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## **Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on “Three Strikes” in California**

Franklin E. Zimring\*

This Essay is about California’s justly famous “Three Strikes and You’re Out” legislation,<sup>1</sup> but my principal concern is about the process that produced the California law rather than its substance. The California Three Strikes initiative was the ultimate “outside the beltway” legislation. It originated from marginal pressure groups without any powerful constituency in the legislative or executive branches of state government. Yet, it became law without any significant amendment, compromise, or analysis. Was this a one-time fluke or a forerunner of how criminal justice policy will be made? This is the central issue I address in the following pages.

The path of the Essay is from the general to the specific. I begin with a capsule history of the Three Strikes initiative in California from proposal to legislation to initiative adopted by the voters. A second section will list a few of the objections that can be made to the penal approaches of the California Three Strikes initiative. The third section takes more space to describe the two sets of “missing persons” in the California legislative process. Three Strikes swept through the law making processes in California without any significant influence by powerful legislative or executive branch personnel. The legislative and initiative processes through which the proposal went were also almost entirely devoid of expert scrutiny from governmental specialists or from scholars. I regard this as an important part of the Three Strikes story, one that has not received much attention.

My general conclusion is that Three Strikes was an extreme example of populist preemption of criminal justice policy making. No outside proposal is likely to march through the legislative process untouched by human hands again soon. But the processes that left the state vulnerable to this blitzkrieg also produced structural changes in California government that lessen the insulation between popular sentiment and specific criminal justice policy outcomes. This change may be much broader than Three Strikes, much more general than merely impacting California, and a partial

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\* William G. Simon Professor of Law and Director of Earl Warren Legal Institute, University of California, Berkeley. I thank Meir Dan-Cohen and Jan Vetter for reacting to an earlier draft of this Essay; Thad Behrens did more than an articles editor should have to do to conform this Essay to scholarly standards.

1. CAL. PENAL CODE § 667 (West Supp. 1996) (enacted by the California Legislature); *id.* § 1170.12 (West Supp. 1996) (virtually identical provision enacted by a voter initiative).

explanation for recent large increases in the scale of penal confinement across the United States.<sup>2</sup>

### I. THE STORY BRIEFLY TOLD

Penal laws that provide aggravated penalties for recidivist offenders have a long history in the Anglo-American legal system. Special "habitual offender" laws that could impose life imprisonment on a third felony conviction were common in England<sup>3</sup> and the United States<sup>4</sup> through most of the twentieth century. But the reputation of such laws for enhancing community safety was not strong. Norval Morris's study of offenders sentenced under the English habitual felon statute showed most of these certified habitual felons usually committed crimes of minor social consequence and were distinguished from other criminals principally by their vulnerability to swift detection.<sup>5</sup> Life terms for many of these petty thieves seemed like a progressive tax on stupidity. While "three-time loser" laws remained on the statute books in many states, they were not widely used nor were they an important issue in the modern politics of law and order until the 1990s.

The first conversion of habitual criminal logic into the baseball parlance of "Three Strikes and You're Out" was passed in the State of Washington in 1993.<sup>6</sup> While the triggering threshold of three separate convictions was borrowed from the earlier habitual felon model, the Washington law was designed to cover only selected serious felonies with a life sentence on third conviction.<sup>7</sup> An even narrower three strikes provision became part of the 1994 federal crime legislation.<sup>8</sup>

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2. See Elizabeth Shogren, *Population in U.S. Prisons Is Up Record 8.8%*, L.A. TIMES, Dec. 4, 1995, at A1 (noting the recent dramatic increase in prison population across the nation).

3. See NORVAL MORRIS, *THE HABITUAL CRIMINAL* 40-51 (1951) (describing England's Prevention of Crime Act of 1903).

4. See Michael G. Turner et. al, *"Three Strikes and You're Out" Legislation: A National Assessment*, 59 FED. PROBATION 16, 17 (1995) (recounting the history of habitual offender laws in the United States).

5. See MORRIS, *supra* note 3, at 64-66 (examining the effect of early habitual felon laws).

6. WASH. REV. CODE ANN. § 9.94A.120(4) (West Supp. 1996).

7. *Id.*; see Daniel W. Stiller, *Initiative 593: Washington Voters Go Down Swinging*, 30 GONZ. L. REV. 433, 435 (1995) (describing the provisions of the Washington law).

8. 18 U.S.C.A. § 3559 (West Supp. 1996). For a comprehensive analysis of habitual offender statutes in all 50 states, see Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY (forthcoming 1997) (manuscript at 79-105, on file with the author).

The California version of Three Strikes was first proposed by Mike Reynolds, a Fresno photographer and father of a murder victim.<sup>9</sup> His version of Three Strikes was broader than the other proposals being debated across the United States in three respects. First, significant sentencing enhancements were generated in this new package upon conviction for a second felony.<sup>10</sup> So the "three strikes" label vastly understated the scope of the penalty enhancements. Second, the type of criminal record necessary to create eligibility for the twenty-five-years-to-life sentence did not require violence. A conviction for residential burglary is a sufficient condition for Three Strikes.<sup>11</sup> Because burglary is much more common than serious crimes of violence, many of those who become eligible for the extended sentences are burglars.<sup>12</sup>

The third special expansion in the Reynolds proposal was that the "third strike," which leads to a minimum twenty-five-years-to-life term, can be generated by conviction for any felony in the California Penal Code.<sup>13</sup> In this sense, once the appropriate first two strikes occur, the California proposal is a return to the undifferentiated emphasis of the old-fashioned habitual criminal legislation, except with mandatory language rather than explicit prosecutorial discretion<sup>14</sup> and with enhancements for a second strike as well.

Each of these three expansions of coverage multiplies the number of offenders significantly in the California scheme, but together they operate exponentially. The serious-violence three strikes proposal that then-Governor Cuomo was discussing in New York would have involved a few hundred violent three-time offenders per year.<sup>15</sup> The nationwide impact of the federal law was, at most, a few hundred

9. Dan Morain, *A Father's Bittersweet Crusade, Mike Reynolds Vowed that His Murdered Daughter Would Not Die in Vain; Few Thought He Would Win, But Today He Will See the 'Three Strikes' Bill Signed into Law*, L.A. TIMES, Mar. 7, 1994, at A1 [hereinafter Morain, *A Father's Bittersweet Crusade*].

10. See CAL. PENAL CODE §§ 667(e)(1), 1170.12(c)(1) (West Supp. 1996).

11. See *id.* §§ 667(d)(1), 1170.12(b)(1) (West Supp. 1996) (defining qualifying "prior felony convictions" as "violent" felonies under California Penal Code § 667.5 or "serious" felonies under California Penal Code § 1192.7); see also *id.* § 1192.7(c)(18) (West Supp. 1996) (listing residential burglary as a serious felony).

12. See Vincent Schiraldi, *Corrections and Higher Ed Compete for California Dollars; Corrections Winning*, OVERCROWDED TIMES, June 1994, at 7 (projecting that the costs of Three Strikes would be diminished by as much as 75% if residential burglary was not a qualifying prior felony).

13. CAL. PENAL CODE §§ 667(e)(2), 1170.12(c)(2) (West Supp. 1996).

14. See *id.* § 667(f) (West Supp. 1996) (requiring prosecutors to "plead and prove" all qualifying prior felonies, but allowing the court to strike a prior felony conviction only on the motion of a prosecutor); *id.* § 1170.12(d) (West Supp. 1996) (identical provision in voter initiative version). This provision is wrought with ambiguity that made it difficult for judges to apply until a recent pronouncement from the California Supreme Court. Section 667(f)(2) gives prosecutors the power to make a motion to strike priors "in the furtherance of justice" or for insufficient evidence. However, the provision permitted judges to grant only a prosecutor's motion upon a finding of insufficient evidence. Furthermore, the provision purported to strip courts of discretion to strike priors sua sponte. The California Supreme Court has recently restored the judiciary's discretion to strike prior convictions. *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 529-30, 917 P.2d 628, 647, 53 Cal. Rptr. 2d 789, 808 (1996).

15. Timothy Egan, *A 3 Strike Law Shows It's Not as Simple as It Seems*, N.Y. TIMES, Feb. 15, 1994, at A1.

offenders annually.<sup>16</sup> The probable impact of the package in California might have been as much as seventy times as great. Nobody knew.

The campaign to put this initiative on the 1994 California ballot involved an alliance between some of the crime victim pressure groups in California, the California Correctional Peace Officer's Association, the prison guard union, which stood to benefit greatly by the expansion of the prison population, and the National Rifle Association, a gun owners group that welcomes punitive sentencing programs as a method of addressing violent crime concerns without inconveniencing gun owners.<sup>17</sup> Prior to November 1993, this version of Three Strikes was not a significant part of mainstream politics in California.<sup>18</sup>

Polly Klaas changed all that. This twelve-year-old girl was abducted from her Petaluma home in October 1993 by a twice-convicted violent offender who had recently been paroled from the state prison system. For a month after she had been sexually assaulted and killed, public attention and anxiety was stimulated by her unknown fate. Then the ex-convict was apprehended and provided the path to Polly's remains.<sup>19</sup>

Violent crime had struck at the heart of a prosperous small town in Marin County. The victim was an idealized version of everybody's daughter or sister, an innocent young girl at a slumber party.<sup>20</sup> The offender was a violent recidivist of Willie Horton proportions.<sup>21</sup> And the political timing was uncanny.

A Republican governor was about to launch a re-election campaign with low approval ratings and a weak state economy.<sup>22</sup> Pete Wilson was anxious to seize the initiative to be portrayed as getting tough on crime.<sup>23</sup> The Democrats were then in

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16. William Douglas, *Panel OKs Amended '3 Strikes' Bill, Provision Allows Parole After Age 70*, NEWSDAY, Mar. 18, 1994, at 17.

17. In addition to the California Correctional Peace Officer's Association, the National Rifle Association and various victims' groups, the Three Strikes and You're Out Committee received substantial funding from the Republican Party, Governor Wilson's campaign committee, and United States Senatorial candidate Michael Huffington's campaign. Dana Wilkie, *Prop 184: 3 Strikes Already on Books, Foes Say Its Passage Only Bolsters a Bad Law*, SAN DIEGO UNION-TRIB., Oct. 12, 1994, at A1.

18. See Morain, *A Father's Bittersweet Crusade*, *supra* note 9, at A1 (describing the California Assembly Public Safety Committee's swift defeat of the Reynolds bill in April 1993).

19. Richard C. Paddock & Jennifer Warren, *Suspect's Tip Leads to Body of Polly Klaas*, L.A. TIMES, Dec. 5, 1993, at A1.

20. See John Carman, *Why Polly Was So Special, Her Abduction, Death Penetrate the National Consciousness*, ORLANDO SENTINEL, Dec. 9, 1993, at A19 (describing the extraordinary efforts of the Polly Klaas family in keeping Polly's case alive in the minds of the entire nation).

21. See Richard Price, *Cruel Lesson/Why Polly Died/Town Angry at a System that Failed*, USA TODAY, Dec. 8, 1993, at 1A (noting Richard Allen Davis's eleven-page list of prior convictions and reporting that the accused had recently been paroled after serving half of his 16 year sentence for kidnapping, assault, and burglary).

22. Sherry Bebitch Jeffe, *Wilson Hoping Crime Will Assure His Job—But What Has He Done So Far?*, L.A. TIMES, Jan. 9, 1994, at M6.

23. See Bill Stall, *GOP Pins Hopes on Crime Issue to Re-Elect Wilson*, L.A. TIMES, Feb. 28, 1994, at A3 (reporting that Governor Wilson and the Republican Party made crime a prevailing theme in the three-day Republican convention).

control of the state legislature and were not about to give the vulnerable Governor an opportunity to make crime a defining issue in his re-election campaign.

What followed was an extraordinary power realignment in the face of the upcoming election. The Democrats, unwilling to create a contest of wills in which the Governor could claim to be distinctively tough on crime, responded to the Governor's call for new enhanced punishment for recidivists. The legislature considered a collection of five different proposals for increased sentences that ranged from specific programs targeted at repetitive violent offenders to a broad legislative version that was word-for-word the Mike Reynolds three-strikes initiative in legislative form.<sup>24</sup> Instead of choosing one of these five alternatives, the legislative leadership announced that it would pass whatever proposal the Governor selected from the range of plans then under consideration.<sup>25</sup> By deferring in advance to the Governor's choice, the Democrats' hope was that the Governor would either back down from an unqualified "get tough" stand or be politically neutralized if he persisted. But the willingness to pass even the extreme version of Three Strikes if the Governor demanded that they do so was an attempt not to allow even the extreme version of Three Strikes to be a campaign issue that divided the major political parties.<sup>26</sup> Give the Governor whatever he demands, the strategy went, and he will have to find some other issue on which to run for re-election.

In March 1994, Governor Wilson reiterated his preference for legislative enactment of the copycat version of the Mike Reynolds Three Strikes program,<sup>27</sup> a preference the Governor had first announced at Polly Klaas's funeral.<sup>28</sup> In doing this, the Governor rejected a narrower bill that had been submitted by the California District Attorneys Association.<sup>29</sup> In effect, the executive and legislative branches of

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24. In addition to Assembly Bill 971, backed by Reynolds and sponsored by Bill Jones and Jim Costa, the legislature also considered these "three strike" measures in 1994: AB 1568 (Rainey), AB 167 (Umberg), AB 2429 (Johnson), and AB 9X (Johnson).

25. See James Richardson, *Three Strikes Supporters Divided*, SACRAMENTO BEE, Feb. 12, 1994, at A4 (quoting then Assembly Speaker Willie Brown, who said, "Put [the five competing three strikes measures] on the governor's desk and let him deal with it . . . and that's a pure, unadulterated, practical political approach.").

26. See Dan Morain, *Assembly Panel OKs Five '3 Strikes' Bills*, L.A. TIMES, Jan. 27, 1994, at A3 (recounting Willie Brown's attempt to place Reynolds's initiative on the June ballot to take the issue away from Republican proponents in the November election). The struggle to downplay Three Strikes for the November election continued after Reynolds put the initiative on the ballot. When a proposal was presented by Mike Reynolds in late March to clean up the drafting errors in AB 971, Speaker Brown responded:

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

James Richardson, *Brown Won't Touch "Three Strikes" this Year*, SACRAMENTO BEE, Mar. 16, 1994, at A4.

27. Vlae Kershner, *Governor Wants '3 Strikes' Plan that Is Toughest, Most Costly*, S.F. CHRON., Mar. 3, 1994, at A1.

28. George Skelton, *Wilson Seizes the Day After Polly's Murder*, L.A. TIMES, Dec. 13, 1993, at A3.

29. Daniel Weintraub, *'Three Strikes' Law Goes into Effect*, L.A. TIMES, Mar. 8, 1994, at A1. The California District Attorneys Association's version (AB 1568) was sponsored by Assemblymember Richard Rainey, a Republican former sheriff. Ironically, Rainey's version was supported by the Klaas family and the Polly Klaas

California government had swallowed the outside-the-beltway version of Three Strikes whole because the Governor and the legislature were unwilling to concede the high ground on getting tough to the other side in the political campaign to come. Three Strikes went mainstream in March 1994 through gubernatorial initiative and legislative enactment. The November passage of Initiative Number 184 became a political afterthought, of diminished practical import, and overshadowed by the divisive Proposition 187 debate on immigration that was the most visible issue in the 1994 election.

The day after he rejected the three strikes proposal from the district attorneys of California because it was soft on crime, Governor Wilson also announced his own support for a "one strike" proposal of life imprisonment for sex crimes and selected crimes of violence.<sup>30</sup> This new wrinkle has since died a quiet death. But Pete Wilson was re-elected handily, and the broad and mandatory language of the Reynolds edition of "Three Strikes and You're Out" became one of the enduring legacies of California's 1994 political season.

## II. A CRITICAL PERSPECTIVE

More than any other habitual offender provision in the long history of such laws, the California version of Three Strikes is a penal practice without a theory. Twenty-five-years-to-life prison sentences are administered to persons convicted of minor felonies as a third strike, but only if the previous convictions were for violence or housebreaking.<sup>31</sup> The requirement of a serious prior felony means that the "habitual felon" logic of the earlier laws was not the exclusive basis for the protracted term. If this were a statute aimed at the confirmed criminal, it would sweep even more broadly than it does.

Yet proportionality is also obviously not served in any consistent fashion by the new sentencing provisions. Any trivial felony by a twice-convicted burglar will call down a larger sentence for a three-time loser than a nonaggravated second-degree murder will generate for a non-three-strikes defendant.<sup>32</sup> In the early days of the new law, more twenty-five-years-to-life terms under Three Strikes were handed down as a result of convictions for possession of marijuana than for murder, rape, and kidnapping combined.<sup>33</sup> While previous attempts at habitual criminal sanctions were dependent on prosecutorial discretion, California's Three Strikes was supposed to be

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Foundation. Peter Hecht, *Two Grieving Fathers Part Ways on '3 Strikes' Crusade*, SACRAMENTO BEE, July 10, 1994, at A1. In fact, Rainey's bill was eventually named "The Polly Klaas Memorial Habitual Offender Act." Dan Morain, *Three Strikes Clears State Legislature*, SACRAMENTO BEE, Mar. 4, 1994, at A1.

30. Skelton, *supra* note 28, at A3.

31. CAL. PENAL CODE §§ 667(e)(2), 1170.12(c)(2) (West Supp. 1996).

32. See *id.* § 190(a) (West Supp. 1996) (providing for a 15-years-to-life sentence for second degree murder); *cf. id.* § 667(e)(2) (West Supp. 1996) (providing a minimum 25-years-to-life term for any felony conviction if the defendant has two qualifying prior felony convictions).

33. Fox Butterfield, *Tough Laws on Sentences Is Criticized*, N.Y. TIMES, Mar. 8, 1996, at A14.

mandatory.<sup>34</sup> Usually, the substitution of mandatory for discretionary charging and sentencing is justified by the need for consistency in serving the principles that produced the new penal law. But the hybrid version of Three Strikes has no principle to serve as bedrock. Adhering to the letter of the new law will not elevate any particular purpose of criminal sanctions in the penal treatment of recidivists because there is no principled basis for the new provision.

Indeed, some of the key provisions of the Three Strikes package seem in conflict with each other on basic questions. The enhancements provided after one prior conviction are proportional to the offense currently charged, so that the prior qualifying conviction doubles the base penalty for the new offense rather than supplants it.<sup>35</sup> The burglar and the armed robber will each serve more time in prison if this is a second strike, but they will not serve the same sentence. The seriousness of the current crime counts for much of the current sentence. Yet if the robber and burglar are in the docks with two prior felonies, the sentences to be imposed will be equal as long as twenty-five-years-to-life is more severe than the base penalty for the current offense.

The effect of separating penalties in response to whether a prior record contains a strike is to establish different penalty structures depending not only on whether a special status felony conviction takes place, but also on when the special status conviction occurs in a particular career. Table 1 shows the differing penal results for three defendants convicted of the same three offenses, but in different sequence.

**Table 1: Sequence and Penalty Under California Three Strikes Law**

	<i>Offender A</i>	<i>Offender B</i>	<i>Offender C</i>
1st Conviction	Theft	Burglary	Burglary
2nd Conviction	Burglary	Theft	Burglary
3rd Conviction	Burglary	Burglary	Theft
Sentence on 2nd Conviction	No Three Strikes enhancement	Twice the penalty for theft	Twice the penalty for burglary
Sentence on 3rd Conviction	Twice the penalty for burglary	Twice the penalty for burglary	25-years-to-life

34. CAL. PENAL CODE § 667(f)(1) (West Supp. 1996) (requiring that a prosecutor "plead and prove each prior felony conviction"); *id.* § 1170.12(d)(1) (West Supp. 1996) (setting forth the identical provision in the voter initiative version).

35. *Id.* §§ 667(e)(1), 1170.12(c)(1) (West Supp. 1996).



*Offender A* faces no three strikes aggravation of the second felony sentence because the first felony conviction was not a listed felony. *Offender A*'s third conviction generates a doubling of the burglary term because of the prior burglary conviction but does not result in the highest level of three strikes liability.

*Offender B*, by contrast, will face twice the theft sentence for the theft conviction because it follows a burglary conviction. But the theft conviction does not constitute a second strike, so *Offender B*'s next conviction also carries the doubling of the burglary term only.

*Offender C* faces twice the term for burglary at the second conviction and twenty-five-years-to-life upon the theft conviction because of the two prior three strikes convictions.

When these three defendants are sentenced upon their third conviction, they have identical criminal records in every respect but sequence. It is the defendant with the least serious current offense who receives the most severe prison sentence.

Is there any penological justification for these divergent results? Is the *Offender C* sequence evidence of larger public danger than *Offenders A* and *B*? Is a burglary conviction followed by a theft conviction more dangerous than a theft conviction followed by a burglary conviction?

The Three Strikes provisions are silent on issues of principle, and it may be that the only general principle in the statute is increasing the seriousness of all punishments for those who had been convicted earlier of selected felonies.<sup>36</sup> If the list of selected previous felonies had been confined to offenses of violence, then it could be argued that the statute sought to isolate only dangerous felons, but the addition of house burglary waters the stock rather dramatically in that regard. And confirming a prediction of serious criminality with any felony conviction is also a peculiar way to isolate the dangerous.

One searches in vain for consistent principles animating Three Strikes other than harsher penal treatment for repeat offenders. The specific strategies in the statute were not subjected to scrutiny either before the law became effective or since. Those who support the law make claims for the appropriateness of the classifications in the statute in an indirect way, by attributing declines in California's reported crime rate to the new penal regime.<sup>37</sup> This proposal was unexamined at any stage in the political process.<sup>38</sup> The problem, in my view, was not the usual difficulty with new legislation

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36. See *id.* § 667(b) (West Supp. 1996) ("It is the intent of the Legislature in enacting [the Three Strikes provisions] to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.").

37. See Nicholas Riccardi, *Statewide Crime Rate Is Down in First Half of '94*, L.A. TIMES, Aug. 31, 1994, at A3 (reporting Attorney General Dan Lungren's claim that Three Strikes was responsible for the drop in crime rate); see also Dan Morain, *Proposition 184 'Three Strikes': A Steamroller Driven by One Man's Pain*, L.A. TIMES, Oct. 17, 1994, at A3 (reporting Mike Reynolds's claim that Three Strikes was having a "deterrent effect").

38. See Vitiello, *supra* note 8 (manuscript at 21-32) (recounting the failure of the legislature to examine the various three strikes proposals).

when nobody reads the fine print in legislative programs. For Three Strikes in California, nobody seems to have read the big print.

### III. MISSING PERSONS

The process that produced Three Strikes was the creation of a proposal outside ordinary governmental channels and its subsequent endorsement by the legislature and the Governor. Months afterward, a favorable vote on Proposition 184 ratified the earlier enactment and politically insulated the law's provisions from normal legislative amendment.<sup>39</sup>

Two things that did not happen in the legislative career of this law are of particular interest to me. In the first place, the provisions of this package received little or no analytic attention from criminal justice professionals and academic experts prior to the law's enactment. One reason Three Strikes received little attention from practitioners and professors is that these experts were not consulted by anybody in government. Another reason for the absence of expert analysis was the short period of time between the post-Polly Klaas pressures for fast passage of a violent recidivist package and the March 1994 decision by Governor Wilson to demand line-by-line conformity to the proposed initiative. Both the haste and the pressure in this story are remarkable even for the far-from-careful, normal criminal legislation process. The Department of Corrections made some guesses about the prison population impact of the proposals.<sup>40</sup> Alternative violent offender proposals were drafted by some legislators and by the California District Attorneys Association.<sup>41</sup> No hearings or criminal justice impact studies were launched. The prison guard union, the victim lobby groups, and the National Rifle Association had no interest in legislative impact assessments and no competence to conduct such studies. The capacity of legislative staff and support personnel to do policy analysis had been reduced by budget cuts and staff reduction.<sup>42</sup> In any event, the commitment of the legislative leadership to follow the Governor's lead made independent judgments about the different

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39. Contrary to the Three Strikes and You're Out Committee's musings that the voter initiative would be insulated from legislative tinkering because amendment would require a supermajority, the adoption of the initiative by the voters had no such effect. The version enacted by the California Legislature already required a supermajority for amendment. *See* CAL. PENAL CODE § 667(j) (West Supp. 1996).

40. *See* Memorandum from Richard S. Welch to the Director of Corrections (Feb. 28, 1994) (on file with author) (projecting that AB 971 would add \$5.7 billion in prison operating costs every year by 2027-28 and would cost \$21.3 billion in prison construction costs).

41. The alternative bills were AB 1568 (Rainey and California District Attorneys Association), AB 167 (Umberg), AB 2429 (Johnson), and AB 9X (Johnson). *See supra* note 24 and accompanying text (discussing the proposals).

42. *See* Kenneth R. Weiss, *Budget Cuts Cost Area Legislators 16 Staff Members*, L.A. TIMES, Feb. 19, 1991, at B1 (describing the mass exodus of legislative staff required to meet the budget cuts imposed by voter initiative Proposition 140).

recidivist proposals beside the point.<sup>43</sup> The absence of interest in outside analysts' views on Three Strikes and its alternatives is one good reason why outside experts were quiet.

The second missing element in this story is the influence of political elites. The legislative process that passed Three Strikes into law in March 1994 was also remarkable in that neither the Governor nor the legislature made any attempts to question or to change the Three Strikes proposal.<sup>44</sup> This total lack of influence on the shape of this major legislation is quite novel in California. In saying this, I do not mean that Edmund Burke would approve of the normal pattern for drafting and deliberating legislation in the Golden State. But one of the prerogatives of power is the capacity to shape the ways in which laws will be structured. The crafting by a lobby of a large, radical, and complex piece of legislation that sails through the legislature and the executive branches untouched by human hands is unusual even by standards of narrow political self-interest. For a Willie Brown-led legislative leadership to pledge itself to pass any bill selected by an adversary governor is by no means an everyday occurrence. For a governor from the political mainstream to reject a bill proposed by the state's district attorneys association because it was too soft on criminals in favor of a fringe group alternative is also not a common event in the annals of state government. Which of these choices was the more cynical is a close question. Both Brown and Wilson knew much better than they acted. Neither is a likely candidate for the next edition of *Profiles in Courage*. But of these two stratagems, I regard the selection by Pete Wilson as the more important proximate cause of how the Reynolds proposal was swallowed whole by the legislative process. Willie Brown dared Governor Wilson, and the Governor accepted that dare with a vengeance.

There is little doubt that the deficiencies of process mentioned earlier allowed some of the more problematic and internally inconsistent elements in Three Strikes to tiptoe onto the statute books in California. The critical question this raises is the extent to which the story of Three Strikes is a portent of the legislative future of criminal justice policy making. Have we been talking about a one-time California fiasco or a visit from the political equivalent of Charles Dickens's Ghost of Christmas Yet To Come?

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43. See Jerry Gilliam, *Legislators Fear Public on "3 Strikes," Brown Says*, L.A. TIMES, Mar. 2, 1994, at A3 (reporting Assembly Speaker Willie Brown's refusal to use his influence to facilitate a rational debate on the competing measures because of the potential political consequences of appearing to oppose Mike Reynolds).

44. The inability of the legislature to amend the initiative version of Three Strikes was poignantly illustrated during a Senate committee hearing on the measure. An amendment was proposed and adopted. At that point, Mike Reynolds stood and said, "When we start adding amendments, it's going to open a Pandora's box. . . . It will demonstrate to me at the least the inability of the [l]egislature to act in a responsible way." The amendment was promptly repealed. Morain, *A Father's Bittersweet Crusade*, *supra* note 9, at A1 (internal quotes omitted). Summing up the mood of the legislature, Willie Brown, who opposed Three Strikes, stated "I got out of the way of this train because I'm a realist." Gilliam, *supra* note 43, at A3 (internal quotes omitted).

In my view, the Three Strikes story is a little of both. The one-time pressures in the story are substantial. The 1994 campaign was a particularly mean political season in California and elsewhere.<sup>45</sup> The Polly Klaas episode was a one-time horror, and the prospect of the initiative put pressure on elected officials of a kind that does not exist in most states. So far, the attempts of Mr. Reynolds and others to push on for life terms for first convictions for serious violence and ten-year prison sentences if fourteen-year-olds use guns in felonies have not captured the public's imagination or preempted the legislative process in the same way that Three Strikes was.<sup>46</sup>

#### A. *The Decline of Expertise*

Two structural changes in the circumstances of criminal justice policy making render the process vulnerable to populist domination. The first of these is the decline of expert influence on policy formation and evaluation. Criminal justice in the United States over the past generation has been experiencing two seemingly contradictory trends. On the one hand, the sheer amount of expertise available on questions of crime and punishment has expanded rapidly. There are well over five hundred college and university criminal justice programs in the United States and bumper crops of new Ph.Ds. each year.<sup>47</sup> So we have more experts.

But expert influence on the process and expert involvement in the process has declined. Let me give examples that involved professors of criminal law. When the young Gerald Caplan<sup>48</sup> marched off to Washington, D.C., to head the National Institute of Justice in the early 1970s, he became part of a long tradition of legal academics intensely involved in the policy process. James Vorenberg of Harvard Law School had been the executive director of the 1966 President's Crime Commission. The Model Penal Code effort of the American Law Institute brought the best and the brightest in academic law into the process of substantive criminal law reform.

One might title my complaint "From the Model Penal Code to Three Strikes in One Generation." There is now a large gap between law professors and the legislative process, and not just in California. Part of the problem is that most academic lawyers are not much interested in criminal justice policy processes. Most of the problem is that there is no demand for what experts have to offer, which is information about the implications and consequences of policy choices.

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45. See Howard Kurtz, *Political Peddlers' Bitter Bromides*, WASH. POST, Oct. 11, 1994, at A1.

46. See Andy Furillo, *Impatient Crime-Busters Leave Legislature on Sidelines*, SACRAMENTO BEE, Aug. 4, 1996, at A10 (describing Reynolds's proposed "10-20 Life" initiative for sentencing gun-carrying felons); see also Skelton, *supra* note 28, at A3 (recounting Governor Wilson's proposal for a life sentence for first time sex offenders).

47. See 3 THE COLLEGE BLUE BOOK 567-70 (25th ed. 1995) (listing over 500 criminal justice programs by state).

48. Gerald Caplan is currently the Dean of McGeorge School of Law.

The public believes that analytic and statistical implications of policy choices in criminal justice are unimportant. And it is not just the academic expert who is a victim of declining influence. Deference to expertise in the separation of governmental powers is also an endangered species in the modern politics of criminal justice. In the 1950s and 1960s the allocation of power across branches of government in the American criminal justice system was protected by notions that those in the executive and judicial branches of government had special expertise in their jobs. Parole boards made decisions about prisoner rehabilitation based on special competence to predict future behavior, or so it was thought.<sup>49</sup> Judges and probation officers who wrote presentence reports were specially qualified to make sentencing decisions about individuals one at a time.<sup>50</sup> Prison wardens and correctional administrators had the wisdom and experience required to design and administer prison programs.<sup>51</sup> Shared belief in specialized expertise became a support, not only for the "hands-off doctrine" that insulated correctional officials from judicial review, but also for a broader hands-off tendency that restrained legislatures from second-guessing the powers of the operating branches of the criminal justice system.<sup>52</sup> Belief in expertise functions as a support of the division of labor and the division of power in functioning systems of criminal justice.

When citizens come to believe that no special expertise is implicated in criminal justice decision-making, then separation of powers will no longer allow the expert deference. If sentencing and selection for parole involves no special skill, no deference is due the governmental actors that traditionally held power for these functions. Developments like the decline of the belief in rehabilitation can thus undermine the standing of administrative and judicial actors. In the short run, the legislature may seem a more appropriate power holder. If punishment for crime is not a science, why not see making punishment policy solely as the sort of political act that democratically-elected legislators are best suited to perform?

The modern politics of criminal justice involve rhetoric that imagines criminal sentencing as a zero-sum game between victims and offenders. If one prefers the victim, then punishment should be increased. Those who oppose increasing punishments must, in this view, prefer offender interests to victim interests. To live in this kind of world is to deny that expert opinion is of any real importance in making policy.

One reason for the decline of the belief in expertise as an important explanation for modern trends in the United States is that the shift to populist paradigms fits the timing of recent changes better than a theory of increased hostility toward criminals or fear of crime. Burglars have never been popular in the United States and populist

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49. NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 31-34 (1974).

50. Herbert Wechsler, *Sentencing, Corrections, and the Model Penal Code*, 109 U. PA. L. REV. 465, 470-88 (1961).

51. *Id.*

52. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 159 (1991).

sentiments have always been hostile to convicted offenders. At any time in the twentieth century, a public choice between the interests of crime victims and the interests of criminal offenders would favor victim interests. Why were these sentiments not dominant in setting policy in the 1960s and 1970s?

It may be that the social authority accorded criminal justice experts provided insulation between populist sentiments (always punitive) and criminal justice policies at the legislative, administrative, and judicial levels. This insulation prevented the direct domination of policy by anti-offender sentiments that are consistently held by most citizens at most times. What has been changing in recent years is that the insulation that separated public sentiments and criminal justice decisions has been eaten away. Three Strikes was an extreme, but by no means isolated, example of the kind of law produced when very little mediates anti-offender sentiments. The 1994 federal anti-crime legislation is another example of crime legislation directly reflecting public sentiments. At the federal level, the kind of expertise that used to write crime commission reports in the 1960s was considered a drawback to federal criminal justice administration in the 1990s. The deliberative and analytical style of Philip Heymann during his time as the U.S. Deputy Attorney General was considered a problem by his critics.<sup>53</sup>

But one reason Three Strikes will cost so much to administer is that hard cost and benefit questions were not asked when alternative methods of controlling serious recidivists were before the legislature.<sup>54</sup> This was a failure of governing politicians to do their jobs. Political leaders who hold governmental power must do more than reflect the sentiments of their constituents when important questions must be decided. Also, those who have expertise in criminal justice matters must raise their voices to be heard, disregarding the embarrassing fact that very few in the public are interested in what they have to say. The decline of expert authority is a social circumstance that makes responsible policy more difficult to achieve. It is not an excuse for abandoning the criminal justice system to populist preemption.

One central task in protecting criminal justice policy from soundbite populism is to rebuild some conditions in decision-making that insulate individual decisions from direct popular pressures. Some protection could come in the form of creating expert bodies, rather than legislatively fixed terms, to set general guidelines for criminal sentencing, protecting the individual decisions of judges in sentencing matters

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53. See Dan Freedman, *Critics Hit Reno as Top Aide Quits*, S.F. EXAM., Jan. 28, 1994, at A10 (reporting that critics portrayed Heymann as a "deliberative ex-professor who had trouble making decisions").

54. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 971 (Jan. 26, 1994) (passing the measure without fiscal analysis); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 971 (Feb. 28, 1996) (noting the committee's awareness of the Department of Corrections' cost projections, but failing to procure data on cost information on the other bills); *id.* (acknowledging implicitly that AB 971 would have much greater costs because of the inclusion of residential burglary as a qualifying prior felony); see also SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 971 (Feb. 17, 1994) (citing the Committee's concern that AB 971 "appears to be constitutionally infirm in that it would require cruel and unusual punishment in some cases, with no option for a lesser sentence in the interest of justice").

from the expectations that they should reflect popular sentiments,<sup>55</sup> and redefining the political role of legislators in voting on criminal justice matters from reflecting the sentiments of their constituents to supporting measures that will rationally address the most important concerns of the public.

Let me close with two cautions about my declared preferences. In pleading for the values of insulating decisions in criminal justice from popular sentiment, I am not suggesting a conflict between democratic and undemocratic systems of criminal justice, but rather contrasting two different types of criminal justice decision-making in a democracy. Indeed, the traditional forms of criminal justice decision-making in democratic government were more insulated from direct sentimental governance than Three Strikes and its ilk.

Second, let me underscore that no structures can protect us from excess without responsible behavior by individual actors in the face of political temptation. The sentencing commission is a mechanism that was designed to insulate the standards governing sentencing decisions from direct political pressure.<sup>56</sup> In Minnesota, where the first such commission was created, the mechanism has achieved this insulating function.<sup>57</sup> In the federal system, in which a similar mechanism was designed for similar purposes, the new sentencing commission quickly acquired a reputation for blowing in the political winds.<sup>58</sup> Mechanisms to deflect political pressure are a necessary, but not sufficient, condition for reversing the dominance of popular sentiments. The bedrock necessity is for political actors to subscribe to a culture of responsibility in regard to criminal justice, a value system that might unite those who hold political office to defend the institutions of criminal justice against outside attack.

No mechanism designed to insulate criminal justice will work well in the face of the sort of behavior of the Governor and legislative leaders in the California of 1994. But perhaps now is a better time to suggest the creation of a culture of responsibility as a defense against the next panic. I earlier asked if Three Strikes was the Ghost of Christmas Yet To Come for American criminal justice. The hopeful undertone of this question is that the harrowing vision of the future carried by that messenger was instrumental in persuading Ebenezer Scrooge to change his ways. My hope is that the principal value of California's recent adventures with "Three Strikes and You're Out" will be an object lesson in how criminal justice policy should never be made again.

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55. The California Supreme Court has recently taken a substantial step in restoring judicial discretion in Three Strikes sentencing. A judge may now strike prior convictions in the interest of justice on the judge's own motion in some circumstances. *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 529-30, 917 P.2d 628, 647, 53 Cal. Rptr. 2d 789, 808 (1996).

56. See MICHAEL TONRY, SENTENCING MATTERS 25 (1996) (describing sentencing commissions as insulating "sentencing policy from short-term 'crime of the week' political pressures").

57. ZIMRING & HAWKINS, *supra* note 52, at 156-75.

58. *Id.*