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California's Three Strikes Law: History, Expectations, Consequences

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I. INTRODUCTION: CALIFORNIA'S THREE STRIKES LAW

By 1993, California's crime rate had climbed to epic proportions. Serious and violent crimes had reached levels that concerned every citizen. It was clear that action needed to be taken. A violent crime in Fresno, California begat an effort to find a solution.[1] This effort produced California's Three Strikes Law.[2] Without question, Three Strikes is a tough sentencing law, but the Penal Code is full of laws that have tough sentences. Three Strikes was intended to go beyond simply making sentences tougher. It was intended to be a focused effort to create a sentencing policy that would use the judicial system to reduce serious and violent crime.

Much of the debate surrounding Three Strikes fails to address the true purpose and rationale of the law. The Three Strikes Law, like so many other laws, sprang from tragedy—the senseless killing of a young woman and the promise of her father before she died.[3] Unlike many such promises, this one was kept, but contrary to some views, not with a vengeance. In fact, when Mike Reynolds approached me, I expected him to be vengeful, angry and irrational with grief. This was not the man I saw, and it was not the man others close to him saw. What I saw was a man who had decided to make something positive happen to ensure that others would not experience his grief. He approached his objective, not by simply assuming an answer, but by trying to understand an entire system of punishment. In trying to reach that understanding, he gathered people who were involved in the criminal justice system and asked if it was working, and if so, why, and if not, why not.

My initial reaction was sympathetic but candid: "No, it is not perfect, but it is better than the alternative." His next question was "What can be done to fix it?" My question became "What is it you want to fix?" His response was that we needed to reduce crime, especially serious and violent crime. This became the starting point of what became a revolution in the system and a source of continuing controversy.

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1. *See* Dan Morain, *A Father's Bittersweet Crusade*, L.A. TIMES, Mar. 7, 1994, at A1.

2. California's Penal Code contains two nearly identical provisions collectively referred to as "Three Strikes Law." *See* CAL. PENAL CODE §§ 667, 1170.12 (West 1999 & Supp. 2000).

3. *See* Morain, *supra* note 1; George Skelton, *A Father's Crusade Born from Pain*, L.A. TIMES, Dec. 9, 1993, at A3.

It also became the objective: to reduce crime generally, and serious and violent crime in particular.

A group of community leaders, including judges and lawyers, came together to engage in discussion on the issue. Consequently, several people sat down and formulated the concepts behind what is now known as the Three Strikes Law. I was one of those people. A general structural proposal was put together for purposes of discussion and presentation to other experts in the field.

The final concept constituting the theoretical structure of the Three Strikes Law was taken to then-Assemblyman Bill Jones, who agreed to carry a written version as one of his bills. Ultimately, the bill was written by legislative drafters and others and was submitted as the Three Strikes Law. It went through considerable evolution after its initial concept. Assemblyman Jones carried the bill with significant opposition from adversaries of the Three Strikes concept. Senator Jim Costa added his assistance in the Senate and then-Attorney General Dan Lungren added his political support. Governor Pete Wilson placed himself squarely in support of the law and it ultimately was passed by the Legislature as well as by initiative.[4]

Part of the purpose of this Essay is to answer the question of whether the Three Strikes Law has been successful. The answer depends both on what the objective was for the law and what the reasons for the law were. The answer lies in the rationale behind the formulation of the law and an explanation of its history.

II. WHY THREE STRIKES?

In order to fully understand the Three Strikes Law, there are some things we must accept as true. There is the reality of crime, which has a number of aspects. There is the problem of what causes people to commit crimes and what you do to them after they commit crimes. Arguably, we might be able to reduce crime if we could clearly identify the causes of criminal behavior and rectify them. But beyond dealing with the root causes of crime, we cannot reduce crime unless we can deter its commission or effectively deal with those who are criminals. This brings us back to the problem: we must accept the actuality of crime. To say that imprisonment is not the way to deal with crime is to ignore the reality that we still have to deal with criminals. To say that imprisonment is the only way to reduce crime is to ignore the causes.

The Three Strikes Law does not advocate ceasing the search for alternatives to conventional incarceration that will protect the public and deter crime. But it does accept the reality that, for whatever reason, some people are criminals. Apart from dealing with whatever causes a person to become a criminal, we must deal with an appropriate *and* effective way to reduce and deter crime.

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4. CALIFORNIA ATTORNEY GENERAL'S OFFICE, "THREE STRIKES AND YOU'RE OUT"—ITS IMPACT ON THE CALIFORNIA CRIMINAL JUSTICE SYSTEM AFTER FOUR YEARS 1 (1998) [hereinafter THREE STRIKES AND YOU'RE OUT].

The overall objective of punishment and its role in our criminal justice system is to prevent the commission of crime and to deter the repetition of crime, e.g., recidivism. In accomplishing that objective through the development of the Three Strikes Law, it was concluded that it is less the existence of punishment itself as a deterrent in individual crimes than it is the effectiveness of the system in addressing the problem and focusing on the solution.

There are a number of different methods and theories to take into account in deciding how to reduce crime generally, and serious and violent criminal behavior in particular—for example, more police, more courts, tougher laws, tougher judges. It was concluded in the formulation of the concept that the most efficient approach was to try to craft a law that would effectively accomplish the objective of reducing crime and serious and violent criminal behavior through the use of sentencing. In using such an approach, however, one needs to evaluate the conventional sentencing structure and the purpose of punishment. This is how the Three Strikes Law differs from conventional sentencing laws.

Laws are written by people who make certain assumptions about punishment and its effects on crime. First of all, the people who draft laws generally look at it from the perspective of what would affect them, the drafters: "A long sentence would scare me." "A longer sentence would scare me more." "Incarceration would cause someone to not want to face that again." In other words, traditional notions of how punishment would deter, rehabilitate, or alter behavior are considered. This is based on the perspective of law-abiding people who look at punishment in terms of how such measures would affect them. In developing the Three Strikes Law, however, the question was "How do such measures affect the criminal from his or her perspective?" The drafters looked at it in terms of how the group at whom the laws were aimed—e.g., lawbreakers—view punishment and how it would affect their behavior. It was not viewed from the perspective of attempting to affect those who followed the law.

In order for criminal sentencing laws to be effective in reducing crime, such laws must direct themselves to measures that affect lawbreakers. Here the objective was to enforce a policy determination regarding career criminals. The reality is that criminal sentencing laws generally are only used after they have failed in their traditional purpose of deterring crime. Simply put, you would not be sentencing if you had deterred the offender from committing the crime in the first place.

The generally accepted notion is that the existence of punishment deters crime either through deterring people from committing a crime because of the existence of punishment or in altering behavior as a result of punishment which results in the punished person not committing more crimes. For purposes of formulating the concept of the Three Strikes Law, the premise that the existence of punishment in its traditional sense was an effective means of deterring serious and violent criminal behavior was rejected. Furthermore, the notion that lengthening sentences was an effective deterrent generally to the commission of crime was also rejected. Also dismissed was the idea that lengthening incarceration was reasonably effective in

terms of rehabilitation in the traditional sense. I say the traditional sense because I am referring to punishment as a tool for altering behavior. This is not to say that traditional notions were or are totally ineffective. Rather, it is to say that such concepts are not substantially effective with respect to career criminals.

The traditional purpose of punishment furthers four general objectives: deterrence, rehabilitation, retribution and isolation.[5] First is the concept of deterrence. This assumes that the threat of incarceration or other adverse consequence will prevent people from committing crimes because they do not want to suffer adverse consequences. Alternatively, deterrence works on a broader level, preventing criminals from committing future crimes by fostering a desire to avoid the adverse consequences they have suffered in the past. In formulating the Three Strikes Law, it was not accepted that the existence of an adverse consequence—such as a period of imprisonment—was effective in deterring the criminal population from committing new criminal acts. The idea that the average person does not commit crimes because of the existence of severe consequences was rejected. In other words, it was not accepted that the reason the average person does not commit serious crimes was because they would suffer a lengthy incarceration.

Instead, it was concluded that the primary deterrent to serious criminal behavior was the existence of a value system. The criminal justice system does not create or establish a value system; it reacts to a disregard of an acceptable value system. While it may be true that minor crime is deterred through the existence of adverse consequences, it was not accepted that those people who committed serious crime or who represented a consistent threat of antisocial behavior were deterred by the existence of different terms of punishment for different crimes. It was concluded that the average person did not know what the penalty was for stealing a car; thus, the existence of a term of sixteen months to three years was not itself a deterrent to the average person contemplating the theft of a car. It was likewise concluded that because the average person was unaware of the penalty for residential burglary (e.g., two, four, or six years), the term itself was not a deterrent to committing the crime. The notion that the average person does not engage in felonious conduct because of the existence of specific terms of imprisonment was rejected because the average person is wholly unaware of what those terms of imprisonment are. It was thus concluded that the length of the term *itself* was not a deterrent factor for the average individual. It *was* concluded, however, that the average person does not commit crimes primarily because of a personal value system, and to a lesser extent, because of the existence of punishment generally, rather than the existence of a specific punishment for a particular crime.

Further, if the average law-abiding citizen did not know the term for specific criminal behavior, it was also unlikely that the average criminal knew what it was. It was concluded that if any deterrent value existed in incarceration, it was the

5. *See* LAWRENCE TAYLOR, BORN TO CRIME 11-13 (1984).

existence of incarceration as a clear inevitable consequence, and not the length of specific terms for particular crimes. People who have a history of criminal behavior have already demonstrated that the length of incarceration itself (or other adverse consequences) did not alter their behavior. Simply put, lengthening the sentences for individual crimes was not a feasible deterrent because it clearly was not a factor to those who had a pattern of breaking the law.

Thus, the Three Strikes Law was not designed to deter the average citizen or to deter criminals by lengthening specific terms of imprisonment. Rather, to the extent that the existence of criminal sanctions have a deterrent effect on criminals, it was intended to convey the reality and inevitability of punishment in stark terms. It sends a simple message that can be easily understood by those who engage in repeated criminal behavior: further criminal behavior will result in severe consequences; disregard this message at your peril.

In *An Essay on Crimes and Punishment*,[6] Cesare Beccaria stated that "crimes are more effectually prevented by the *certainty* than by the *severity* of punishment."[7] The Three Strikes Law simply recognizes this age-old concept, making consequences clear and visible as a mechanism of deterrence. To the extent that it has a deterrent effect, the message regarding punishment is clear and understandable. Likewise, the certainty of punishment is addressed through an unequivocal sentencing policy. To the extent that the visibility of punishment deters, the consequences are clear to those who would evaluate them before breaking the law.

The second objective of punishment is rehabilitation. This factor assumes that a person has broken the law, and that that person seeks to prevent future criminal acts by altering their behavior. Rehabilitation seeks to teach offenders that certain conduct is unacceptable and to encourage them to avoid such conduct in the future. While it was accepted that rehabilitation was a primary concern with new or low-level offenders, it was not demonstrably effective on repeat offenders. As repeat offenders made clear through continued criminal acts, probation and other alternatives aimed at rehabilitation were simply ineffective.

To illustrate this point, one need only review the recidivism rate in California. The *1998 Corrections Yearbook* showed the recidivism rate for inmates released in 1997 in California as 55.9% during the two years following their release.[8] This is the second highest recidivism rate in the United States. The recidivism rate for inmates released in 1996 was 57.0% during the three years following their release.[9] For those released in 1995, the rate was 56.0%, tracked over two years following their release.[10] These figures remain consistent as one tracks further into the past. This

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6. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENT (Stephen Gould ed., 1809).
7. *Id.* at 80.
8. CRIMINAL JUSTICE INSTITUTE, THE 1998 CORRECTIONS YEARBOOK 56 (1999).
9. CRIMINAL JUSTICE INSTITUTE, THE 1997 CORRECTIONS YEARBOOK 46 (1998).
10. CRIMINAL JUSTICE INSTITUTE, THE 1996 CORRECTIONS YEARBOOK 44 (1997).

means that at least 50% of the offenders who are released from prison re-offend within two years of release.[11]

The third objective of punishment is retribution. Retribution is defined as "deserved punishment for evil done."[12] Simply put, it is the price society exacts for the magnitude of the crime. However, retribution is not viewed in the abstract as the only factor affecting punishment. Like everything else in life, criminal behavior is evaluated in terms of past behavior. Thus, our criminal justice system uses enhancements based on past records to increase the length of incarceration as an appropriate response to continued criminal behavior. This practice is observed in other sentencing systems such as the Federal Sentencing Guidelines.

Retribution serves several aspects of the purposes of punishment. Theoretically, the magnitude of the punishment ensures that society imposes a consequence equal to the magnitude of the harm caused. It serves in part to demonstrate there is a consequence for criminal behavior, and it expresses some measure of society's evaluation of the harm caused in terms of the magnitude of the criminal sanction. In addition, it functions as a deterrent to others by expressing the measure of punishment, and as a rehabilitative technique by making the point that criminal conduct must be altered or there will be consequences. Finally, legal retribution serves the purpose of preserving peace because it allows society to impose consequences, rather than the aggrieved. Thus, the existence of penalties for crimes helps to eliminate vigilante justice.

In drafting the Three Strikes Law, it was concluded that lengthening the specific terms of individual crimes for purposes of retribution was not a significant factor in altering or deterring conduct. This conclusion was reached in part because individual terms are only effective as a deterrent if they are known and understood. Further, it was clear that rehabilitation and retribution had not proven effective in deterring new criminal behavior, as evidenced by the recidivism statistics mentioned above. This is not to say that retribution was regarded as an inappropriate consideration in punishment. Society requires a response to antisocial behavior as a way of expressing a measure of its outrage. It is also necessary to preserve public confidence in the system by demonstrating that there really are unpleasant consequences to the commission of crime. It was simply concluded that while specific punishments may be appropriate measures of retribution, they were not significant factors as deterrents.

The last factor is isolation. Simply put, isolation—or removal from society—is justified because the individual has demonstrated that he or she is a continuing threat to the community. Isolation is also referred to as "incapacitation."

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11. Necessarily, this statistic only accounts for the crimes for which these individuals are arrested and convicted. It does not include crimes they commit for which they are never arrested. It is not unreasonable to assume that a significant percentage of such repeat offenders have committed other crimes for which they have not been arrested or convicted.

12. WEBSTER'S NEW WORLD DICTIONARY 1215 (2nd College ed. 1982).

Based on statistics like arrest rates, it is often difficult to ascertain exactly who is committing crime. The reality is that a very low percentage of crime results in "clearance." The Criminal Justice Statistics Center of the California Department of Justice defines "clearance" by stating that:

> An offense is cleared or "solved" for crime reporting purposes when at least one person is arrested, charged with the commission of the offense, and turned over to the court for prosecution or cited to juvenile authorities. In certain situations a clearance may be counted by "exceptional means" when the police definitely know the identity of the offender, have enough information to support an arrest, and know the location of the offender but for some reason cannot take the offender into custody.[13]

The term "clearance rate" means the "method used to determine the percentage of crimes cleared. The rate is based on the number of crimes reported."[14] Using the California Crime Index as the basis for establishing the "clearance rate" for the crimes of willful homicide, forcible rape, robbery, aggravated assault, burglary, and motor vehicle theft, California had a "clearance rate" of 25.3% in 1998.[15] The FBI Crime Index, which also includes the crimes of larceny-theft and arson, shows a "clearance rate" of 21.1%.[16] The clearance rate for burglary was 13.5% in 1998.[17] In 1998, the clearance rate was 63.1% for homicide and 27.7% for robbery.[18] The rates are higher for more serious crimes and are particularly high for murder.

Because we do not convict every offender who commits every offense, we do not really know the demographics of crime. However, we can look at certain basic assumptions—people who commit felonies have shown a criminal disposition that is not initially deterred by the existence of punishment. Each crime depends on the circumstances surrounding the crime. The fact that a person commits a felony on a particular occasion does not necessarily mean that person is a habitual criminal or even has a general criminal disposition. People who commit serious and violent crimes have shown a disposition toward violence, but again, it depends on the circumstances of the crime. Not every violent act committed by a person means he or she is generally violent. Such a conclusion depends on the presence of provocation and other circumstances. We can only conclude that under certain circumstances such people are capable of violent and antisocial acts.

However, people who qualify as repeat offenders have shown a disposition toward criminal behavior and the circumstances surrounding the crime are less of

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13. CRIMINAL JUSTICE STATISTICS CENTER, CALIFORNIA DEP'T OF JUSTICE, CALIFORNIA CRIMINAL JUSTICE PROFILE 1998 76 (1999).
14. *Id.*
15. *Id.* at 6.
16. *Id.*
17. *Id.*
18. *Id.*

a consideration. We can draw more reliable conclusions about them being disposed to serious antisocial criminal behavior due to the fact that they have repeatedly engaged in such behavior. People who commit multiple felonies (including multiple serious and violent felonies) and who continue to commit felonies are people who represent a clear danger to the community. They are people who are disposed to criminal behavior and continue to engage in it. They must be dealt with in a way that recognizes that conventional notions of punishment (as a deterrent, as rehabilitation, and as retribution affecting conduct) are *not* effective. Still, the threat they present to the community is real. How do we deal with it?

In formulating the concepts behind the Three Strikes Law, it was concluded that the most effective way to reduce serious and violent criminal behavior through the use of sentencing law required a policy decision. This decision requires us to identify through past behavior those who have demonstrated a clear disposition to engage in serious criminal acts and whose conduct has not been deterred by conventional concepts of punishment. Once identified, we must isolate those individuals to eliminate repeat behavior, using criteria which are "triggered" by new criminal behavior.

The Three Strikes Law requires isolation of those who repeatedly demonstrate a disposition toward criminal behavior, without requiring that the new criminal behavior be necessarily serious or violent. Rather, it only need be reflective of further felonious activity. In simple terms, we must isolate those who have shown a clear disposition toward serious and violent criminal behavior whenever they commit *any* new felony. This result is intended to have two consequences: first, it seeks to eliminate further criminal behavior by habitual criminals; and hopefully second, it will halt their criminal behavior with a lower grade "triggering" felony before they have a chance to commit a more serious or violent crime for which they have already exhibited a disposition.

The difficulty in identifying such individuals is called "the predictability factor." Clearly, one could simply require all first time offenders who commit a certain type of act to receive life sentences. But not only would such an approach be overly broad, it would characterize disposition by a single act regardless of circumstance. Therefore, the focus was on identifying factors that narrowly defined habitual offenders with a high degree of predictability.

Initially, a target group was identified—not people who have committed crimes in general, but people who have demonstrated a repeated pattern of criminal behavior. These are not just people who have engaged in repeated criminal behavior, but who represent a substantial risk of harm in their criminal behavior. What appears obvious was also assumed: people do not get arrested and convicted for many or most of the crimes they commit.

It was accepted that a relatively small group of people commit a large percentage of all crime. In one study,[19] a review was conducted of 9,945 males born in Philadelphia in 1945.[20] They were tracked through their 18th birthday in 1963.[21] The purpose of the study was to evaluate the percentage of offenses committed by the group. The ultimate conclusion was that 6% of the offenders in the group accounted for 52% of all arrests within the group.[22] In addition, the majority of the serious crimes were committed by this small percentage.[23] These findings have been replicated in other studies with consistent empirical data.

The basic conclusion of such studies is that a small percentage of the criminal population is responsible for the majority of crime. If one accepts this conclusion, then the question becomes whether or not incapacitating this small percentage of offenders will substantially reduce serious and violent crime, as well as other criminal activity.

It was not assumed that simply because individuals had engaged in serious and violent behavior in the past, all of their criminal behavior was necessarily serious and violent. Rather, the drafters posited that such individuals engaged in repeated criminal behavior with a demonstrated disposition; this disposition included a willingness to commit serious and violent criminal behavior. By targeting that group, if it could be identified, one could reduce crime generally and serious and violent crimes specifically. This rationale suggests that as those individuals were incarcerated for any level of felony criminal behavior, there would be a concomitant elimination of their further criminal behavior and, hopefully, prevention of further violent behavior. The question thus became "Who is that group and what is an effective way to deal with them to accomplish the objective?"

A deliberate policy decision was made that the gravity of the new felony should not be a determinative factor in "triggering" the application of the Three Strikes Law. It was concluded that prosecutors were capable of making a decision in the case of low-grade felonies—which could alternately be charged as misdemeanors—in determining whether or not to charge such behavior as a felony and to "trigger" the consequences of the Three Strikes Law.

Before any detailed discussion of the effectiveness of the Three Strikes Law is initiated, it is appropriate to give a brief explanation of what Three Strikes Law is and to clear up some misconceptions. First of all, nobody is subject to the law unless they have at least one prior serious or violent felony conviction on their record. The average person might rightly assume that all felonies are "serious" because the term "felony" defines conduct that causes significant damage, threat of injury, injury, or

19. MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT (1972).
20. *Id.* at 244.
21. *Id.* at 29.
22. *Id.* at 89.
23. *Id.* at 248-49.

other serious social evil. In reality, however, the terms "serious felony" and "violent felony" have a specific legal meaning.

Serious and violent felonies are special categories of crimes defined by Penal Code sections 667.5[24] and 1192.7.[25] These are specified felonies that the California Legislature or the public, through proposition or initiative, has concluded are special threats to society, thus making them more dangerous than other felonies. Felonies that are specified in section 667.5 are defined as "violent felonies." This does not mean they are the only felonies that involve violence against human beings. It means that they are the most severe of all felonies involving the use of violence. A person who has been convicted of a "violent felony" who commits a new felony offense must receive an additional three-year term because of his or her prior record. These "violent felonies" are: murder or voluntary manslaughter, mayhem, rape, sodomy by force or fear, oral copulation by force or fear, lewd acts on a child under fourteen, any felony punishable by death or life imprisonment, any felony in which the defendant has inflicted great bodily injury on a person, any felony in which the person has used a firearm, any robbery committed in an inhabited dwelling house, arson, violation of Penal Code section 289, attempted murder, exploding a bomb, kidnapping, kidnapping a child under fourteen, continuous sexual abuse of a child in violation of Penal Code section 288.5, carjacking, robbery in violation of Penal Code section 213, and rape with a foreign object.[26] The Penal Code specifically provides that "[t]he Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person."[27]

Penal Code section 1192.7 specifically provides that a certain category of designated crimes shall be specified as "serious felonies," and that plea bargaining is prohibited except under very restricted circumstances. These crimes are: murder or voluntary manslaughter, mayhem, rape, sodomy by force, oral copulation by force, lewd act on a child under fourteen, any felony punishable by death or imprisonment for life, any felony in which the defendant personally inflicted great bodily injury, attempted murder, assault with intent to commit rape or mayhem or sodomy or oral copulation or robbery, assault with a deadly weapon on a peace officer, assault by a life prisoner on a non-inmate, assault with a deadly weapon by an inmate, arson, exploding a destructive device with intent to injure, exploding a destructive device causing great bodily injury or mayhem, exploding a destructive device with intent to murder, burglary of an inhabited dwelling house, robbery, kidnapping, holding a hostage in a state prison, attempt to commit a felony punishable by death or imprisonment for life, any felony in which a dangerous or deadly weapon is used, selling to a minor any heroin, cocaine, PCP, or

24. CAL. PENAL CODE § 667.5 (West 1999 & Supp. 2000).
25. *Id.* § 1192.7 (West 1982).
26. *Id.* § 667.5.
27. *Id.* § 667.5(b).

methamphetamine, sodomy by force, grand theft involving a firearm, car jacking, violations of Penal Code section 288.5, assault with a caustic chemical, assault with a deadly weapon on a firefighter, rape with a foreign object, any felony listed in Penal Code section 12022.3 in which a firearm is used, any attempt to commit one of the foregoing listed felonies, or any conspiracy to commit an offense described in 11370.4 of the Health and Safety Code (sale or manufacture of very large quantities of narcotics).[28]

As demonstrated by the list of "serious" and "violent" felonies, these crimes involve the most aggravated form of criminal conduct with a high degree of danger of physical injury or harm to individuals, or to society as a whole. In order for the Three Strikes Law to be applicable, the offender must commit a new felony and have been previously convicted of a "serious" or "violent" felony as specified in section 667.[29] Thus, the commission of a felony or even a "serious" or "violent" felony does not, by itself, trigger the consequences of the Three Strikes Law. A felon who has never committed a "serious" or "violent" felony will never be subject to the law no matter how many felonies he or she commits so long as none of them are "serious" or "violent." In other words, a person could be convicted of one hundred car thefts, grand thefts or drug offenses, and they would never qualify under the Three Strikes Law because they had never previously committed a qualifying "serious" or "violent" felony.

Therefore, only if a person has a prior felony conviction for a "serious" or "violent" felony and commits a new felony of any kind (referred to as a "triggering felony") is he or she subject to the Three Strikes Law. Under those specific conditions, the offender would not be eligible for probation and must be sent to prison for a term of imprisonment that is *twice* the term set for the new crime.[30] If a person has two prior serious or violent felony convictions *and* commits a new felony, then he or she must be sent to prison for a term of not less than twenty-five years to life.[31] Furthermore, eighty percent of that term (e.g., a minimum of twenty years) must be served.[32]

This leads to another common misconception. It is not a "life" sentence *per se* that is imposed. Rather, it is an indeterminate sentence. This means that one must serve a minimum sentence, approximately twenty years, before he or she is eligible for parole. When one is eligible for parole, then the parole board will determine whether or not he or she is an appropriate candidate for release. If the parole board determines the individual is not an appropriate candidate for release, then they can keep that individual in prison until they decide he or she should be released. The parole board may decide to reconsider their determination not to release, or they

28. *Id.* § 1192.7.
29. *Id.* § 667(f)(1) (West 1999).
30. *Id.* § 667(e)(1).
31. *Id.* § 667(e)(2)(A).
32. *Id.* § 667(c)(5).

may determine that release is not an option altogether. Thus, referring to the sentence for a third-strike offender as a "life" sentence is misleading. In reality, a defendant can be released after serving the minimum term, or a defendant can be retained in the prison system because, in the opinion of the parole board, the defendant is not an appropriate candidate for release. This allows a measure of discretion by allowing the evaluation of attitude, behavior, or even age, as relevant factors in further recidivism to be considered before release.

Therefore, only people who have shown a clear tendency to commit "serious" and "violent" felonies—crimes that by definition involve a high degree of danger to human life and society—are sentenced under this law. They have all been through the criminal justice system at least once for extremely aggravated felonious conduct, and they have not been deterred from committing further felonious conduct. That is, the new felony clearly demonstrates that the person has not been rehabilitated by the previous punishment, has not been deterred by the previous punishment, and retribution for the previous aggravated felony has not affected their behavior. These are the offenders who can be identified as having the greatest propensity for violence because of their past criminal records. These are the offenders who can be identified as not having been deterred by conventional concepts of punishment. These are the offenders who show the greatest likelihood of being among those who commit the largest percentage of crimes and who represent the greatest threat to the community. These are the offenders who are habitual criminals by any reasonable interpretation. These are the offenders targeted by the Three Strikes Law.

Therefore, the purpose of the Three Strikes Law was not primarily to deter the commission of specific crimes, but to reduce crime in general. It was intended to catch career criminals and deal with them in a way that would serve the primary objectives of the criminal justice system: to prevent and to reduce crime. Thus, there are two questions which need to be addressed: 1) is the Three Strikes Law effective in catching career criminals, and 2) is the Three Strikes Law effective in reducing crime?

In determining whether the Three Strikes Law has been successful, one must look at the criticisms and the consequences of the law's implementation.

III. The Criticisms and the Consequences

A. *The Fairness of the Law*

The first category of criticism argues that the law is not fair, that it is cruel, and that it results in sentencing disproportionate to the crime. Let me initially place arguments about "fairness" in context. Such arguments tend to define a "fair" sentencing concept as the sentences being commensurate with the severity of the particular "triggering" crime, and whether it is appropriate to use sentencing to address the risk of future criminal behavior. Such arguments tend to avoid emphasis

on the offender and focus on the magnitude of the new "triggering" crime without discussing the offender's record.

The first problem with such arguments is that they disregard accepted concepts of sentencing: punishment always considers the offender in terms of his or her record measured against the crime for which the offender is presently before the court. Clearly, one who has a past pattern of antisocial behavior is a worse offender than one who has no past antisocial behavior. Likewise, the length of a particular sentence does not consider the concept of identifying individuals who represent an extreme threat of continuing criminal behavior. Three Strikes does not focus upon the particular new crime committed as the primary factor in sentencing; it focuses on the individual. This is consistent with accepted sentencing considerations: does this individual merit a longer term of incarceration because his or her conduct is aggravated by their past behavior? California law has long used enhancements for prior felony convictions to increase the length of sentences. This same concept is acknowledged in the California Rules of Court.[33]

B. The Law Is Cruel

Another common argument suggests that the Three Strikes Law is cruel. This argument is apparently based on the imposition of long sentences for low grade "triggering" offenses. Again, the argument ignores the evaluation of the defendant's past record and focuses solely on the specific "triggering" felony. It also ignores accepted constitutional standards used in evaluating such arguments for their legal merit. I think the best response to such arguments is the one given by the United States Supreme Court. In *Rummel v. Estelle*,[34] the defendant was sentenced to life under a recidivist statute because he had obtained $120.75 by false pretenses after having previously been convicted of the felony of fraudulently using a credit card to obtain $80 worth of goods and the felony of passing a forged check.[35] The United States Supreme Court held that the sentence did not violate the Eighth Amendment provision prohibiting cruel or unusual punishment, stating:

> [P]rimary goals [of a recidivist statute] are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line

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33. *See* CAL. R. CT. 410-28 (covering appropriate sentencing considerations in choosing the length of term from among the three specified terms set for most crimes).

34. 445 U.S. 263 (1980).

35. *Id.* at 265-66.

> dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.[36]

It is appropriate to note that the defendant in *Rummel* had two prior convictions for similar theft offenses. He was prosecuted as an habitual offender under a Texas statute requiring that "[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."[37] California's Three Strikes Law, unlike the Texas statute, requires two prior "serious" or "violent" felonies to "trigger" its implementation. The issue, in my view, is whether it is "cruel or unusual" punishment to sentence habitual criminals with serious and violent criminal records to twenty-five years to life in prison when they continue their criminal activity by committing a new felony.

As noted, what is often not mentioned when talking about the "triggering felony" is the actual record of the offender. While the new felony may not be a "serious" or "violent" felony, it should not be looked at in isolation. In a study of 233 third-strike felons (those with two prior "serious" or "violent " felonies who committed a new felony), the Sacramento Bee reported in March of 1996 that 84% of these offenders had at least one prior crime involving actual violence (including 17 homicides, 7 attempted murders, and 81 sexual assaults or child molestations).[38] In addition, these 233 offenders had an aggregate of 1,165 prior felony convictions, including more than 300 robberies and more than 250 burglaries. In 25% of the all of the third-strike offenders sentenced up to that date, the triggering offense was a "violent" felony.[39] Thus, each of these 233 felons who had committed a new felony had an average of five prior felony convictions, including two prior "serious" or "violent" felony convictions.

This result is corroborated by Gregg McClain of the San Diego District Attorney's Office, whose office did a survey between 1995 and 1998 and found an average of five prior felony convictions for those offenders who were third-strike felons (people who had two prior "serious" or "violent" felony convictions and committed a new "triggering" offense).[40] The same San Diego analysis found that, of those five prior felony convictions, on average, only two of the five had resulted in prison commitments. Presumably, the other three resulted in probation. Further, these felons had their parole revoked an average of twice. This analysis did not include any prior misdemeanor convictions which would evidence lower level

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36. *Id.* at 284-85.

37. Codified at the time as article 63 of the Texas Penal Code, *recodified as* TEX. PENAL CODE § 1242 (West 1994).

38. Andy Furillo, *Most Offenders Have Long Criminal Histories*, SACRAMENTO BEE, Mar. 31, 1996, at A1.

39. *Id.*

40. Telephone conversation with Gregg McClain, Deputy District Attorney, San Diego District Attorney's Office (Aug. 16, 2000).

criminal activity prior to and in between their felony convictions. Such evaluations provide clear evidence of the habitual criminal nature of Three Strikes offenders.

In fact, if one looks at the case that upheld the constitutionality of the California Three Strikes Law and vested trial courts with the discretion to strike prior convictions, one finds the very same criminal pattern. The defendant in *People v. Superior Court (Romero)*[41] was reported as having five prior felony convictions in addition to the new "triggering" offense.[42]

C. Disproportionate Sentencing

The argument that the law can or does result in sentences disproportionate to the crime likewise focuses on the offense rather than the offender. Further, these arguments assume that it is not appropriate for society to simply say that repeated criminal behavior will not be tolerated. Typical of such arguments is the grossly misleading hyperbole surrounding the alleged "pizza guy." This is the man who supposedly only stole a slice of pizza and was sentenced to 25 years to life.[43] The attempts to cast this individual as a modern day Jean-Valjean (with apologies to Victor Hugo's *Les Miserables*) are simply beyond comprehension. This individual had five prior felony convictions, including two serious and violent convictions consisting of robbery and attempted robbery. He was granted probation and given suspended sentences five times between 1985 and 1990, even though he had been convicted of two misdemeanors and three felonies. The alleged pizza theft was not stealing a slice of pizza from the counter at Pizza Hut. Rather, he stole a piece of pizza from four children by intimidation (the defendant was 6'4" and weighed 220 pounds; his four victims were children between the ages of 7 and 15). This is normally referred to as a strong-arm robbery. If it had been $8 in cash instead of a pizza that cost $8, would society have a different attitude? Since when do we categorize the magnitude of harm in a robbery by the value of the thing taken? If one of the victims/children had been knocked down, hit his head, and subsequently died, it would have been a capital offense.

D. Nonviolent Property and Drug Crimes Should Not Be Triggers

Another argument suggests that most new felonies that qualify a defendant to be treated as a second- or third-strike offender are for nonviolent property and drug crimes. This argument generally obscures the issue by giving an example that involves a nonviolent, low-grade crime such as stealing some item that would be a petty theft (property valued at less than $400). Generally, the example takes the form of "he got 25 years to life for stealing a tire" or "for being in possession of one

41. 917 P.2d 628 (Cal. 1996).
42. *Id.* at 631.
43. Eric Slater, *Pizza Thief Gets 25 Years to Life*, L.A.TIMES, Mar. 3, 1995, at B3.

balloon of heroin," both "victimless" crimes. This type of argument needs to be placed in context of what is actually included in the catch-all description of "nonviolent property and drug crimes."

Clearly, a simple theft crime such as grand theft (stealing property of another with a value over $400) or petty theft, with a prior petty theft or prior felony, might reasonably be placed in the category of "nonviolent theft" offenses. However, such a categorization usually places residential burglary and burglary in general as offenses included within the "nonviolent theft" category. I would point out that burglary stands apart from general theft-related offenses because it is not, by definition, only related to theft. "Crimes involving drugs" also obscures the issue because it lumps simple possession of narcotics in the same category as sale of narcotics and possession for sale. These crimes are, by most reasonable interpretations, far more serious than just simple possession and bear far more scrutiny than "just drug crimes."

It is true that 5.0% of such third-strike offenders and 9.9% of second-strike offenders fall within the Three Strikes Law because their triggering offense is a crime such as petty theft with a prior.[44] But such an offense is not simply a petty theft because the defendant's prior record converts it into a potential felony if the district attorney charges it as such. Further, it only remains a felony if the judge does not declare it to be a misdemeanor and neither the district attorney nor the judge strike one or more third strike-qualifying priors.

This means that a district attorney has exercised discretion to charge it as a felony rather than a misdemeanor. The judge has exercised his or her jurisdiction not to reduce it to a misdemeanor with full knowledge of the consequences. The district attorney has exercised discretion by filing all the priors that qualify the offender for sentencing under the doubling formula or the sentence of twenty-five years to life and by not striking the prior or one of the two prior "serious" or "violent" convictions for purposes of sentencing. The judge has used his or her discretion with full knowledge of the consequences to not strike one or more of the prior "serious" or "violent" convictions. In sum, such offenders have convinced the judge and the officers of the court that their past records demonstrate that such sentences under the Three Strikes Law are appropriate.

The remaining "theft" type offenses consist of grand theft, receiving stolen property, vehicle theft and forgery/fraud. For second-strike offenders, the percentage of offenders in these "other theft" categories is 11.5%.[45] For third-strike offenders, the percentage is 7.6%.[46] In each of these "other theft" type offenses, the district attorney and the judge have made the same type of discretionary decision as with

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44. DATA ANALYSIS UNIT, CALIFORNIA DEP'T OF CORRECTIONS, THIRD STRIKE CASES 12 (Sept. 30, 1999) [hereinafter THIRD STRIKE CASES]; DATA ANALYSIS UNIT, CALIFORNIA DEP'T OF CORRECTIONS, SECOND STRIKE CASES 13 (Sept. 30, 1999) [hereinafter SECOND STRIKE CASES].

45. SECOND STRIKE CASES, *supra* note 44.

46. THIRD STRIKE CASES, *supra* note 44.

those who have a petty theft in addition to a prior petty theft or prior felony. Many layers of discretion must be exercised for the defendant to be sentenced as a second- or third-strike felon. Thus, a Three Strikes sentence is never automatic *per se*.

As to the argument about the "triggering felony" being simply a drug offense, the Legislature and the community have repeatedly rejected the "victimless crime" rationale and have recognized that there *are* victims other than just the drug user. It is appropriate to note the comments of Justice Anthony Kennedy in *Harmelin v. Michigan*,[47] where the defendant was sentenced to life without the possibility of parole for possessing 672 grams of cocaine. The primary issue in *Harmelin* was whether the sentence imposed constituted a "cruel and unusual punishment." Justice Kennedy stated:

> Petitioner's suggestion that his crime was nonviolent and victimless . . . is false . . . . To the contrary, petitioner's crime threatened to cause grave harm to society.
>
> Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) [a] drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) [a] drug user may commit crime in order to obtain money to buy drugs; and (3) [a] violent crime may occur as part of the drug business or culture.[48]

It is true that 20.4% of the offenders sentenced under the doubling formula for "triggering" offenses with one prior "serious" or "violent" offense are convicted of simple possession of illegal narcotics such as heroin, cocaine, or methamphetamine.[49] The same is true of 9.8% of third-strike offenders.[50] It is also true that 8.8% of second-strike offenders and 7.3% of third-strike offenders have been convicted of sale of narcotics, possession for sale or manufacturing of drugs.[51] Perhaps in this respect I have a different view than the critics. I do not regard the acts of people who make their living off of the misery of others by selling narcotics, possessing narcotics with the intent to sell, or manufacturing narcotics, as "just drug related crimes." The same holds true with these offenses as of those whose triggering offense was petty theft with a prior: district attorneys and judges have exercised their discretion not to strike priors and to impose the full consequences of the law. One can only assume that such experienced public officials have determined these defendants are appropriate candidates for such sentencing consequences.

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47. 501 U.S. 957 (1991).
48. *Id.* at 1002-03.
49. SECOND STRIKE CASES, *supra* note 44.
50. THIRD STRIKE CASES, *supra* note 44.
51. SECOND STRIKE CASES, *supra* note 44, at 13; THIRD STRIKE CASES, *supra* note 44.

Therefore, I argue that statistics that fail to identify the nature of the theft-related crime or the nature of the drug crime obscure the gravity of the offense and are grossly misleading. There are significant differences in "theft" offenses in terms of their magnitude and their degree of harm. There are significant differences in "drug crimes" and crimes that involve selling and manufacturing drugs. All such arguments need to be evaluated in terms of the types of crimes they minimize by lumping them under "theft crimes" and "drug crimes."

E. Many of the Priors Are for Nonviolent Burglaries

The argument is often made that many of the felony offenses that qualify a person for the Three Strikes Law are nonviolent burglaries and should not be used as "triggering" felonies. The actual percentage is 12.9% for second-strike offenders (5% residential burglaries and 7.9% nonresidential)[52] and 18% for third-strike offenders (11.2% residential burglaries and 6.8% nonresidential).[53]

I categorically reject the assertion that residential burglaries are nonviolent felonies. The Legislature has made that policy determination unmistakably clear, and justifiably so. Residential burglaries are specifically categorized as serious felonies in Penal Code section 1192.7. Penal Code section 189 specifically provides that a killing in the course of a burglary is a capital offense.[54] Courts have repeatedly held that a residential burglary is a felony involving a high risk of harm to individuals. It should also be recognized that, by definition, a residential burglary is an entry into someone's home for the purpose of committing a felony.[55] This felony can include rape, assault or other violent felonies as well as theft of property from the home.

I also categorically reject the assertion that other types of burglary are non-violent felonies. By definition, a person who commits a burglary enters someone's residence, place of business or other building with the intent to commit a felony or a theft.[56] Burglary is a premeditated and calculated crime that is intended to take advantage of the greater sense of security one has in their home or business. It creates a high risk of danger because people are extremely vulnerable under the circumstances and they are inclined to react defensively. It is not just entry into a residence to commit theft. It includes entry to commit assault, rape, robbery or any number of other felonies. Just ask anybody who has been burglarized whether they have a greater or lesser sense of security after the crime. Ask them whether they continue to feel safe in their home.

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52. SECOND STRIKE CASES, *supra* note 44.

53. THIRD STRIKE CASES, *supra* note 44.

54. *See* CAL. PENAL CODE § 189 (West 1999) ("All murder . . . which is committed in the perpetration of . . . burglary . . . is murder in the first degree.").

55. *See* CAL. PENAL CODE § 459 (West 1999) ("Every person who enters any house, room, apartment . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.").

56. *Id.*

> 'Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. The laws are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety.' Section 459, in short, is aimed at the danger caused by the unauthorized entry itself.' [E]ntry into an *inhabited* structure is recognized as *most dangerous and most likely* to create personal injury, justifying assignment of the greater degree.[57]

The assertion that burglary is a "non-violent" property crime because no harm in fact occurs when a burglar enters someone's home or building does not minimize the *risk* of harm that is nevertheless present. It simply begs the question and asserts credence based upon mere fortuity. The reality is that residential burglary has long been recognized as having the potential for a high risk of harm. It is an intrusion into our personal space where we are most vulnerable. The Legislature has emphasized this by making a residential burglary a no-probation felony except under unusual circumstances.[58] Thus, the argument that residential burglaries in particular, and burglaries in general, are nonviolent felonies is legal revisionism at best and legal misrepresentation at worst.

It is also appropriate to point out that burglars are particularly representative of the habitual offender. A 1982 study by the RAND Corporation regarding selective incapacitation concluded that 10% of all active burglars committed more than 230 burglaries each year.[59]

F. The Reality of the Triggering Offenses

The commission of any felony with two prior "serious" or "violent" felony convictions qualifies an individual for the application of Three Strikes. Likewise, the commission of any felony with one prior serious or violent felony conviction qualifies an individual for the no-probation doubling formula. However, the appropriate evaluation is in the application in sentencing—not simply in charging the priors—to bring into issue the application of the law. In other words, there are a number of different permutations available under the law that must be considered.

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57. People v. Montoya, 874 P.2d 903, 911-12 (Cal. 1994) (citations omitted) (emphasis added).

58. *See* CAL. PENAL CODE § 462 (West 1999) ("Except in unusual cases where the interests of justice would be best served if the person is granted probation, probation shall not be granted to any person who is convicted of a burglary of an inhabited dwelling house . . . .").

59. PETER W. GREENWOOD & ALLAN ABRAHAMSE, RAND CORPORATION, SELECTIVE INCAPACITATION 45-46 (1982).

For example, a person with one prior serious or violent felony conviction who commits a new felony that is a "wobbler," that is, it can be charged as a felony or as a misdemeanor, will not face the impact of the law if the prosecutor charges it as a misdemeanor or if the judge reduces it to a misdemeanor. Even if the "triggering offense" is left as a felony, if there is only one prior serious or violent conviction it can be stricken, resulting in non-application of the sentencing consequences under Three Strikes. Therefore, even assuming a significant percentage of "triggering offenses" are low grade felonies or "wobblers," they are not necessarily ultimately prosecuted in terms of achieving the full possible range of consequences under Three Strikes.

The same is true if there are two prior serious or violent prior felony convictions. Striking one or both priors can result in non-application of the law or in diminishing its possible consequences. In my view, the issue is not whether the crimes *charged* under the Three Strikes Law *could* result in the consequences the law provides. Rather, what must be examined is what *actually* occurs when the crime charged is *sentenced.* Many cases are filed alleging specific crimes and enhancements that theoretically could result in a certain possible sentence. Many of these cases are actually disposed of, subjecting the defendant to far less severe consequences. Thus, out of all of the defendants actually charged under the Three Strikes Law, only those fitting the profile of the "habitual criminal" are sentenced to the fullest extent of the law. This is what was intended.

I think it is quite telling to look at the actual nature of the "triggering" felonies which result in a Three Strikes sentencing. According to the California Department of Corrections' Data Analysis Unit (as of September 30, 1999), a total of 43,831 "second strike" offenders have been sentenced under the Three Strikes Law.[60] Of those offenders, the following profile emerges: 27.6% (12,090) of the "triggering" offenses were for new "serious" or "violent" felonies,[61] or for felonies with violence committed against the victim.[62] Furthermore, 6.4% (2,826) of the "triggering offenses" were for "possession of a weapon."[63] This means possession of a weapon (such as a firearm) by a person who has been previously convicted of a "serious" or "violent" felony.

For the 5,658 offenders who have been sentenced under the Three Strikes Law who had two prior "serious" or "violent" prior felony convictions when they committed their new "triggering" offense (making them eligible for a minimum of 25 to life), the profile is even more ominous. Of such "third-strike" offenders, 52.2%

60. SECOND STRIKE CASES, *supra* note 44. Having one prior "serious" or "violent" felony conviction makes defendants eligible for a doubled term and no probation.

61. *Id.*

62. *E.g.*, first degree murder, second degree murder, manslaughter, vehicular manslaughter, robbery, assault with a deadly weapon, assault by means of force likely to produce great bodily injury, felony battery, rape, lewd act with child, forcible oral copulation, sodomy, penetration with an object, other sex offenses, kidnapping, or residential burglary.

63. SECOND STRIKE CASES, *supra* note 44.

committed new "triggering" offenses that were either "serious" or "violent" or involved felony violence against their victim.[64] Additionally, 5.5% of these offenders with such prior felony convictions were convicted of a new "triggering" offense that involved possession of an illegal weapon.[65]

Such statistics make it amply clear that the target group identified under the Three Strikes Law has a high propensity for further violent behavior and will most likely engage in such violent behavior. The statistics also make it clear that the vast majority of "triggering" offenses that give rise to application of the Three Strikes Law would be regarded by the average reasonable person to involve serious antisocial conduct that strikes at the fabric of society's standards of behavior. Such statistics also make it amply clear that the actual enforcement of the law is consistent with application to career criminals.

G. Increasing the Prison Population

As to the arguments that Three Strikes is something we cannot afford because it will dramatically increase prison populations, I would make the following observation. There is no question that economics must play a role in evaluating whether certain programs cost more than the returns they provide. I do not think it is inappropriate to look at the cost of crime reduction in relation to the loss of money for other programs. Such things are valid policy considerations. For example, would a one percent reduction in violent crime that cost $100 million be worth the expenditure if that $100 million had to be removed from education? This is a difficult policy issue. What if that reduction in serious and violent crimes is 10 percent? Where do we draw the line? It places the issue in emotional terms to say that $100 million is too much to pay to possibly save one life even though we regard each life as priceless. Is it too much to pay if we save 100 lives or save 10,000 citizens from the trauma of robbery or rape? Personally, I say we cannot justify *not* spending the money if we have substantial results to base our decision on. Is a geometric jump in prison population a realistic consideration? Yes. Has it happened? No.

At the time the Three Strikes Law was implemented, predictions of uncontrolled increases in funding for an expanding prison population were made. Frankly, I never completely understood the "schools or prisons" hyperbole. Clearly, criminals had to go somewhere and they certainly were not going to schools.

"By the fall of 1994 state officials had already begun scaling back projections, predicting 230,000 inmates by 2000. Officials once talked of a need for 20 new prisons by 2000. . . . The state Legislative Analyst now predicts that California

64. THIRD STRIKE CASES, *supra* note 44.
65. *Id.*

won't run out of prison beds until mid-year 2000."[66] Other estimates ranged as high as 260,000 the week before Governor Wilson signed the Three Strikes bill. As of mid-1997, the prison population was 146,500 —up 21,000 from 1994. By 1997, growth was 10,500 inmates a year, instead of the 19,000 per year originally projected.[67] The 1993 California Department of Corrections projection, made prior to consideration of any impact of Three Strikes, was 161,144 inmates by June 30, 1998.[68] The actual prison population on June 30, 1998 was 158,207—3,000 less than the pre-Three Strikes Department of Corrections projection.[69]

In other words, the predictions made by the critics when Three Strikes was proposed have entirely missed their mark. In fact, the actual prison population is less than what the California Department of Corrections projected prior to any consideration of Three Strikes. In reality, prison populations increased 50% in the five years prior to Three Strikes and only increased 30% in the five years after Three Strikes.[70] In considering the economic impact of Three Strikes, the issue is not whether prison is the best way to deal with the crime problem. The issue is whether Three Strikes is responsible for an economically unfeasible or unjustifiable increase in prisons and prison population. The answer is *NO*.

H. Overburdening the Court System

Another argument claims that the court system will stagger and collapse under the load of Three Strikes trials. There is no question that at its inception, some people who before could have obtained some "deal" resulting in little or no time were now going to trial. There is no question that this initially resulted in many second- and third-strike cases going to trial, but I would pose several questions for the critics. Are the critics saying these people would not have gone to trial but for the consequences of Three Strikes? Experience tells me that many of these people would have gone to trial regardless of the enactment of Three Strikes. Are the critics saying Three Strikes forces defendants to go to trial because they cannot get probation or low terms? The public can and has answered such questions. This is part of what is perceived as wrong with our system and what is in fact wrong. We cannot and should not let the community pay the price for recidivism because we want to or can avoid a trial. In any event, it was expected that over time, the judicial

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66. Mary Anne Ostrom, *Prison Boom Hasn't Come; 3 Strikes: Predicted Increase in Inmate Population Was Overstated*, SAN JOSE MERCURY NEWS, Mar. 2, 1997, at 1A.

67. *Id.*

68. CALIFORNIA DEP'T OF CORRECTIONS, FALL 1993 POPULATION PROJECTIONS 1993-1999 18 (1993).

69. Matt Krasnowski, *Critics of '3 Strikes' Plan to Fix It by Ballot*, SAN DIEGO UNION-TRIB., Sept. 23, 1999, at A3.

70. *See* CALIFORNIA DEP'T OF CORRECTIONS, FALL 1999 POPULATION PROJECTIONS 2000-2005 4 (1999); CALIFORNIA DEP'T OF CORRECTIONS, FALL 1998 POPULATION PROJECTIONS 1998-2004 20 (1998). These percentages are obtained by comparing the increase in the prison population in the five years preceding Three Strikes with the increase in the five years following the enactment of Three Strikes.

and legal community would adapt to the new reality. They have. Does anyone have statistics to show they have not?

At the time Three Strikes was proposed and passed, there were projections from critics that trials would double as a result. Such predictions ignored the reality of the trial court system. There are only so many trial judges, and they are all working every day on cases. In other words, those courts are full. They could not double their output even if they felt so inclined. The question as to the impact on trial loads could only be answered by an analysis of the trial rate of cases eligible for Three Strikes prior to the advent of the law as opposed to the trial rate for Three Strikes eligible cases after the advent of the law. Another way of phrasing the question would be: are more of these cases going to trial now than would have gone to trial before the law?

In addition, one would need to know what the prosecutorial policy was in the particular county prior to the advent of the law. In other words, were only a small percentage of cases that would now be eligible for Three Strikes going to trial or prosecuted vigorously prior to the enactment of the law? If a county had a low percentage of vigorous prosecution of such cases prior to the law, it would necessarily have a higher percentage of enforcement after the law. If anything, this would call into question the policy decision being made on this type of criminal prior to the advent of Three Strikes. Thus, increases in trial percentages of post-Three Strikes cases would depend on the trial rates of such cases prior to the law.[71] These statistical conclusions must also consider how many cases have pleaded out because priors have been stricken.

Furthermore, crime statistics that link crime reduction results to enforcement rates and attempt to draw a correlation between crime rates in low and high enforcement jurisdictions must also look at pre-Three Strikes enforcement rates in order to draw any valid conclusions. They must also look to see how the Three Strikes Law is being used. Are district attorneys using Three Strikes to obtain pleas? For present purposes, I would assert that greater enforcement and more uniform enforcement are positive and beneficial impacts on the crime rate. The primary shift is in consequence—no more probation or short term incarceration for habitual criminals.

Another consideration must be the shifting of resources. As noted, courts can try only one case at a time. Without increasing the number of judges and courtrooms, the number of cases tried will not increase. Therefore, it is most likely that what is occurring is that more of the cases being tried, at least initially, were or

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71. One cannot reasonably assume a statistical conclusion about the impact of different levels of enforcement rates without analyzing what the enforcement rates were before, because this would fail to consider the overlap between previous rates and current rates. Another way of looking at this would be to recognize that a county that had only a 10% enforcement rate pre-Three Strikes and now has a 40% enforcement rate would only show a 40% enforcement rate but would actually have increased its enforcement rate of such cases by 300%. A county which had a 50% enforcement rate pre-Three Strikes and now has a 75% enforcement rate would have only increased its enforcement rate by 50%.

are of the three strikes and two strikes variety. This would logically mean that other types of criminal cases are not being tried but are receiving other types of dispositions. While there are a number of different conclusions that can be drawn from such an observation, one reasonable conclusion is that more emphasis is being shifted toward career criminals.

I do not believe there is currently any basis to conclude that the existence of the Three Strikes Law as applied is presently burdening our courts simply because of its application. Likewise, one must evaluate the beneficial consequence of Three Strikes and not just its impact. Further, I suspect that the existence of Three Strikes has resulted in a substantially higher number of pleas, thus reducing the number of lengthy trials that would have otherwise occurred.

I. Prosecutors Have Too Little or Too Much Discretion

It was expected that the Three Strikes Law would give prosecutors more leverage in plea negotiations, resulting in more pleas and fewer trials. Although my sources are largely anecdotal, I believe this has proven to be true. Generally speaking, whether a felony criminal case goes to trial or results in a plea depends on several factors: the quality of the evidence, the gravity of the offense, the potential length of the sentence and the number of available courtrooms. Cases with weak evidence plead out because prosecutors are more willing to make concessions in order to obtain a conviction. Less grave offenses are more inclined to plead because they call for lower sentences and probation. Offenses that potentially require a high sentence are more likely to plead when a lower sentence is guaranteed. In simple terms, defendants are generally pragmatists. They want to know if they will get less time by pleading guilty than if they go to trial. If the answer is yes, then they are more likely to plead than they would be had they been offered nothing.

The existence of longer sentences and the ability to work within that range gives greater leverage to prosecutors to obtain pleas than they had prior to Three Strikes. This is because the Three Strikes Law significantly raises the consequences of going to trial as opposed to pleading.

Addressing the argument that Three Strikes gives prosecutors too much or too little discretion, let me respond one way. Prosecutors are the individuals given the public responsibility to ensure that justice is pursued. It is their job to make sure the community is safe, and the public gives them discretion to exercise their judgment. I don't think, as a matter of policy, the public would understand or agree with the idea of defendants who have serious and violent records not getting long-term prison commitments when they commit a new felony. Three Strikes was a policy determination that was intended to ensure as much as possible that such a position was enforced.

As a former prosecutor and long-time trial and appellate judge, I believe that it is appropriate to try to equalize the treatment of defendants throughout California. The Three Strikes Law was intended to equalize as much as possible the treatment

of defendants. There is no morally defensible justification for allowing different treatment of individuals with similar backgrounds, simply depending on the legal culture of the county in which they are prosecuted or the caseload of the district attorney or the judge who has their case.

While it raises the hackles of some participants in the justice system to suggest limitations on discretion, one must consider the nature of the limitations. The drafting of laws, the prescribed punishment for violation of laws, and the intended purpose and objective of laws are policy determinations made by the Governor and the Legislature in statutes or by the public through proposition or initiative. District attorneys and judges enforce those policy determinations. Unfortunately, the enforcement of those policy objectives is affected by the caseload of the district attorney's office, judicial caseloads, available courtrooms, and local legal culture. In my view, there is a lack of consistency in the application of laws because of pressures on the courts and prosecutors and because of different perspectives that affect the high degree of subjective judgment used in the enforcement of legislative policy. In effect, local courts become the policy makers and the consequences of their individual policy decisions become the aggregate enforcement of legislative policy. What may get six years in one county may well get six months in another on virtually identical facts or even on facts where the mitigated punishment is on more egregious facts than the aggravated punishment. Many factors affect such a result; however, while the result may be explicable or even understandable, it is not necessarily justifiable.

Three Strikes was intended to minimize disparities in policy implementation by ensuring that career criminals do not receive probation and are not given minimal sentences. Objective guidelines are provided to enforce those policy objectives. Three Strikes was intended to ensure that an effective habitual offender statute would be implemented and enforced to the extent practicable. To that extent, it has made the sentencing of such offenders more consistent. It has not eliminated all inconsistency, however. To accomplish consistency, one would have to eliminate all discretion regarding a specific class of offender. Eliminating all discretion from district attorneys and judges would create exactly the consequence that provokes criticism in some cases: all "triggering offenses" would have the same result regardless of their circumstances.

I do not believe, however, that the use of prosecutorial discretion has been abused or that such discretion is inappropriately placed. I would argue that the statistics concerning actual sentencing application, as previously discussed, support this view. In an analysis of the use of prosecutorial discretion as it relates to Three Strikes, the following conclusion was reached:

> Under the California three-strikes law, all traditional forms of prosecutorial discretion have been eliminated by the legislature—all except the ability of the prosecutor to dismiss a prior strike conviction "in the furtherance of justice." Earlier reports seemed to indicate that this discretion was creating

> an unequal application of the law as some prosecutors used this discretion more frequently than others, yet none examined this issue empirically. In this [study], I analyze the use of this discretion and conclude that prosecutors are not treating offenders disparately with their ability to strike a strike, nor are they using their discretion in a way that encourages sentence leniency. Rather, they are applying the law, and using their discretionary authority, in accordance with crime control goals. Prior strikes are stricken only in those cases that involve less serious crimes or defendants who present a reduced risk of recidivism and a lesser degree of culpability.[72]

The statute requires the district attorney to file all of the offender's prior serious or violent prior felony convictions.[73] This is designed to insure public accountability. This makes policy decisions by the prosecutor and the judge clear because the dismissal of a prior conviction must be done on the record with the reasons stated. It also provides a record of the exercise of discretion. While this does not compel uniformity, it does promote accountability by those vested with discretion.

J. Three Strikes Duplicates Existing Recidivist Statutes

Some argue that we already have recidivist statutes and therefore Three Strikes is unnecessary. While it is true that we have had other recidivist statutes in the past, it is also true they were never enforced. Three Strikes has implemented a policy determination regarding habitual offenders that compels recognition of habitual offenders by requiring recognition of their past felony convictions and mandating that they be specifically addressed. It never required that everybody must be treated exactly the same without regard to circumstances. Prosecutors must determine whether or not to strike prior felony convictions in order to avoid Three Strike sentences. Judges must also determine whether or not to strike prior felony convictions to avoid Three Strike sentences. In other words, discretion must be exercised in public and on the record for all to see. If there is an inappropriate exercise of discretion, it will stand in the light of day. I think that is good policy, and it certainly is an honest policy.

K. Three Strikes Fails to Address Rehabilitation

A further argument made against Three Strikes posits that it fails to address rehabilitation. The law did not fail to address rehabilitation; rather, it was not

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72. Jennifer Edwards Walsh, "In the Furtherance of Justice": The Effect of Discretion on the Implementation of California's Three Strikes Law (1999). Delivered at the 1999 Annual Meeting of the American Political Science Association, Sept. 2-5, 1999 (on file with the *McGeorge Law Review*).

73. CAL. PENAL CODE § 667(f)(1) (West 1999).

intended to address rehabilitation. The concept of the Three Strikes Law recognizes that the individuals involved had been through the criminal justice process at least once, if not several times, and efforts to use the system to rehabilitate him or her had failed. Therefore, Three Strikes accepted that rehabilitation was not the goal. The goal was public safety and the reduction of crime generally, and serious and violent offenses in particular. The emphasis was on the safety of the public rather than on the rehabilitation of a habitual offender.

L. The Cost Is Too High

Another criticism made of the Three Strikes Law argues that it costs too much. It costs approximately $21,000 to $22,000 a year to incarcerate a single prisoner. Let me make a point that often goes unstated when such arguments are made—crime costs society a great deal of money. These arguments fail to acknowledge that society in general is benefitted economically from a reduction in crime rates. How much is saved if a murder doesn't occur? How much is saved if the burglary and robbery rates go down? To consider relative costs, one must consider not only what it costs to keep career criminals in custody, but also how much it costs to let them out of custody. These are career criminals. Crime is what they do.

In the research report *Victim Costs and Consequences: A New Look,*[74] an extensive study was done regarding the tangible (actual and measurable) costs of crime and the intangible (emotional and psychological effects) costs. The resulting conclusions were that murder has a tangible cost of $1,030,000 and an intangible cost of $1,910,000 for an aggregate cost per murder of $2,940,000.[75] Rape and sexual assault have a tangible cost of $5,100 and an intangible cost of $81,400 for an aggregate cost of $86,500.[76] The aggregate cost of robbery with injury is $19,000; assaults cost society $9,400 and each burglary costs the public $1,400.[77] The tangible costs were calculated based on the National Crime Victimization Survey. Intangible costs were based on studies that measured a range of factors from loss of productivity to mental disabilities. Of course, one cannot measure the actual anguish caused by crimes like murder, assault, or burglary. The only perspective, for purposes of objective observation, must look to measurable factors. Thus, while we put an economic price on murder, we acknowledge that all life is priceless. However, the cost of crime can be measured against the benefit to society (i.e. crime reduction) to produce a cost-benefit analysis. To that extent, one can look at crime reduction (that arguably may be attributed to Three Strikes) to calculate the money saved because the crimes were not committed.

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74. NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK (1996).

75. *Id.* at 9.

76. *Id.*

77. *Id.*

M. Three Strikes Affects Old Criminals

Another argument that is made with some degree of frequency suggests that Three Strikes locks up offenders who are "old" and past their criminal "prime." This argument is essentially the geriatric dilemma: how long does one continue to be a threat to the community, and at what point are we simply keeping criminals in custody when they no longer pose a significant risk of further harm?

The first issue is whether these really are "old" offenders. I think most people would assume that it takes some effort and time to acquire the type of record that qualifies for second- and third-strike treatment. Department of Corrections statistics do not bear out this expectation. Of the 43,831 offenders convicted as second-strike offenders as of September 30, 1999 (one prior serious or violent felony in addition to the new felony), 79% (34,532) are under the age of 40.[78] Further, 59% (25,736) are under the age of 35.[79] Only 21% (9,299) are over the age of 40 and only 9% (4,015) are over the age of 45.[80]

For third-strike offenders (two prior serious or violent felonies in addition to the new felony), the percentages likewise refute this criticism. Of the 5,658 offenders who have been sentenced as third-strike offenders, 69% (3,917) have been under the age of 40.[81] Further, 44% (2,466) are under the age of 35.[82] Only 31% (1,741) are over the age of 40 and only 14% (782) are over the age of 45.[83]

While I am not prepared to accept for personal reasons that being over 50 is "old," I am certainly not willing to accept that being under 40 is "old." It seems clear that the vast majority of offenders who have acquired the type of aggravated records that qualify them for sentencing under this law are under the age of 40. Nearly half of those sentenced as third-strike offenders are under the age of 35. Over half of those sentenced as second-strike offenders are under 35. In short, these are not "old" offenders who are past their criminal "prime."

N. Three Strikes Does Not Deter Crime

Another argument that I have heard is difficult to explain, because it is difficult to understand. This argument suggests that if a career criminal is aware of the Three Strikes Law and commits a new offense, then the law is not an effective deterrent. I disagree with this criticism for a number of reasons. First, the law assumed that career criminals would continue to ply their trade even though there were severe consequences. There are laws on the books for all kinds of crimes, and offenders are

78. SECOND STRIKE CASES, *supra* note 44, at 10.
79. *Id.*
80. *Id.*
81. THIRD STRIKE CASES, *supra* note 44, at 9.
82. *Id.*
83. *Id.*

aware that their conduct is against the law when they commit the crime. The fact that people expose themselves to the consequences of the Three Strikes Law does not mean that it is ineffective as a deterrent or as a law. Those offenders have been identified and isolated by the law. Because of the law, they will no longer be in the community to continue their criminal behavior. That was, in fact, an objective of the law.

Second, while the law was not written to primarily be a deterrent against the commission of crime in the first instance, it was written to send a simple message that offenders could understand. It seems evident that the precipitous drop in crime rate is in part due to fewer people committing crime. It is reasonable to conclude, therefore, that *some* people are being deterred. That not all people are deterred is not a sign of failure. In this regard it is appropriate to quote Justice Schauer in his dissenting opinion in *People v. Love*:[84]

> I, of course, recognize that there are persons who in all sincerity urge that the death penalty be abolished. They point to the cases which reach the courts and say: "See, it has not deterred the commission of these crimes." Certainly the potentiality of the penalty is not 100 per cent effective as a deterrent *as to all criminals*. But it would be absurd to claim that because it did not deter *all* that it did not deter *any*. As to each victim of each armed robbery whose life is spared because that one robber was deterred from killing, I dare say that the victim and his loved ones would not quibble over the percentage of the deterrent's efficacy.[85]

One factor that can be considered in determining whether deterrence is a consequence is the recidivism rate. Since the passage of Three Strikes, the recidivism rate of parolees who are returned to prison because of the commission of a new crime (as opposed to a parole violation) has dropped by nearly 25%.[86] In the three years prior to Three Strikes it had increased by almost 4%.[87] However, what is a dramatic consequence is the following:

> An unintended but positive consequence of "Three Strikes" has been the impact on parolees leaving the state. More California parolees are now leaving the state than parolees from other jurisdictions entering California. This striking turnaround started in 1994. It was the first time more parolees left the state than entered since 1976. This trend has continued and in 1997 more than 1,000 net parolees left California.[88]

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84. 366 P.2d 33 (Cal. 1961).
85. *Id.* at 47.
86. THREE STRIKES AND YOU'RE OUT, *supra* note 4, at 10.
87. *Id.*
88. *Id.*

What seems evident to me is that the large percentage of those opposed to the law tend to be of the mind that incarceration is not an acceptable way to alter behavior, except at a very minor level. They therefore tend to reject approaches which utilize incarceration as a primary solution. I would agree to the extent that incarceration of some offenders, particularly habitual criminals, has not proven effective in terms of rehabilitation. This does not mean, however, that we should not consider incarceration from the standpoint of effective crime prevention. Until they come up with a better solution, I demand that my streets be safe, my home be safe, my wife be safe, and my children be safe. The reality is that crime is dropping at a dramatic pace, and the only things that are different are more police, tougher laws, and Three Strikes. That some people look for any other reason does not give their concepts credence. I look at results. The rule of Ockham's Razor merits emphasis: when there are a number of possible explanations for a result, the simplest explanation is most probably correct.[89]

IV. HAS THREE STRIKES BEEN SUCCESSFUL?

A. *It Identifies Career Criminals*

The conclusion would appear inescapable that the legal restrictions on eligibility for sentencing as a second- or third-strike offender are extremely narrow and focus on those with a significant criminal history. Each of these offenders has a substantial record and, on average, has numerous felony convictions, in addition to their prior serious and violent felony convictions. These individuals have not been successfully deterred by the existence of criminal sanctions, as evidenced by their new felony conviction. It is clear that these individuals are career criminals.

B. *It Provides a Means to Allow Sentencing to Be Used to Address Crime*

Rather than focus on individual sentences for different crimes, Three Strikes focuses on the commission of crime by those who are career criminals. It provides for a sentencing formula to be used that targets career criminals and promotes a policy determination of removing career criminals from our streets.

C. *It Provides for a More Uniform Disposition of Criminal Cases*

Three Strikes has substantially reduced disparities in sentencing by providing a uniform policy for certain offenders. The sentencing structure of Three Strikes

89. William Ockham (1285?-1349) English scholastic philosopher who employed the principle of assuming as little as possible to explain a fact.

encourages more uniform disposition by providing clear legislative guidelines. It requires that individuals who have one prior serious and violent felony conviction and who commit a new felony receive a mandatory prison commitment that doubles the term for their new "triggering offense." It requires that individuals who have a record of two prior serious or violent felonies and commit a new "triggering felony" be isolated for a substantial period of time as clearly defined "habitual criminals." It places the discretionary decisions of prosecutors and judges on the public record and in the open. It is, in effect, "truth in sentencing" for career criminals.

D. It Enforces a Policy Decision for Career Criminals

Three Strikes asserts a policy determination that career criminals will be isolated and removed from their community. It encourages judges and prosecutors to avoid dispositions that are inconsistent with that policy decision. It is consistent with both the expectations of the community and with accepted criteria for punishment.

E. It Reduces Crime Generally and Serious and Violent Crime in Particular

At the inception of Three Strikes, the RAND Corporation estimated that, if fully implemented, the Three Strikes law would ultimately reduce serious and violent felonies by 22% to 34%.[90] This was based on a number of factors, including the fact that the targeted individuals would be unable to continue building their criminal history. The RAND projection was based on essentially the same rationale used in the formulation of the Three Strikes Law—isolating the targeted class of career criminals would inexorably reduce the commission of serious and violent crimes. Has this happened? One need only look at the statistics to see that it has.

After its proposal in 1993, the Three Strikes Law became highly publicized. It became law in 1994. California's Crime Index did not make any consistent downward trend until the latter part of 1993.[91] In 1993, homicide went up 3%, consistent with prior trends. Robbery went down 5% over 1992, which had a 2% increase. Assault went down 3% over 1992, which showed a 2% increase. Burglary went down 5% over 1992, which showed a 2% decrease. 1994, which was the first partial year of Three Strikes implementation, showed an 11% decrease in homicide, 12% decrease in robbery, 2% decrease in assault and an 8% decrease in burglary.[92] Such downward trends have continued. 1996 shows an 18% decrease in homicide,

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90. PETER W. GREENWOOD ET AL., RAND CORPORATION, THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY-SENTENCING LAW xii (1994).

91. Statistics following for 1993 are reported in CRIMINAL JUSTICE STATISTICS CENTER, CALIFORNIA DEP'T OF JUSTICE, CRIME & DELINQUENCY IN CALIFORNIA 1994 109 (1995).

92. CRIMINAL JUSTICE STATISTICS CENTER, CALIFORNIA DEP'T OF JUSTICE, CRIME & DELINQUENCY IN CALIFORNIA 1998 101 (1999).

11% decrease in robbery, 11% decrease in assault, and a 13% decrease in burglary.[93] This trend has continued to the present.

"The drop in the crime rate that California has experienced since 1993 is drastically different from the first four years of this decade (1990-1993) where the overall crime rate dropped only 2.4% and the violent crime rate increased 7.3%."[94] Crime in California had been slowly rising until it reached a peak in 1993. At that time it began a slight decline. After the implementation of the Three Strikes law crime experienced a precipitous plunge, according to statistics issued by the California Department of Justice for the period through 1999. Crime in California has shown an aggregate drop in the crime rate index, since 1994, of 44%.[95] In 1994, the crime rate dropped 6.9%, 12.6% from 1995 to 1996, 6.9% from 1996 to 1997, 13% from 1997 to 1998, and 14.9% from 1998 to 1999.[96] According to the California Department of Justice, the homicide rate has dropped by 48.7% since 1994. The robbery rate has dropped 49.4%. The assault rate has dropped 33%. The burglary rate has dropped 45%.[97] In other words, the murder and violent crime rate has been cut nearly in half.

Furthermore, the decline in serious and violent crime has been more dramatic than the decline in the aggregate crime rate. In 1993 there were 4,095 lives lost in California due to homicide.[98] In 1994 the figure was 3,699, a drop of 9.7% from 1993 levels; in 1995 it was 3,530, a drop of 13.8%; in 1996 it was 2,910, a drop of 28.9%; in 1997 it was 2,579, a drop of 37.0%; in 1998 it was 2,170, a drop of 47.0% from 1993 levels.[99] Put in stark terms, 5,587 fewer murders were committed in California from 1993 to 1998 than would have occurred if the 1993 rate had continued.

The crime of forcible rape has dropped 16.8% from 1993 levels;[100] that is, there were 7,063 fewer rape victims than there would have been by 1998 had the 1993 rate continued. For robbery, the drop by 1998 was 45.6% from 1993 levels,[101] or 170,703 fewer robberies than would have occurred had the 1993 rate continued. Aggravated assault, by 1998, had dropped 23.1% over 1993 levels;[102] thus, there have been 111,353 fewer assaults than there would have been had the 1993 rate continued. For burglary the drop by 1998 was 35.0% from 1993 levels,[103] or 450,617

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93. *Id.*

94. THREE STRIKES AND YOU'RE OUT, *supra* note 4, at 2.

95. CRIMINAL JUSTICE STATISTICS CENTER, CALIFORNIA DEP'T OF JUSTICE, CRIME & DELINQUENCY IN CALIFORNIA 1999, ADVANCE RELEASE 2 (2000).

96. *Id.*

97. *Id.*

98. CRIMINAL JUSTICE STATISTICS CENTER, CALIFORNIA DEP'T OF JUSTICE, CALIFORNIA CRIMINAL JUSTICE PROFILE 1998 5 (1999).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

fewer burglaries than would have occurred had the 1993 rate continued. Vehicle theft is down 38.8%,[104] or 341,367 thefts.

Utilizing the cost factors calculated by the National Institute of Justice, a department of the U.S. Department of Justice,[105] the tangible cost of these crimes—had they occurred—would have been $8,155,132,850. The overall cost of these crimes, including both the tangible and intangible costs, would have been $21,655,636,200. To put these figures in perspective, the cost of incarcerating a third-strike felon for the 20-year minimum provided under the law (at $21,000 per year) is $420,000, not taking inflation into account. The aggregate tangible and intangible cost of one murder is $2,940,000. Setting aside for the moment the observation that life is priceless, the overall cost of 5,587 murders that would have occurred by 1998 had 1993 levels continued is $5,864,820,000. Utilizing the $420,000 figure for purposes of illustration, the cost of incarcerating the 5,658 offenders who have been sentenced as third-strike felons for a period of 20 years is $2,376,360,000. This is $3,488,460,000 *less* than the aggregate cost of those murders that would have occurred had 1993 rates for murder continued. This is $5,778,772,850 *less* than the tangible cost of the murders, rapes, robberies, assaults, burglaries and auto thefts that would have occurred had 1993 crime rates continued. This does not even begin to take into account the intangible cost of misery, emotional distress, and fear created as a consequence of those crimes. However, most importantly, it is 5,587 citizens of California who are still going home to their families and raising their children. There is no price that can be put on that result.

It is also appropriate to look at national crime rate trends to see if there are differences in jurisdictions that do not have California's law. Using the statistics of the Federal Bureau of Investigation from their indexes on Crime in the United States for 1998, the figures are just as compelling. In the United States for the year 1997-1998, the total crime index dropped 5.4% (the crime rate drop in rate per 100,000 was 6.4%).[106] Those same FBI indexes show the total crime index in California dropping 9.6% (the crime rate drop in rate per 100,000 was 10.7%).[107] *In that year alone, there was over a 4% greater drop in crime in California than in the nation.* The national violent crime index dropped 6.4% (the crime rate drop per 100,000 crimes was 7.3%).[108] Those same FBI indexes show the total violent crime index in California dropping 10.8% (the crime rate drop in rate per 100,000 was 11.9%).[109] *In that year alone, there was over a 4% greater drop in violent crime in California than in the nation.* The national crime rate index for property crime dropped 5.3%

104. *Id.*

105. NATIONAL INSTITUTE OF JUSTICE, *supra* note 74, at 9.

106. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1998: UNIFORM CRIME REPORTS 5 (1999).

107. *Id.* at 72.

108. *Id.* at 10.

109. *Id.* at 72.

(the crime rate drop in rate per 100,000 was 6.2%).[110] Those same FBI indexes show the total property crime index in California dropping 9.4% (the crime rate drop in rate per 100,000 was 10.5%).[111] *In that year alone, there was over a 4% greater drop in property crime in California than in the nation.* The national crime rate index for murder and non-negligent manslaughter dropped 7.1% (the crime rate drop in rate per 100,000 was 7.4%).[112] Those same FBI indexes show the total murder and non-negligent manslaughter index in California dropped 15.8% (the crime rate drop in rate per 100,000 was 17.5%).[113] *In that year alone, there was over an 8-10% greater drop in homicide in California than in the rest of the nation.*

In every category, California's crime rate drop substantially exceeds the national crime rate drops for 1997-1998. It should also be noted that the drop in the national crime rate includes California's drops in the overall statistic. Therefore, the actual national crime rate drop excluding California would be significantly lower. California accounted for approximately 15% of all violent crime in the United States in 1998[114] and approximately 11% of all crime in the FBI index in 1998.[115] In order to effectively compare California to the rest of the nation, one must exclude California from the nation's crime index figures.

According to the California Attorney General report of March 1998, utilizing California and national statistics through 1997,

> California's drop in crime is nearly double that experienced in the other 49 states combined [through 1997]—30.8% drop in California compared to a 17.4% decline for the rest of the nation. California is also doing substantially better in the violent crime rate compared to the rest of the nation—26.9% versus an 18.2% decline.[116]

V. CONCLUSION

This Essay has examined the criticisms of the Three Strikes Law and whether the Three Strikes Law has been successful. The answer to that question depends on the objective of the law. Based on previous studies that supported the view that a small percentage of career criminals were responsible for a large percentage of crime, Three Strikes sought to identify and target those individuals. The objective was to isolate those career criminals and habitual offenders through the use of a sentencing law. By isolating these offenders and removing them from the population through an applied sentencing policy, it was predicted that serious and violent crime

110. *Id.* at 35.
111. *Id.* at 72.
112. *Id.* at 13.
113. *Id.* at 72.
114. *Id.* at 10, 74.
115. *Id.* at 5, 74.
116. THREE STRIKES AND YOU'RE OUT, *supra* note 4, at 4.

rates would drop. Analysis by entities such as the RAND Corporation supports this conclusion. Has Three Strikes been successful in accomplishing its objective? I think by any statistical approach the answer is unequivocal. The policies of the Three Strikes Law have been instrumental in accomplishing the dramatic drop in crime rates that have occurred since 1993. I would point out that both Attorney General Lungren and Attorney General Lockyer, as well as virtually every district attorney in California, have supported this conclusion.

Many things must be considered in measuring the impact of Three Strikes. Has it been effective in removing career criminals from the general population? Clearly the answer is yes. Has it been effective in obtaining more pleas, particularly with second-strike offenders? Clearly the answer is yes. Has it been effective in mandating prison sentences for career criminals, as opposed to probation and minimal treatment (thus releasing them back into the community)? Again, the answer is yes. If you don't believe me, ask your local district attorney.

It is also appropriate in measuring the success of Three Strikes to evaluate the results in comparison to the criticisms. As I indicated, cost analysis is a factor in policy decisions. Does the cost significantly outweigh the social benefit to the extent the benefit does not justify the cost? The critics' assertions are not borne out by the statistics. Are the wrong types of offenders being targeted by the law? The statistics do not bear out the criticisms.

When one looks at the many florid criticisms that have been directed at this law, we are left with a basic philosophical confrontation. Those who oppose laws that target career criminals and involve tougher sentencing are generally opposed to the notion that incarceration is an appropriate and effective tool in fighting crime. Those who support the concept of using sentencing as a means of reducing serious and violent crime accept incarceration as an effective means of addressing crime.

Let me ask the questions that need to be asked to put this entire discussion in perspective. Should people with prior serious and violent felony convictions who commit new felonies be precluded from probation except where there is a careful, public exercise of discretion? If the answer is no, then there is a basic philosophical disagreement with the concept of sentencing as a public policy factor. If the answer is yes, then you have the Three Strikes Law. Are people with two or more prior serious or violent felonies who commit a new felony appropriately categorized as habitual criminals? If the answer is no, then there is a basic philosophical disagreement with the concept of what constitutes a career criminal. If the answer is yes, then you have the Three Strikes Law. Is it appropriate to use the sentencing structure of the criminal justice system to identify and incarcerate those who continually prey on society by their criminal behavior? If the answer is no, then there is a basic philosophical disagreement with the concept of prison as an effective means of society protecting itself. If the answer is yes, then you have the Three Strikes Law.

The Three Strikes Law does not have to justify itself. The results speak for themselves. Crime in California has declined dramatically since 1993. The only

things that are different are more police, tougher laws, and Three Strikes. I go back to the basic concept of Ockham's Razor: where there are a number of arguable explanations for a given result, the simplest explanation is usually correct. The Three Strikes Law *is* that explanation.