McGeorge Law Review

Volume 26 | Issue 3 Article 6

1-1-1995

California's Three Strikes Law: Desperate Times Require Desperate Measures-But Will It Work

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I. INTRODUCTION

Heightened fears of increased crime may lead to a belief that society should turn its attention away from the rights of the accused and toward an emphasis on public safety. These fears, and their accompanying shift in public priorities, may carry the voters and their representatives on a wave of retributive emotion to enact laws that might otherwise have faced more intense scrutiny. Assembly Bill 971 (hereinafter "AB 971"),[1] California's "Three Strikes" law (hereinafter "Three Strikes"),[2] and its practically identical twin, Proposition 184,[3] are recent illustrations of this phenomenon.

While similar bills failed in the California State Legislature,[4] Three Strikes, representing a more draconian answer to demands for safer communities, succeeded overwhelmingly both in the Legislature and at the polls.[5] Three Strikes appealed to voters because it promised to bring about a safer environment during a groundswell of anti-crime emotions brought about by high-profile media coverage of violent offenses.[6] The law's authors intended it to help reduce the number of serious and violent crimes across California by requiring judges to hand down greatly enhanced penalties for recidivist[7] offenders.[8] California voters believed this promise of reduced crime—as evidenced by their overwhelming approval of Proposition 184—while several high-profile instances of violent crimes committed by repeat felons against innocent victims in 1993 and 1994 provided additional fuel for the public outrage leading to Three Strikes' approval.[9]

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1. 1994 Cal. Legis. Serv. Ch. 12, sec. 1, at 56 (amending CAL. PENAL CODE § 667).

2. Due to the similarity between AB 971 and Proposition 184, the phrase "Three Strikes" will be used to refer collectively to the laws enacted by these two acts unless otherwise specified.

3. Increased Sentences. Repeat Offenders. Initiative Statute, Proposition 184, Section 1 (codified at CAL. PENAL CODE § 1170.12).

4. *See infra* notes 44-48 and accompanying text (describing unsuccessful legislative alternatives to Three Strikes).

5. *See* James Richardson, *Wilson Set to Approve "Three Strikes" Measure*, SACRAMENTO BEE, Mar. 4, 1994, at A1 (reporting the vote in the State Senate as 29-7 in favor with equally lopsided approval in the Assembly); Debra J. Saunders, *Three Sprays and You're Out*, S. F. CHRON., Mar. 11, 1994, at A22 (tallying the vote on AB 971 at 92 out of 120 legislators in favor); *State Propositions: Election 1994: California*, SAN DIEGO UNION-TRIB., Nov. 9, 1994, at A3 [hereinafter *State Propositions*] (reporting the final vote for Proposition 184 at 72%).

6. *See infra* notes 13-18 and accompanying text (discussing public outrage over violent crime and its effect on popular support for anti-crime legislation).

7. *See* BLACK'S LAW DICTIONARY 1269 (6th ed. 1990) (defining a recidivist as a habitual criminal or repeat offender that is incorrigible or makes a trade of crime); *see also* Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 512-32 (1982) (discussing the problem of recidivism, state efforts to address the problem, and use of the concept of selective incapacitation as a means of reducing the crime rate); *infra* notes 133-136 and accompanying text (addressing Three Strikes as a concept of collective incapacitation).

8. *See infra* notes 64-68 and accompanying text (setting forth Three Strikes' sentence enhancement features).

9. *See* Dan Morain & Virginia Ellis, *California Elections/Propositions*, L.A. TIMES, Nov. 10, 1994, at A3 (reporting Proposition 184's unusual success at the polls); *see also infra* notes 36-41 and accompanying text (discussing the swelling of public support leading to the passage of Three Strikes).

Proponents of Three Strikes, claiming to speak for the general public, opined that, if only the law had incapacitated these repeat offenders before their final acts of violence, the innocent lives depicted in sensational media accounts might have been saved.[10]

Thus, Three Strikes may be one solution to the problem of rising crime; but perhaps, in the words of Shakespeare, it is better to "bear those ills we have than fly to others that we know not of."[11] Three Strikes is, by many accounts, a poorly drafted and confusing piece of legislation with serious functional and constitutional problems, and amounts to a massive and costly experiment to see if sharply increasing sentence terms will significantly deter crime.[12] It claims to save would-be victims by incapacitating criminals before they have the opportunity to strike again, but will it have its claimed effect? Even if it does accomplish its goals, does it do so at too great a human and economic cost? Will constitutional and other legal and administrative challenges ultimately defeat Three Strikes?

This Legislative Note seeks to address these and other issues as well as to answer the following questions: Will Three Strikes be successful, and will it continue to enjoy broad public support? Part II discusses the forces that brought Three Strikes to its ultimate passage in the Legislature and at the polls. Part III describes the functional elements of California's three strikes law and of recidivist statutes in other states, along with legislative and judicial attempts to modify or weaken the California law's provisions. Part IV explores the legal issues raised by Three Strikes, while Part V will consider its economic ramifications. Finally, this Note will conclude that, despite its problems and expected challenges, Three Strikes reflects the current desire of the people and will probably remain operative until and unless its costs outweigh its benefits.

II. BACKGROUND

Growing public outrage over the burgeoning incidence of violent crime in the United States has fueled a movement of public opinion toward tougher sanctions

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10. Al Locher, Assistant Chief Deputy, Sacramento County District Attorney's Office, Debate Against Peter Vlautin, Supervisor, Career Criminal Unit, Sacramento County Public Defender's Office, at the University of California, Davis, Oct. 27, 1994 (recording on file with the *Pacific Law Journal*) [hereinafter Debate]; *see id.* (discussing Peter Vlautin's statement purporting to reflect popular sentiments regarding the reasons behind the desire to incapacitate repeat offenders).

11. WILLIAM SHAKESPEARE, HAMLET act III, sc. i.

12. *See* Stephen Green, *Court Panel Discovers Major Flaws in Three Strikes*, SAN DIEGO UNION-TRIB., Apr. 9, 1994, at A3 (citing an informal opinion by the Judicial Council of California that Three Strikes, as drafted, was confusing and ambiguous, and that some of its provisions should not be applied to sentences); *see also* Debra J. Saunders, *Is It Back to the Bastille?*, S.F. CHRON., Mar. 4, 1994, at A22 (suggesting that the language of Three Strikes will result in successful constitutional challenges because petty felons may suffer grossly unproportional sentences).

for felons.[13] Newspaper articles and editorials have harangued readers and viewers with images of decaying public safety, while television shows depicting real arrests have soared in popularity.[14] The result is reflected in recent public opinion polls that show an increase in the percentage of Americans who believe that crime is the main problem facing the country today from four percent in February of 1993 to nineteen percent in January of 1994.[15] Other figures reflect a similar upward trend with an increase in the percentage of Americans ranking crime as one of the country's most important problems from twenty-one percent in June of 1993 to forty-three percent in January of 1994.[16] Thus, Americans now rank their concern over crime higher than for public morality (twelve percent), the economy (eleven percent), unemployment (ten percent), government and politics (nine percent), and the budget deficit (five percent).[17]

California, like the nation, has experienced a similar growth in public distress over rising crime statistics with citizens pressuring state legislators to stop the epidemic of random violence against persons and property.[18] Whether this fear is based on a real or perceived growth in violent crime has a different answer, depending on whether long-term or short-term crime-rate trends are considered.

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13. *See* W. John Moore, *Shooting in the Dark*, NAT. J., Feb. 12, 1994, at 358 (citing the results of a recent *NBC News-Wall Street Journal* poll revealing that 93% of those surveyed desired that the President and Congress pass some form of tough anti-crime measure in 1994). Although some data show a decrease in the crime rate since its peak in 1981, the statistics are confusing, with differing results depending on the study, the region, the crime, and the criminal. *Id.* at 358. This fact, combined with "horror stories fueling public outrage" have propelled the crime issue to a position of prominence. *Id.* at 360.

14. *See* Sam Stanton, *It Was Simpson—and So Much More*, SACRAMENTO BEE, Jan. 1, 1995, at A1 (recapping the top stories of 1994 and emphasizing a popular movement against crime and support for tougher anti-crime measures); *see also* Robin Andersen, *"Reality" TV and Criminal Justice; Programs That Film Police Conduct*, HUMANIST, Sept. 1994, at 8 (discussing the popularity of so-called "reality-based" programming and the sociological antecedents and implications of shows such as "American Detective," "America's Most Wanted," "Cops," "Night Beat," and "Top Cops"). Stanton attempts to confirm the intuitive conclusion that such reality-based television shows affect the way people perceive crime, and argues that they have increased the public's misunderstanding of criminal-justice issues. *Id.* at 12. Whether the public's heightened awareness reflects a misunderstanding is an open question in view of recent crime statistics. *See infra* notes 19-25 and accompanying text (interpreting crime statistics that appear, upon cursory examination, to be inconclusive with respect to growth in the crime rate).

15. *See* Richard Lacayo, *Lock 'Em Up and Throw Away the Key*, TIME, Feb. 7, 1994, at 50 (citing the results of a telephone poll of 1000 adult Americans taken from January 17-18, 1994 for Time/CNN by Yankelovich Partners Inc.).

16. Stephen Braun & Judy Pasternak, *A Nation with Peril on Its Mind*, L.A. TIMES, Feb. 13, 1994, at A1 (reporting the results of a *Los Angeles Times* poll of 1516 respondents taken from January 15-19, 1994). Younger Americans also appear to place concern for crime at the top of their lists of important issues according to an *MTV* poll. Moore, *supra* note 13, at 358 (assessing support for the national crime bill by citing the results of a recent *MTV* poll of people between the ages of 16 and 29 that showed respondents ranking the issue of crime over unemployment and the economy).

17. Lacayo, *supra* note 15, at 50.

18. *See* Rene Lynch, *"Three Strikes" Case Leniency Is Out in Orange County*, L.A. TIMES, Oct. 23, 1994, at A41 (describing "public outcry over the criminal justice system's seeming inability to keep habitual offenders behind bars"); *see also* Leslie Goldberg, *Search for Solutions to Juvenile Crime; Help for Youngest, Harsh Treatment for Repeaters Proposed*, S.F. EXAM., Mar. 2, 1994, at A1 (focusing on juvenile crime and observing that "public outcry over increasingly violent youth crime is pushing government leaders to consider harsher treatment of young offenders," both in San Francisco and throughout the nation).

While short-term statistics may reflect modest drops in the national crime rate, long-term data suggest that the trend is still arching upward. Although the national rate of violent crime reportedly dropped by three percent in the first six months of 1993, the long-term statistics show an increase in the murder rate from 8.4 murders per 100,000 people in 1988 to 9.3 murders per 100,000 people in 1992, reflecting a 14.92% increase.[19] This same period saw a 33.55% increase in the number of murders in California, ranking the state at number eight in murder-rate growth.[20] The long-term period from 1988 to 1992 showed a similar increase in the number of violent crimes of 23.37% for the nation and 31.96% for California.[21] An even broader look at crime trends reveals a startling 371% increase in the violent crime rate in the United States since 1960, representing a trend nine times higher than the population growth rate.[22] Examination of murder statistics alone may provide a faulty foundation when considering a recidivist statute, such as Three Strikes, since many murders are committed in the heat of passion, leaving the perpetrators unaffected by the threat of stiffer sentences. However, composite statistics such as the violent crime rate, reflect an even more dramatic growth rate of 18.92% from 1988 to 1992.[23]

Upon careful scrutiny, even the short-term statistics reveal a more ominous scene since, although violence appears to have waned in the aggregate, the actual local murder rates crept upward in small towns, medium-sized cities, and large cities with populations between 500,000 and 1,000,000.[24] The short-term drop in

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19. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, FBI UNIFORM CRIME REPORTS FOR JAN.-JUNE 1993 (1993) [hereinafter FBI CRIME REPORTS]; *see id.* at 17 (reporting a three percent national decrease, during the period from January through June of 1993, in the reported crime index—a compilation of offenses reported to law enforcement authorities). *But see* CRIME STATE RANKINGS 1994 286, 419, 420 (Kathleen O'Leary Morgan et al. eds., 1994) [hereinafter CRIME STATE RANKINGS] (reporting statistics calculated by the Morgan Quitno Corporation using data from the U.S. Department of Justice, showing a 14.92% increase in the number of murders—including nonnegligent manslaughter—from 1988 to 1992).

20. CRIME STATE RANKINGS, *supra* note 19, at 420.

21. *Id.* at 416 (depicting percentage changes in the number of violent crimes comprising the offenses of murder, forcible rape, robbery, and aggravated assault, including attempted rape and robbery).

22. Braun & Pasternak, *supra* note 16, at A1; *see id.* (reporting the findings of a two-day crime conference attended by police executives which observed, in addition to increases in the overall crime rate, an increase of 300% in the number of reported homicides and 500% in the number of reported rapes).

23. CRIME STATE RANKINGS, *supra* note 19, at 416-17 (reporting statistics calculated by the Morgan Quitno Corporation using data from the U.S. Department of Justice and comprising the offenses of murder, forcible rape, attempted rape, robbery, attempted robbery, and aggravated assault). It is important to note that the majority of crimes go unreported to the police and that, assuming that there is no significant change in victims' willingness to report crimes, the actual magnitude of these crime-rate increases is likely to be higher than suggested by the data. *See id.* at i (reporting U.S. Department of Justice estimates that only 50% of violent crimes were reported to the police in 1992).

24. FBI CRIME REPORTS, *supra* note 19, at 17 (listing increases in the murder rate for the first half of 1993 of one percent for cities with populations under 10,000, one percent for those with populations between 10,000 and 24,999, thirteen percent for those with populations between 25,000 and 49,999, six percent for those with populations between 100,000 and 249,000, seven percent for those with populations between 500,000 and 999,999, and nine percent for cities outside metropolitan areas). The only population centers showing either stasis or decrease in the number of reported murders were those with populations of over 1 million (six percent decrease), between 250,000 and 499,999 (no change), and 50,000 to 99,999 (one percent decrease). *Id.*

the murder rate seems to reflect increases almost entirely from the largest cities with populations of over one million. Thus, public perceptions regarding crime may find their bases more in fact than in paranoia as long-term trends and local short-term figures depict dramatically rising crime rates in almost all population centers.[25]

Public fears, brought about by increased violent crime, are also exacerbated by highly-publicized accounts of violent atrocities. Indeed, a majority of Americans cite media reports, instead of personal experience or other sources, as the foundations of their views on crime.[26] The widely-reported case of Polly Klaas is an example of a specific act of violence that brought public antipathy for violent criminals in California and across the nation to an apex.[27]

In October of 1993, twelve-year-old Polly Hannah Klaas was kidnapped from her home in Petaluma, California while her mother slept in an adjacent room.[28] She was taken from her slumber party at knife-point while two of her young friends helplessly watched.[29] What followed was a highly-publicized search for the missing girl and her kidnapper, enlisting the support of hundreds of volunteers including actress Winona Ryder, also from Petaluma, further increasing public awareness of the incident.[30] As police and volunteers mounted one of the most intense searches in the nation's history, friends and neighbors distributed over eight million pictures of the missing child.[31] Finally, the young girl's body was found in a wooded area of Sonoma County, California, and the suspect, Richard Allen

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25. Notwithstanding trends, California is still regarded by some observers as one of the most dangerous states in the nation with one study ranking it sixth most dangerous, based on fourteen negative and two positive factors pertaining to crime rate and percentage of crimes cleared. CRIME STATE RANKINGS, *supra* note 19, at ii (compiling a "most-dangerous-state" index comprising two positive factors—percentage of crimes cleared in 1991 and percentage of violent crimes cleared in 1991— and fourteen negative factors including: (1) Crime rate in 1992; (2) violent crime rate in 1992; (3) murder rate in 1992; (4) rape rate in 1992; (5) robbery rate in 1992; (6) aggravated assault rate in 1992; (7) property crime rate in 1992; (8) percent change in crime rate from 1988 to 1992; (9) percent change in violent crime rate from 1988 to 1992; (10) state prisoner incarceration rate in 1992; (11) reported arrests of youths 17 years and younger as a percentage of all arrests in 1992; (12) reported arrests of youths 17 years and younger for violent crime as a percentage of all such arrests in 1992; (13) state and local government expenditures for police protection as a percentage of all direct expenditures in 1991; and (14) full-time sworn officers in law enforcement agencies per 10,000 people in 1992).

26. Braun & Pasternak, *supra* note 16, at A1; *see id.* (summarizing the results of a *Los Angeles Times* poll showing that 65% of those surveyed indicated the media (electronic and printed) as the source of their attitudes toward crime, 21% cited their own personal experiences or those of friends and family, 13% relied on both equally, and 1% relied on neither).

27. *See Initiative or No Initiative, "Three Strikes" Is the Law in California*, CAL. J. WKLY., Mar. 14, 1994, at 1 (citing the murder of Kimber Reynolds by a paroled felon and, in particular, the kidnapping and murder of Polly Klaas by a repeat felon, as examples of cases providing impetus for the passage of Three Strikes); *infra* notes 28-35 and accompanying text (discussing the Polly Klaas incident and its effect on anti-recidivist sentiment).

28. Richard C. Paddock, *All-Out Search for Missing Girl*, L.A. TIMES, Oct. 6, 1993, at A3.

29. Peter Fimrite, *600 Search for Kidnapped Girl; Petaluma Police Say They Have No Substantive Leads*, S.F. CHRON., Oct. 4, 1993, at A17.

30. Jim H. Zamora, *Winona Ryder Offers Reward in Kidnap Case; Actress Feels a Kinship with Polly Klaas—Both Hail from Petaluma*, S.F. EXAM., Oct. 11, 1993, at A4.

31. John Flinn, *1993 Crimes*, S.F. EXAM., Dec. 27, 1993, at A8.

Davis, apprehended.[32] Overnight, the search was transformed into a vigil of grief, as mourners held candles outside search headquarters and television carried the image throughout the nation.[33] Grief quickly became outrage when it was disclosed that Davis had spent most of his adult life in prison for violent crimes, including two kidnapping convictions, and that police had actually held the killer in custody while Polly Klaas was still alive and hidden on a nearby embankment.[34] Thus was born a popular movement, spearheaded by the victim's father, Marc Klaas, and the Polly Klaas Foundation, that ignited a stepped-up campaign for stricter treatment of repeat offenders in the forum of public opinion as well as in the State Legislature.[35]

Growing anti-crime fervor, elevated by the high-profile Klaas incident and other similar crimes,[36] soon led to intense pressure on state legislators to offer some form of anti-recidivist legislation.[37] Although other alternatives to Three Strikes had failed to muster enough support for passage in the California Legislature,[38] AB 971, the strictest of the three strikes bills, was quickly ushered to the Governor's desk for signing.[39] Indeed, most of the debate concerning the parti

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32. Eric Brazil, *Polly Found Dead; Body of 12-Year-Old Discovered near Cloverdale*, S.F. EXAM., Dec. 5, 1993, at A1.

33. Nancy Vogel, *Fury, Grief Take Over in Petaluma*, SACRAMENTO BEE, Dec. 6, 1993, at A1.

34. *See* Michael Otten, *California Governor Calls Crime Crackdown Session*, REUTERS, Dec. 29, 1993, *available in* LEXIS, News Library, Curnws File (reporting facts surrounding the discovery of the body of Polly Klaas and the apprehension of Richard Allen Davis, the man accused of kidnapping and murdering Klaas); George Raine, *Prison Work Plan a "Sham;" Incentive Program that Let Klaas Suspect out Early Slammed by Critics*, S.F. EXAM., Dec. 12, 1993, at A1 (discussing the outrage many felt toward the work incentive program that allowed Richard Allen Davis to reduce his prison term from 16 to 8 years); Seth Rosenfeld, *Davis Admits Killing Polly; Suspect Says He Strangled, Buried Her and Acted Alone; Reportedly She Was Alive and Hidden Nearby as Deputies Grilled Suspect on Night of Kidnapping*, S.F. EXAM., Dec. 6, 1993, at A1 (reporting that Polly Klaas was alive and hidden on a nearby embankment while Richard Allen Davis was being questioned for nighttime prowling by Sonoma County Sheriff's Deputies).

35. Larry King, *Abduction and Murder—The Polly Klaas Tragedy*, LARRY KING LIVE, Dec. 14, 1993, *available in* LEXIS, News Library, Curnws File. Klaas described the mission of the Foundation as "making America safe for children" and outlined a three-point plan that included: (1) Educating the public and children about the dangers that confront the children; (2) establishing methods for helping other parents to deal with kidnapping situations; and (3) supporting anti-recidivist legislation such as Three Strikes. *Id.* Although Klaas described a law with features like those of AB 971 and Proposition 184, such as a possible life sentence for third serious felony convictions, he later opposed Three Strikes, arguing that the nonviolent third strike provision could unfairly require life sentences for perpetrators of relatively innocuous third felonies. *Id.*; *see infra* note 140 and accompanying text (discussing Marc Klaas' opposition of AB 971 and Proposition 184 due to the fact that both laws included nonviolent third felonies).

36. *See, e.g.*, Jill Smolowe, *Danger in the Safety Zone; As Violence Spreads into Small Towns, Many Americans Barricade Themselves*, TIME, Aug. 23, 1993, at 28 (recounting an array of highly visible crimes committed in places traditionally believed to be safe havens, such as homes, hospitals, and courtrooms).

37. *See* Jerry Gillam, *Legislators Fear Public on "Three Strikes," Brown Says*, L.A. TIMES, Mar. 2, 1994, at A3 (describing the pressure bearing upon California legislators to pass tougher habitual offender laws).

38. *See infra* notes 44-48 and accompanying text (discussing alternatives to Three Strikes, as legislated in AB 971).

39. Richardson, *supra* note 5, at A1; *see id.* (describing AB 971's trip through the State Senate as proceeding "like few measures in recent history, without a single change, a rarity in an institution that commonly tinkers with every measure before it"). Governor Pete Wilson quickly signed the bill into law amidst highly-publicized fanfare, receiving the bill on Thursday, March 3, 1994 and signing it into law only four days later on Monday, March 7, 1994. *Id.*; 1994 Cal. Legis. Serv. ch. 12, sec. 1, at 56 (amending CAL. PENAL CODE

culars of Three Strikes was waged outside of the Legislature since both Democrats and Republicans supported the bill, stating that they were merely responding to the desires of their constituents.[40] Even legislators professing disapproval of Three Strikes vowed support in the name of representative democracy.[41]

After the furor surrounding the Polly Klaas incident, the young victim's name soon found its way into the rhetoric of state politicians seeking popular mandates for their own versions of anti-recidivist legislation.[42] AB 167, AB 1568, AB 2429, ABX 9, and SB 864 were examples of some of the Legislature's most ardent efforts to provide an alternative to the three strikes provisions of AB 971.[43] Assemblymember Tom Umberg (D-Garden Grove) authored AB 167, which contained repeat offender provisions targeted primarily at violent second offenders with prior violent felony convictions.[44] Assemblymember Richard Rainey (R-Walnut Creek) proposed AB 1568, with less-severe ten-year sentence enhancements for second-time violent offenders.[45] AB 2429 and its sibling ABX 9, both authored by Assemblymember Ross Johnson (R-Placentia) represented one of the most narrowly crafted bills, designed to target only the most violent of repeat felony offenders.[46] Senator Quentin Kopp's (I-San Francisco) SB 864 was similar

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§ 667.5); *see Initiative or No Initiative, "Three Strikes" Is the Law in California, supra* note 27, at 1 (reporting that AB 971 was passed by the State Legislature on March 3 and signed along with a statement by the Governor on the morning of March 7 as the press looked on).

40. *See* Gillam, *supra* note 37, at A3 (quoting Assembly Speaker Willie Brown's remark that Three Strikes was passed without rational dialogue as the Legislature bowed to public pressure); *see also* James Richardson, *"Three Strikes" Sent Roaring into Senate*, SACRAMENTO BEE, Feb. 1, 1994, at A1 (recounting Senate debate where legislators cited the desires of constituents who wanted "safer neighborhoods and criminals locked up for life").

41. Richardson, *supra* note 5, at A1; *see id.* (quoting a statement by State Senator Leroy Greene (D-Carmichael) that he would "vote for these turkeys [AB 971 and other crime bills] because that's what our constituents want....").

42. *See* ASSEMBLY WAYS AND MEANS COMMITTEE, COMMITTEE ANALYSIS OF AB 971, at 2 (Jan. 26, 1994) (listing four bills proffered as alternatives to the provisions of Three Strikes as proposed in AB 971 by Assemblymembers Bill Jones and Jim Costa: AB 167, authored by Assemblymember Tom Umberg; AB 1568, authored by Assemblymember Richard Rainey; and AB 2429/ABX 9, authored by Assemblymember Ross Johnson).

43. AB 167, 1993-1994 Calif. Leg. Reg. Sess. (Mar. 2, 1994); AB 1568, 1993-1994 Calif. Leg. Reg. Sess. (Mar. 2, 1994); AB 2429, 1993-1994 Calif. Leg. Reg. Sess. (Mar. 2, 1994); ABX 9, 1993-1994 Calif. Leg. Spec. Sess. A (Mar. 2, 1994); SB 864, 1993-1994 Calif. Leg. Reg. Sess. (June 16, 1994).

44. *See* SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 167, at 2 (Feb. 28, 1994) (providing an alternative to the sentencing provisions proposed in AB 971 with different term enhancements for felons depending on whether the prior felonies were violent, serious, or both).

45. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1568, at 1 (Mar. 3, 1994) (providing for a fixed ten-year enhancement for each prior violent felony rather than the doubling or tripling provisions of Chapter 12); *id.* at 1, 3-7 (providing additions to the lists of serious or violent felonies found in California Penal Code §§ 1192.7(c) and 667.5(c)(1)-(17), respectively).

46. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2429, at 1-2 (Mar. 3, 1994) (containing provisions similar to those found in AB 1568, but applying only to third or more repeat felony convictions and additionally providing for the development of an anti-recidivism plan for inmates under the age of 25 who are serving sentences for first-time felony convictions); *see also* SENATE COMMITTEE ON APPROPRIATIONS, *supra* note 44, at 2 (describing ABX 9 as similar to AB 2429 and outlining its features, including the absence of sentence enhancements for second felony offenders and the omission of "serious" felonies as a sentence-enhancement trigger).

to AB 1568, but only contained sentence enhancements of fifteen years to life for rapists, twenty-five years to life for child molesters, and life without possibility of parole for third-time violent felons.[47] In stark contrast with the support resulting in passage of AB 971, each alternative measure failed, sometimes miserably, with one bill actually receiving only one vote in its first hearing.[48]

The subject of this Note, AB 971, authored by Assemblymembers Bill Jones (R-Fresno) and Jim Costa (D-Fresno), was quickly passed by the Legislature, carried with bipartisan support that found its impetus in public opinion.[49] California Governor Pete Wilson invoked the Klaas incident as he convened a special session of the State Legislature for the purpose of considering AB 971 and other crime bills[50] that would, upon passage, go into effect immediately, rather than on January 1, 1995 with the rest of the legislative session's business.[51]

Even during the 1994 gubernatorial election, front runners Kathleen Brown (Democrat) and Pete Wilson (Republican) each sought to harness the power of public support for three strikes laws and, particularly, Proposition 184, the so-called "Three Strikes and You're Out" initiative, by voicing their support for these measures.[52] Brown, despite what opponents had characterized as a permissive stance on crime, firmly embraced the initiative and, when asked about its estimated $17 billion cost, replied that the State must "do what it takes" to ensure public safety.[53] Likewise, Wilson was often quick to take credit for signing AB 971 and for supporting the Three Strikes initiative that, prior to its passage, enjoyed an eighty percent approval rating.[54] Support or opposition to three strikes laws became a benchmark for evaluating candidates in the 1994 state elections.

Thus, swelling anti-crime emotions, brought to a crescendo by tragedies such as the one that took the life of Polly Klaas, inspired Three Strikes and other bills

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47. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 864, at 3 (June 21, 1994) (providing that a third strike resulting in life imprisonment without parole will only occur where a violent felony has been committed).

48. Debra J. Saunders, *What Are They Fighting Over?*, S.F. CHRON., June 22, 1994, at A21; *see id.* (reporting a vote tally of one before the Assembly Public Safety Committee in favor of SB 864 which would have reserved life sentences for third-time violent felons).

49. *See supra* notes 39-41 and accompanying text. AB 971 was introduced on March 1, 1993, and enrolled on March 3, 1994.

50. *See, e.g.*, Richardson, *supra* note 40, at A1 (summarizing Three Strikes and other crime bills such as AB 87 by Assemblymember Mickey Conroy (R-Orange) that would have appropriated $175,000 for a feasibility study on deportation of inmates who are illegal immigrants to their native countries to finish their sentences; AB 560 by Assemblymember Robert Epple (D-Cerritos) that would have allowed children 14 and older to be tried as adults for murder; AB 645 by Assemblymember Doris Allen (R-Cypress) that would have increased maximum sentences for those caught carrying or using firearms on school grounds; and AB 2261 by Assemblymember Tom Connolly (D-Lemon Grove) that would have increased the maximum length of prison sentences for kidnapping from 8 years to a range between 11 and 13 years).

51. Otten, *supra* note 34.

52. *A Voters' Guide to the Top Races in California and the Sacramento Area*, SACRAMENTO BEE, Oct. 23, 1994, Election '94, at 2-3.

53. *Id.* Election '94, at 3.

54. *State Propositions*, *supra* note 5, at A3. *See supra* note 39 and accompanying text (noting the haste and publicity surrounding Governor Wilson's signing of AB 971).

that began to appear in the State Senate and Assembly to address a perceived revolving door through which felons repeatedly entered, exited, and then re-entered the state prison system.[55] Part III will specifically discuss the workings of Three Strikes as enacted by AB 971 and its proposed methods of addressing the State's revolving-door prison system.

III. PENAL CODE SECTION 667: THE ELEMENTS OF THREE STRIKES

A. The Statute

Enhanced sentencing schemes for repeat offenders are not new to California's statute books that have, since June 8, 1982, contained Penal Code section 667, the Career Criminal Punishment Act.[56] This section enacted into law a provision that one who is presently convicted of a serious felony[57] and who has been previously convicted of a serious felony in California or an equivalent felony[58] in another state receives, in addition to the sentence for the present felony, a five-year sentence enhancement for each prior felony conviction on charges separately brought and tried.[59] Thus, California joined nearly thirty other states, including Illinois, Michigan, New York, and Texas, in enacting sentence enhancements for recidivists.[60]

Section 667, after the enactment of AB 971, augments these sentence enhancements by providing for increased terms of imprisonment for felons convicted of second and third offenses.[61] Under the amended version of section 667,

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55. *Recent Legislation: Criminal Procedure—Sentencing—California Enacts Enhancements for Prior Felony Convictions,* 107 HARV. L. REV. 2123, 2123 (1994) (describing passage of AB 971 as the California Legislature's response to public pressure for a solution to the penal system's tendency to release violent and dangerous career criminals). *See generally* Mark W. Owens, *Review of Selected 1994 Legislation,* 26 PAC. L.J. 202, 442-46 (1995) (discussing the features, foundations, and ramifications of AB 971).

56. 1989 Cal. Stat. ch. 1043, sec. 1, at 3619 (amending CAL. PENAL CODE § 667).

57. *See* CAL. PENAL CODE § 667(d) (West Supp. 1995) (defining "felony," for the purposes of this section, as a serious felony as defined in California Penal Code § 1192.7); *see also id.* § 1192.7(c)(1)-(28) (West Supp. 1995) (defining a serious felony as any of several enumerated offenses including violent crimes, drug-related offenses, and conspiracies to commit such offenses). However, § 667 excludes from the definition of serious felony, convictions for selling or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in California Penal Code § 1192.7(c)(24). *Id.* § 667(a)(5) (West Supp. 1995); *see infra* note 62 (listing the offenses defined as serious for the purposes of Three Strikes).

58. *See* CAL. PENAL CODE § 667(d)(2) (West Supp. 1995) (defining a prior felony conviction, in part, as a conviction in another jurisdiction for an offense that, if committed in California, would be punishable by imprisonment in state prison or conviction in another jurisdiction for an offense that includes all of the elements of a serious felony as listed in California Penal Code § 1192.7(c)); *infra* note 62 (setting forth the provisions of California Penal Code § 1192.7(c)).

59. CAL. PENAL CODE § 667(a)(1) (West Supp. 1995).

60. *See infra* notes 111-123 and accompanying text (discussing three strikes legislation in other states).

61. CAL. PENAL CODE § 667 (West Supp. 1995).

defendants with one prior serious[62] or violent[63] felony conviction must receive twice the term that they would otherwise receive for the current conviction.[64] Defendants with two or more prior convictions shall be sentenced to an indeterminate term of imprisonment for life with a minimum term of the greatest of three options: Three times the term otherwise provided for the current felony, twenty-five years of imprisonment in state prison, or the term for the underlying con-

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62. *See id.* § 1192.7(c)(1)-(28) (West Supp. 1995) (defining a "serious" felony as any of the following enumerated offenses: (1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, or threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury; (6) lewd acts on a child under 14; (7) any felony punishable by death or life imprisonment in the state prison; (8) any felony in which the defendant inflicts great bodily injury or uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a non-inmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary of an inhabited dwelling house, or trailer coach, or inhabited portion of any other building; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in state prison; (22) attempt to commit a felony punishable by death or life imprisonment; (23) any felony where the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give heroin, cocaine, PCP, a methamphetamine-related drug, or a precursor of methamphetamine to a minor; (25) any penetration with a foreign object, under California Penal Code § 289(a), accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) carjacking; and (28) any attempt to commit one or more of the crimes enumerated in this section).

63. *See id.* § 667.5(c)(1)-(17) (West Supp. 1995) (listing felonies defined by statute to constitute "violent" felonies, including: (1) Murder or voluntary manslaughter; (2) mayhem; (3) rape in violation of Penal Code § 261(2); (4) sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury; (5) oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury; (6) lewd acts on a child under 14 in violation of Penal Code § 288; (7) any felony punishable by death or life imprisonment in the state prison; (8) any felony in which the defendant inflicts great bodily injury (except on an accomplice) pursuant to Penal Code § 12022.7 or § 12022.9 or uses a firearm pursuant to Penal Code § 12022.5 or 12022.55; (9) any robbery perpetrated in an inhabited dwelling house, vessel that is inhabited and designed for habitation, inhabited floating home, inhabited trailer coach, or the inhabited portion of any other building, using a deadly or dangerous weapon; (10) arson in violation of Penal Code § 451; (11) rape by force, violence, duress, menace or fear of immediate and unlawful bodily injury; (12) attempted murder; (13) explosion with intent to murder in violation of Penal Code § 12308; (14) kidnapping in violation of Penal Code § 207(b); (15) kidnapping as punished in Penal Code § 208(b); (16) continuous sexual abuse of a child in violation of Penal Code § 288.5; and (17) carjacking where the defendant personally used a dangerous or deadly weapon as provided in Penal Code § 12022).

64. *Id.* § 667(e)(1) (West Supp. 1995); *see id.* (requiring double prison terms for determinate sentences and twice the minimum term for indeterminate sentences); *see also id.* § 1170(a)(1) (West Supp. 1995) (establishing sentences of definite duration in order to provide for uniformity of sentencing); E. Barrett Prettyman, *The Indeterminate Sentence and the Right to Treatment*, 11 AM. CRIM. L. REV. 7, 13 n.27 (1972) (discussing the definition of indeterminate sentencing and providing a comparison with the notion of indefinite sentencing). An indeterminate sentence is one in which there is no maximum term and the reviewing authority has complete discretion to release the inmate at any time, with or without conditions, or to keep him or her incarcerated for life. *Id.* An indefinite sentence may involve a minimum period of incarceration, but there is nevertheless a legislatively or judicially set maximum beyond which the inmate cannot be kept. *Id.* The indefiniteness of the sentence arises from the power of the reviewing authority to release the inmate prior to the expiration of his or her maximum term. *Id. See generally* Alan Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 304-15 (1974) (examining the history of indeterminate sentencing).

viction including applicable enhancements.[65] The application of Three Strikes may be illustrated by a hypothetical court applying the law to a defendant with two prior serious or violent felony convictions—one for armed assault on a peace officer[66] and one for burglary of a residence[67]—facing a current charge of burglary. Under prior law, assuming that the defendant had earned the maximum number of allowable credits for participation in work or education programs, a typical sentence would be seven years in state prison.[68] Under Three Strikes, the greatest of the three sentencing options would be twenty-five years, since three times the term otherwise provided would result in a twenty-one-year sentence, and the term for the underlying conviction, including enhancements, would be seven years.[69]

Three Strikes ostensibly proscribes the use of prior felony convictions in plea bargaining,[70] thus requiring the prosecution to plead and prove all prior felony convictions without entering into agreements to strike or dismiss any of them.[71] However, prosecuting attorneys have the latitude under Three Strikes to dismiss or strike a prior felony conviction allegation in the furtherance of justice.[72]

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65. CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1995); *see id.* § 667(e)(2)(A)(iii) (West Supp. 1995) (proscribing the use of determinate sentences or enhancements found in California Penal Code § 1170 as a source for one of the options); *id.* § 1170 (West Supp. 1995) (establishing determinate sentences to be used in the absence of mitigating circumstances); *see also id.* § 667(e)(2)(B) (West Supp. 1995) (providing that indeterminate sentences imposed under § 667(e)(2)(A) are to be served consecutively with any other term which may be accompanied by a consecutive sentence).

66. *Id.* §§ 240-241 (West Supp. 1995); *see id.* (defining the crime of assault on a peace officer and establishing the penalty of six months in the county jail or one year or less if the assault was committed against the officer while in the performance of his or her duties).

67. *Id.* §§ 459-461 (West 1988 & Supp. 1995); *see id.* (defining the crime of burglary of an inhabited dwelling house and setting forth a punishment of two, four, or six years imprisonment).

68. *See* Debate, *supra* note 10 (discussing sentencing variations under Three Strikes and prior law). This sentence may be calculated by adding two five-year sentence enhancements to the middle sentence of four years for first-degree burglary and subtracting 50%, the maximum allowable credit under prior law.

69. *See* CAL. PENAL CODE § 667(e)(2)(A)(i)-(iii) (West Supp. 1995) (providing for a minimum term of the greater of three options which, here, would provide a choice between 25 years, 3 times 7 years or 21 years, or the underlying sentence of 7 years).

70. *See id.* § 1192.7(b) (West Supp. 1995) (defining plea bargaining as any bargaining, negotiation, or discussion between a criminal defendant (or his or her attorney) and the prosecuting attorney or judge wherein the defendant agrees to plead guilty or *nolo contendere* in exchange for promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge regarding charging or sentencing).

71. *Id.* § 667(g) (West Supp. 1995).

72. *Id.* § 667(f)(2) (West Supp. 1995); *see id.* § 1385(a) (West Supp. 1995) (providing that a judge or magistrate may, in the furtherance of justice, order an action to be dismissed upon his or her own motion, or upon the application of the prosecuting attorney); *see also* Interview with John W. McTigue, Chief Deputy District Attorney, Contra Costa County, Oct. 12, 1994 (notes on file with the *Pacific Law Journal*) (opining that prosecutors will frequently dismiss or strike prior felony convictions where they believe the particular felon to be too benign to justify the expense of public funds that could be used to prosecute more nefarious offenders); Peter Hecht, *How "Three Strikes" Law Is Used Across the State; Prosecutors Exercise Differing Degrees of Discretion in Charging Those Liable for Long Sentences*, S.F. EXAM., Aug. 8, 1994, at A7 [hereinafter *How "Three Strikes" Law Is Used*] (citing district attorneys' fears of soaring prosecution costs as motivating decisions not to prosecute minor third felonies). Those opposing Three Strikes' furtherance-of-justice feature have criticized the granting of such discretion to prosecutors with one hand while removing it from judges with the other. *See id.* Even some prosecutors have criticized this feature which, they argue, results in the law's uneven application throughout the state, with felons in some counties receiving life sentences for the same offenses that result in short sentences in other counties. *See id.*; *see also* Peter Hecht, *Case Merits*

Additionally, since Three Strikes is silent with respect to offenses committed while on parole, prosecutors may avoid treating current offenses as "strikes" by processing them as administrative parole violations.[73]

With respect to prior convictions, Three Strikes defines a prior felony as a "strike" regardless of whether a sentence was actually served. Therefore, it makes no difference whether the prior felony resulted in a suspended sentence, stay of execution of sentence, commitment to the State Department of Health Services, or commitment to the California Rehabilitation Center or other rehabilitative institution.[74]

Three Strikes also prohibits or limits several means of diverting convicted felons around the prison system or limiting their stay in prison. Probation or suspended sentences for felons who have committed one or more prior serious or violent felony are prohibited.[75] Diversion to any facility other than the state prison, including the California Rehabilitation Center, is also prohibited.[76] The total duration of term credits[77] awarded under the Penal Code may not exceed one-fifth of the total sentence, and will not begin to accrue until the defendant is physically placed in the state prison.[78] Three Strikes prohibits felons from serving concurrent terms and instead requires consecutive sentencing for multiple felonies not committed on the same occasion.[79] Finally, the amount of time that has elapsed between the current felony conviction and the prior felony conviction is irrelevant for the purpose of sentencing under Three Strikes.[80]

Three Strikes eliminates several practices whereby sentence terms are reduced or tempered. The court must adhere to certain enumerated prohibitions including those related to aggregate term limitations.[81] Specifically, where the ag-

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"Three Strikes?" Depends on the DA, SACRAMENTO BEE, Aug. 7, 1994, at A1 (quoting a statement by San Mateo County District Attorney James Fox that Three Strikes allows for considerable inequality of punishment from county to county). The decisions of district attorneys to seek a Three Strikes sentence is difficult and complex and frequently involves a balancing of notions of fairness and political considerations. *How "Three Strikes" Law Is Used, supra*, at A7 (quoting a statement by Professor J. Clark Kelso of McGeorge School of Law regarding the issues created by Three Strikes).

73. *See* Claire Spiegel, *"Three Strikes" Loophole Can Give Offenders a Break*, L.A. TIMES, Oct. 24, 1994, at A1 (listing several instances where California prosecutors have routed third-strike offenders around the provisions of Three Strikes by processing offenses as administrative parole violations).

74. CAL. PENAL CODE § 667(d)(1) (West Supp. 1995).

75. *Id.* § 667(c)(2) (West Supp. 1995).

76. *Id.* § 667(c)(4) (West Supp. 1995); *see id.* (providing that the defendant shall not be eligible for commitment to the California Rehabilitation Center as would normally be available under Article 2 of the Welfare and Institutions Code (commencing with § 3050)).

77. *See id.* §§ 2930-2932 (West Supp. 1995) (containing provisions for credit on terms of imprisonment).

78. *Id.* § 667(c)(5) (West Supp. 1995).

79. *Id.* § 667(c)(6)-(8) (West Supp. 1995); *see id.* (providing that multiple current convictions, not arising from the same set of operative facts, must result in consecutively-served sentences, and sentences for current convictions must also be served consecutively with any other sentences already being served).

80. *Id.* § 667(c)(3) (West Supp. 1995).

81. *See id.* § 1170.1 (West Supp. 1995) (providing for the calculation of aggregate and consecutive terms of imprisonment for multiple convictions imposed under California Penal Code §§ 669 and 1170).

gregate term of imprisonment would normally be limited by prior law, Three Strikes provides that no such limit will apply with regard to consecutive sentencing of felons with one or more prior serious or violent felony convictions.[82] Thus, under Three Strikes, the five-year sentence cap for nonviolent felons no longer applies to affected offenders and, likewise, the limit for non-serious felonies—twice the number of years imposed as the base term—also becomes redundant.[83]

Juvenile adjudications also count as prior convictions for the purposes of Three Strikes. If the juvenile was sixteen or seventeen years old at the time he or she committed the prior serious or violent offense, was found to be subject to treatment under juvenile law, and was adjudged a ward of the juvenile court, Three Strikes will consider the prior offense as a "strike" for sentencing purposes.[84]

Proposition 184, the Three Strikes ballot initiative, essentially a duplicate of AB 971, enacted California Penal Code section 1170.12 to reflect changes to Penal Code section 667 enacted by AB 971.[85] However, Proposition 184 is not a tautology since, unlike legislative amendments that may be modified or repealed by a majority vote of the Legislature, additions or changes to California law brought about through the initiative process may only be modified or repealed by a two-thirds vote in the Legislature or by a subsequent ballot initiative.[86] Thus, passage of Proposition 184, in November of 1994, protects Three Strikes from direct legislative tampering, at least until the next general election.

B. Judicial Backlash to Three Strikes

Prior to the passage of AB 971, efforts were made, both in the Legislature and in the courts, to dilute the impact of Three Strikes. Consideration of Three Strikes in the Legislature sparked the introduction of several alternative bills, all of which failed to garner the support that ultimately led to the success of Three

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82. *Id.* § 667(c)(1) (West Supp. 1995).

83. *Id.* § 1170.1(a) (West Supp. 1995); *see id.* (imposing a 5-year maximum on sentences not defined as violent felonies under California Penal Code § 667.5); *id.* § 1170.1(g)(1)-(2) (providing that the sentence limit shall be twice the number of years imposed by the trial court as the base term under California Penal Code § 1170 for felonies that are not: (1) Defined as violent under § 667.5; (2) imposed consecutively under § 1170.1, subsections (b) or (c); (3) imposed as enhancements under specifically enumerated code sections; or (4) defined as serious under § 1192.7).

84. *Id.* § 667(d)(3) (West Supp. 1995).

85. *See id.* § 1170.12 (West Supp. 1995) (containing almost identical provisions to those found in Penal Code section 667(c)-(j) as amended by AB 971); *Legislative Analyst's Analysis of Proposition 184*, Nov. 8, 1994 California General Election (copy on file with the *Pacific Law Journal*) (describing the provisions of Proposition 184 as identical to those of AB 971); *cf. infra* notes 99-103 and accompanying text (analyzing an apparent difference between the provisions of AB 971 and Proposition 184).

86. CAL. CONST. art. II, § 8; *id.* art. XVIII, § 2; *id.* art. XVIII, § 3.

Strikes.[87] But, after passage of AB 971 and Proposition 184, the battle moved from the Legislature to the courts, where some judges have taken issue with Three Strikes' removal of judicial sentencing discretion while others have simply refused to uphold a law that they believe to be unjust.[88]

The debate over Proposition 184, having simmered in the form of legislative Three Strikes arguments since the introduction of AB 971 and other bills, had lost much of its fuel in the months prior to the November elections of 1994.[89] Public attention seemed to have been diverted toward more closely contested initiatives, such as the controversial Proposition 187,[90] instead of toward one that was predicted to pass by an eighty percent margin and which functioned more as a message from the voters than as new law.[91] Thus, following enactment of AB 971 and Proposition 184, the battle moved from the forum of public debate to the courtroom with some recalcitrant jurists vowing to ignore Three Strikes' popular mandate by refusing to follow its dictates. A *Los Angeles Times* study showed that, in Los Angeles County, only one in six defendants eligible for Three Strikes received the twenty-five years to life sentence required by law.[92] Although the exercise of prosecutorial discretion has accounted for some of the softening of Three Strikes, many weakening blows have come from judges acting on their own to reduce penalties.[93]

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87. *See* Brad Hayward, *Panel Rejects Alternate "Three Strikes" Proposal*, SACRAMENTO BEE, June 22, 1994, at A3 (describing efforts to pass alternative legislation, such as State Senator Quentin Kopp's SB 864, in the shadow of the Legislature's consideration of AB 971).

88. *See* Richard Lee Colvin & Ted Rohrlich, *Courts Toss Curveballs to "3 Strikes,"* L.A. TIMES, Oct. 23, 1994, at A1 (reporting that judges and prosecutors have diluted the effect of Three Strikes through judicial refusal to hand down prescribed sentences and through prosecutors' unwillingness to demand sentence enhancements under certain circumstances).

89. *See* John Borland, *The Initiative War*, CAL. J. WKLY., Oct. 24, 1994, at 1 (observing that, despite its ostentatious beginning, the Three Strikes debate had dwindled to a "whimper" by November).

90. *See* Illegal Aliens. Ineligibility for Public Services. Verification and Reporting. Initiative Statute, Proposition 187 (codified at CAL. EDUC. CODE §§ 48215, 66010.8; CAL. GOV'T CODE § 53069.65; CAL. HEALTH & SAFETY CODE § 130; CAL. PENAL CODE §§ 113, 114, 834b; and CAL. WELF. & INST. CODE § 10001.5) (making illegal aliens ineligible for certain public services, requiring various state and local agencies to report illegal aliens, and making it a felony to manufacture, distribute, sell, or use false citizenship or residence documents); *see also* K.L. Billingsley, *Wilson Wins California Race Dominated by Immigration; Huffington has Lead for Senate*, WASH. TIMES, Nov. 9, 1994, at A13 (referring to Proposition 187 as a controversial measure that led by a narrow margin in the last week prior to the election).

91. George Skelton, *Sending a Message with Initiative*, L.A. TIMES, Sept. 29, 1994, at A3; *see id.* (referring to Proposition 184 as a "less controversial" message initiative designed to "tell opposition leaders to go jump off a long pier . . . ."); *see also State Propositions*, *supra* note 5, at A3 (reporting the final vote for Proposition 184 at 72%). Thus Proposition 184 passed by less than the predicted 80%, but still by a significantly higher margin than that most of the other proposition on the November ballot. *See State Propositions*, S.F. CHRON., Nov. 10, 1994, at B4 (reporting passage rates of 67% for Proposition 183, 59% for Proposition 187, 79% for Proposition 189, 64% for Proposition 190, and 61% for Proposition 191).

92. Colvin & Rohrlich, *supra* note 88, at A1 (summarizing a review of all 98 third-strike cases adjudicated between enactment of AB 971 in March, 1994 and August 31, 1994).

93. *Id.* at A1 (finding that, of the Three Strikes cases decided during the survey period, 25 reduced sentences were handed down as a result of mitigating action by district attorneys, while 27 resulted from judicial action).

The ability of judges to ignore sentencing requirements under Three Strikes stems from three sources: power under pre-existing law allowing judges to ignore past strikes, authority to reduce certain felonies to misdemeanors punishable by no more than one year in jail, and simple refusal to abide by what defecting judges believe to be an unjust law.[94] One recent example of a judge choosing that third of these options involved a case in which a Contra Costa County Superior Court Judge refused to hand down a twenty-five years to life sentence for a third strike, ruling that judges have broad discretion when applying Three Strikes.[95] This case involved Clarence Malbrough, a third-time felon who had spent most of his forty-seven years in prison and, on his third strike, was tried for the theft of batteries, with a value of eighty dollars, from an El Cerrito store.[96] Rather than sentencing Malbrough to life in prison for a third felony under Three Strikes, Judge Richard Arnason chose to reduce the crime from a felony to a misdemeanor, sentencing Malbrough to one year in jail.[97] Although purportedly acting in the interests of justice, judges such as Arnason sometimes choose to ignore what appears to be the express provisions of the law, placing felons back on the streets. It should be noted that Malbrough, although most recently convicted of theft, had a history of eleven felony convictions, eleven misdemeanor convictions, and had spent thirty-two years entering and re-entering the prison system—the epitome of the criminal targeted by Three Strikes.[98]

Although Proposition 184 and AB 971 appear identical and are generally reported to be functionally redundant, there is one difference that has begun to provide fuel for arguments that judges have discretion to strike prior convictions. California Penal Code section 667, as amended by AB 971, contains language referring to California Penal Code section 1385 that expressly refuses to authorize judges to strike prior convictions of serious felonies used for the purpose of enhancement under section 667.[99] In contrast, California Penal Code section 1170.12, added by Proposition 184, is silent regarding section 1385 as well as the five-year sentence enhancement which provided its context in section 667. Thus, thorough defense attorneys will most likely argue that, since courts must construe statutes harmoniously whenever possible to avoid "absurd and anomalous results," the apparent conflict between AB 971 and Proposition 184 should be

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94. *See id.* at A1 (reporting claims by judges that pre-existing law allows them to ignore prior strikes or reduce the current felony to a misdemeanor).

95. Larry D. Hatfield, *Prosecutor Decries "Three Strikes" Ruling*, S.F. EXAM., Dec. 23, 1994, at A6.

96. *Id.* at A6.

97. *Id.*; *see id.* (describing Judge Arnason's reduction of a third-strike sentence through the use of a so-called "wobbler" or crime chargeable as either a misdemeanor or a felony under the Penal Code).

98. *See id.* (describing Malbrough's prior convictions).

99. *See* CAL. PENAL CODE § 667(a)(1) (West Supp. 1995) (providing that the 5-year sentence enhancements authorized by existing law be imposed in compliance with California Penal Code § 1385(b)); *see also id.* § 1385(b) (West Supp. 1995) (stating that the provisions of § 1385 relating to the striking of prior convictions by the judge or magistrate in the furtherance of justice, do not authorize a judge to strike prior convictions for serious felonies used for sentence enhancement under California Penal Code § 667).

resolved in favor of the latter, which was more recently enacted.[100] It might further be assumed that, the omission of this clause in Proposition 184, where it was present in prior law, betrays a legislative intent that the provisions of section 1385 should not be incorporated by section 1170.12.[101]

Nevertheless, the fact remains that general rules of statutory construction require not only that reference be made to the plain language of the statute, but also that the intent of the enacting body be given "paramount consideration."[102] Therefore, although both arguments are compelling, it will be difficult, given the significant amount of published material relating to the legislative intent behind Three Strikes, to argue that the Legislature intended to allow judicial discretion in Proposition 184 where such was denied by AB 971 and where no mention is made in section 1385 to section 1170.12, enacted by Proposition 184.[103]

Prior to publication of this Note, the California Court of Appeal had decided only one case, *People v. Romero*,[104] addressing the aforementioned issues of statutory interpretation. That case held that legislative intent must prevail over the letter of the law which, in turn, should be construed in conformity with the spirit of the act.[105] The Court of Appeal found that, although the language of Proposition 184 did not specifically refer to the court's authority to strike in the interest of justice pursuant to California Penal Code section 1385, the stated intent of the Legislature was to "ensure 'longer prison sentences and greater punishment' for recidivist felony defendants who had previously been convicted of serious and/or violent crimes."[106] An additional argument asserts that the separation of powers doctrine requires that judges be permitted to strike prior

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100. *See* People v. Gonzales, 51 Cal.3d 1179, 1221, 800 P.2d 1159, 1179, 275 Cal. Rptr. 729, 749 (1990) (holding that "[w]henever possible, courts must construe statutes harmoniously and to avoid absurd or anomalous results").

101. *See* Ultramar, Inc. v. South Coast Air Quality Mgmt. Dist., 17 Cal. App. 4th 689, 699, 21 Cal. Rptr. 2d 608, 612 (1993) (espousing the maxim of statutory construction *expressio unius est exclusio alterius*, meaning that expression of certain things in a statute necessarily involves exclusion of other things not expressed); *see also* Lungren v. Deukmejian, 45 Cal.3d 727, 735, 755 P.2d 299, 304, 248 Cal. Rptr. 115, 120 (1988) (holding that "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act").

102. *See* Moyer v. Workmen's Compensation Appeals Bd., 10 Cal.3d 222, 230, 514 P.2d 1224, 1229, 110 Cal. Rptr. 144, 149 (1973) (holding that a fundamental rule of statutory construction requires that the intent of the Legislature be obtained from "every word, phrase, sentence and part of an act in pursuance of the legislative purpose"); *see also In re* Lance W., 37 Cal.3d 873, 889, 694 P.2d 744, 754, 210 Cal. Rptr. 631, 641 (1985) (holding that "[i]n construing . . . statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration").

103. *See* People v. Romero, 37 Cal. Rptr. 2d 364, 370 (1995) (observing that "[a] perceived failure of the criminal justice system to deal effectively with recidivism is evident from the initiative proponents' arguments which refer to the 'judicial system's revolving door' and 'soft-on-crime judges, politicians, defense lawyers and probation officers'"(citations omitted)).

104. 37 Cal. Rptr. 2d 364 (1995).

105. *Id.* at 375.

106. *Id.* at 375; *see* CAL. PENAL CODE § 667(b) (West Supp. 1995) (setting forth the legislative purpose behind Three Strikes in language identical to that found in the ballot pamphlet preamble of Proposition 184); *see also California Ballot Pamphlet*, Nov. 8, 1994 California General Election, at 64 (copy on file with the *Pacific Law Journal*) (stating the legislative intent behind Proposition 184).

offenses on their own volition and not only on the prosecutor's motion.[107] However, this argument was rejected by *Romero* which held that Three Strikes constrains rather than augments prosecutorial discretion and does not further remove any power from the court which is delimited by California Penal Code section 1385 and not section 667.[108]

Appellate judges have occasionally refused to follow Three Strikes for no other reason than because their consciences have so dictated. However, such refusals have, so far, come in the form of denials of writs of mandate, without the force of precedent.[109] One such case involving a refusal to overturn a Sonoma County Judge's grant of probation in contravention of Three Strikes drew a copious dissent from Justice Paul Hearle of the First District Court of Appeal that may ultimately carry more precedential value than the unpublished opinion of the majority.[110]

C. Other Three Strikes Laws

California's AB 971 and Proposition 184 are regarded as the toughest versions of three strikes legislation in the country.[111] Still, the growing national preoccupation with crime has resulted in efforts by state governments across the nation to enact their own brands of repeat-offender statutes. Sixteen states are currently considering permutations of Three Strikes, while several besides California have already enacted recidivist statutes of their own.[112]

Two such statutes, ranked on a level with California's Three Strikes in terms of strictness, are Washington's repeat offender statute and Texas' recidivist statute, both of which are similar to and predate California's three strikes law. Enacted in November of 1993 as the Persistent Offender Accountability Act, Washington's law provides for mandatory life sentences without possibility of

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107. *Romero*, 37 Cal. Rptr. 2d at 372.

108. *Id.* at 373-74.

109. *See, e.g.*, Philip Carrizosa, *"Three Strikes" Is Loser, and Convict Gets Probation*, S.F. DAILY J., Dec. 19, 1994, at 1 (citing the unpublished order in *People v. Sup. Ct.*, A067465, where Justice Paul Haerle of the First District Court of Appeal in San Francisco refused, without opinion, to grant a writ of mandate to overturn a lower court decision by Judge Lawrence G. Antolini, who refused to abide by the sentencing mandates of Three Strikes).

110. *See* Bill Kisliuk, *Losing Judge Draws Blueprint for Blocking "3 Strikes" Challenges*, THE RECORDER, Dec. 19, 1994, at 1 (reporting the case of *People v. Superior Ct.* wherein Justice Hearle remarked in dissent that "our trial courts must be guided by what the Legislature says in these circumstances . . . . Those who may want to change that must understand that any change must come via the political process and not via a case-by-case evisceration of the Three Strikes law").

111. Jeff Brown, *Politics and Plea Bargaining: Victims' Rights in California*, 45 HASTINGS L.J. 697, 697 n.1 (1994) (book review); Steven A. Capps, *Jury's Out on Effect Three Strikes will Have*, S.F. EXAM., Mar. 8, 1994, at A1.

112. Braun & Pasternak, *supra* note 16, at A1; *see id.* at A17 (reporting that 16 states are considering laws that would mandate life in prison on third felony convictions including Alaska, California, Connecticut, Delaware, Georgia, Massachusetts, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Virginia, and Wisconsin).

parole for third-time serious offenders.[113] Considered, along with California's Three Strikes, to be one of the strictest habitual offender statutes in the country, Washington's law still requires that the final strike be a serious felony rather than merely a felony, as with Three Strikes.[114] Similarly, Texas has had, since 1974, its own recidivist statute that mandates sentences from twenty-five years to life in prison for twice-convicted prior felons.[115] However, as with Washington's law, the Texas statute currently requires violent third offenses, leaving its effect still more lenient than California's law.[116] In addition, Texas' statute allows judicial discretion whereby trial judges may sentence defendants charged with third-degree felonies to lesser punishments.[117] So, although other states have also passed similar three strikes laws, they nevertheless fail to match the severity of California's Three Strikes.

Although the three strikes laws in California and Washington are still in their infancy, Texas has had a chance to accumulate experience with its recidivist statute and has found it to be effective in reducing property crimes but ineffective in reducing the incidence of violent crime.[118] However, Texas' law has, since its enactment, been diluted by early release programs, good-time credits, and other sentence reductions that may account for its lack of effectiveness.[119] Caps on inmate populations following enactment of the Texas law also caused it to fall into

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113. WASH. REV. CODE ANN. §§ 9.94A.030, 9.94A.120 (West Supp. 1994).

114. WASH. INITIATIVE MEASURE 593 §§ 1-8 (West 1993).

115. TEX. PENAL CODE ANN. § 12.42(d) (West 1994).

116. *Id.* § 12.35(c) (West 1994). Texas' three strikes law was significantly amended in 1983 to its present form requiring that third strikes be committed with a deadly weapon. *Id.*

117. *Id.* § 12.44(a)-(b) (West 1994); *see* State v. Allen, 865 S.W.2d 472, 473-74 (Tex. Crim. App. 1993) (holding that a trial judge may sentence a defendant charged with a third-degree felony to a lesser punishment, according to the gravity and circumstances of the charged offense, but noting that Texas Penal Code § 12.42 provides that a habitual felon shall be sentenced to life imprisonment after the state proves that the defendant has been convicted of two prior felonies); *see also Mandatory Statutes/Habitual Felons/Misdemeanor Punishment/Penal Code § 12.42(d)*, TEX. LAW., Dec. 6, 1993, at 21 (summarizing the arguments of counsel in *State v. Allen*, and noting that, although Court of Criminal Appeals held that the trial court has discretion to impose reduced sentences, the court accepted the State's argument that the trial court may not sentence the defendant to a misdemeanor punishment where the State had proved the prior felony convictions). The Texas Court of Criminal Appeals has also held that such a sentence under Texas Penal Code § 12.42(d) does not violate the defendant's constitutional protection against cruel and unusual punishment, noting that, although the Eighth and Fourteenth Amendments to the Constitution require the punishment to be proportionate to the offense, a disproportionate sentence will stand, provided that the sentence is not "grossly disproportionate." Lackey v. State, 881 S.W.2d 418, 421-22 (Tex. Crim. App. 1994); Rummell v. Estelle, 445 U.S. 263, 264-65 (1980); *see infra* notes 139-162 and accompanying text (discussing the proportionality argument as it pertains to three strikes laws).

118. Pamela J. Podger, *Texas Grappling with "Three Strikes,"* SACRAMENTO BEE, Mar. 14, 1994, at A3.

119. TEX. PENAL CODE ANN. § 12.44 (West 1994); *see* Podger, *supra* note 118, at A3 (describing amendments to Texas three strikes law); *see also* Note: *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 531-32 (1982) (citing studies that suggest one reason the Texas law failed where the California law might not is that incapacitation effects in Texas are more expensive due the fact that high-rate offenders are less active in that state, thus requiring, for instance, a 30% increase in the incarceration rate for robbers in order to achieve a 10% reduction in the robbery rate).

disuse, thus curtailing its application before it had the chance for long-term implementation.[120]

The federal government attempted to join the States with its own measures aimed primarily at violent felons.[121] These bills, known as the Crime Prevention and Criminal Justice Reform Act of 1993 and the Violent Crime and Law Enforcement Act of 1993, like those that resulted in the Texas and Washington statutes, fell short of imposing life sentences for nonviolent and non-serious three-time felons. These federal three strikes bills provided mandatory life sentences only where the defendant had committed a crime of violence after having accumulated one or more prior convictions for crimes of violence, felony drug offenses, or a combination of the two.[122] In addition, the federal measures were further limited by their application only to third-time federal offenses.[123] Thus, the federal three strikes laws again fell short of the severe sanctions imposed in California and were ultimately tabled in 1994.

IV. LEGAL RAMIFICATIONS

Public anger and fear over increasing violent crime in California has clearly resulted in a demand for anti-crime legislation such as Three Strikes. The amended version of Penal Code section 667, along with section 1170.12, added

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120. Podger, *supra* note 118, at A3.

121. H.R. 3315, 103d Cong., 2d Sess. §§ 621-642 (1994); H.R. 3355, 103d Cong., 2d Sess. §§ 2408, 5111 (1994); *see* Linda L. Ammons, *Discretionary Justice: a Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 2, 44 n.164 (1994) (describing H.R. 3355 as a compilation of 34 anti-crime bills, introduced or approved by the House of Representatives during 1994, whose three strikes provisions mandate life in prison for any person who is convicted of a third violent crime when the last crime was a federal crime).

122. H.R. 3315, 103d Cong., 2d Sess. §§ 621-642 (1994); *see Hearings on H.R. 3315 and H.R. 3355 Before the Subcomm. on Crime and Crim. Just. of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. 8 (1994) (statement of Randolph N. Stone, Chairperson of the Criminal Justice Section on behalf of the American Bar Association) (discussing the ramifications of H.R. 3315 and 3355). *See generally* Holly Idelson, *Highlights of House Crime Bill*, CONG. Q., Apr. 23, 1994, at 1002 (outlining the provisions of the federal three strikes law).

123. H.R. 3315, 103d Cong., 2d Sess. §§ 621-642 (1994); *see Hearings on H.R. 3315 and H.R. 3355 Before the Subcomm. on Crime and Crim. Just. of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. 8 (1994) (statement of Randolph N. Stone, Chairperson of the Criminal Justice Section on behalf of the American Bar Association) (discussing the ramifications of H.R. 3315 and 3355); John Kolbe, *Crime Bill Flip-flop Is Politics as Usual*, PHOENIX GAZETTE, Aug. 24, 1994, at B7 (opining that the federal three strikes law was concerned more with political consensus-building than with addressing the problem of recidivism); *see also* Harris Fawell, Press Release on the House Crime Control Conference Report, Aug. 22, 1994, *available in* LEXIS, News Library, Curnws File (observing that the federal crime bill contains a "watered-down version of the so-called 'Three Strikes and You're Out' provision" and imposes mandatory life imprisonment without parole for criminals convicted of three violent crimes or serious drug offenses). Fawell also opines that, at first blush, the bill seems to contain a strong crime control provision, but that, as reported by the Conference Committee, the provision is "weak and ineffective." *Id.* The fundamental flaw, according to Fawell, is that the third strike must be a federal crime or drug offense and, "[s]ince 95% of violent crimes fall under state and local statutes, few criminals will be affected by this provision." *Id.*

by Proposition 184, were proposed to answer this demand.[124] Yet much of the public debate regarding these anti-recidivist laws still focuses on the question of whether this implementation of Three Strikes is the right answer or whether it goes too far, perhaps without even being able to achieve its intended results.

A. The Theory Underlying Three Strikes

Recidivism, and its indication of an offender's tendency to repeat criminal activity, poses a manifest danger to society.[125] A court's consideration of this proclivity in sentencing is consistent with the social-protection function of criminal law, which seeks to guard the public from criminal activity by identifying repeat offenders and incapacitating them before the damage is done rather than after society has been further victimized.[126] This function is distinct from other justifications for punishment such as retribution,[127] deterrence,[128] or reform,[129] and has gained momentum in the face of eroding public confidence in the ability of correctional programs to rehabilitate offenders.[130]

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124. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 971, at 2 (Jan. 6, 1994); *see* Otten, *supra* note 34 (reporting on a special state legislative session ordered by California Governor Pete Wilson on the subject of stricter sentences for violent criminals and citing statements by Wilson referring to the kidnapping and murder of Polly Klaas in arguing for public support of anti-crime legislation); *see also supra* notes 13-18 and accompanying text (discussing public support for anti-crime legislation).

125. People v. Karsai, 131 Cal. App. 3d 224, 242, 182 Cal. Rptr. 406, 417 (1982).

126. *See* DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 64 (1978) [hereinafter DETERRENCE AND INCAPACITATION] (asserting that incapacitation seeks to remove offenders from society, thus reducing crime by physically preventing them from committing more crimes in society); *see also id.* at 64-79 (defining incapacitation as a strategy for public protection and assessing the incapacitative effect of imprisonment); Kenneth R. Zuetel, Jr., Comment, *Senate Bill 42 and the Myth of Shortened Sentences for California Offenders: The Effects of the Uniform Determinate Sentencing Act*, 14 SAN DIEGO L. REV. 1176, 1182 (1977) (discussing the notion of incapacitation and its function "to protect society from the premature release of dangerous criminals"). Thus, the concern over life sentences handed down for nonviolent third offenses must be balanced against concerns such as those voiced by some county district attorneys, that failure to incapacitate a repeat offender after his or her third offense, even if nonviolent, might cost the life of an innocent person victimized during the defendant's fourth strike. *See, e.g.*, Debate, *supra* note 10 (reflecting the opinion of one Sacramento district attorney).

127. *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 137-48 (discussing retributive theory and its basis in the notion that it is right for wrongdoers to be punished, completely aside from other purposes of punishment).

128. *See* DETERRENCE AND INCAPACITATION, *supra* note 126, at 19 (noting that all theories of general deterrence are based on the notion that the imposition of sanctions on detected offenders creates a deterrent to others who might otherwise engage in similar conduct); *see also* KADISH & SCHULHOFER, *supra* note 127, at 149 (discussing specific deterrence as involving punishment that leaves particular offenders less likely to repeat their crimes and general deterrence as the same dissuasion accomplished by example through the sentences of others); *cf.* Jacqueline Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls*, in 5 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1-84 (M. Tonry & N. Morris eds., 1983) (noting that incapacitation does not involve deterrence (a modification of behavior), but rather makes it impossible to repeat the offense since the offender is incarcerated).

129. *See* KADISH & SCHULHOFER, *supra* note 127, at 153-59 (discussing the reform function of the criminal law as an attempt to modify offenders' penchant for criminal behavior).

130. *See* A. Murray, et al., *Prison Reform: Backward or Forward?*, 50 CAL. ST. B.J. 356, 361 (1975) (discussing the failure of the rehabilitative function of the California State prison system); *see also* Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1014-26 (1991) (discussing the criminal justice

Selective incapacitation is one means to further the protective goals of criminal punishment. Selective incapacitation provides individualized sentences based on predictions that particular types of offenders would commit serious offenses at a high rate if not incarcerated.[131] This method, however, suffers from many ethical and predictive problems: First, because most people would agree that punishment should be deserved and not based merely on some statistical predictor; and second, because there is no completely reliable way to predict recidivism.[132]

Three Strikes operates under the principle of collective incapacitation whereby all people convicted of designated offenses with second and third iterations receive the same sentence enhancement.[133] This method avoids some of the objections to selective incapacitation while protecting society from offenders, who are imprisoned and thus unable to commit crimes in the free community.[134] First, the notion that a punishment should be deserved is less offended by a law that takes into account a totality of circumstances which reflect a defendant's tendency to repeat felonious conduct. Second, the concern that there is no fool-proof predictor of criminal conduct remains valid, but is less compelling when faced with an actual history of recidivism and presents a more common-sense means to identify repeat offenders than other, as yet, undeveloped means of predicting criminal behavior.[135]

Statutes employing incapacitation strategies have experienced a measure of success. Although the concept has been criticized by some legal commentators citing studies that have found the crime-reduction effect of incapacitation to be a mere ten to seventeen percent, other studies indicate more favorable statistics,

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system's rejection of the rehabilitative rationale); Zuetel, *supra* note 126, at 1180-82 (citing the failure of rehabilitation as one of the reasons for California's abandonment of indeterminate sentencing); *see also infra* notes 174-177 and accompanying text (discussing the rejection of the rehabilitative rationale as a justification for discretionary sentencing). *But* see Vitiello *supra*, at 1032-37 (hypothesizing that the rehabilitative model may have been prematurely discarded in light of recent findings regarding the effectiveness of rehabilitation).

131. *See generally* Cohen, *supra* note 128, at 1-84 (discussing collective and selective incapacitation).

132. *Id.* at 1-84. *See generally* Leonard J. Long, *Rethinking Selective Incapacitation: More at Stake than Controlling Violent Crime*, 62 UMKC L. REV. 107 (1993) (analyzing the relationship between the methods to predict criminal dangerousness, the punishment decisions to incapacitate predictably dangerous offenders, and the rights of those offenders).

133. Cohen, *supra* note 128, at 1-84 (discussing the pros and cons of collective incapacitation as a strategy for crime control).

134. KADISH & SCHULHOFER, *supra* note 127, at 161.

135. A predictive method that attempts to forecast individual behavior from collective statistics suffers from the inability of those statistics to account for anything other than aggregate behavior. Whereas collective incapacitation, although perhaps being overinclusive, sentences groups of similar offenders based on group tendencies. *See* Long, *supra* note 132, at 107 (illustrating this point with a quote from Arthur Conan Doyle's Sherlock Holmes, observing that "[w]hile the individual man is an insoluble puzzle, in the aggregate he becomes a mathematical certainty. You can, for example, never foretell what any one man will do, but you can say with precision what an average number will be up to.").

with one estimating a thirty-one percent reduction in violent crime and a forty-two percent reduction in burglary.[136]

Thus, because Three Strikes considers actual prior criminal convictions, it may perhaps be the best answer to the need for public protection, since the Constitution prohibits the loss of life, liberty, or property without due process of law[137] and therefore prevents the punishment of a defendant before he or she has acted, based on some as-yet undeveloped predictor of recidivist behavior. In the face of conflicting studies regarding the effect of collective incapacitation on the rate of recidivism, the need remains for some means of identifying and incarcerating repeat offenders where eighty percent of all crimes are committed by about twenty percent of the criminal population, thirty-five percent of whom, have been in prison before.[138] Three Strikes provides a middle ground by incapacitating defendants who have demonstrated a tendency toward recidivism and have not merely intended to commit but have committed repeat offenses. Thus the law, as with numerous other sentence enhancement statutes, elevates the penalty to match the totality of the circumstances surrounding the defendant's criminal behavior.

Regardless of the merits of the philosophical and legal underpinnings of Three Strikes, challenges will undoubtedly abound with regard to the law's apparent disproportionate treatment of defendants, its denial of alternative programs and term credits, its effect on control of the prison population, and its consideration of prior juvenile offenses. The remainder of Part IV will discuss these issues.

B. The Eighth Amendment and the Proportionality Argument: Prohibiting Cruel or Unusual Punishment

California's three strikes law seeks to prevent recidivism by providing an increasingly compelling deterrent for repeat offenders as they garner multiple convictions. However, one of the primary concerns over the new law is its failure to distinguish between degrees of felonious conduct in constituting a third strike. While first and second strikes must be either "serious," as defined in California Penal Code section 1192.7, or "violent," as defined in section 667.5, the law

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136. Cohen, *supra* note 128, at 1-84 (citing the results of six studies on the effects of selective incapacitation with crime-reduction figures ranging from less than 10% in two studies to between 14% and 17% in four others); KADISH & SCHULHOFER, *supra* note 127, at 161 (citing the results of a Rand Corporation study showing more favorable statistics).

137. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

138. Jill Smolowe, *...And Throw Away the Key: America's Overcrowded Prisons Have Failed as a Deterrent. Building More of Them and Imposing Longer Sentences May Only Increase the Crime Rate*, TIME, Feb. 7, 1994, at 54, 56-57.

merely requires that the third strike be a "felony."[139] This creates the possibility of a scenario such as the one frequently referred to by Marc Klaas, founder of the Polly Klaas Foundation and outspoken opponent of Three Strikes' inclusion of nonviolent third-time felons, in arguing against Proposition 184 and AB 971.[140] This hypothetical situation depicts an aging defendant who faces a felony prosecution for writing a bad check but who, as a teenager, twice stole a bicycle from someone's garage in youthful indiscretion. The 50-year-old felon then faces the possibility of a life sentence of twenty-five years to life under either Penal Code section 667 or 1170.12.[141] This scenario showcases many of the primary issues surrounding Three Strikes and will be referred to again when arguments pertaining to those issues are addressed in this Note.

The situation described above highlights the most hotly debated aspect of Three Strikes: disproportionate punishment of criminal offenders. The Eighth Amendment of the United States Constitution and Article I, section 17 of the California Constitution proscribe the infliction of cruel and unusual punishment.[142] This principle that the punishment imposed should not be greatly disproportionate to the crime committed can be found in English law dating back as far as 1215 to the Magna Charta's[143] requirement that "amercements," or fines, not be excessive.[144] English common law courts later adopted this principle as a basic tenet of English law.[145]

Proportionate sentencing serves general utilitarian goals designed to foster respect for the criminal justice system in society.[146] Yet the proportionality principle

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139. CAL. PENAL CODE § 667(d)(1)-(3) (West Supp. 1995); *see id.* (requiring that first and second felony convictions constitute serious or violent felonies but remaining silent regarding the nature of the third felony conviction); *see also id.* § 1170.12(b)(1)-(3) (West Supp. 1995) (requiring, as with section 667, that prior felonies be serious or violent offenses but making no such requirement for current felonies); *supra* note 62 (listing felonies defined by statute to constitute "serious" felonies); *supra* note 63 (listing felonies defined by statute to constitute "violent" felonies).

140. Marc Klaas opposed both AB 971 and Proposition 184 because of their inclusion of nonviolent third felonies and their predicted financial drain on California's economy. *Prop. 184: Why Even Polly Klaas' Father Says It's a Big Mistake*, L.A. TIMES, Oct. 24, 1994, at B8.

141. Marc Klaas, *Argument Against Proposition 184*, 1994 California Ballot Pamphlet, Nov. 8, 1994 (copy on file with the *Pacific Law Journal*).

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

143. *See* Magna Charta, 25 Edw., ch. 17 (1297); *see id.* (codifying Magna Charta, chs. 20-25 (1215), reprinted in 1 Statutes of the Realm 116 (London 1810)).

144. *See* Barton C. Legum, *"Down the Road Toward Human Decency:" Eighth Amendment Proportionality Analysis and* Solem v. Helm, 18 GA. L. REV. 109, 124-26 (1983) (discussing the development, in American jurisprudence, of the principle that the punishment must fit the crime).

145. *Id.* at 126 (discussing the evolution of the proportionality debate in the context of Solem v. Helm, 463 U.S. 277 (1983)).

146. Where the legal gradation of crimes diverges from the dictates of commonsense scale, there is a risk of resulting contempt for the law. *See* Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 ARIZ. L. REV. 25, 26 (1985) (observing that the proportionality doctrine "prohibits a punishment more severe than that deserved by the criminal for the harm caused and the moral blameworthiness exhibited"). Thus, disproportionate sentencing may lead people to question their generally held beliefs regarding what constitutes a serious or minor offense. *See also* A. C. Ewing, *A Study of Punishment II:*

is primarily concerned with retribution and seeks to ensure that criminals receive the "just deserts" of their crimes.[147] Thus, the retributive rationale would reason that, once a defendant has been convicted of a crime, justice demands that he or she be punished, but with a severity no greater than what the defendant "deserves." This type of proportionate sentencing punishes defendants under a more narrow rubric, insuring that defendants are treated on an individual basis rather according to purely utilitarian purposes.[148]

Since the California Supreme Court's decision in *In re Lynch*,[149] lower state courts have repeatedly held that statutory penalties that are grossly excessive in relation to the crime violate California's constitutional prohibition against "cruel or unusual punishment."[150] Thus, those opposed to Three Strikes cite cases similar to that of the 50-year-old man who wrote a bad check as examples of penalties —in this case, twenty-five years to life—that are so disproportionate to the crime that they offend the constitutional proscription of cruel or unusual punishment.[151]

Although the defendant must have committed two prior serious or violent felonies to qualify for Three Strikes' most severe sentence enhancement, the fact remains that it is the current felony for which the defendant is being sentenced and that a twenty-five-years-to-life sentence, if examined in isolation, would certainly be grossly disproportionate to the crime of passing a bad check.[152]

Punishment as Viewed by the Philosopher, 21 CANADIAN B. REV. 102, 115 (1943) (arguing that to punish a lesser crime more severely than a greater would be "either to suggest to men's minds that the former was worse when it was not, or, if they could not accept this, to bring the penal law in some degree into discredit or ridicule"). Ewing also suggests that disproportionate penalties can make the criminal appear to be the victim of cruel laws and thus detract attention away from the criminal act and toward the cruelty of the punishment. *Id.*

147. Allyn G. Heald, *Criminal Law:* United States v. Gonzalez: *In Search of a Meaningful Proportionality Principle*, 58 BROOK. L. REV. 455, 456 (1992).

148. *Id.* at 456.

149. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

150. *In re* Lynch, 8 Cal. 3d 410, 424, 503 P.2d 921, 930, 105 Cal. Rptr. 217, 226 (1972); *see id.* (holding that a punishment may violate article I, section 6, of the California Constitution, even though its method is not cruel or unusual, if it is so disproportionate to the crime for which it is inflicted that it "shocks the conscience and offends fundamental notions of human dignity").

151. *See, e.g.*, Colvin & Rohrlich, *supra* note 88, at A1 (recounting the case of a shoplifter who faced a third-strike after being caught with a few dollars' worth of purloined pancake mix, syrup, sausages, and Kool-Aid); *How "Three Strikes" Law Is Used*, *supra* note 72, at A7 (citing, as an example of discretionary prosecution under Three Strikes, the filing of a third-strike felony against a defendant with two prior robbery convictions who allegedly stole a piece of pizza from two children having lunch on a Redondo Beach pier).

152. *See In re* Foss, 10 Cal. 3d 910, 919, 519 P.2d 1073, 1078, 112 Cal. Rptr. 649, 654 (1974) (holding that, in determining whether a punishment is so disproportionate to the offense as to be cruel or unusual, the court must consider factors relating to the current offense, such as the danger to society posed by the offense and the offender); *see also* Wayne S. Grajewski, *Prohibiting Cruel or Unusual Punishment: California's Requirement of Proportionate Sentencing After* Wingo *and* Rodriguez, 10 U.S.F. L. REV. 524, 530-31 (1976) (discussing the effect of *In re Lynch* and *In re Foss* on California's then-indeterminate sentencing system and stating that, under *Wingo*, courts must examine the facts of individual cases to determine whether the particular punishment therein is disproportionate). Although the hypothetical case of the bad check writer does not involve the imposition of a maximum sentence under California's prior indeterminate sentencing scheme, it does involve a sentence enhancement that would normally be imposed for an aggravated offense, but is instead being inflicted for non-aggravated conduct. However, similar punishments have been determined to be

Indeed, the three-pronged test of proportionality of punishment first used by the United States Supreme Court in *Solem v. Helm*[153] would lead to the conclusion that such a punishment was disproportionate. The *Solem* test involves comparison of the harshness of the penalty with the gravity of the crime, comparison of the penalty with corresponding punishments for the same crime in other jurisdictions, and comparison of the penalty with those for more serious crimes in the same jurisdiction.[154] Comparing the gravity of writing a bad check with the severity of a twenty-five-years-to-life sentence in state prison would lead most reasonable people to find disproportionality. Furthermore, the punishment for passing a bad check, both in California and in other jurisdictions, would be far less than twenty-five years to life if the current felony alone was considered.[155] Comparison with more serious felonies would show that the current punishment certainly exceeds those for more serious crimes, thus suggesting disproportionality.[156]

However, any proportionality examination must take into account the defendant's prior offenses, a consideration that has become an undeniable part of sentencing law. According to the California Supreme Court's decision in the case of *People v. Dillon*,[157] the trial judge must look beyond the *Solem* factors in determining whether a sentence constitutes cruel or unusual punishment and must additionally look at the totality of the circumstances with respect to both the offense and the offender.[158] Moreover, *People v. Wingo*[159] held that any proportionality analysis must depend on the particular facts of each individual case.[160] Thus, as part of the totality of the circumstances surrounding the defendant, the court may consider recidivism in determining whether the particular punishment is disproportionate to the offense committed.

The California courts appear to have moved beyond the simple pronouncement of *In re Lynch*[161] and have expressed a willingness to consider factors in

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proportionate under California's present determinate sentencing system. *See, e.g.*, People v. Curry, 76 Cal. App. 3d 181, 187, 142 Cal. Rptr. 649, 652 (1977) (holding that punishment, under a state statute providing that convictions were misdemeanors but second convictions were felonies, did not constitute cruel or unusual punishment in violation of the Eighth Amendment); *infra* note 162 and accompanying text.

153. 463 U.S. 277 (1983).

154. Solem v. Helm, 463 U.S. 277, 305 (1983).

155. *See, e.g.*, CAL. PENAL CODE § 476a(a) (West Supp. 1995) (penalizing with a maximum term of one year in the state prison or county jail, one who, with the requisite knowledge and intent, passes a bad check); *id.* § 476a(b) (restricting imprisonment to the county jail where the total amount of the checks does not exceed $200).

156. *See, e.g., id.* § 264(a) (West Supp. 1995) (providing that the crime of rape is punishable by a three-, six-, or eight-year term of imprisonment); *see also* Grajewski, *supra* note 152, at 534 (discussing examples of disproportionate consideration of single sentences).

157. 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).

158. People v. Dillon, 34 Cal. 3d 441, 479, 668 P.2d 697, 720-21, 194 Cal. Rptr. 390, 413-14 (1983); *see id.* (considering in its analysis of proportionality, in addition to the nature of the crime, the characteristics of the offender—specifically the defendant's individual culpability, age, prior criminal record, personal characteristics, and state of mind).

159. 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975).

160. People v. Wingo, 14 Cal. 3d 169, 177, 534 P.2d 1001, 1008, 121 Cal. Rptr. 97, 104 (1975).

161. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

addition to the current offense. The Second District of the California Court of Appeal has held, in a case very similar to that of the hypothetical check bouncer, that the Legislature can provide for greatly enhanced penalties short of the death sentence based on circumstances not currently before the court.[162] If Three Strikes fails, it will not be from a sudden Eighth Amendment challenge but more likely from gradual erosion such as judicial refusal to enforce the law or from the inability of the criminal justice system to accommodate the added financial burdens brought about by the law.

C. Three Strikes' Channeling Function: Denial of Alternative Programs and Term Credits

California Penal Code sections 667 and 1170.12 channel convicted third-strike felons directly to state prison and eliminate the possibility of sentencing offenders to alternative programs or other facilities.[163] Both laws specifically prohibit probation and suspended sentences for second and third strikes and ignore the length of time between the prior felony conviction and the current conviction for the purpose of imposing sentences.[164] Three Strikes also expressly prohibits commitment to any facility other than the state prison, including eligibility for commitment to the California Rehabilitation Center.[165] Yet this channeling function, diverting felons past alternative programs directly to prison, dismisses the value of judicial discretion in determining a punishment suitable for each individual defendant as well as the rehabilitative effect of state programs.

Judicial sentencing discretion has long been considered an integral part of American criminal law.[166] Thus, the roles of legally-bound agents, such as police and trial judges, have been combined with those of discretionary agents, such as prison officials, parole board members, and sentencing judges, in an effort to address society's desires for both social control and protection of the rights of the accused.[167] In order to individualize punishment, statutes have employed dis

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162. People v. Curry, 76 Cal. App. 3d 181, 187, 142 Cal. Rptr. 649, 652 (1977) (holding that punishment, under a state statute providing that first convictions were misdemeanors but second convictions were felonies, did not constitute cruel or unusual punishment in violation of the Eighth Amendment). The court reasoned that this enhancement did not constitute cruel or unusual punishment because: (1) There was nothing prohibiting the Legislature from imposing penalties of less than life in prison for repeated acts of public indecency, and (2) the penalty imposed did not constitute extreme penalization). *Id.*

163. CAL. PENAL CODE § 667(c)(1)-(4) (West Supp. 1995); *id.* § 1170.12(a)(1)-(4) (West Supp. 1995).

164. *Id.* § 667(c)(2)-(3); *id.* § 1170.12(a)(2)-(3) (West Supp. 1995).

165. *Id.* § 667(c)(4) (West Supp. 1995); *id.* § 1170.12(a)(4) (West Supp. 1995); *see* CAL. WELF. & INST. CODE §§ 3050-3054 (West 1984 & Supp. 1995) (containing provisions for involuntary commitment of persons convicted of crimes and establishing the California Rehabilitation Center).

166. *See* Larry I. Palmer, *The Role of Appellate Courts in Mandatory Sentencing Schemes*, 26 UCLA L. REV. 753, 755-58 (1979) (discussing four assumptions underlying American criminal law in the context of discretion in sentencing).

167. *Id.* at 753-54. The labels "legally-bound" and "free" or "discretionary" are somewhat misleading since both types of actors are, in a sense, legally bound and also exercise some degree of discretion. Still, the terms are used in current legal literature to distinguish between agents exercising different levels of discretion

cretionary factors in sentencing, giving judges broad discretion to tailor the sentence to the individual defendant.[168]

Some commentators have justified the use of discretionary free agents[169] to individualize punishment as necessary to achieve the goals of reformation and rehabilitation.[170] This argument states that any imposition of limits on the discretion of sentencing judges must contemplate multiple levels of discretion with great latitude for departure from those limits in the interest of justice.[171] Without opportunity for the exercise of discretion, statutorily imposed mandatory sentencing guidelines such as those in Three Strikes have often been considered unjust and have been nullified or ignored by juries, judges, and prosecutors.[172]

Despite these arguments, legislatures and voters have enacted mandatory sentencing schemes and other limits on the discretion of sentencing authorities to provide a greater deterrent to felonious conduct for those who have demonstrated a resistance to rehabilitative attempts.[173] Thus, notwithstanding concerns over removing discretion from the hands of judges, public dissatisfaction, such as that prompting enactment of AB 971, has led to the adoption of sentencing guidelines and mandatory prison terms such as Three Strikes.

Perhaps the most reasonable explanation for this apparent disregard for the philosophical justifications underlying discretionary sentencing lies in the public's rejection of the rehabilitative rationale for incarceration.[174] This rejection is mirrored in a statement by a repeat felon who described jail as a place where "[y]ou get healthy, you sleep good, you eat good, you get cable TV . . . . They don't rehab you at all. They don't teach you anything . . . so these guys come out and do the same thing all over again."[175] Some critics of rehabilitation maintain that conditions in California prisons make self-rehabilitation practically impos-

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in the criminal justice system.

168. Larry I. Palmer, *A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing*, 62 Geo. L.J. 1, 1-6 (1973) [hereinafter Criminal Dispositions].

169. *See supra* note 167 and accompanying text (defining "discretionary" or "free" agents in the criminal justice context).

170. Criminal Dispositions, *supra* note 168, at 3-4.

171. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1683 (1992).

172. *Id.* at 1683. *See generally* Milton Heumann & Lance Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 AM. CRIM. L. REV. 343 (1983) (discussing instances where judges, juries, or prosecutors have nullified oppressive laws by ignoring them in deliberations or sentencing, in order to avoid imposing disproportionate penalties).

173. *See supra* notes 111-123 and accompanying text (listing other mandatory sentencing schemes). California's movement from an indeterminate to a determinate sentencing scheme in 1976 is one example of a beginning trend toward restricted discretion. Zuetel, *supra* note 126, at 1178-86; *see id.* (discussing California's history of indeterminate sentencing and the rationale for its adoption of determinate sentencing). Besides serving to discourage criminal behavior, determinate sentencing has been adopted to provide for greater uniformity of sentencing and to provide greater predictability to inmates regarding the lengths of their terms. *See generally* Palmer, *supra* note 166, at 753-54 (1979) (describing the value of uniform sentencing to alleviate inmate frustration).

174. Smolowe, *supra* note 138, at 58.

175. *Id.* at 58.

sible.[176] Therefore, just as the state's old indeterminate sentencing scheme provided a deterrent to prisoners who became discouraged by the unpredictability of discretionary agents, critics opine that continued judicial discretion and rehabilitative sentencing do nothing to address public demand for reduction in habitual criminal conduct.[177]

Critics of indeterminate sentencing have argued that public safety should be the primary concern and that, since there is no reliable test by which to predict a prisoner's potential danger to society, the prison system should err on the side of confinement.[178] Thus, a serious doubt about the efficacy of alternative programs translates to a likelihood of the injury and death of innocent people who might have been otherwise protected had the offender been imprisoned and retained under an enhanced sentencing scheme.

Regardless of the scholarly arguments for judicial discretion and those expounding the benefits of rehabilitation, people in California as well as the rest of the country have registered their dissatisfaction with the status quo, with seventy-two percent of California voters favoring Three Strikes and eighty-one percent of all Americans in favor of laws like Three Strikes that require enhanced prison terms for anyone convicted of three serious crimes.[179]

D. The Effect of Increased Sentence Duration and Good-Time Credits on Recidivism and Prisoner Control

Three Strikes, in addition to providing virtually certain imprisonment for recidivist serious or violent felons, significantly increases the duration of sentences for repeat offenders.[180] One hypothetical scenario involves a defendant with one prior conviction for residential burglary who is subsequently convicted of a similar crime. Assuming that the offender receives a typical prison sentence for the current offense, additional prison sentences for the prior offense, and the maximum number of credits for participation in work or education programs, a

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176. Zuetel, *supra* note 126, at 1181 (arguing that the poor living conditions in California prisons cause inmates to abandon self-rehabilitative efforts in favor of more short-sighted but necessary issues of survival).

177. *Id.* at 1181 n.37.

178. SAMUEL HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME 313-14 (1967); Joshua Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 443 (1974); Robert Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161, 1164-73 (1974); Eugene Steadman & Anthony Cocozza, *We Can't Predict Who is Dangerous*, PSYCH. TODAY, Jan. 1975, at 32. One author observed that this preference for confinement does, in fact, occur and reasoned that, due to society's inability to predict dangerousness, we tend to overemphasize an offender's potential threat and impose longer sentences). Sue Titus Reid, *A Rebuttal to the Attack on the Indeterminate Sentence*, 51 WASH. L. REV. 565, 573-82 (1976).

179. Morain & Ellis, *supra* note 9, at A3; *see* Lacayo, *supra* note 15, at 53 (citing the results of a Yankelovich Partners Inc. nationwide telephone poll of 1000 adult Americans taken for TIME/CNN between January 17 and 18, 1994, and showing 81% public support for bills like AB 971); *see also Initiative or No Initiative, "Three Strikes" Is the Law in California*, *supra* note 27, at 3 (citing pre-election polls that indicated over 80% support for Proposition 184).

180. *See supra* notes 61-65 and accompanying text.

4.5-year sentence under the Penal Code prior to enactment of Three Strikes would become a 10.4-year sentence under current law.[181] An even more dramatic example shows a two-year sentence becoming a twenty-five-years-to-life sentence for a defendant, with two prior serious or violent felonies, convicted of receiving stolen property.[182] Thus, in keeping with the deterrence goals of Three Strikes, recidivist serious or violent felons will receive both certain and augmented penalties for second and subsequent offenses.

While these exacerbated penalties are designed to combat recidivism by acting as deterrents to those who would commit multiple felonies, some legal scholars and criminologists argue that no evidence has been found to suggest that longer sentences deter crime.[183] While a minority argues that increased severity of punishment has no deterrent effect, most critics suggest that there is at least a doubtful correlation between severity of punishment and deterrence.[184] Still, other legal scholars espouse a more common-sense view, concluding that, in general, the preventive effect of criminal sanctions increases with the severity of the punishment.[185]

Three Strikes, as well as increasing the duration of prison sentences, restricts the availability of credits that reduce the offender's time in prison.[186] In addition to the argument that increased penalties do not necessarily have their expected deterrent effect, many opponents of Three Strikes, prison officials, and corrections officers argue that by limiting the discretion of parole boards, a significant tool of prisoner control is removed.[187] In the words of one Southern California corrections officer, "If there's no time off for good behavior, what can you use to bargain with an inmate?"[188] Therefore, there are legitimate fears that

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181. *Illustrations of Changes in Prison Sentencing Law: Legislative Analyst's Analysis of Proposition 184*, Nov. 8, 1994 California General Election, at 34 (copy on file with the *Pacific Law Journal*); *see id.* (calculating the hypothetical prison term as follows: Under prior law, the defendant would serve four years plus five years of sentence enhancements divided by two, assuming the maximum allowable credits for participation in work and education programs for a total of 4.5 years; under Three Strikes, the defendant would serve twice the sentence under prior law, or eight years, plus the applicable sentence enhancement of five years for a total of 13 years, less the new maximum credit of 20% resulting in a total net time of 10.4 years).

182. *Id.* at 34.

183. *See* California Assembly Committee on Criminal Procedure, PROGRESS REPORT, DETERRENT EFFECTS OF CRIMINAL SANCTIONS 7 (May 1968) (citing results of a study showing that, among adult prison inmates surveyed, over half indicated that they had not been restrained in their criminal activity because of knowledge regarding sanctions).

184. KADISH & SCHULHOFER, *supra* note 127, at 150-51.

185. *See, e.g.*, Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 965-70 (1966) (citing severe punishments in dictatorships as examples of the deterrent effect of more severe sanctions).

186. CAL. PENAL CODE § 667(c)(5) (West Supp. 1995) (limiting the total amount of credits awarded pursuant to Penal Code article 2.5 (commencing with § 2930) to one-fifth of the total term of imprisonment imposed and providing that credits cannot begin to accrue until the defendant physically enters the state prison). However, a drafting problem with AB 971 and Proposition 184 has resulted in a consensus that the prohibition on accumulation of good-time credits while the defendant is in jail awaiting trial is ineffective. Green, *supra* note 12, at A3; Debate, *supra* note 10.

187. Joe Domanick, *Who's Guarding the Guards*, L.A. WKLY., Sept. 2, 1994, at 20, 24-25.

188. *Id.* at 24-25.

California's prisons may become engorged with unruly inmates believing they have nothing to lose.

While it would indeed seem logical that the ability to control the prison population would be hindered by removing incentives such as good-time credits, psychologists have proposed that a large proportion of prison violence may be born from frustration over indefinite sentences and review boards perceived to be capricious.[189] In fact, according to many criminology experts, determinate sentencing laws with longer mandatory prison terms result in an aging and more easily domitable prison population.[190] This would seem to portray a much different scenario than that depicted by opponents of Three Strikes and, instead, forecast a less agitated and energetic group of prisoners.

Nevertheless, what may be a positive factor for prisoner control becomes negative when limited prison resources are used to warehouse aged and presumably benign criminals who, even if they had the inclination, may no longer be able to pose a threat to society. In addition, many of these prisoners may have been incarcerated for nonviolent or non-serious felony convictions, perpetuating the image of prisons full of aging and harmless offenders, in a world where more dangerous criminals go free. Thus it may be argued that public funds could be more efficiently allocated by releasing some aged criminals to make room for others in the prime of their violent tendencies.

This argument seems based, however, on an entirely economic analysis and disregards the value of taking whatever steps are necessary to remove violent criminals from the streets. In other words, rather than releasing aging felons to make room for new ones, it may be even more desirable to build more prisons to house them all. While the criminal adjudication process does, through plea bargaining, account for other factors such as overcrowded dockets and overly burdened prosecutorial resources, the release of felons should not be based entirely on considerations of prison conditions. Certainly it may be argued that a mandatory sentencing scheme which reduces the ability of prison administrators to shorten sentences effectively reduces the number of cells available for more deserving occupants. Yet this argument ignores the value of incapacitating recidivists who have a proven record of criminal resilience and will, presumably, continue to commit crimes if given the opportunity.

So, at least in the eyes of California voters and legislators, the argument for incapacitation outweighs those for rehabilitation and prisoner control. Perhaps the

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189. *See* Murray, *supra* note 130, at 361 (describing prisoner attitudes at Folsom, San Quentin, Vacaville, and Soledad of lost incentive for self-rehabilitation due to uncertainty and apparently pointless parole hearings).

190. *See* Jonathan Turley et al., Project for Older Prisoners: Report to the State of New York, at 8-9 (unpublished report, on file with the *Pacific Law Journal*) (asserting that, as inmates grow older, the cost of their maintenance within the prison system dramatically increases, while the risk they pose to society decreases).

construction of more prison facilities, while tremendously costly, is a burden to be willingly borne by citizens increasingly fearful of rampant crime.

E. The Use of Juvenile Court Records in Fixing Sentences in Subsequent Adult Criminal Proceedings

AB 971 has been criticized for its use of prior juvenile adjudications to constitute "strikes" that may result in sentence enhancements under the statute. California Penal Code section 667, under the amendments of AB 971, allows the use of prior felonies for sentence enhancements regardless of whether those felonies and their concomitant sentences took place while the defendant was a minor.[191] This presents a potential problem due to the nature of a juvenile proceeding, which differs from the trial of an adult criminal defendant.

The Fourteenth Amendment of the United States Constitution prohibits any state from depriving persons of life, liberty, or property without due process of law.[192] Procedural due process has been held to include the right to a jury, the right to counsel, and the right of confrontation in state criminal proceedings.[193] Yet juvenile proceedings have typically been procedurally informal with individualized, offender-oriented dispositions aimed more toward the rehabilitative function of the criminal law than toward other goals, such as retribution, incapacitation, or deterrence.[194] Juvenile proceedings, in addition to having fewer formal procedures, have almost universally excluded juries and lawyers.[195]

Still, there can be no doubt that juveniles do have some due process rights.[196] In *In re Gault*,[197] the United States Supreme Court held that due process required notice of charges, the right to counsel, the privilege against self-incrimination,

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191. CAL. PENAL CODE § 667(d)(3) (West Supp. 1995); *see id.* (allowing the use of prior juvenile offenses for sentence enhancement if: (a) The juvenile was at least 16 years old at the time the prior offense was committed; (b) the prior offense was one of the enumerated offenses of Welfare and Institutions Code § 707(b)(1)-(2) as a felony; (c) it was found by the court to be "fit and proper" to deal with the juvenile under juvenile law; and (d) the juvenile was adjudicated a ward of the juvenile court because of an offense listed in Welfare and Institutions Code § 707(b) in accordance with Welfare and Institutions Code § 602).

192. U.S. CONST. amend. XIV.

193. *See* Scott v. Illinois, 440 U.S. 367 (1979) (holding that the Sixth and Fourteenth Amendments guarantee the right of an indigent defendant to state-provided counsel before he is sentenced to imprisonment); Manson v. Brathwaite, 432 U.S. 98 (1977) (applying the Sixth and Fourteenth Amendments to guarantee the right of confrontation); Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that no person may be imprisoned without first having had the opportunity of representation as granted by the Sixth Amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that the application of the Fourteenth Amendment to the states incorporates the notion of trial by jury).

194. Barry C. Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal,"* 65 MINN. L. REV. 167, 170 (1981).

195. Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. 1185, 1192 (1989).

196. See *In re* Gault, 387 U.S. 1, 10 (1967) (citing several procedural due process rights constitutionally mandated in juvenile proceedings); *see also In re* Dennis M., 70 Cal. 2d 444, 451, 450 P.2d 296, 299, 75 Cal. Rptr. 1, 4 (1969) (outlining due process rights found in juvenile court proceedings).

197. 387 U.S. 1 (1967).

and the right to confrontation and cross-examination in a juvenile proceeding.[198] Likewise, in *In re Winship*,[199] the Court applied the "beyond a reasonable doubt" standard of proof to juvenile adjudications,[200] while in *Breed v. Jones*,[201] it extended the right to protection against double jeopardy to juvenile defendants.[202]

Even though juveniles lack certain due process rights, sentencing judges have been allowed to consider their criminal records. For instance, the Pennsylvania Superior Court, in *Commonwealth ex rel. Hendrickson v. Myers*,[203] responded to the use of the defendant's prior juvenile record in a subsequent criminal prosecution by holding that the trial judge was entitled to all of the material facts to acquaint himself with the past record of the offender in determining an appropriate penalty.[204] On review, the Pennsylvania Supreme Court held that prior juvenile convictions could not be excluded from consideration where they were to be used solely for the purpose of "imposing a fair, proper and just sentence."[205]

Appellate courts in other jurisdictions have used arguments such as those found in *People v. Williams*[206] to conclude that courts may consider prior juvenile adjudications to enhance adult sentences without violating due process. Here, the Michigan Court of Appeals found no due process violation in the trial court's consideration of the defendant's juvenile record and rejected her argument that "the juvenile justice system is separate and distinct from the criminal justice system" and that consideration of juvenile violations should thus be barred for the purpose of sentence enhancement.[207] Many federal courts have also concluded

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198. *In re* Gault, 387 U.S. at 31-58.

199. 397 U.S. 358 (1970).

200. *In re* Winship, 387 U.S. at 368.

201. 421 U.S. 519 (1975).

202. *See* Breed v. Jones, 421 U.S. 519, 531 (1975) (deciding whether the prosecution of respondent as an adult, after Juvenile Court proceedings which resulted in a finding that he had violated a criminal statute by committing what, for an adult, would have been the crime of robbery, and a subsequent finding that he was unfit for treatment as a juvenile, violated the Fifth and Fourteenth Amendments to the United States Constitution); *see also* Richard M. v. Superior Court, 4 Cal. 3d 370, 375, 482 P.2d 664, 668, 93 Cal. Rptr. 752, 756 (1971) (holding, prior to the Supreme Court's decision in *Breed*, that the protection against double jeopardy was applicable to juvenile proceedings).

203. 126 A.2d 485 (Pa. Super. Ct. 1956).

204. Commonwealth *ex rel.* Hendrickson v. Myers, 126 A.2d 485, 487 (Pa. Super. Ct. 1956).

205. Commonwealth *ex rel.* Hendrickson v. Myers, 144 A.2d 367, 370 (Pa. 1958). *But see* Robert G. Lane, Note, *Use of Juvenile Court Records in Fixing Sentence in a Subsequent Adult Criminal Proceeding*, 32 S. CAL. L. REV. 207, 210 (1959) (noting the constitutional issue regarding the use of juvenile sentences for adult sentencing as the fact that juvenile proceedings are not penal in nature and thus juvenile defendants do not have access to constitutional and procedural safeguards present as a matter of right in adult criminal trials).

206. 382 N.W.2d 191 (Mich. Ct. App. 1985).

207. People v. Williams, 382 N.W.2d 191, 194 (Mich. Ct. App. 1985); *see also* Beaver v. State, 455 So.2d 253, 259-60 (Ala. Ct. Crim. App. 1984) (holding that the judge could consider the defendant's failure to complete juvenile probation in sentencing under the state's habitual offender statute); Walters v. State, 690 S.W.2d 122, 123 (Ark. 1985) (holding that a juvenile's prior California convictions, even if expunged, could be used in Arkansas to enhance his sentence under that state's habitual offender statute); Rivers v. State, 616 So.2d 1090, 1090 (Fl. Dist. Ct. App. 1993) (holding that juvenile convictions may be considered as prior offenses for enhancement of adult defendants' sentences); Muir v. State, 517 A.2d 1105, 1107 (Md. 1986) (holding that a juvenile conviction could be used as a prior conviction under Maryland's enhanced punishment statute); State v. Peterson, 331 N.W.2d 483, 485-86 (Minn. 1983) (holding that the defendant's adult sentence

that juvenile violations may be considered as aggravating factors in adult federal sentencing.[208] The Ninth Circuit has specifically and frequently concluded that such a use of juvenile records does not offend due process.[209]

California appellate courts have overwhelmingly held that juvenile convictions are relevant and may be considered in adult sentencing proceedings. The California Supreme Court in *People v. Cox*[210] held that evidence of two robberies committed by the defendant while a minor were admissible during sentencing in a death penalty case.[211] The Third District California Court of Appeal, in *People v. Hubbell,*[212] observed that a defendant whose juvenile record was being considered in determining an appropriate sentence was not being punished for the crime he committed as a juvenile. Rather, his juvenile record was being considered as an aggravating circumstance under California's sentencing rules.[213]

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could be increased based upon criminal adjudications of delinquency as a juvenile); Commonwealth v. Thomas, 507 A.2d 57, 61 (Pa. 1986) (holding that a juvenile theft conviction could be used to enhance punishment under an adult offense of retail theft, raising the offense from a summary offense to a misdemeanor); State v. Moore, 596 S.W.2d 841, 845 (Tenn. Ct. Crim. App. 1980) (holding that the trial court had not erred in permitting the jury to consider juvenile offenses in determining whether the defendant should be subject to the state's habitual offender statute); State v. Randle, 734 P.2d 51, 57-58 (Wash. Ct. App. 1987) (holding that a prior juvenile adjudication could be used to determine the adult sentence).

208. *See* United States v. Davis, 1995 U.S. App. LEXIS 3317, *10 (7th Cir. 1995) (deciding that the consideration of a defendant's juvenile record is important to achieving the congressional goals of federal sentencing, that it is not "unfair," and that it does not infringe on the defendant's due process rights); *see also* United States v. Holland, 26 F.3d 26, 28 (5th Cir. 1994) (ruling that the sentencing court properly considered the defendant's juvenile record in determining his criminal history score, even though juvenile adjudications were allegedly not considered to be convictions under Texas law); United States v. Pinion, 4 F.3d 941, 943-45 (11th Cir. 1993) (holding that the defendant's prior state youthful offender convictions could be used in assessing criminal history points under sentencing guidelines, and that such a conviction could serve as predicate offense to classify the defendant as career offender; the defendant was convicted and sentenced for offenses in adult court and received and served adult sentences); United States v. Baker, 961 F.2d 1390, 1392-93 (8th Cir. 1992) (deciding that the sentencing court may consider prior juvenile adjudications in the calculation of his adult sentence); United States v. Unger, 915 F.2d 759, 761-62 (1st Cir. 1990) (judging that a juvenile conviction may be used in tabulating a criminal history score under sentencing guidelines if the right to counsel was made clear and was sentiently waived); United States v. Hanley, 906 F.2d 1116, 1119-20 (6th Cir. 1990) (finding that the district court and the defendant's probation officer properly considered juvenile commitments as "confinement" in determining his criminal history category under sentencing guidelines); United States v. Bucaro, 898 F.2d 368, 372-73 (3d Cir. 1990) (deciding that the district court's increase of the defendant's sentence range based on his juvenile record did not violate due process where a Pennsylvania statute provided the defendant with notice that his juvenile record could be used for sentencing purposes after a felony conviction); United States v. Kirby, 893 F.2d 867, 868 (6th Cir. 1990) (holding that the defendant's delinquency adjudication as a minor and his commission to a state agency charged with custody of delinquent juveniles could be considered in determining his criminal history category under federal sentencing guidelines, even though, under state law, adjudication of delinquency by a juvenile court could not be deemed a conviction).

209. *See* United States v. Williams, 891 F.2d 212, 214-15 (9th Cir. 1989) (rejecting a defendant's argument that consideration of juvenile adjudications in the calculation of his adult sentence violated the Due Process Clause).

210. 53 Cal. 3d 618, 809 P.2d 351, 280 Cal. Rptr. 692 (1991).

211. People v. Cox, 53 Cal. 3d 618, 688-90, 809 P.2d 351, 392-94, 280 Cal. Rptr. 692, 742 (1991).

212. 108 Cal. App. 3d 253, 166 Cal. Rptr. 466 (1980).

213. People v. Hubbell, 108 Cal. App. 3d 253, 255, 166 Cal. Rptr. 466, 467 (1980). *Hubbell* additionally contained the following language:

[D]efendant has not cited nor have we discovered any authority holding, or implying, that con-

The Fifth District Court of Appeal in *People v. Ramos*[214] rejected the defendant's argument that his juvenile record should not have been taken into account during his adult sentencing and pointed to the California Rules of Court, which include the number and seriousness of both adult convictions and juvenile adjudications as aggravating factors.[215]

Thus, not only are juvenile proceedings increasingly taking on the characteristics of criminal trials, juvenile records are now widely considered admissible for determination of adult sentences, regardless of the extension of due process guarantees during juvenile adjudications. This makes the argument that Three Strikes considers juvenile adjudications less compelling, since they are already often used for adult sentence enhancements. In addition, the wisdom which refuses to view an offender's eighteenth birthday as a magic threshold beyond which his or her prior offenses are no longer meaningful, is sound with respect to Three Strikes and its attempts to identify recidivism.

V. ECONOMIC RAMIFICATIONS

A. Can California Afford Three Strikes?

Even if the premises underlying Three Strikes are accepted, there is a point at which reduction in crime becomes too costly for the system to bear. It is true that crime reduction is a laudable goal and that if Three Strikes achieves what it attempts, it will be praised as a success. However, it is equally true that the cost of implementation must come from some source in an economy already burdened to capacity. A study conducted by the Rand Corporation on the benefits and costs of Three Strikes estimates that state general fund allocations to the Department of Corrections must double from nine percent, in 1994, to eighteen percent by 2000, to accommodate the demands on the penal system brought about by AB 971 and Proposition 184.[216] Yet, in order for allocations to the correctional system to increase, revenues must increase proportionally or funds must be diverted from programs such as higher education, health and welfare, or other social and administrative categories. Since minimum spending for primary and secondary

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sideration of an adult offender's juvenile record violates any concept of fundamental fairness. In fact, the Arizona Supreme Court has rejected this precise contention, concluding that consideration by a sentencing court of a convicted adult offender's juvenile record does not violate due process. We agree with this conclusion.

Id. at 256.

214. 106 Cal. App. 3d 591, 165 Cal. Rptr. 179 (1980).

215. People v. Ramos, 106 Cal. App. 3d 591, 609-10, 165 Cal. Rptr. 179, 189-90 (1980); *see* CAL. RULES OF COURT Rules 405, 421, 439-41 (1991) (containing rules regarding what the sentencing courts may consider as aggravating factors).

216. PETER W. GREENWOOD ET AL., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY-SENTENCING LAW 32-33 (Rand 1994).

education is fixed by the California Constitution[217] and must be no lower than forty-six percent of general fund allocations, and since health and welfare spending cannot realistically be expected to drop below the 1994 level of thirty-five percent, higher education and miscellaneous categories must drop from their current combined level of twenty-one percent to an impossible one percent of the state's general fund budget.[218]

Estimates of the price of California's Three Strikes vary depending on the study. One prediction by the State Department of Corrections estimates that the measure will require twenty additional prisons by the year 2000 at an additional cost of $5.7 billion per year.[219] The Rand study predicts a current cost increase of $3 billion for 1994 with annual expenses totaling an additional $5.5 billion for every year thereafter.[220] Regardless of the source, it is obvious that implementation of Three Strikes will come with a significant cost to the state.

Texas' recidivist statute serves as an example of a law similar to Three Strikes that has left the state unable to withstand the additional burden on its penal system brought about by mandated life sentences for certain repeat felons.[221] The Texas statute that, unlike California's three strikes law, considered relatively minor property offenses as "strikes," helped to propel the state to the number one position in the country for prison population, a ranking that led the Legislature to revise the statute in 1983.[222] After the enactment of Texas' three strikes law, the cost of building prisons in the state rose from $64.7 million in 1974, when those items represented less than 1% of the state budget, to $3.7 billion in 1994, or 5.2% of the state budget.[223] In addition, the cost of operating Texas' prisons increased six times from $147.5 million in 1982 to $877.4 million in 1992.[224]

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217. CAL. CONST. art. XIIIB, § 2, art. XVI, § 8 (specifying minimum expenditures for K-12 education as enacted by Proposition 98).

218. GREENWOOD, *supra* note 216, at 32-36. Californians, according to one poll, appear to be unwilling to fund Three Strikes at the expense of the State's educational system. *See* Daniel M. Weintraub, *Residents Balk When Asked to Pay for "Three Strikes,"* L.A. TIMES, Apr. 2, 1994, at A1 (reporting the results of a Los Angeles Times survey of 1608 Californians showing only 22% of those surveyed willing to accept cuts in the State's higher-education budget, 72% unwilling, and 6% undecided).

219. *Initiative or No Initiative, "Three Strikes" Is the Law in California*, CAL. J. WKLY., Mar. 14, 1994, *available in* LEXIS, News Library, Curnws File; *see also* GREENWOOD, *supra* note 216, at 18 (citing the results of a California State Department of Corrections study on the cost of implementing Three Strikes).

220. GREENWOOD, *supra* note 216, at 32-36; *Bearing the Burden*, CAL. J. WKLY., Oct. 3, 1994, *available in* LEXIS, News Library, Curnws File.

221. TEX. PENAL CODE ANN. § 12.42(d) (West 1974); Cameron J. Rains, *Recidivism and the Eighth Amendment—Is the Habitual Offender Protected Against Excessive Punishment?*, 55 NOTRE DAME LAW., 1979, at 305-15.

222. Michael S. Serrill, *Prison Population Rises Again, But at a Slower Rate*, CORRECTIONS MAG., JAN. 1978, at 20-24. The current version of Texas' recidivist statute requires felony convictions involving deadly weapons or third-degree offenses. TEX. PENAL CODE ANN. § 12.42(d), 12.35(c) (West 1995)

223. Podger, *supra* note 118, at A3.

224. *Id.* at A3. Not only economic burdens on the State of Texas, but arguments that the statute offended notions of fundamental fairness, plagued the law from its enactment, leading one member of the Texas bench to predict that California's Three Strikes may ultimately fail simply because ". . . it just doesn't make sense to send someone away for life for stealing a pizza."). Personal Interview with Justice Phillip D. Hardberger, Fourth District Texas Court of Appeals (Mar. 16, 1995) (notes on file with the *Pacific Law Journal*).

As foretold by studies such as the Rand report and the experiences of other states like Texas, California has begun to feel the fiscal effects of Three Strikes. Ten months of experience under Three Strikes has, in fact, shown an increased burden on California's criminal justice system, with reports of 7400 second- and third-strike cases filed since the law's enactment in March of 1994.[225] Several California county district attorneys forecast dramatic increases in their offices' workloads, with Los Angeles predicting a 144% increase in the number of jury trials from 2410 in 1994 to 5875 in 1998, San Diego County forecasting a tripling of jury trials, and Santa Clara County expecting an increase of 200% in trials by jury.[226]

Yet, despite the hefty price tag, Californians' willingness to bear the monetary burden of Three Strikes depends on its effectiveness, with many professing a willingness to pay for a reduction in crime if such a reduction will truly result.[227] Whether Californians will ultimately refuse to bear the increased financial burden brought about by Three Strikes remains to be seen and will depend on the willingness of taxpayers to bear greater monetary burdens to achieve a safer environment.[228] Despite Californians' traditional willingness to vote for prison bond initiatives, about half of California's voters are currently willing to pay additional taxes to fund increased burdens on the prison system brought about by Three Strikes.[229]

An accurate assessment of Three Strikes costs must take into account the costs of serious and violent crime already borne by society. The Rand study estimates a reduction in serious adult crime, as a result of Three Strikes, of twenty-eight percent, representing 338,000 serious crimes prevented each year over the twenty-five years following the law's enactment.[230] Based on a breakdown of the types of crimes falling within the "serious or violent" category, Three Strikes would, for every one million dollars of added costs, prevent four rapes, eleven robberies, twenty-four aggravated assaults, twenty-two serious burglaries, seventeen minor burglaries, thirty-two motor vehicle thefts, fifty other thefts, and one arson.[231] This represents a cost of only $16,300 per serious crime prevented.

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225. *See* Hallye Jordan, *"Three Strikes" Jamming Justice System, Jails*, S. F. DLY. J., Jan. 9, 1995, at 1, 7 (quoting a statement by the State Legislative Analyst's Office); *see also* Gil Garcetti, *"Three Strikes" Is Working, But Who's Going to Pay the Bill?*, L.A. TIMES, Aug. 5, 1994, at B7 (reporting that 6000 three strikes cases were filed in Los Angeles County alone, during the five months following passage of AB 971).

226. Jordan, *supra* note 225, at 1, 7.

227. John G. Schmidt Jr., *"Three Strikes" Proposal Is Worth the Expense*, NAT. L. J., May 9, 1994, at A20.

228. *Id.* at A20. Such a willingness to bear greater expenses in the name of public safety has been demonstrated in California by the voter's traditional willingness to fund prison bond initiatives.

229. *See* Weintraub, *supra* note 218, at A1 (reporting the results of a Los Angeles Times survey of 1608 Californians showing 47% of those surveyed willing to accept increased taxes, 42% unwilling to pay more taxes, and 11% who do not know).

230. GREENWOOD, *supra* note 216, at 18; *Bearing the Burden*, *supra* note 220.

231. GREENWOOD, *supra* note 216, at 19; *see id.* (predicting that, for an additional $5 million, five times the number of serious crimes plus one murder would be prevented).

Although only short-term data are available, since the passage of AB 971 in March of 1994, there has been an actual 7.7% decrease in the State Crime Index which some, such as California State Attorney General Dan Lungren, attribute to implementation of Three Strikes.[232] Thus, forecasts and current data tend to support the intuitive reasoning of one California county district attorney who confided that criminals are smart enough to avoid a third offense when it is certain that the result will be a life behind bars.[233] And the people of California have been and may perhaps remain willing to pay a price that, if forecasts have been accurate, is truly a bargain in saved lives and property.

VI. CONCLUSION

Three Strikes, despite prolific public debate, represents the will of the people of California at this time.[234] It seems that the people have weighed their concerns for public safety against Three Strikes' alleged offenses to the economy of the state and the rights of felons, the latter found wanting. They have, at least for the moment, concluded that desperate times warrant desperate measures and that public safety must be assured regardless of a broad sweep that may often imprison the nonviolent felon with the violent, the non-serious felon with the serious. The people have decided that if imprisonment of occasional nonviolent, non-serious offenders with histories of violent or serious offenses will save the lives of those who would otherwise be their final victims, the benefit is worth the cost. But, what remains to be seen is whether public support will continue as financial burdens on California's criminal justice system continue to mount. This Note has concluded that the inevitable costs brought about by Three Strikes will account for its demise unless the people of California decide to pay more than lip service and accept higher taxes or reduced spending for other government programs.

Three Strikes will face challenges in the courts and in the State Legislature from those who believe that the law is unfair or overly broad in its inclusion of nonviolent felons and its use of juvenile records for sentence enhancements. These challenges will likely center around arguments similar to those discussed in this Note and, in fact, have already appeared in briefs at the trial and appellate level. Nevertheless, forecasts and early findings indicate that Three Strikes will

232. *Bearing the Burden*, *supra* note 220. The reader must, however, be cautioned lest he or she commit the *post hoc ergo propter hoc* fallacy of attributing a cause and effect relationship to Three Strikes and the decrease in the Crime Index merely because of their temporal relationship.

233. Interview with John W. McTigue, *supra* note 72.

234. *See* Weintraub, *supra* note 218, at A1 (reporting the results of a Los Angeles Times survey of 1608 Californians showing 65% of those surveyed favoring Three Strikes, 21% opposing it, and 14% uncommitted).

have its intended effect on crime. With a two-thirds vote of the Legislature or a new ballot initiative now being necessary to modify or repeal Three Strikes, the law is guaranteed at least some tenure in the California statute books. Perhaps it is best, given increases in serious and violent crime, to allow Three Strikes a chance to work before prematurely burying it, along with the victims it might have gone on to save.