recognizing the inadequacies of existing studies, Professor Zimring and Dr. Hawkins estimated that during a period of dramatically increased incarceration in California, the crime rate only dropped by about 3.5 crimes per offender per year of incarceration²²⁹—far less than the “conservative” estimate of twenty crimes per year relied upon by “three-strikes” proponents.²³⁰

Similar doubts exist concerning Philip J. Romero’s estimated savings from each crime prevented. Romero determined the cost of crime by adding the victims’ out-of-pocket expenses, the monetary value of pain and suffering, and the costs of crime prevention that would be saved if the crime did not occur.²³¹ Acknowledging that

227. See NATIONAL CRIMINAL JUSTICE COMM’N, *supra* note 105, at 116 (commenting that, despite an increase in arrests and harsher sentences, the war on drugs did not force drug dealers off the streets; instead, drug dealing remained steady or increased in the affected communities). Joseph Perkins, a columnist for the *San Diego Union-Tribune*, noted that as long as the street value of an ounce of cocaine, \$1500, is more than the value of an ounce of gold, \$350, there will be drug merchants willing to meet the demand for illicit drugs. See Joseph Perkins, *Legalize Drugs? No, Let’s Work on Cutting Demand*, ATLANTA J. & CONST., May 19, 1993, at A11.

228. Perkins argues that “[i]t is profit that drives the drug trade. And the way to reduce the profitability of drugs is not by stemming supply, but by dampening demand.” Perkins, *supra* note 227, at A11. Perkins proposes a way to reduce the demand and advocates Attorney General Janet Reno’s “carrot-and-stick approach” to the drug problem: “The carrot should be treatment on demand for those who need help to beat their self-destructive habit. The stick should be swift and sure punishment for those who refuse treatment and get caught buying or doing drugs.” *Id.* Examples of such a policy at work can be seen in Miami and Baltimore. These cities require nonviolent offenders to undergo mandatory, periodic drug testing in addition to substance abuse treatment. See Janet Reno, *Fighting Youth Violence: The Future Is Now*, 11 CRIM. JUST. 30, 33 (1996). Participants receive mandatory penalties if they do not display satisfactory progress. See *id.* The success of such programs is demonstrated by drops in recidivism—Miami had a 33% drop in recidivism and Baltimore decreased its expected re-arrests by 50%. See *id.*

229. See ZIMRING & HAWKINS, *supra* note 185, at 114-17 (concluding that increased incarceration of an additional 115,000 people led to a reduction of 3.5 offenses per individual per year).

230. See ROMERO, *supra* note 181, at 3. But see Zimring, *supra* note 195, at 3 (arguing that if the estimate used by Philip Romero, chief economist of the Governor’s Office of Planning and Research, was accurate, given California’s incarceration increases during the 1980s, the crime rate should already have dropped to zero).

231. See ROMERO, *supra* note 181, at 2.

society's expenditures for crime prevention would not be reduced in equal proportion to a reduction in crime, Romero hypothesized the actual cost reduction if crimes were prevented by the increased incapacitation of habitual offenders.²³² He calculated the savings that would result if society actually did not spend either twenty-five or seventy-five percent of the costs attributable to each crime avoided.²³³ Based on an estimated twenty crimes per year prevented by a year of incarceration, Romero estimated that a year of imprisonment saves between \$137,512 and \$248,868, far exceeding the cost of incarceration.²³⁴ Further, Romero estimated that if "three strikes" prevented 150 crimes per year, the savings would jump to between \$302,536 and \$515,215.²³⁵

Small overestimates in either number of crimes or cost per crime produce dramatic results. Hence, as RAND study author Peter Greenwood has argued, if we rely on average out-of-pocket expenses of between \$1000 and \$2000 per crime and Romero's twenty crimes per offender figure, the savings amount to only \$20,000 to \$40,000 per year.²³⁶ Comparing this figure to the cost of incarcerating an offender leads to different conclusions. Zimring and Hawkins's estimated reduction of only 3.5 crimes per year²³⁷ would further reduce the savings to about \$3500 to \$7000.

The Romero study contained other flaws that make its conclusions suspect. For example, Romero did not consider the effect of age on the number of crimes committed per offender per year.²³⁸ Violent felonies are committed most frequently by young male of-

232. *See id.* at 3.

233. *See id.* at 3 tbl.1.

234. *See id.*

235. *See id.* Romero's estimated savings from crime prevention measures are almost certainly overstated. Those expenditures are driven by public fear about crime, rather than by the reality of those risks. *See* NATIONAL CRIMINAL JUSTICE COMM'N, *supra* note 105, at 3 (reporting a vast difference between the public perception of crime and the reality of crime rates in the United States—the reality being that crime rates have remained stable for several years). *See generally id.* at 61-98 (exploring the prevailing criminal policies and attributing their failure to having been implemented as reactions to public fear of crime, rather than crime itself). But "three strikes" is a case study of how politicians use fear of crime and ignore the reality—here that crime rates were decreasing—for political advantage. *See* John Vasconcellos, *Three Strikes and You're Out: No*, DOCKET, Mar. 1994, at 11 (criticizing such politicians and stating, "I abhor politicians who pander to people's fear with simplistic and ineffective solutions, providing a false sense of security rather than actual safety.").

236. *See* Morain, *supra* note 195, at A3.

237. *See supra* note 229 and accompanying text.

238. *See* Morain, *supra* note 195, at A3.

fenders.²³⁹ The crime and recidivism rates of offenders sharply decline as they age.²⁴⁰

Romero and the "three-strikes" campaign literature also ignored a fundamental question: whether similar savings through reduction in crime may have been available at a lower cost. Instead, the published literature in support of Proposition 184 relied on sensationalism to obfuscate the issue. It promised to keep rapists, murderers, and child molesters behind bars where they belong.²⁴¹

While "three strikes" may put violent felons behind bars—though in many cases a murderer would receive an equal or more severe penalty under existing law²⁴²—it ignores the reality that the majority of offenders within the provisions of Proposition 184 would not be murderers, rapists, and child molesters.²⁴³ Inclusion of burglary as a "strike," and making the third strike any felony, guaranteed that most offenders within the provisions of "three strikes" would not be murderers, rapists, or child molesters.²⁴⁴ Given the absence of a "wash-out" period,²⁴⁵ the law also guaranteed that many

239. See WILSON & HERRNSTEIN, *supra* note 150, at 141-42.

240. See PROJECT FOR OLDER PRISONERS, REPORT TO THE STATE OF NEW YORK 12-13 (on file with the *Loyola of Los Angeles Law Review*); WILSON & HERRNSTEIN, *supra* note 150, at 126-41. Based on the 1994 crime index, defendants age 20 to 29 commit 34% of the reported violent crimes. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1994, 227-28 tbl.38 (1995) [hereinafter CRIME IN THE U.S. 1994]. The rate of violent crimes drops to 24.6% for defendants age 30 to 39, 9.2% for the 40 to 49 age group, 2.5% for the 50 to 59 age group, and a mere 1.1% for the over 60 age group. See *id.*

241. See California Ballot Pamphlet, *supra* note 2, at 36.

242. See CAL. PENAL CODE § 190 (West Supp. 1997) (indicating that every person convicted of murder in the first degree shall be sentenced to death, life imprisonment without the possibility of parole, or 25 years to life; every person convicted of murder in the second degree shall be sentenced for 15 years to life, or for 20 years to life if the killing was committed by means of shooting a firearm from a motor vehicle, or 25 years to life if the victim was a peace officer).

243. See *supra* note 142.

244. During the first eight months of the California "three-strikes" law, approximately 70% of all second- and third-strike defendants had been convicted of nonviolent and nonserious offenses. See ESPARZA, *supra* note 142, at 8. Among the 30% charged with serious or violent felonies, almost half involved burglary as the felony charged. See LEGISLATIVE ANALYST'S OFFICE, *supra* note 142, at 9. Only 17% of those convicted of a second-strike felony were convicted of violent or serious offenses. See *id.* at 2. As of January 31, 1996, 41% of second- and third-strike offenders were subject to "three strikes" penalties for committing a property offense. See CAL. DEP'T OF CORRECTIONS, IMPACT OF "THREE STRIKES" LAW ON THE CALIFORNIA DEPARTMENT OF CORRECTIONS chart 6a (1996). Next only to possession of a controlled substance, petty theft with prior and second degree burglary served as the most frequent second- and third-strike convictions. See *id.*

245. California's "three-strikes" law specifically rejects "wash-out" provisions.

older felons committing drug offenses would be swept within its sentencing provisions. As supported by follow-up data, many "three-strikes" offenders are older felons who have almost certainly "graduated" from violent crime.²⁴⁶

I. The RAND Report

In September, 1994, the RAND Corporation issued a report concerning the fiscal impact and crime prevention efficiency of "three strikes."²⁴⁷ The report might have brought rationality to the "three-strikes" debate.²⁴⁸ But given its timing—after alternatives like the Rainey bill²⁴⁹ had been tabled and the initiative process was in full swing, and given that Pete Wilson had tied his election campaign to "three strikes"²⁵⁰—the RAND report was too little, too

See CAL. PENAL CODE §§ 667(c)(3), 1170.12(a)(3) (mandating that the length of time between a prior felony conviction and a current felony conviction shall not affect imposition of sentence). For instance, if a 45-year-old defendant had two prior felony convictions dating back 25 years, and was subsequently convicted of a felony—which could be a nonserious or nonviolent felony—that defendant would be subject to the provisions of "three strikes."

246. Second- and third-strike offenders over the age of 30 comprise about 46% of "three-strikes" defendants. See CAL. DEPT OF CORRECTIONS, *supra* note 244, at chart 8. This statistic is consistent with the rates of violent crime according to age groups observed by the U.S. Department of Justice in its 1994 crime index. See CRIME IN THE U.S. 1994, *supra*, note 240, at 227-28 tbl.38. The statistics from the national crime index reveal that people over the age of 30 accounted for 37.4% of all violent crimes in 1994, while people over the age of 40 accounted for only 12.8% of all violent crimes. See *id.*

Experts also attribute a further 9% drop in the 1995 violent crime rate to the age factor. See *Crimes of Violence Continue to Drop*, SACRAMENTO BEE, Sept. 18, 1996, at A7. Jack Levin of Boston's Northeastern University believes "[t]he baby boomers have matured into their 30s and 40s They are mellowing out, perhaps aging gracefully, and they are graduating out of high-risk violence and property crimes" *Id.*

247. See GREENWOOD ET AL., *supra* note 137, at xi.

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

249. See *id.* at xii.

250. See Jean O. Pasco, *Wilson Will Test His Themes Nationwide*, ORANGE COUNTY REG., Mar. 24, 1995, at 1.

late.

The RAND report constructed models to predict the relative efficiency and cost of five sentencing-enhancement proposals.²⁵¹ The report estimated the crime reduction from A.B. 971 to be between twenty-two and thirty-four percent.²⁵² The legislation would generate minor savings in several areas, including the cost of police, adjudication, trials, and jail operation. Any savings would be “overwhelmed by a large difference in prison operating cost[s] and a 12-fold increase in the annual cost of prison construction.”²⁵³ The cost of implementing “three strikes” was estimated to be \$5.5 billion annually.²⁵⁴

“Three strikes” would achieve the greatest reduction in crime but was by far the most expensive.²⁵⁵ The alternative with the most promise was the Guaranteed Full Term (GFT) proposal which would have given California almost as much reduction in crime. The report singled out GFT because it would reduce costs by “incapacitating offenders early in their criminal careers.”²⁵⁶

251. RAND examined the effects of the following alternatives to “three strikes”: “Jones Second-Strike Only”; “Jones Violent Only”; “Rainey Three Strikes”; and a variant constructed by Jones and Rainey entitled “Guaranteed Full Term (GFT).” See GREENWOOD ET AL., *supra* note 137, at 7-10. The Jones Second-Strike Only alternative would be triggered by a conviction for any felony with a prior serious or violent felony and eliminate the third-strike provision. See *id.* at 8. The Jones Violent Only alternative would apply only to a defendant with a current conviction for a violent felony and a prior conviction for a serious or violent felony. See *id.* at 8-9. The Rainey Three Strikes alternative was identical to the Rainey bill that was proposed in the legislature. See *id.* at 9. The GFT alternative would require a prison term for all serious or violent felonies even if the defendant had no priors. See *id.* GFT would not allow a good time reduction for serious or violent felons and would cut costs by not incarcerating half of the people convicted of minor offenses. See *id.*

252. See *id.* at xii. RAND projected that the number of serious and violent crimes prevented would increase quickly over the first 10 years and more slowly thereafter. See *id.* at 22.

253. *Id.* at 19-20.

254. See *id.* at 18.

255. See *id.* at 25-30. RAND projected that the crime reduction for “three strikes” would result in a 120% increase in cost over the previous prison budget. See *id.* Jones Second-Strike Only would have yielded 85% of the crime reduction of “three strikes” with a 90% increase in the prison budget. See *id.* at 25, 26 tbl.4.4. Rainey Three Strikes was about as effective and costly as Jones Second Strike. See *id.* at 26 tbl.4.4. Jones Violent Only would yield two-thirds of the crime reduction of “three strikes,” but would increase the prison budget by 57%. See *id.* at 26 tbl.4.4, 27. GFT matched the crime reduction effectiveness of “three strikes” with only a 97% increase in prison budget. See *id.*

256. *Id.* at 29. Each of the alternative models would increase costs significantly but not to the level of “three strikes.” See *id.* at 28 fig.4.8 (comparing cost per serious crime prevented from “three strikes” and alternatives).

The RAND report made projections similar to those made by the CDC.²⁵⁷ However, the report went further and analyzed how the state was likely to fund the increased costs.²⁵⁸ It argued that a tax increase was unlikely and that the electorate was unlikely to approve prison bond issues.²⁵⁹ It then explored how the prison expansion could be paid for from the General Fund.²⁶⁰ The most probable result, if "three strikes" was to be funded, was that "three strikes" would compete directly with higher education funds.²⁶¹

Both A.B. 971 and Proposition 184 were passed by wide mar-

257. *See id.* at 18.

258. *See id.* at 31-36.

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

Voters were not the only ones against the issuance of bonds to raise money for prisons. In 1994 Governor Wilson proposed a \$2 billion prison bond measure which was strongly opposed by Senate Republican Leader Ken Maddy. *See* Daniel M. Weintraub, *Wilson's Budget Slashes Welfare, Backs New Prisons*, L.A. TIMES, Jan. 8, 1994, at A1. Senator Maddy, usually a strong ally of the Governor, argued that the state was already too much in debt. *See id.*

The reluctance to issue bonds does not bode well for the CDC. The CDC has requested \$6 billion in bonds to finance the construction of 25 new prisons it estimates it will need over the next five years to handle the predicted prisoner increase resulting from the "three-strikes" law. *See* Dan Morain & Virginia Ellis, *Tobacco Industry Power May Go Up in Smoke, Foes Say*, L.A. TIMES, Nov. 10, 1994, at A3.

260. *See* GREENWOOD ET AL., *supra* note 137, at 32-36.

261. *See id.* at 33-34. Faced with the unfavorable predictions from the RAND study, supporters of "three strikes" attacked its validity. They claimed that the report failed to consider the economic benefits of the measure, specifically deterrence and lower insurance rates. *See* Ben Wildavsky, *'3 Strikes' Could Drain College Money*, S.F. CHRON., Sept. 22, 1994, at A21. Bill Jones assailed the study for unfairly depicting "three strikes" as competing with education and other state funded programs. Pamela J. Podger, *'3 Strikes' Could Bust State, Study Says*, FRESNO BEE, Sept. 22, 1994, at A1. Citing RAND's failure to address the report of the Governor's chief economist, Alfie Charles of the Three Strikes You're Out Committee said: "They only look at half of the equation, and it's ridiculous . . . One of the problems is that Greenwood [author of the study] decided he opposed Three Strikes, then he drafted a report to support his conclusion." Bill Jones further disparaged the report by saying, "The beauty of a report for someone sitting in academia . . . is they don't have to get tough laws through the Assembly Public Safety Committee." *Id.*

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

gins.²⁶² But, as this Section has developed, those large majorities were the product of a number of factors that prevented rational discourse about crime.²⁶³

Backed by seasoned veterans capable of playing political hardball, Mike Reynolds wielded extraordinary power and used bullying tactics to move A.B. 971 through the legislature.²⁶⁴ Despite those tactics, he would not have succeeded but for the tragic kidnapping and murder of Polly Klaas.²⁶⁵ Reynolds is a private citizen, not responsible for crafting legislation with an eye for sound public policy. But most members of the legislature, as well as the gubernatorial candidates, did not even attempt to craft sound legislation.²⁶⁶

As argued above, a number of sound alternatives were available.²⁶⁷ California's elected officials were well aware of the problems with A.B. 971 and Proposition 184.²⁶⁸ Beating the anticrime drum was just too tempting. Politicians like Pete Wilson had too much to gain by backing bad legislation. Reliance on the Romero study does not excuse policy makers. Its methodological flaws were evident.²⁶⁹ Most members of the legislature acted no more responsibly than the Governor.²⁷⁰ Finally, the ballot pamphlet supporting Proposition 184 compounded misleading aspects of the Romero study by its extravagant claims.²⁷¹

Politicians are not likely to admit that they hoped or expected the courts to save California from their political opportunism. But politicians like Pete Wilson and Bill Jones must have been aware of that possibility because they must have known of critics who pointed out the deficiencies of "three strikes." As developed below, the court did act responsibly in its review of the "three-strikes" law. Its principled decision has given the legislature and the governor a second opportunity to demonstrate similar responsible behavior.²⁷²

262. See *supra* notes 11-12 and accompanying text.

263. See *supra* Part II.A-B and accompanying text.

264. See *supra* notes 72-75, 82-85 and accompanying text.

265. See *supra* notes 55-72 and accompanying text.

266. See *supra* Part II.E.

267. See *supra* notes 134-44 and accompanying text.

268. See *supra* notes 124-30 and accompanying text.

269. See *supra* Part II.F.

270. See *supra* Part II.C.

271. See *supra* notes 202-07 and accompanying text.

272. See *infra* Part III.

III. THE COURT TO THE RESCUE

"Three strikes" mandates long prison terms for some deserving, but many undeserving, recidivists. Because the third strike may be any felony, and most felonies are nonviolent, the law requires long prison terms in a large number of cases where the underlying conduct is minor in comparison to the sentence imposed.²⁷³

In many sentencing schemes judges have discretion to avoid unjust sentences. Even under sentencing laws like the *Federal Sentencing Guidelines*,²⁷⁴ judges have limited discretion to depart from sentencing norms in the interests of justice.²⁷⁵ Such discretion is important because, no matter how carefully a statute is crafted, legislators cannot anticipate all of the circumstances that may make a particular punishment unjust. Judicial discretion is also a necessary antidote to excessive prosecutorial zeal.²⁷⁶

273. See *supra* note 148.

274. The federal system—although it has narrowed judicial discretion—permits the court to depart from the sentencing guidelines if there is an aggravating or mitigating factor not adequately considered by the Sentencing Commission in determining the guidelines. See 18 U.S.C. § 3553(b) (1994).

275. For example, the *Federal Sentencing Guidelines* recognize "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6); see also Michael Tonry, *Sentencing Guidelines and Their Effects*, in *THE SENTENCING COMMISSION AND ITS GUIDELINES* 16-43 (Andrew von Hirsch et al. eds., 1987) (reviewing the sentencing commissions of Minnesota, Maine, Connecticut, New York, Pennsylvania, South Carolina, and Washington and concluding that the most successful sentencing commissions are those that develop presumptive sentencing guidelines and policies for appellate sentence review); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 *HOFSTRA L. REV.* 1 (1988) (providing an overview of the development of the *Federal Sentencing Guidelines* and their intended goals).

276. Perhaps the most noted case in this regard is that of Jerry Dewayne Williams—"the pizza thief." See Slater, *supra* note 142, at B9. Williams, at the age of 27, was sentenced to prison for 25 years to life for stealing a slice of pepperoni pizza. See *id.* Although he was found guilty of petty theft, a standard misdemeanor, his prior convictions for robbery, attempted robbery, unauthorized use of a motor vehicle, and possession of a controlled substance, bumped the misdemeanor conviction up to a felony, which served as his final strike under California's "three-strikes" law. See *id.*

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

Stealing a drill from a garage was Ricky Valadez's final strike. See Lynch & Cekola, *supra* note 142, at A1. With two prior residential burglaries serving as prior strikes, including one that dated back to the late 1970s, Valadez was sentenced to 25 years to life. See *id.*

Proponents of "three strikes" and many prosecutors argued that subsection 667(f) denies judges the power to "strike" a prior felony conviction to avoid sentencing a defendant who would otherwise qualify under its provisions.²⁷⁷ Its proponents argued that they distrusted "liberal" judges and, therefore, sought to prevent judges from dismissing "three-strikes" cases.²⁷⁸ Whether judges had authority to strike prior felonies was the issue resolved in *Romero*.²⁷⁹

On June 3, 1994, the San Diego County district attorney filed an information in a case that would provide a basis for review of one key component of "three strikes."²⁸⁰ Defendant Jesus Romero's third strike was the charge of possession of 0.13 grams of cocaine base.²⁸¹ The district attorney pled the following prior felony convictions: a 1980 conviction for second degree burglary, a 1984 conviction

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

A recent study addressing the effects of California's "three-strikes" law reported that, in the two years since its enactment, the law has led to life imprisonment for 192 marijuana users, while only 40 convicted murderers, 25 rapists, and 24 kidnapers have been sentenced to life. See Whittell, *supra* note 142, at 12.

277. See *infra* notes 296-301 and accompanying text.

278. One reporter noted that the power to dismiss prior strikes was intentionally vested in the prosecutor, rather than in the judge. See James F. Sweeney, *Foul Ball*, NAT'L REV., Aug. 12, 1996, at 1, 1. For the system to work, he noted, judges must be "denied the discretion to unilaterally reduce mandatory sentences in the amorphous 'interest of justice.'" *Id.* He further explained that this provision of "three strikes" represents a tacit understanding that judges rarely stand for reelection and are "too often enthralled with the liberal paradigm equating 'judicial independence' and 'fairness' with leniency to criminals." *Id.* Against this backdrop of the criminal "victim," however, is the prosecutor. As an elected official, the prosecutor must fight for public safety or face the wrath of the electorate at election time—a battle the judiciary need never face. See *id.* Nevertheless, that argument ignores the fact that state court judges do face reelection.

Statements by the drafters before passage conflict, but there is ample support that, based on their distrust, they intended to limit judicial discretion to prevent judges from gutting the law. See *supra* notes 16-17 and accompanying text. The *Romero* decision rekindled drafters' fears about how judges would use discretion if it were granted. See *supra* note 27 and accompanying text (describing Secretary of State Bill Jones's disdainful response accusing the judiciary of protecting "their turf" rather than the safety of Californians); *supra* note 33 and accompanying text (quoting Wilson's dissatisfied reaction with the decision in *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996)). To counteract *Romero*, Reynolds and the CDAA are planning to put the Save 'Three Strikes' Public Safety Act of 1998 on the ballot. See discussion *infra* Part IV.C.

279. See *Romero*, 13 Cal. 4th at 497-98, 917 P.2d at 628, 53 Cal. Rptr. 2d at 789.

280. See *id.* at 506, 917 P.2d at 631, 53 Cal. Rptr. 2d at 792.

281. See *id.*

tion for attempted burglary of an inhabited dwelling, a 1986 conviction for first degree burglary of an inhabited dwelling, and convictions for possession of a controlled substance in 1992 and 1993.²⁸² Without "three-strikes" provisions, the defendant's sentence for the offense at bar would have been between one and six years.²⁸³

The trial court was willing to strike prior felony convictions if Romero pled guilty.²⁸⁴ The prosecutor contended that the court lacked the power to strike prior felony convictions absent prosecutorial consent.²⁸⁵ The court held that, were the statute so read, it would violate the state constitutional doctrine of separation of powers.²⁸⁶ The court sentenced Romero to a term of six years in prison.²⁸⁷ The court of appeal reversed the trial court and held that "three strikes" denied the trial court authority to dismiss a prior felony conviction on its own motion.²⁸⁸ The California Supreme Court granted Romero's petition for review.²⁸⁹

Romero was the ideal case in which to raise key constitutional challenges to "three strikes." Three aspects of Romero's record are compelling: first, none of his convictions involved a crime of violence; second, his serious felonies were committed in the 1980s—the most recent being approximately eight years before the current felony; third, his current offense, like his other more recent felony convictions, was a drug offense.²⁹⁰ Incarcerating a man who appears to be near the end of his criminal career to a term of twenty-five

282. *See id.*

283. *See id.* The current charge for possession of a controlled substance was punishable by 16 months, two years, or three years in prison. *See id.* The three prior felonies for which defendant served prison terms within the last five years, if not stricken pursuant to section 1385, would result in three consecutive one-year enhancements. *See id.* at 506-07, 917 P.2d at 631, 53 Cal. Rptr. 2d at 792. The court imposed a sentence of six years in state prison, representing the upper term for possession of a controlled substance plus the three consecutive one-year enhancements. *See id.* at 507, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793. Under "three strikes" the defendant was eligible for a life sentence because of his two prior "serious felonies." *See id.* at 506, 917 P.2d at 631, 53 Cal. Rptr. 2d at 793.

284. *See id.* at 507, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793.

285. *See id.*

286. *See id.*

287. *See id.*

288. *See id.* The court of appeal also held that Romero's sentence was not a violation of California's prohibition against cruel or unusual punishment. *See People v. Superior Court (Romero)*, 37 Cal. Rptr. 2d 364, 382 (Ct. App. 1995), *aff'd in part, rev'd in part*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996).

289. *See Romero*, 13 Cal. 4th at 507, 917 P.2d at 632, 53 Cal. Rptr. 2d at 793.

290. *See id.* at 506, 917 P.2d at 631, 53 Cal. Rptr. 2d at 792.

years to life seems excessive and a poor use of resources.²⁹¹ The facts of the case and the disposition in the court of appeal strongly suggested that the supreme court would rule in Romero's favor. Subsection 667(f) is the key provision whereby its drafters attempted to limit judicial, and to some degree, prosecutorial discretion.²⁹² Subsection 667(f)(1) states that the key provisions of the law "shall be applied in every case" involving defendants with two or three strikes.²⁹³ A prosecutor must "plead and prove each prior felony."²⁹⁴ Thus, subsection 667(f)(1) limits the authority of a prosecutor to bargain in a case within the provisions of the law.²⁹⁵ It recognizes prosecutorial discretion, but such discretion is severely limited.²⁹⁶

Subsection 667(f)(2) provides that the prosecutor "may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction."²⁹⁷ Subsection 667(f)(2) further provides that the role of the judge's discretion is limited to cases in which "there is insufficient evidence to prove the prior felony conviction."²⁹⁸

At a minimum, the subsection is badly drafted, a fact raised prior to passage of A.B. 971.²⁹⁹ Read literally, the section is nonsensical: A prosecutor may move to strike the prior felony on one of two bases, but the court may grant such a motion only on the basis of insufficient evidence.³⁰⁰

291. The proportionality issue was not addressed by the California Supreme Court; instead, the issue was raised and rejected at the appellate level. See *Romero*, 37 Cal. Rptr. 2d at 378 n.15. The supreme court decided *Romero* on statutory grounds alone. See *Romero*, 13 Cal. 4th at 523, 917 P.2d at 643, 53 Cal. Rptr. 2d at 804.

292. See CAL. PENAL CODE § 667(f) (West Supp. 1997).

293. CAL. PENAL CODE §§ 667(f)(1), 1170.12(d)(1).

294. *Id.*

295. See Brown, *supra* note 10, at 279-80 (discussing that prosecutors will take advantage of the ambiguity of subsection 667(f)(2) and continue to plea bargain); see also Menaster, *supra* note 15, at 285 (commenting that plea bargaining is only restricted after the information or indictment is filed).

296. In other words, subsection 667(f) entirely removes the prosecutor's discretion to charge—by requiring that each prior felony be pled and proved—and then revests the prosecutorial power to strike a prior felony, "pursuant to section 1385," which the court has discretion to grant or deny. *Romero*, 13 Cal. 4th at 523, 917 P.2d at 643, 53 Cal. Rptr. 2d at 804.

297. CAL. PENAL CODE §§ 667(f)(2), 1170.12(d)(2).

298. *Id.*

299. See *supra* note 74 and accompanying text.

300. It would be unconstitutional for a statute to impose criminal sanctions based

A more plausible interpretation of subsection 667(f)(2) is that a prosecutor must allege all prior felonies and may thereafter move to strike in the furtherance of justice or if there is insufficient evidence. The court would have the obvious, implicit power to grant the motion if appropriate. Such a reading would be consistent with traditional rules of statutory construction.³⁰¹

The second sentence would apply even if the prosecutor did not move to strike and would allow the court to act on its own motion, or presumably on the motion of the defendant. As advanced by its proponents, however, the statute gives the court no power to strike prior felonies. The court must, therefore, sentence the defendant in accordance with the "three strikes" sentencing provisions, unless the prosecutor moves to strike a prior felony in the interest of justice. That interpretation is consistent with numerous statements by its proponents and with Reynolds's distrust of liberal sentencing judges.³⁰²

The supreme court disagreed. After a review of its separation-of-powers case law, the court concluded that, if the statute were read to deny the court authority to strike prior felonies, the statute would violate the state constitution.³⁰³ The court observed that, when selecting between two plausible readings of a statute, the court should presume that the legislature intended not to violate the constitution.³⁰⁴

The court also relied on the presumption that the legislature must make a clear statement of its intent to eliminate a court's power to strike a prior felony or to dismiss in the interests of justice under section 1385.³⁰⁵ The court found that "three strikes" contained no such clear legislative direction.³⁰⁶ Not only did the legislation contain no clear direction that the court's power was withdrawn, but, according to the court, subsection 667(f)(2) makes

on insufficient evidence. Therefore, the language empowering the court, on its own motion, to dismiss factually insupportable allegations is unnecessary. *See Romero*, 13 Cal. 4th at 523, 917 P.2d at 643, 53 Cal. Rptr. 2d at 804 (citing *Jackson v. Virginia*, 443 U.S. 307, 313-16 (1979)).

301. When interpreting statutes, courts frequently depart from the literal meaning of a word to give words a reasonable meaning. *See* 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 24 (2d ed. 1988).

302. *See supra* notes 15-17 and accompanying text.

303. *See Romero*, 13 Cal. 4th at 507-18, 917 P.2d at 632-39, 53 Cal. Rptr. 2d at 793-800.

304. *See id.* at 509, 917 P.2d at 633, 53 Cal. Rptr. 2d at 794.

305. *See id.* at 517-18, 917 P.2d at 639, 53 Cal. Rptr. 2d at 800.

306. *See id.* at 518-28, 917 P.2d at 639-46, 53 Cal. Rptr. 2d at 801-07.

explicit reference to section 1385, suggesting that the legislature intended to retain that power in full force.³⁰⁷ Subsection 667(f)(2) states that the prosecutor may “move to . . . strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385.”³⁰⁸ Although not explicit,³⁰⁹ the court must have the power to grant that motion; hence, the legislature intended to preserve the court’s power under section 1385.³¹⁰

The court rejected the argument that section 667 limited a court’s power to strike prior felony convictions on its own only if the evidence was insufficient.³¹¹ Various amici curiae advanced the argument that, in reliance on traditional rules of construction, subsection 667(f)(2) gave the court discretion on its own motion in one limited instance—when the evidence was insufficient. Granting that explicit power demonstrated its intent to exclude the power to strike a prior felony conviction in the interests of justice.³¹²

The supreme court adopted an alternative reading of the statute: subsection 667(f)(2) requires the prosecutor to prove and plead all prior felony convictions but then creates an exception—that a prosecutor may move, pursuant to section 1385, to dismiss in fur-

307. See *id.* at 527-28, 917 P.2d at 646, 53 Cal. Rptr. 2d at 807. In reaching this decision, the supreme court drew from the final proposed amendments of A.B. 971 before the bill was chaptered. The court found the following:

[T]he Legislature declined to add proposed language that would have deleted the reference to section 1385 [which] . . . would clearly have eliminated the court’s power to strike prior felony allegations in furtherance of justice sua sponte. Thus, the language in the Three Strikes law permitting action “pursuant to section 1385” . . . cannot realistically be seen as inadvertent.

Id. at 528, 917 P.2d at 646, 53 Cal. Rptr. 2d at 807 (citations omitted).

308. CAL. PENAL CODE §§ 667(f)(2), 1170.12(d)(2) (West Supp. 1997).

309. See *supra* notes 297-300 and accompanying text.

310. The legislature’s failure to add the proposed language removing “three strikes” from the requirements imposed by section 1385 may have been a consequence of Reynolds’s refusal to allow amendments to the bill. See *supra* notes 74, 83-91 and accompanying text.

311. See *Romero*, 13 Cal. 4th at 519, 917 P.2d at 640, 53 Cal. Rptr. 2d at 801.

312. See *id.* at 522, 917 P.2d at 642-43, 53 Cal. Rptr. 2d at 803-04. Applying the maxim *expressio unius est exclusio alterius*, the attorney general argued that “the expression of the trial court’s power to strike solely for insufficient evidence plainly implies an exclusion of that court’s power to strike in furtherance of justice.” *Id.* at 522, 917 P.2d at 642, 53 Cal. Rptr. 2d at 803. The supreme court quickly dismissed this argument. See *id.* It stated that the provision is not exhaustive, as evidenced by the Attorney General’s acknowledgment of the implicit power of the court to grant a prosecutor’s motion to strike a prior felony “in the furtherance of justice” without any such explicit language within the statute. See *id.* at 522, 917 P.2d at 642-43, 53 Cal. Rptr. 2d at 803-04.

therance of justice.³¹³ Implicitly the trial court may grant that motion. The prosecutor may also move to strike a felony conviction that must be pled if the evidence is insufficient.³¹⁴ Subsection 667(f)(2) does not limit the court's power to strike felonies; rather, it makes explicit that a prosecutor's decision is subject to judicial oversight.³¹⁵

According to the supreme court's reading, subsection 667(f)(2) deals with prosecutorial responsibility—first, to allege all prior felonies and second, to strike some. A court's power to grant the motion to dismiss in the interests of justice is implicit; its power to grant the motion to dismiss for insufficient evidence is explicit. Its power to dismiss a prior felony conviction on its own is found in section 1385 because nothing in section 667 clearly eliminates that authority.³¹⁶ The specified authority to dismiss if the evidence of a prior felony is insufficient only refers to the court's disposition of the prosecutor's motion; implicit is its power to dismiss on its own authority.

That explanation is strained. On its face the section only addresses a court's power to grant motions when those motions are made by the prosecutor. The court's authority to move on its own is found in section 1385 if in the interest of justice. If the evidence is insufficient, the court's authority is found in the constitution. The court's rationale does not explain why, when the prosecutor moves to dismiss, the section does not mention a court's authority to grant the prosecutor's motion to dismiss in the interests of justice but does mention the less controversial power—or obligation³¹⁷—to dismiss if the evidence is insufficient.

The strained interpretation of section 667 is unfortunate. Though the statute is poorly drafted,³¹⁸ the court's interpretation leaves the court open to criticism that it frustrated the intent of the

313. *See id.* at 522-23, 917 P.2d at 642-43, 53 Cal. Rptr. 2d at 803-04.

314. *See id.* at 522, 917 P.2d at 642, 53 Cal. Rptr. 2d at 803.

315. *See id.* at 522-23, 917 P.2d at 642-43, 53 Cal. Rptr. 2d at 803-04.

316. *See id.* at 527-30, 917 P.2d at 646-48, 53 Cal. Rptr. 2d at 807-09.

317. *See Jackson v. Virginia*, 443 U.S. 307 (1979). In *Jackson* the Supreme Court ruled that, in federal habeas corpus proceedings, the judge must review the records from state proceedings and determine whether the evidence "could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318. In the event that the standard has not been satisfied, the conviction must be reversed. *See id.* at 317.

318. *See supra* notes 297-99 and accompanying text. *See generally* Thornbury, *supra* note 13 (discussing ambiguity in the "three-strikes" law as a result of poor draftsmanship).

statute's drafters.³¹⁹ The court could have reached the same result by relying directly upon the constitutional argument it laid out. Then, the court would have had ample precedent that dictated the same result.

Prior to "three strikes," the leading supreme court case on the separation-of-powers argument was *People v. Tenorio*.³²⁰ In *Tenorio* the trial court dismissed a prior conviction without a motion from the prosecutor in direct violation of section 11718 of the Health and Safety Code,³²¹ which provided, in relevant part, that no allegation of fact that would enhance the penalty of the accused "may be dismissed by the court or stricken from the accusatory pleading except upon motion of the district attorney."³²² The statute conditioned the trial court's authority on approval of the district attorney.³²³

That condition, according to the supreme court, violated article III, section 3 of the California Constitution.³²⁴ The court found that the power to strike prior offenses is "an essential part of the judicial power" and that section 11718 granted that judicial power to the prosecutor.³²⁵ Inherent in the role of a judge is the power to dismiss in the interests of justice; that power is violated when the court may not do so unless the court "bargain[s] with the prosecutor."³²⁶

As found by the supreme court in *Romero*, the analogy between section 11718 and "three strikes" is a close one: both sections rec-

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

320. 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970).

321. Section 11718 of the Health and Safety Code has since been repealed. See 1972 Cal. Stat. 2986, 2987 (repealing CAL. HEALTH & SAFETY CODE § 11718).

322. *Tenorio*, 3 Cal. 3d at 94, 473 P.2d at 996, 89 Cal. Rptr. at 252.

323. *See id.*

324. *See id.* at 95, 473 P.2d at 997, 89 Cal. Rptr. at 253.

325. *See id.* at 93, 473 P.2d at 995, 89 Cal. Rptr. at 251 (reasoning that "the power to strike priors is an essential part of the judicial power . . . [and] that section 11718 constituted an invasion of that power because it grants to the prosecutor the unreviewable power to grant or to prevent a judicial resolution of a motion to strike priors").

326. *Id.* at 94, 473 P.2d at 996, 89 Cal. Rptr. at 252; *see also* *People v. Superior Court (On Tai Ho)*, 11 Cal. 3d 59, 65, 520 P.2d 405, 409, 113 Cal. Rptr. 21, 25 (1974) (holding that a statute allowing a prosecutor to veto a judge's decision to sentence a defendant to a diversion program violated the separation-of-powers doctrine); *Esteybar v. Municipal Court*, 5 Cal. 3d 119, 125, 485 P.2d 1140, 1144, 95 Cal. Rptr. 524, 528 (1971) (striking down portion of a statute which allowed the magistrate to reduce a wobbler only with the approval of the prosecutor).

ognize that the judiciary has power to strike prior convictions used for sentence enhancements, but only if the prosecutor consents.³²⁷ Both sections give the prosecutor complete control over dismissing prior convictions *after* the decision to prosecute has been made.³²⁸ Finally, each provision requires judges to "bargain" with prosecutors in order to exercise their discretion to strike prior convictions.³²⁹

Prior to *Romero* a number of California courts of appeal considered whether "three strikes" violated the separation-of-powers doctrine. No court found such a violation.³³⁰ In those cases, as well as in *Romero*, the state argued that "three strikes" limits prosecutorial discretion and does not aggrandize prosecutorial power over the judiciary. This was because subsection 667(g) forces prosecutors to plead and prove all known prior felony convictions and does not allow prosecutors to enter a plea agreement to strike or seek dismissal of prior felonies.³³¹ The only power to dismiss is found in subsection 667(f)(2) which requires prosecutors to seek dismissal from the court.³³² Hence, unlike the situation in *Tenorio*, prosecutorial discretion is not arbitrary and unreviewable.³³³

327. See *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 513, 917 P.2d 628, 636, 53 Cal. Rptr. 2d 789, 797 (1996).

328. See *id.* at 514, 917 P.2d at 637, 53 Cal. Rptr. 2d at 798. In *Davis v. Municipal Court*, 46 Cal. 3d 64, 757 P.2d 11, 249 Cal. Rptr. 300 (1988), the California Supreme Court upheld a statute which permitted the district attorney to decide whether to prosecute a defendant or to allow that defendant to enter a diversion program. In distinguishing the statute at issue in this case from those statutes before the court in *Tenorio*, *Esteybar*, and *On Tai Ho*, the court declared that:

when a district attorney is given a role during the "judicial phase" of a criminal proceeding, such role will violate the separation-of-powers doctrine if it accords the district attorney broad, discretionary decision making authority to countermand a judicial determination [D]istrict attorney[s] [do not] improperly exercise[] "judicial authority" in violation of the separation-of-powers doctrine when [they] exercise[] [their] traditional broad discretion, *before* charges are filed, to decide what charges ought to be prosecuted, even when that charging decision affects the defendant's eligibility for diversion.

Id. at 85, 757 P.2d at 23, 249 Cal. Rptr. at 311-12.

329. See *Romero*, 13 Cal. 4th at 512, 917 P.2d at 635, 53 Cal. Rptr. 2d at 796.

330. See *People v. Glaster*, 49 Cal. App. 4th 1910, 45 Cal. Rptr. 2d 65 (1995); *People v. Gore*, 46 Cal. App. 4th 1396, 44 Cal. Rptr. 2d 244 (1995); *People v. Bailey*, 46 Cal. App. 4th 743, 44 Cal. Rptr. 2d 205 (1995); *People v. Petty*, 46 Cal. App. 4th 723, 44 Cal. Rptr. 2d 34 (1995); *People v. Superior Ct. (Romero)*, 37 Cal. Rptr. 2d 364 (Ct. App. 1995), *aff'd in part, rev'd in part*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996).

331. CAL. PENAL CODE § 667(g) (West Supp. 1997).

332. See *Romero*, 13 Cal. 4th at 514, 917 P.2d at 636-37, 53 Cal. Rptr. 2d 797-98.

333. In *People v. Tenorio*, 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249, the statute in question provided that no prior conviction "may be dismissed by the court or

The state also argued that *Tenorio* was inapplicable in light of events occurring subsequent to that decision.³³⁴ In *Tenorio* the court stated that “even if the Legislature could constitutionally remove the power to strike priors from the courts, it has not done so.”³³⁵ Since then, the legislature has limited judicial power to strike prior felony convictions on several occasions, and state courts have upheld these actions.³³⁶ Thus, the state argued, because trial courts do not have unfettered discretion to strike priors today, one of the key aspects of *Tenorio* was missing: prosecutors under subsection 667(f)(2) did not interfere with an unfettered judicial power.

Romero correctly rejected these arguments. With regard to the first argument, the court found that the trial and appellate courts misread *Tenorio*. In *Tenorio* the court rejected a similar argument and found that section 11718 could not be characterized as a limitation on prosecutorial discretion: “It is no answer to suggest that this is but a lesser included portion of the prosecutor’s discretion to forego prosecution, as the decision to forego prosecution does not itself deprive persons of liberty.”³³⁷ *Tenorio*’s discussion of the arbitrary and unreviewable nature of executive power was not an argument that focused on the extent of the executive’s power. Instead, the evil in section 11718 was that judges were unable to act without prosecutorial approval.³³⁸ As the supreme court observed, the Attorney General and the prosecution missed that point.³³⁹

The state’s second argument in *Romero* was a nonsequitur. There is no question that the legislature can limit judicial power. For example, the legislature can prevent courts from striking prior felonies.³⁴⁰ That power flows from a different separation-of-powers argument—that “in our tripartite system of government it is the function of the legislative branch to define crimes and prescribe

stricken from the accusatory pleading *except* upon motion of the district attorney.” *Id.* at 94, 473 P.2d at 995, 89 Cal. Rptr. at 251.

334. See *Romero*, 13 Cal. 4th at 515, 917 P.2d at 637, 53 Cal. Rptr. 2d at 798.

335. *Tenorio*, 3 Cal. 3d at 94, 473 P.2d at 996, 89 Cal. Rptr. at 252.

336. See, e.g., *People v. McKissick*, 151 Cal. App. 3d 439, 199 Cal. Rptr. 95 (1984) (upholding prohibition against judicial striking of gun-use allegation to allow a grant of probation). In this regard subsection 1385(b) explicitly disallows judges from striking prior felony convictions under section 667.

337. *Tenorio*, 3 Cal. 3d at 94, 473 P.2d at 996, 89 Cal. Rptr. at 252.

338. See *Romero*, 13 Cal. 4th at 512, 917 P.2d at 635, 53 Cal. Rptr. 2d at 796 (stating that “to require the prosecutor’s consent to the disposition of a criminal charge pending before the court unacceptably compromises judicial independence”).

339. See *id.* at 513-14, 917 P.2d at 636-37, 53 Cal. Rptr. 2d at 797-98.

340. See *id.* at 513, 917 P.2d at 636, 53 Cal. Rptr. 2d at 797.

punishments."³⁴¹ Since *Tenorio* the legislature has exercised its authority to limit the power of courts to strike prior felonies.³⁴² This appears consistent with the allocation of power between the judicial and legislative branches. Thus, the legislature can prevent either branch from striking prior offenses. That was the effect of subsection 1385(b).³⁴³

Tenorio, however, was concerned with the allocation of power between the judiciary and the executive. In limiting the court's discretion, the legislature cannot condition the use of judicial discretion on the approval of the prosecutor.³⁴⁴ In other words, *Tenorio* requires, and *Romero* merely reaffirms, that if prior felonies are to be struck at all, the court must be able to raise the issue on its own motion.

Such a result makes sense in light of the policies underlying the separation-of-powers doctrine. Prosecutors make decisions that are largely unreviewable and out of public view.³⁴⁵ While prosecutors serve the interests of justice, they also serve an advocacy function.³⁴⁶ Entrusting them with unreviewable discretion concerning whether striking prior felonies furthers the interests of justice limits the ability of the adversary system to educate the decision. By comparison, judges make decisions in open court after both advocates have addressed the issue. Judges, more so than advocates, act in furtherance of justice; such action is synonymous with judging.³⁴⁷

Despite public criticism of the California Supreme Court, examination of the *Romero* decision suggests that the result was justi-

341. *In re Foss*, 10 Cal. 3d 910, 917, 519 P.2d 1073, 1076, 112 Cal. Rptr. 649, 652 (1974) (quoting *In re Lynch*, 8 Cal. 3d 410, 414, 503 P.2d 921, 923, 105 Cal. Rptr. 217, 219 (1973)).

342. See *supra* note 336 and accompanying text.

343. See CAL. PENAL CODE § 1385(b) (West Supp. 1997).

344. See *Tenorio*, 3 Cal. 3d at 94-95, 473 P.2d at 996-97, 89 Cal. Rptr. at 252-53.

345. See 2 WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.3 (1984) (commenting that under the separation-of-powers doctrine, generally, "courts are not to interfere with [the] exercise of discretion by the executive branch of government" (citing *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973)); see also *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970) (concluding that the Attorney General could not be compelled by mandamus to prosecute suspected civil rights violators); *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965) (stating that courts are not to interfere with the discretionary powers of United States attorneys in their control over criminal prosecutions).

346. See *Tenorio*, 3 Cal. 3d at 94, 473 P.2d at 995, 89 Cal. Rptr. at 251.

347. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(8) (1990) ("A judge shall dispose of all judicial matters promptly, efficiently and fairly.").

fied. The constitution provides for a separation of powers³⁴⁸ that is widely accepted as an important aspect of democratic government.³⁴⁹ While the court engaged in some strained statutory analysis,³⁵⁰ it did so explicitly to avoid conflict between the separation-of-powers clause and the legislation.³⁵¹ The clear message was that a contrary reading of “three strikes” would have violated the state constitution. The latter conclusion is unassailable: reliance on precedent dictated that result.³⁵²

IV. RESTORING DEMOCRACY

Critics of the federal judiciary often argue that federal courts are antidemocratic.³⁵³ But that is by design. The Framers of the Constitution saw virtue in an independent federal judiciary.³⁵⁴ No doubt, there are times when popular sentiment should be resisted

348. See CAL. CONST. art. III, § 3 (“The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”).

349. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 2-4, at 21-22 (2d ed. 1988) (recognizing that “no complex society can have its centers of power *not* ‘offset against each other as checks,’ and resist tyranny”); see also *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The purpose [of the doctrine of separation of powers] was, not to avoid friction . . . incident to the distribution of the governmental powers among three departments, [but] to save the people from autocracy.”).

350. See *supra* note 316 and accompanying text.

351. The California Supreme Court declared that if it adopted the state’s construction of the statute, “the statute would appear to violate the doctrine of separation of powers.” *Romero*, 13 Cal. 4th at 513, 917 P.2d at 636, 53 Cal. Rptr. 2d at 797. The court considered many possible statutory interpretations of the “three-strikes” law and rejected all of them. See *id.* at 517-32, 917 P.2d at 639-49, 53 Cal. Rptr. 2d at 800-10.

352. See *supra* notes 320-44 and accompanying text.

353. See generally BORK, *supra* note 31, at 351 (warning that the “politicization” of the federal judiciary was encouraging judges “on to still greater incursions into Americans’ right to self-government”); ROBERT F. NAGEL, CONSTITUTIONAL CULTURES 25 (1989) (arguing that the unchecked, stringent enforcement of constitutional rights by the federal judiciary “may in fact undermine the capacity for durable constitutional government”); CHARLES RICE, LEGALIZING HOMOSEXUAL CONDUCT: THE ROLE OF THE SUPREME COURT IN THE GAY RIGHTS MOVEMENT (1984) (expressing concern that federal decisions regarding homosexual rights demonstrate an increasing judicial supremacy over state law).

354. James Madison, quoting from Montesquieu, wrote in support of an independent judiciary: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul [sic], for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.” THE FEDERALIST No. 47, at 338 (James Madison) (Benjamin Fletcher Wright, ed. 1966).

and courts should uphold principle over popular will. At times, separation of powers and judicial independence may be antidemocratic. Arguably, this is one of the virtues of our system.³⁵⁵

This Article has argued, though, that in the case of "three strikes," the California Supreme Court's decision in *Romero* was not antidemocratic. Many factors have combined to prevent rational debate about the law: the combination of public and media hysteria over the Klaas killing;³⁵⁶ the political opportunism of elected officials;³⁵⁷ the failure of other politicians to voice objections;³⁵⁸ the power politics of victims' rights advocates armed with money from the prison-industrial complex;³⁵⁹ the absence of any measures requiring voters to decide how they want to pay for the prison construction required by "three strikes";³⁶⁰ and misstatements in campaign literature supporting Proposition 184.³⁶¹

The electorate was not asked, for example, whether it wanted to incarcerate a two-time burglar past the peak of his criminal career for twenty-five years to life when his third felony was for possession of crack cocaine or whether it wanted similar penalties for two-time felons convicted of possession of marijuana. Consistent with public opinion surveys³⁶² and Proposition 184 campaign literature,³⁶³ the

355. See Maxwell S. Pfeifer, *Unwarranted Attacks on Judges Must End*, N.Y. L.J., Mar. 26, 1996, at 2 ("An independent judiciary is essential to our democratic society and is to be treasured and protected."); Thomas C. Platt, *Insuring an Independent Judiciary*, N.Y. L.J., July 8, 1996, at 2 ("[A]n independent judiciary is the cornerstone of good government."); see also Merritt, *supra* note 33, at A11 (arguing that as newly democratic countries, such as Russia and those of Eastern Europe, strive to obtain the same liberties as Americans, they are using the American judicial system, but not its executive or legislative branches, as a model).

356. See *supra* notes 55-72 and accompanying text.

357. See *supra* notes 99-104 and accompanying text.

358. See *supra* Part II.E.

359. See *supra* Part II.B.

360. See *supra* notes 204-07 and accompanying text (discussing the ballot initiative); see also Ronald F. Wright, *Three Strikes Initiative and Sinking Fund Proposal*, FED. SENTENCING REP., Sept./Oct. 1995, at 80 (noting that most state corrections budgets will not feel the immense impact of "three strikes" until several years from now, Law Professor Ronald F. Wright observed that "the remoteness in time of the costs of Three Strikes laws gives legislators a powerful reason to discount those costs. . . . The long time frame makes the cost seem politically irrelevant and easy to ignore.").

361. See *supra* Part II.G.

362. See generally Joseph W. Queen & William Murphy, *Race Doesn't Dictate Politics*, NEWSDAY, Apr. 26, 1996, at 29 (reporting that 82% of the public favor life sentences under the "three-strikes" law for those convicted of three violent felonies).

363. See California Ballot Pamphlet, *supra* note 2, at 36 ("3 Strikes keeps career criminals, who rape women, molest innocent children and commit murder, behind

electorate wanted long prison sentences for murderers, rapists, and other violent felons. One noted commentator suggests that many California citizens might not approve of the broad sweep of "three strikes."³⁶⁴

Reforming "three strikes" in the legislature would have been difficult. Prior to *Romero*, State Senate President Pro Tem Bill Lockyer appeared ready to attempt reform by withholding legislation to fund new prisons that would be made necessary by "three strikes" unless its scope was narrowed.³⁶⁵ Whether those efforts would have succeeded is unclear. Perhaps not fully understood by the electorate, use of the initiative process makes legislative reform extremely difficult. The legislature cannot amend initiatives unless the amendment is approved by the voters, or unless the original initiative provides otherwise; the "three-strikes" initiative permitted legislative amendment by requiring a two-thirds approval by each house.³⁶⁶

"Three strikes" also included a technical provision that voters almost certainly would not have fully appreciated. Subsection 667(h) provides that "[a]ll references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on June 30, 1993."³⁶⁷ The effect of this provision is to prevent the legislature from removing offenses from the list of serious or violent felonies. In other words, it cuts off one area of legislative reform, for example, by removing burglary from the list of prior offenses that may count as a strike.

Romero has given the legislature a second opportunity to correct the excesses of "three strikes." It is unclear, however, whether this will occur.

bars where they belong.").

364. Professor Franklin Zimring believes that public support for "three strikes" is mixed. See Goldberg, *supra* note 26, at A1. Although the public widely supports the law applied to violent repeat offenders, Professor Zimring estimates that 80% of the public is opposed to applying "three strikes" to minor offenses, such as stealing a piece of pizza. See *id.*

365. See Andy Furillo, 'Three Strikes' Collides with California's Bursting Prisons, SACRAMENTO BEE, Apr. 2, 1996, at A1.

366. See CAL. CONST. art. 2, § 10(c); CAL. PENAL CODE § 667(j) (West Supp. 1997). *Romero's* critics fail to acknowledge that requiring a supermajority to reform bad legislation is itself antidemocratic. See generally *supra* note 30 and accompanying text (providing criticism of the *Romero* decision as being antidemocratic).

367. CAL. PENAL CODE § 667(h).

Immediately after *Romero*, commentators differed over the effect of the decision.³⁶⁸ Despite some misleading headlines,³⁶⁹ *Romero* leaves intact key provisions of the law.³⁷⁰ That judges may exercise discretion to strike prior felonies does not mean that they will routinely do so. Some commentators argued that judges would use that power infrequently in light of two facts. First, most judges currently serving are Wilson and Deukmejian appointees—not likely to be the liberal judges so feared by the proponents of “three strikes.”³⁷¹ Second, even liberal judges understand the public’s desire for long prison terms for repeat offenders.³⁷²

An examination of the data of “three-strikes” cases during the first two years of its application reveals a contrary argument—that discretion may result in judges avoiding application of “three strikes” in a large number of cases.³⁷³ For example, application of “three strikes” has occurred in far more cases involving marijuana use than in cases involving violent felons.³⁷⁴ Violent felonies are a

368. See *supra* notes 26-32 and accompanying text.

369. See, e.g., Claire Cooper, “3 Strikes” Provision Tossed Out, SACRAMENTO BEE, June 21, 1996, at A1; Christopher Reed, ‘Three Strikes’ Law Is Ruled Out by Judges, THE GUARDIAN, June 22, 1996, at 14.

370. Since the court did not decide *Romero* on constitutional grounds but rather upon strict statutory interpretation, judges can still issue maximum sentences as outlined by “three strikes.” See *Burden of Proof* (CNN television broadcast, June 24, 1996), available in LEXIS, News Library, Curnws File (discussing how the very narrow discretion now afforded to judges actually supports the sentencing required by “three strikes”).

Criminal law experts, including academics, prosecutors, and defense attorneys, stress that the *Romero* ruling is narrow in scope. See Dan Berstein, *Judges Seem Unlikely to Undo ‘Three Strikes’*, SACRAMENTO BEE, July 1, 1996, at A8; see also *Burden of Proof*, *supra* (quoting Los Angeles County Deputy Public Defender Alex Ricciardulli and Attorney General Dan Lungren’s disagreement with the co-host’s assertion that *Romero* “gutted” “three strikes”).

371. See John Jacobs, Editorial, *More Posturing on ‘Three Strikes’*, SACRAMENTO BEE, June 30, 1996, at F4 (noting that Republican Governors Deukmejian and Wilson have appointed every judge over the past fourteen years and that most judges independently elected to the bench since then have been former prosecutors).

372. See Krikorian & Morain, *supra* note 33, at A1 (discussing that judges will exercise their discretion only in limited circumstances because they recognize the need for criminal incarceration); see also Dan Morain, *Ruling May Force ‘3 Strikes’ Backers to Dilute Law*, L.A. TIMES, June 26, 1996, at A3 (quoting Senator Lockyer’s statement that “most of the judges won’t strike priors”).

373. See *Front-Line Fights Over 3 Strikes*, L.A. TIMES, July 1, 1996, at A1 (citing Los Angeles County statistics which indicate that a third strike is most likely to be a drug offense; specifically, 28% of third strikes were for drug crimes, and 10% involved petty thefts).

374. See *supra* note 142 and accompanying text.

small part of the total number of felonies committed.³⁷⁵ Hence, in many, if not most cases, judges will be faced with defendants accused of having committed nonviolent third strikes. As in *Romero* a judge may be tempted to accept a plea bargain for a felon whose final strike involves drug possession.³⁷⁶

A. S.B. 331: Undoing *Romero*

Despite a lack of evidence of *Romero*'s impact,³⁷⁷ Assembly Speaker Curt Pringle and Senate Majority Leader Rob Hurtt proposed a response to the decision.³⁷⁸ Authored by Hurtt, S.B. 331 would have added a new subsection to section 1385.³⁷⁹ As proposed, subsection 1385(c) would have severely limited the exercise of a judge's discretion. A judge could "strike" a prior felony only if three conditions were met: (1) none of the defendant's prior felony convictions was for a violent crime; (2) the current charge is neither violent nor serious; and (3) the defendant has not committed a prior felony during the last five years that such defendant was not in custody.³⁸⁰

S.B. 331 also would have added language to subsection 667(g) allowing the prosecutor to decide not to charge a prior felony conviction, subject to a requirement that the prosecutor notify the court of all prior felony convictions and explain the decision not to charge those prior felonies.³⁸¹ An amended subsection 667(f) would have specified the legislature's intent that prior convictions should be pled and proven except in unusual circumstances.³⁸²

375. According to the 1994 crime index, violent felonies accounted for 13.3% of total felonies in 1994. See CRIME IN THE U.S. 1994, *supra* note 240, at 8 chart 2.3.

376. See *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 506-07, 917 P.2d 628, 631-32, 53 Cal. Rptr. 2d 789, 792-93 (1996).

377. See '*Three Strikes*' Discretion, FRESNO BEE, June 22, 1996, at B6 (suggesting that a far wiser course than immediate legislative response would be to wait and see how significant the consequences of *Romero* will be).

378. See Sweeney, *supra* note 278, at 5 (noting that Pringle and Hurtt formed a coalition of "three-strikes" supporters to draft a legislative response to *Romero*).

379. See S.B. 331, 1995-96 Reg. Sess. (Cal. 1995) (amending CAL. PENAL CODE § 1385).

380. See *id.*

381. See *id.*; see also Dan Goodin, *New 'Three Strikes' Bill Could Put Heat on Hallinan*, RECORDER (San Francisco), July 9, 1996, at 4 (noting that the provisions in S.B. 331 are designed to put political heat on district attorneys who aren't aggressive in applying "three strikes").

382. See Cal. S.B. 331 (providing the following as not sufficient reasons for a prosecutor to decline to plead and prove a prior felony conviction: (1) disagreement with subsections 667(b)-(i), the "three-strikes" legislation; (2) plea bargaining, ex-

Mike Reynolds and Secretary of State Bill Jones touted S.B. 331 because they believe *Romero* is "thwarting the will of the people."³⁸³ Despite their support and Senator Hurtt's threat of political reprisal, S.B. 331 failed in the Senate.³⁸⁴ While it passed through the assembly with overwhelming bipartisan support, only one member of the Senate Criminal Procedure Committee voted in favor of the bill.³⁸⁵

The Senate Committee's action reflects the change in the political climate since passage of A.B. 971 and Proposition 184. Some legislators were finally focusing on some of the realities of "three strikes." In the two years since its passage, its dragnet effect on nonviolent felons has become increasingly obvious.³⁸⁶ The issue of paying for prisons, conveniently put off during passage of A.B. 971, has come front and center.³⁸⁷ Legislators know they must act soon to find massive funding for prison construction if we are to have enough cells to warehouse the projected prison population.³⁸⁸ Reflecting the new climate, Senator Lockyer opposed S.B. 331 because, like "three strikes," it was a "waste of taxpayer money directed at imposing life imprisonment on petty criminals."³⁸⁹

B. A.B. 2122: A More Moderate Proposal

Assemblyman Phil Isenberg, now a victim of term limits,³⁹⁰ introduced A.B. 2122 in August, 1996.³⁹¹ A.B. 2122 died in the Senate Criminal Procedure Committee.³⁹² As amended during the summer,

cept in unusual circumstances; or (3) a perceived need for reduction of case loads).

383. Vincent Schiraldi, *Three Strikes, Reprise*, RECORDER (San Francisco), Aug. 28, 1996, at 4. *But see id.* (arguing that the will of the people cannot be frustrated because no one asked the voters to choose between a "three-strikes" bill that would provide for judicial discretion in nonviolent cases and one that did not).

384. *See Sweeney, supra* note 278, at 5 (noting the sole vote in favor was from the committee's only Republican member).

385. *See id.*

386. *See supra* note 142 and accompanying text.

387. *See Vitiello, supra* note 2, at 452-53 & nn. 332-36, 458 & nn. 359-60.

388. *See id.*

389. *Sweeney, supra* note 278, at 5.

390. *See Ed Mendel, Legislatures Coming to Terms with Their Limits*, SAN DIEGO UNION-TRIB., Sept. 9, 1996, at A3.

391. A.B. 2122, 1995-96 Reg. Sess. (Cal. 1996) (amending CAL. PENAL CODE §§ 667, 1170.12).

392. Legislators chose not to move ahead with A.B. 2122 before the close of the 1995-1996 Regular Session. *See Dana Wilke, Democrats Seem Slow to Revamp Three-Strikes Law*, SAN DIEGO UNION-TRIB., Aug. 20, 1996, at A3. Instead, the session ended with the bill sitting idle in the Senate Criminal Procedure Committee. *See 1 ASSEMBLY RECESS HISTORY*, 629 (Cal. 1995-1996 Reg. Sess., Oct 7, 1996)

it would have limited a judge's discretion only in cases involving a third strike that was a serious or violent felony.³⁹³ A.B. 2122 would have left section 1385 intact.³⁹⁴

The Isenberg bill would have had a similar effect as the original Rainey bill: enhanced sentences would have been mandated only for those felons whose third strike was at least a serious felony.³⁹⁵ But A.B. 2122 would still have allowed a judge to impose penalties under "three strikes" for other felons.

C. *Save "Three Strikes" Public Safety Act of 1998: Another Initiative*

After the Senate Criminal Procedure Committee voted down S.B. 331, Mike Reynolds filed a new initiative. Both the CDAA and the California Correctional Peace Officers Association supported the initiative.³⁹⁶ Draft No. 6, revised on August 2, 1996, would impose limits on judicial discretion similar to those proposed in S.B. 331.³⁹⁷

Like S.B. 331, a judge may strike a prior felony only if three conditions are met.³⁹⁸ The first two are the same as those in S.B. 331, namely, that none of the prior convictions was for a violent felony and the current charge must be neither a serious nor violent felony.³⁹⁹ Even more severe is the third cumulative requirement, that the defendant not have committed a prior serious felony in at least ten years while not in custody.⁴⁰⁰ Also modeled on S.B. 331 is the provision that allows a prosecutor discretion not to charge a prior felony but requires the prosecutor to file a notice with the court enumerating the felonies and explaining the basis of the decision not

(listing history of A.B. 2122).

393. See Cal. A.B. 2122 (amending CAL. PENAL CODE § 1170.12(f)).

394. Rather than amend section 1385, A.B. 2122 sought to limit judicial discretion by amending the original "three-strike" legislation. See *id.*

395. See *supra* note 140 and accompanying text.

396. See Pamela J. Podger, *Reynolds Pushes 'Save Three Strikes' Initiative*, FRESNO BEE, Oct. 3, 1996, at B1 (citing Larry Brown, who heads the CDAA, as saying that the initiative surpasses legislative fixes and that prosecutors may help raise money for the proposed initiative).

397. See *Save "Three Strikes" Public Safety Act of 1998*, at 8 (Aug. 2, 1996) (fax of Draft No. 6 received by the CDAA) (on file with the *Loyola of Los Angeles Law Review*).

398. See *id.* at 9.

399. See *id.* at 9-11 (proposing amendments to CAL. PENAL CODE § 1385); *supra* note 396 and accompanying text (detailing S.B. 331's requirements for judicial discretion).

400. See *Save "Three Strikes" Public Safety Act of 1998*, *supra* note 397, at 9.

to charge.⁴⁰¹

V. CONCLUSION: RESTORING THE DEMOCRATIC PROCESS

Despite numerous attacks on the supreme court that *Romero* violated the will of the people,⁴⁰² the court did no such thing. As developed above, "three strikes" passed amidst public and media hysteria. Its passage was marred by opportunism by some politicians and by a lack of courage of others.⁴⁰³ Victims' rights groups, backed by money from organizations benefiting from the prison construction boom, dominated the debate over "three strikes."⁴⁰⁴ Even Marc Klaas's defection could not slow passage of "three strikes," absent meaningful opposition.⁴⁰⁵ Campaign literature supporting Proposition 184 underscores how skewed the debate was: It promised to lead to the incarceration of murderers, rapists, and child molesters but failed to mention that California citizens also would have to pay for long incarceration of two-time felons convicted for possession of narcotics.⁴⁰⁶

The drafters of A.B. 971 attempted to protect "three strikes" by including a provision requiring a supermajority to amend its provisions.⁴⁰⁷ That provision now requires proponents of "three strikes" to compromise if they want to secure passage of legislation.

As discussed above, *Romero* has given the legislature the opportunity for rational debate that was lacking when A.B. 971 sailed through the legislature in 1994.⁴⁰⁸ Since that time, Polly Klaas's killer has been convicted and sentenced to death.⁴⁰⁹ The public now has less concern about crime.⁴¹⁰ News reports of some of the excesses of "three strikes" seem to have brought to the public the rec-

401. See *id.* at 8 (proposing amendments to CAL. PENAL CODE § 1170.12(d)(2)(B)).

402. See *supra* notes 30-32 and accompanying text.

403. See *supra* notes 99-104, 145-78 and accompanying text.

404. See *supra* notes 107-23 and accompanying text.

405. See *supra* notes 94-96 and accompanying text.

406. See *supra* notes 203-46 and accompanying text.

407. See *supra* note 336 and accompanying text.

408. See *supra* notes 353-76 and accompanying text.

409. See Mary Curtius, *Klaas Killer Sentenced to Die, Stuns Court*, L.A. TIMES, Sept. 27, 1996, at A1.

410. See Celinda Lake, *Voters Want Action on Crime*, USA TODAY, Aug. 25, 1994, at 11A (reporting that crime was voters' top concern in 1994). *But see Clinton Denies Tobacco Curbs Are Diversion from Drug Stats*, USA TODAY, Aug. 23, 1996, at 6A (illustrating decline in voters' concern about crime). In 1996 crime was the voters' third concern, ranked behind education and the economy. See *id.*

ognition that "three strikes" was not quite what it was advertised to be.⁴¹¹ Concern among some minority communities—traditional Democratic constituencies—has given Democratic politicians incentive to temper "three strikes."⁴¹² If the legislature returns to "three strikes" as a result of *Romero*, in light of post-1994 developments and the need to achieve a two-thirds majority, the chance of rational reform of its excesses increases.

Less certain is the initiative process. There, the most ardent supporters of "three strikes" need only a majority of the electorate.⁴¹³ But the forces that combined to silence opposition to "three strikes" may not be able to prevail a second time. In 1994 no politician was willing to take a visible, principled stand against A.B. 971 or Proposition 184.⁴¹⁴ Since then, as indicated above, the public has begun to recognize the excesses of "three strikes," and its opponents have regained some visibility.⁴¹⁵ In an atmosphere less polluted by fear and anticrime hysteria, the electorate may focus on the economic arguments. Public debate on achieving similar reductions in crime for significantly less money may hit home as it did not during the original campaign for "three strikes."⁴¹⁶

At this point, one can only speculate whether Reynolds's new initiative will qualify for the ballot, and, if it does, whether it will pass. But only because of *Romero* do California citizens have the opportunity to debate "three strikes" a second time, hopefully, more dispassionately than in 1994.

411. Editorials have heightened public awareness of the defects of "three strikes" by detailing individual cases of shocking punishments. *See A Return of Judgment to the Judging Process*, L.A. TIMES, June 21, 1996, at B8 (recounting the pizza thief who was incarcerated for life); *see also Judicious Decision*, ORANGE COUNTY REG., June 23, 1996, at G4 (discussing the same case); *Furthering Justice*, SAN DIEGO UNION-TRIB., June 22, 1996, at B6 (stating that twice as many defendants receive tough sentences for marijuana possession than for violent crime).

412. *See Vitiello, supra note 2*, at 455-57 & nn. 347-53.

413. *See CAL. CONST.* art. 2, § 10(a) (requiring a majority vote of the electorate for passage of an initiative).

414. *See supra* note 145 and accompanying text.

415. *See supra* note 412 and accompanying text.

416. *See supra* Part II.I.