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REFORMING THREE STRIKES' EXCESSES

MICHAEL VITIELLO*

I. INTRODUCTION

California is about to mark a decade of experience with its Three Strikes law.¹ According to the law's proponents, it would result in "spectacular savings" for California.² Campaign literature backing the initiative claimed that "3 STRIKES SAVES LIVES AND TAXPAYER DOLLARS!" and would keep "career criminals, who rape women, molest innocent children

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1. See Act effective Mar. 7, 1994, ch. 12, 1994 Cal. Stat. 71 (codified at CAL. PENAL CODE § 667 (West 1999)); CAL. PENAL CODE § 1170.12 (West Supp. 2004) (added by initiative measure (Prop. 184, § 1, approved Nov. 8, 1994)). Because these provisions of the California Penal Code are nearly identical, the term "Three Strikes law" will be used to refer to both of them collectively unless otherwise indicated. See *infra* notes 124–25 and accompanying text for a brief discussion of the legislative history of these two provisions. California's Three Strikes law provides that a defendant who has been convicted of two prior felonies from an enumerated list of violent and serious felonies is subject to a sentence of a minimum of twenty-five years-to-life upon the conviction of *any* felony. CAL. PENAL CODE § 667(e)(2)(A) (West 1999). Unlike some three strikes statutes in effect in other states, California's Three Strikes law includes no "wash out" period; that is, no matter how long a defendant may have conformed to the law, earlier felonies continue to count as prior strikes under the law. Compare CAL. PENAL CODE § 667(c)(3) (West 1999) (no "wash out" period), with 720 ILL. COMP. STAT. ANN. 5/33B-1 (West 2003) (third felony must have been "committed within 20 years of the date that judgment was entered on the first conviction provided, however, that time spent in custody shall not be counted").

2. See PHILIP J. ROMERO, GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA, HOW INCARCERATING MORE FELONS WILL BENEFIT CALIFORNIA'S ECONOMY (1994) [hereinafter ROMERO].

and commit murder, behind bars where they belong.”³ An increasing body of empirical data suggests that those claims are wrong and that Three Strikes adds a significant number of inmates who are not especially dangerous, whose age indicates that they represent a low risk of violence, and who are increasingly expensive to maintain in prison—an expense that cannot be justified by additional social protection.⁴

National media have highlighted extreme cases resulting in 25-years-to-life terms of imprisonment—cases involving petty third strikes like the theft of a bicycle or piece of pizza.⁵ State trial court judges initially found some Three Strikes sentences excessive in violation of state and federal constitutional prohibitions against grossly disproportionate sentences.⁶ State appellate courts have uniformly disagreed.⁷ Four United States Supreme Court Justices raised constitutional questions about the Three Strikes sentences in some of the more extreme cases, like that of the offender whose third strike was the theft of a bottle of vitamins.⁸ Two panels of the United States Court of Appeals for the Ninth Circuit found that, in cases in which an offender’s third strike was petty theft, terms of imprisonment of 50-years-to-

3. Mike Reynolds et al., *Arguments in Favor of Proposition 184*, in CAL. SEC’Y STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION, Nov. 8, 1994, at 36 (1994). The voter initiative, Proposition 184, was subsequently codified in section 1170.12 of the California Penal Code. CAL. PENAL CODE § 1170.12 (West Supp. 2004).

4. See, e.g., FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA (2001) [hereinafter ZIMRING ET AL.]; Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103 (1998) [hereinafter Beres & Griffith].

5. See, e.g., *60 Minutes: The Bicycle Thief* (CBS television broadcast, May 26, 2003); Eric Slater, *Pizza Thief Receives Sentence of 25 Years to Life in Prison*, L.A. TIMES, Mar. 3, 1995, at B9.

6. See, e.g., *People v. Smith*, 58 Cal. Rptr. 2d 9, 10 (Cal. Ct. App. 1996) (“[T]he [trial] court believed the sentence of 25 years to life which would be required by section 667, subdivision (e) would be unconstitutional.”) (citation omitted) (footnotes omitted); *People v. Drew*, 47 Cal. Rptr. 2d 319, 322 (Cal. Ct. App. 1995) (same); *People v. Patton*, 46 Cal. Rptr. 2d 702, 704 (Cal. Ct. App. 1995) (same); *People v. Superior Court (Missamore)*, 45 Cal. Rptr. 2d 392, 394 (Cal. Ct. App. 1995) (same); *People v. Gore*, 44 Cal. Rptr. 2d 244, 251 (Cal. Ct. App. 1995) (same); *People v. Bailey*, 44 Cal. Rptr. 2d 205, 215 (Cal. Ct. App. 1995) (same).

7. See, e.g., *Smith*, 58 Cal. Rptr. 2d at 11 n.3 (dictum) (expressing “considerable doubt that the sentence . . . required would be unconstitutional”); *Drew*, 47 Cal. Rptr. 2d at 322–24 (overruling trial court’s holding that third-strike sentence of 25-years-to-life would be unconstitutional); *Patton*, 46 Cal. Rptr. 2d at 709–14 (same); *Missamore*, 45 Cal. Rptr. 2d at 401–03 (same); *Gore*, 44 Cal. Rptr. 2d at 251–53 (same); *Bailey*, 44 Cal. Rptr. 2d at 215–17 (same).

8. *Riggs v. California*, 525 U.S. 1114 (1999), *denying cert. to*, No. E019488, 1997 WL 1168650 (Cal. Ct. App. Dec. 17, 1997); Justice Breyer would have granted the writ of certiorari based on “a serious question concerning the application of a ‘three-strikes’ law to what is in essence a petty offense.” *Id.* at 1116 (Breyer, J., dissenting). Justice Stevens, on the other hand, joined by Justices Souter and Ginsburg, recognized the question presented as “obviously substantial” but nevertheless voted to deny certiorari because, among other things, neither any lower federal court nor the California Supreme Court had considered the issue. *Id.* at 1115.

life and 25-years-to-life violated the Eighth Amendment.⁹ For a brief period, reformers could hope that liberal application of the Ninth Circuit precedent might provide a modest reform of some of Three Strikes' excesses. That hope ended with two Supreme Court decisions during the 2002 Term. A deeply divided Court upheld Three Strikes sentences, leaving little, if any, room to argue that Three Strikes may violate the Eighth Amendment.¹⁰ Judicial relief seems unlikely in the near future.

Beyond excessive punishment in individual cases, Three Strikes will force California to misallocate its resources.¹¹ Three Strikes' critics argued that the law would shift spending from education to prison construction and

9. *Andrade v. Attorney Gen. of Cal.*, 270 F.3d 743, 753–67 (9th Cir. 2001) (reversing defendant's sentence of 50-years-to-life for stealing several videotapes from a K-Mart store on two separate occasions), *rev'd sub nom.*, *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003); *Brown v. Mayle*, 283 F.3d, 1019, 1040 (9th Cir. 2001) (reversing sentences of 25-years-to-life for two defendants, one for attempting to steal three videotapes and the other for attempting to steal a steering wheel alarm).

10. *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003); *Ewing v. California*, 123 S. Ct. 1179 (2003). *Ewing* did not produce a majority opinion. Justice O'Connor's plurality opinion (for three justices) upholds proportionality review under the Eighth Amendment but does not state outright that all sentences under Three Strikes are lawful. *Id.* at 1181–90 (plurality opinion).

11. The California Department of Corrections' early projections on increased prison costs were too high. *See ZIMRING ET AL.*, *supra* note 4, at 135 Fig. 8.3. In the early years after its passage, most second- and third-strike felons would have served some prison time without regard to the law. *Id.* at 135. In addition, because second- and third-strike defendants account for only about 10% of all of the crimes being committed, their total number is still quite small by comparison to all felons. Nonetheless, the effect of Three Strikes is cumulative. By adding even fewer felons than projected, their impact becomes cumulative with its impact peaking between 2009 and 2014. As explained by the authors of PUNISHMENT AND DEMOCRACY:

Assuming a constant rate of 25-year-to-life third-strike offenders admitted to the prison system, the cumulative burden is 20 times as large in the twentieth year of operation as it is in the first.

.....

Because many of those habitual felons sentenced under Three Strikes would have served time in any event, the marginal difference between Three Strikes and non-Three Strikes demands on prison resources will be greatest in the later years of the mandatory sentences. The largest gap in total prison resources will occur relatively late in the game.

Id.

Since publication of PUNISHMENT AND DEMOCRACY, the California supreme court has held that, despite textual support to the contrary, a third strike prisoner must serve the full 25 year minimum term and may not earn a 20% reduction in the statutory minimum. *In re Cervera*, 16 P.3d 176, 179–80 (Cal. 2001). As a result, the logjam created by third-strike offenders will be even more severe than projected by PUNISHMENT AND DEMOCRACY.

Three Strikes has resulted in the incarceration of a large number of felons who are not particularly dangerous and who will grow old in prison, further reducing their danger to society. *See ZIMRING ET AL.*, *supra* note 4, at 146. As a result of the incremental growth in the prison population resulting from Three Strikes, "Californians will pay dearly . . . on the installment plan." *Id.* at 138. Projection of the costs run as high as a half a billion dollars a year. *See AB 112 Assembly Bill—Bill Analysis: Hearing Before the Assembly Comm. on Appropriations*, 2003–2004 Reg. Sess. (Cal. May 28, 2003), available at <http://www.leginfo.ca.gov/bilinfo.html> (quoting Assemb. Jackie Goldberg) [hereinafter *AB 112 Analysis*].

force other poor financial choices.¹² For several years after its passage, California's booming economy allowed the state to continue spending money on prison construction and paying high salaries to prison guards without forcing hard choices. However, a budget crisis now dominates California's politics and is not likely to abate in the short term.¹³

The obvious solution to curb Three Strikes' excesses is legislative reform of the Three Strikes law. This Article explores possible legislative reform. Proposition 184, the initiative creating the Three Strikes law, requires that any amendments to the law must be passed by a two-thirds majority of the legislature.¹⁴ As the law's passage demonstrated, many politicians fear the "soft-on-crime" label that Three Strikes' proponents would level against them.¹⁵ The super-majority requirement makes sweeping legislative amendment of Three Strikes difficult.¹⁶ Over the past decade, bills that would have amended Three Strikes have floundered in the legislature.¹⁷ In 1999, Governor Gray Davis vetoed a bill that would have merely funded a study to determine whether Three Strikes achieved its stated goals of reducing crime and saving the state money from lower crime rates.¹⁸ Structural problems

12. See, e.g., PETER W. GREENWOOD ET AL., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS OF CALIFORNIA'S NEW MANDATORY-SENTENCING LAW 33–34 (1994) (stating that budget realities would force the corrections budget to take additional funds from the higher education budget).

13. See, e.g., Doug Smith, *GOP Blames Red Ink on Democrats' "Waste,"* L.A. TIMES, July 8, 2003, at B1 (describing the current California budget crisis); see also Josh Richman, *Activists: Put Prison Funding in Schools,* OAKLAND TRIB., July 5, 2003, at Local & Regional News (describing activists' view that funds should be shifted from prisons to education); Richard Fausset, *Inmates Kept in Cells to Save State Money,* L.A. TIMES, June 3, 2003, § 2, at 4 (reporting that one prison has kept prisoners confined to their cells 24 hours a day to reduce overtime pay for guards).

14. See CAL. PENAL CODE § 667(j) (West 1999) ("The provisions of this section shall not be amended by the Legislature except by statute passed in each house . . . two-thirds of the membership concurring . . .").

15. Mike Reynolds, a citizen who was the driving force behind the passage of Three Strikes, had enormous sway with the legislature by using the press to intimidate politicians. See Dan Morain, *A Father's Bittersweet Crusade,* L.A. TIMES, Mar. 7, 1994, at A1. At one point when Reynolds opposed an amendment that had passed in a senate committee, he reminded the legislators of the upcoming elections. The committee immediately repealed. Dan Morain, *Three Strikes Clears State Legislature,* L.A. TIMES, Mar. 4, 1994, at A1. No doubt, legislators feared that Reynolds would label them as soft on crime in the upcoming election. See also Dan Walters, *Few Challenge Speeding Train,* SACRAMENTO BEE, Feb. 1, 1994, at A3 (stating that "[t]he popular fear of crime is matched only by the fear of politicians that they will be accused of softness in their approach.>").

16. See CAL. PENAL CODE § 667(j) (West 1999). Apart from the requirement of a super-majority, other factors make reform difficult. As the authors of PUNISHMENT AND DEMOCRACY have argued, Californians believe a powerful myth about Three Strikes—that it was a watershed in penal policy, moving from soft on crime to hard on crime, and that it led to a sharp downturn in crime rates. ZIMRING ET AL., *supra* note 4, at 221. Further, single-issue politicians typically oppose reversing Three Strikes, and a powerful coalition of interest groups has formed to support expansion of the prison system. *Id.* at 222–23.

17. See *infra* notes 187–89 and accompanying text (discussing several failed bills).

18. Governor Davis's Veto Message of S.B. 873, 1999–2000 Reg. Sess. (Cal. Oct. 10, 1999).

face those who seek to reform the law. For example, interest groups supporting Three Strikes, like the California Corrections and Peace Officers Association and victims' rights groups, have extraordinary sway with the legislature.¹⁹ Groups opposing Three Strikes lack the resources of the law's proponents.²⁰ Intensity of support for the law increases the challenge for reformers.²¹

When I first wrote about Three Strikes, I argued that prospects for reforming Three Strikes would improve when California had to start paying for the additional, unnecessary costs associated with warehousing Three Strikes defendants.²² More recently, I have argued that worsening economic conditions statewide would force the issue.²³ Other states have begun to explore alternatives to long prison sentences as a way to manage budget deficits without risking public safety.²⁴ California's deepening budget crisis creates an opportunity for serious reform efforts.²⁵ In addition, public attitudes towards Three Strikes are changing. Despite Three Strikes' proponents' claims that the voters have embraced the law,²⁶ even when the voters adopted Three Strikes, some of that support was based on an

Davis's reasoning was that "[a]n additional study of the Three Strikes law is unlikely to produce much, if any, useful information that is not already available." *Id.*

19. See ZIMRING ET AL., *supra* note 4, at 5, 222–23.

20. See *id.*

21. See ELIZABETH ADELL COOK ET AL., BETWEEN TWO ABSOLUTES: PUBLIC OPINION AND THE POLITICS OF ABORTION 199–200 (1992) (discussing the reality that legislators often respond to organized and vocal interest groups).

22. In 1997, I wrote the following:

As is often the case with anti-crime measures, the invitation to beat the anti-crime drum is too tempting for politicians because funding the costs associated with the legislation is usually left for the future. Neither AB 971 nor the initiative included a provision to raise revenue. One could vote for the bill or the initiative without a vote on how the added costs would be financed. Its proponents were promising that Three Strikes would result in net savings, savings that have been misrepresented.

Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 452 (1997) [hereinafter Vitiello, *Return to Rationality?*].

23. See Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises*, 90 CAL. L. REV. 257, 287 (2002) (book review) [hereinafter Vitiello, *Overblown Promises*].

24. For example, Missouri began an alternative sentencing program for non-violent drug offenders in January 2002. Offenders are supervised, treated, and counseled rather than incarcerated. Of the 2200 offenders statewide to graduate from drug-court programs, only about 6% have committed new crimes. See Tim Rowden, *Special Sentencing Program May Be Expanded*, ST. LOUIS POST-DISPATCH, June 19, 2003, at Jefferson County Post 1.

25. See *supra* note 13.

26. See Edward J. Erler & Brian P. Janiskee, *California's Three Strikes Law: Symbol and Substance*, 41 DUQ. L. REV. 173, 190 (2002) (describing the public support for Three Strikes as "overwhelming and almost unprecedented"); Bill Jones, *Why the Three Strikes Law is Working in California*, 11 STAN. L. & POL'Y REV. 23, 23–24 (1999) [hereinafter Jones]; Vitiello, *Return to Rationality?*, *supra* note 22, at 451 (discussing proponents' claims).

extremely misleading campaign with little opposition.²⁷ Then-current polls suggested that voters wanted to target violent crime²⁸ and were led to believe that Three Strikes would do so.²⁹ More recently, polling data suggest that over 60% of likely voters would vote to amend Three Strikes to limit it to violent felons.³⁰ Faced with voter support for narrowing Three Strikes along with a severe budget crisis, legislators may be open to reforming Three Strikes. With the recent Supreme Court decisions rejecting the Eighth Amendment challenge to Three Strikes sentences,³¹ legislatures who may have hoped for a judicial solution to a difficult political problem must face a hard choice between responsible reform and the risk of being labeled “soft on crime.”

Apart from the cost of maintaining of Three Strikes prisoners, critics have identified a second problem with the law’s application. Data from the California Department of Corrections suggest that prosecutors are invoking Three Strikes less frequently and that courts are invoking their authority to strike prior felonies³² more often than they did in the first years after its passage.³³ While diminished enthusiasm for Three Strikes may provide a partial solution to some of the law’s excesses, commentators have argued persuasively that county-by-county variations lead to “uneven justice,”³⁴ and undercut the law, which aimed for uniform treatment for defendants.³⁵ Disparity derives from widely different attitudes towards the law in different counties across the state.³⁶

Thus, the current Three Strikes landscape looks like this: California is using limited resources to warehouse a significant number of aging prisoners who present little risk of violence; the state must choose how to allocate limited resources because of a budgetary crisis. But the requirement of a

27. See Michael Vitiello, “Three Strikes” and the Romero Case: The Supreme Court Restores Democracy, 30 LOY. L.A. L. REV. 1643, 1679–85 (1997) [hereinafter Vitiello, “Three Strikes” and the Romero Case].

28. See Vitiello, *Return to Rationality?*, *supra* note 22, at 451–52.

29. See Vitiello, “Three Strikes” and the Romero Case, *supra* note 27, at 1684.

30. See *infra* note 192.

31. See *Ewing v. California*, 123 S. Ct. 1179 (2003); *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003).

32. See *infra* note 171.

33. See *infra* note 172.

34. See Samara Marion, *Justice By Geography? A Study of San Diego County’s Three Strikes Sentencing Practices From July-December 1996*, 11 STAN. L. & POL’Y REV. 29, 29–30, 41 (1999) [hereinafter Marion] (examining 185 Three Strikes case files in San Diego county).

35. See Joshua E. Bowers, Note, “The Integrity of the Game is Everything”: The Problem of Geographic Disparity in Three Strikes, 76 N.Y.U. L. REV. 1164, 1180–87 (2001) [hereinafter Bowers] (arguing that “integrity” in the law demands consistent application of Three Strikes throughout California).

36. See *infra* note 176.

super-majority makes reform difficult. Even apart from the super-majority, politicians have not shown a willingness to take on the powerful lobbies that have pushed a wide array of “get tough on crime” laws for over a decade. The appellate courts have refused to provide a safety valve to correct the law’s excesses. Insofar as actors in the criminal justice system are dealing with those excesses, prosecutors are making charging decisions that vary widely across the state, and judges are striking prior felonies with limited control of their discretion. The result is one that neither opponents nor proponents of the law should find tolerable.

This brief overview begs a question: how can we reform the system? Elsewhere, I have argued that California should follow the lead of other states in adopting sweeping sentencing reform, including the adoption of a sentencing commission.³⁷ Careful study of existing resources might lead a commission to conclude that, for some crimes, punishment is too lenient, while, as critics have argued about Three Strikes, it is too severe for many offenders.³⁸ Other states have achieved rational sentencing reform through the sentencing commission-sentencing guidelines route.³⁹ Adoption of similar legislation would allow California to make rational use of its finite prison resources, which should result in significant financial savings. Absent wholesale reform, California should look for narrow, incremental reform to avoid some of the excesses created by Three Strikes. This Article proposes one such statute, one that might require only a legislative majority and that would define the ambiguous term “in furtherance of justice,” in Penal Code § 1385, not Three Strikes itself.⁴⁰

Part II of this Article discusses the evidence that Three Strikes has failed in its promises to save money and lives and that the benefits that it delivers are unnecessarily expensive in light of limited benefits that it provides.⁴¹ Part III reviews the lack of success that Three Strikes defendants have had in the

37. See Vitiello, *Return to Rationality?*, *supra* note 22, at 461–62.

38. Some of Three Strikes’ critics argued that Three Strikes leads to punishment that is too severe for some offenders and not severe enough for others. For example, Marc Klaas, Polly Klaas’s father, labeled Three Strikes as “too hard on soft crime and too soft on hard crime.” See Daniel M. Weintraub, *Lone Justice*, L.A. TIMES, Feb. 14, 1995, at E1 [hereinafter Weintraub] (paraphrasing Marc Klaas). I previously argued that “a defendant who has committed two residential burglaries and is currently charged with possession of narcotics will be imprisoned for a minimum term of twenty years while an offender who commits first degree robbery will face a maximum term of nine years.” Vitiello, *Return to Rationality?*, *supra* note 22, at 454. I based that comparison on the assumption that Three Strike prisoners could earn up to a 20% reduction in their sentences, but the state supreme court later rejected that reading of the statute. See *In re Cervera*, 16 P.3d 176, 179–80 (Cal. 2001).

39. See discussion *infra* Part IV.A.

40. See CAL. PENAL CODE § 1385 (West 2000 & Supp. 2004).

41. See discussion *infra* Part II.

courts and in the legislature.⁴² Part IV addresses possible legislative reforms. It discusses the sentencing commission model.⁴³ It then discusses why a narrow statute that would give content to “in furtherance of justice” would require only a simple majority in the legislature and would be desirable.⁴⁴ Such a law would clarify a statute, § 1385, that the state supreme court has already found to be ambiguous, and it would not circumvent Three Strikes.⁴⁵ Finally, Part V describes the proposed legislation.⁴⁶

II. “3 STRIKES SAVES LIVES AND TAXPAYER DOLLARS!”

Three Strikes’ proponents argue that incarceration of repeat offenders is “the only sure method to keep our citizens safe.”⁴⁷ Its drafters targeted repeat offenders who, they contended, commit a disproportionate amount of crime.⁴⁸ As a result, taking that group off the street should result in significant savings. For example, during passage of Three Strikes, Governor Pete Wilson’s chief economist reported that Three Strikes would save the state billions of dollars.⁴⁹ The economist based his calculations on a “highly conservative” estimate that incarcerating each offender would prevent between 20 and 150 crimes per year.⁵⁰ When he factored in savings to victims in the form of out-of-pocket expenses like lost wages and pain and suffering and savings in unnecessary security services, the economist estimated total savings of between \$200,000 and \$300,000 for each year that an offender was in prison.⁵¹ Based on those assumptions, the report concluded that Three Strikes would save California many billions of dollars each year.⁵²

While critics have pointed to serious methodological flaws in those estimates,⁵³ other supporters of increased incarceration use less

42. See discussion *infra* Part III.

43. See discussion *infra* Part IV.A.

44. See discussion *infra* Part IV.B.2.

45. See discussion *infra* Part IV.B.2.

46. See discussion *infra* Part V.

47. Jones, *supra* note 26, at 25.

48. See *id.* at 24; see also James A. Ardaiz, *California’s Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 9 (2000) [hereinafter Ardaiz]. Justice Ardaiz was one of several individuals who “formulated the concepts behind . . . the Three Strikes Law.” *Id.* at 2.

49. See ROMERO, *supra* note 2, at 2–5.

50. See *id.* at 2.

51. See *id.* at 2–5.

52. See *id.* at 5.

53. See Vitiello, “Three Strikes” and the Romero Case, *supra* note 27, at 1676 n.195 (quoting critics that refer to Philip Romero’s report as employing estimates that were not “conservative” but were “just plain wrong.”).

unsubstantiated assumptions to come up with similar economic arguments supporting wholesale incarceration of criminal offenders. For example, a National Center for Policy Analysis (NCPA) report argues that incarceration is the most cost-effective way to deal with crime, despite the costs attendant to building and maintaining prisons.⁵⁴

Although not dealing directly with Three Strikes, the NCPA report is consistent with the underlying philosophy of Three Strikes and other recidivist statutes. According to the report, as of 1998, warehousing a prisoner cost up to \$25,000 per year, while incarcerating each additional prisoner reduces the number of crimes committed by about 15 crimes per year, leading to a net benefit of at least \$53,000.⁵⁵

After the law's passage, Three Strikes' proponents found empirical support for their position.⁵⁶ Then-Attorney General Dan Lungren issued a report in 1998, claiming that since passage of Three Strikes, "the violent crime rate in California has dropped 26.9% with a 30.8% drop in the six major crime categories."⁵⁷ The report strongly suggested that Three Strikes was responsible for the "largest overall drop in crime in any four-year period in history with double digit drops in every major crime category between 1994 and 1997."⁵⁸ Then-Secretary of State Bill Jones, the original sponsor of Three Strikes in the Assembly,⁵⁹ pointed to additional data indicating that California's decline in crime far exceeded the decline around the rest of the United States as evidence that Three Strikes was the reason for California's sharply declining crime rates.⁶⁰

Certainly, the facts of some Three Strikes cases support the optimism of Three Strikes proponents. For example, John Earl Cartwright's 30-year criminal history included "convictions for voluntary manslaughter, rape, burglary, and assault with a deadly weapon."⁶¹ A trial court sentenced

54. See MORGAN O. REYNOLDS, NATIONAL CENTER FOR POLICY ANALYSIS, CRIME AND PUNISHMENT IN AMERICA: 1998 1-5, available at <http://www.ncpa.org/studies/s219.html> [hereinafter REYNOLDS]; see also Kent Scheidegger & Michael Rushford, *The Social Benefits of Confining Habitual Criminals*, 11 STAN. L. & POL'Y REV. 59, 61 (1999) [hereinafter Scheidegger & Rushford] (describing an economist's study which estimated that the social benefit of reduced crime is over \$50,000 per prisoner per year while the cost of incarceration is just over \$20,000).

55. See REYNOLDS, *supra* note 54, at 3 (using Bureau of Justice Statistics figures and an economist's study of twelve states to estimate the monetary costs and savings of imprisonment).

56. See, e.g., Jones, *supra* note 26, at 24-25; Ardaiz, *supra* note 48, at 31-34.

57. OFFICE OF THE ATTORNEY GEN., CAL. DEP'T OF JUSTICE, 'THREE STRIKES AND YOU'RE OUT'—ITS IMPACT ON THE CALIFORNIA CRIMINAL JUSTICE SYSTEM AFTER FOUR YEARS 3 (1998), available at http://www.threestrikes.org/cag98_pgthree.html.

58. *Id.*

59. See Jones, *supra* note 26, at 23.

60. See *id.* at 24.

61. *People v. Cartwright*, 46 Cal. Rptr. 2d 351, 353 (Cal. Ct. App. 1995).

Cartwright to 375-years-to-life plus an additional 53 years in prison based on 19 felony convictions arising out of violent sexual assaults on three women.⁶² Richard Allen Davis, the repeat felon whose kidnapping and murder of Polly Klaas resulted in the overwhelming public support for Three Strikes,⁶³ had a similar history of violent crime.⁶⁴ One can hardly argue against severe criminal sentences for such offenders. But whether cases like Davis's and Cartwright's prove that Three Strikes is the right answer for California's crime problem is less certain than its proponents claim.⁶⁵

Numerous Three Strikes' defendants present a different criminal profile from violent offenders like Cartwright and Davis. For example, Jesus Romero and Leandro Andrade, the defendants in two widely reported Three Strikes cases,⁶⁶ were aging felons and addicted to drugs, when they committed their third strikes. Their earlier criminal records that brought them within the law involved residential burglary,⁶⁷ classified as a serious, not a

62. *Id.*

63. See Vitiello, "Three Strikes" and the Romero Case, *supra* note 27, at 1655–56 (concluding that Davis's status as a repeat offender "may have assured the passage of 'three strikes'"); Paul J. Pfingst et al., "The Genie's Out of the Jar": The Development of Criminal Justice Policy in California, 33 MCGEORGE L. REV. 717, 738 (2002) [hereinafter Pfingst et al.] (explaining that the "Three Strikes and You're Out" hotline overwhelmed the local telephone system immediately after Polly's body was discovered).

64. One writer has described Davis's prior crimes in some detail. See Denise Noe, *All About Polly Klaas and Richard Allen Davis*, Court TV's Crime Library, at http://www.crimelibrary.com/serial_killers/predators/klaas/1.html (last visited July 23, 2004). For example, in 1976, he "perpetrated his first provable violent crime against a woman." Denise Noe, *Bad Parents, Sadistic Child*, Court TV's Crime Library, at http://www.crimelibrary.com/serial_killers/predators/klaas/4.html (Previously, he was suspected of murdering a woman with whom he was friends, but police ruled the death a suicide.). Davis saw a woman getting into her car in a parking lot and believed that he heard her voice "talking inside his brain and 'wondering what it was like to be raped.'" *Id.* Davis menaced her with a knife, forced her into her car, drove her to a deserted area, stole her wallet and commanded her to perform fellatio. She managed to escape and flag down a California highway patrolman. *Id.*

Sent to Napa State Hospital for a psychiatric evaluation, Davis escaped. On the night of his escape, he broke into a 32-year-old woman's home and battered her with a poker. A few days later, after having stolen a shotgun and ammunition, he attacked another woman as she got into her car. While he paused to tie her hands with tape, she escaped. *Id.*

After a term of imprisonment, Davis hooked up with Sue Edwards, a young woman making her living as a drug dealer. See *id.*; Denise Noe, *Motorcycle Mama*, Court TV's Crime Library, at http://www.crimelibrary.com/serial_killers/predators/klaas/5.html [hereinafter Noe, *Motorcycle Mama*]. The two went on a multi-state crime spree. In November, 1984, they broke into a woman's home and threatened to kill her and her family. When the woman tried to escape, "Davis struck her in the face, hard, with his pistol, causing her to splatter blood." Noe, *Motorcycle Mama, supra*. Later during their travels, Davis and Edwards robbed a bank. *Id.*

65. In fact, Marc Klaas, the father of Polly Klaas, withdrew support for Three Strikes before its passage because he believed too many nonviolent criminals would be incarcerated. See Vitiello, "Three Strikes" and the Romero Case, *supra* note 27, at 1659.

66. *People v. Superior Court (Romero)*, 917 P.2d 628 (Cal. 1996); *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003).

67. Romero's two prior felonies were burglary and attempted burglary of an inhabited dwelling.

violent, felony under California law.⁶⁸ Romero's third strike was the felony possession of a small amount of cocaine;⁶⁹ Andrade's two counts of petty theft would have been misdemeanors but for his prior criminal conduct.⁷⁰ In fact, data assembled by the California Department of Corrections demonstrate that most third-strike sentences have involved non-violent third strikes.⁷¹ Cases like those of Andrade and Romero are more common than those of Cartwright and Davis and suggest why Three Strikes has not, in fact, delivered on its promises and why the law misallocates limited resources.

Prior to passage of Three Strikes, critics argued that the law swept too broadly, even if one agreed with the general premise that incapacitating high-rate offenders would lead to a sharp decline in crime.⁷² Reports like those prepared by Governor Wilson's economist and the NCPA use aggregate data to project the number of crimes that a year of incarceration prevents.⁷³ Thus, they argue that each additional year of incarceration per offender prevents the commission of 15 or more crimes.⁷⁴ Those numbers are inflated. Those numbers should be discounted depending on the age of the offender. Even high-rate offenders slow down as they age; for example, violent offenders' criminal careers wane beginning at around 28 years of age.⁷⁵ The absence of a "washout" period⁷⁶ in the Three Strikes law increases the number of aging felons who may have committed felonies in their youth but no longer represent a significant threat as they age. Thus, the projection that Three Strikes prevents 15 crimes (or, as argued by Wilson's chief economist, 20 to

Romero, 917 P.2d at 631. In 1983, Andrade pleaded guilty to three counts of residential burglary. *Andrade*, 123 S. Ct. at 1170.

68. A "serious felony" is defined as "a serious felony listed in subdivision (c) of Section 1192.7." CAL. PENAL CODE § 667(a)(4) (West 1999). "[A]ny burglary of the first degree" is a "serious felony" under Section 1192.7(c)(18). CAL. PENAL CODE § 1192.7(c)(18) (West Supp. 2004).

69. *Romero*, 917 P.2d at 631.

70. Typically, petty theft is a misdemeanor under California law. However, petty theft with a prior conviction is treated as a "wobbler" that can be punishable as either a misdemeanor or felony. *Andrade*, 123 S. Ct. at 1170.

71. See Marion, *supra* note 34, at 30 (stating that "property, drug, and other non-violent offenses account for nearly 60 percent of [Three Strikes sentences]" (citing DATA ANALYSIS UNIT, CAL. DEP'T OF CORR., THIRD STRIKE CASES BY SEX AND ETHNIC GROUP 11 (1999)); see also SECOND AND THIRD STRIKERS IN THE INSTITUTION POPULATION: DECEMBER 31, 2002 (2003) [hereinafter INSTITUTION POPULATION], available at <http://www.corr.ca.gov/OffenderInfoServices/Reports/Quarterly/Strike1/STRIKE1d0212.pdf>. As of December 31, 2002, the California prison system contained 7,626 third strike offenders. INSTITUTION POPULATION, *supra*, at tbl.1. Of these offenders, 4,158 (54.5%) had committed either a property crime, drug crime, or other non-violent crime. *Id.*

72. See Weintraub, *supra* note 38, at E1 (paraphrasing Marc Klaas).

73. See *supra* notes 54–58 and accompanying text.

74. See *supra* text accompanying note 55.

75. See Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 STAN. L. & POL'Y REV. 65, 68 (1999) [hereinafter Males & Macallair].

76. See CAL. PENAL CODE § 667(c)(3) (West 1999).

150) is implausible when the third-strike defendant is an aging felon whose criminal career is winding down.⁷⁷

Close scrutiny of existing studies on the effect of incapacitation shows that those numbers are far too high. Professors Franklin Zimring and Gordon Hawkins examined the available data concerning the causal link between incarceration and crime reduction⁷⁸ and came to wildly different conclusions about how much incarceration lowers crime rates. Studies examined by Zimring and Hawkins varied from estimates that as little as three crimes per year are prevented to as high as 187 crimes per year.⁷⁹ The authors argued that the wide disparity in existing studies is a function, in large part, of different methodologies.⁸⁰ After an examination of that data, they concluded that California's dramatic increase in incarceration resulted in a drop of only about 3.5 crimes per offender per year of incarceration.⁸¹ Critics have raised similar concerns about estimated savings, arguing that a reduction in crime of only 3.5 crimes per year/per offender would save the state \$3,500 to \$7,000—far less than the cost of incarceration.⁸²

In addition, Three Strikes is not well designed to meet its goal of incapacitating high-rate offenders. Requiring only two prior serious or violent felonies limits the law's ability to single out high-rate offenders. High-rate offenders, ones committing far more than the median number of crimes per year,⁸³ may come within the law's provisions, but so too will

77. See *California's Aging Prison Population, Hearing Before the Senate Select Comm. on the California Correctional System of the California Senate Comm. on Public Safety* 14–18 (written statement of professor Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University Law School) (on file with author) [hereinafter Turley]. Turley presents data that show recidivism rates are far lower among older prisoners than younger prisoners. For example, a federal study of recidivism rates by age found that prisoners above age 40 had a recidivism rate of 11% while prisoners under age 40 had a recidivism rate of 31.6%. *Id.* at 16. In addition, a study of the New York prison system found that the recidivism rate for inmates over age 65 is as low as 7.4%. *Id.* at 17.

Insofar as aging felons continue to commit crimes, they are usually not the kinds of violent crimes like rape, murder, and child molestation that the public was concerned about in its passage of Three Strikes. See *supra* note 71 and accompanying text (explaining that most third strike offenders committed non-violent crimes).

78. FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 100–27 (1995) [hereinafter ZIMRING & HAWKINS].

79. *Id.* at 38, 50, 145.

80. *Id.* at 80. For example, one study, focusing on offenders' self reporting, was considered unreliable because of problems with memory and because of the sample questioned (offenders at the height of their careers). *Id.* at 81–86. Other studies have relied on community impact. Those studies indicate that the impact on the crime rate of incarcerating an individual depends on whether he is readily replaced by other offenders. *Id.* at 43.

81. *Id.* at 114–17.

82. See Vitiello, *Return to Rationality?*, *supra* note 22, at 436–37.

83. See Vitiello, *“Three Strikes” and the Romero Case*, *supra* note 27, at 1674–75 n.188 (stating that 10% of repeat offenders are extremely active criminals who commit more than 600 crimes apiece).

many offenders who do not commit anywhere near that number of crimes per year. According to *DANGEROUS OFFENDERS*, a provocative book about the criminal justice system's response to high-rate offenders, the system does a poor job of identifying the truly high-rate offenders whose incarceration would prevent significant criminal conduct.⁸⁴ The authors argued that recognizing high-rate offenders is difficult because crimes like robbery are hard to solve and because once the police arrest an offender, the system has a bias against investigating all potential charges against the offender.⁸⁵ That is so because, once the police are confident of a conviction on the current charge, they have little incentive to investigate old charges.⁸⁶

Three Strikes' proponents intended to cast a wide net.⁸⁷ Apart from concerns about proportional punishment, especially in cases in which the third strike is a relatively trivial offense,⁸⁸ the effect of casting such a wide net is that the law imposes very long terms of imprisonment on offenders who represent a low social risk because they are not high-rate offenders and because their criminal careers are winding down.⁸⁹

Since passage of Three Strikes, an increasing body of literature supports those who questioned the claims of Three Strikes proponents.⁹⁰ For example, critics question the 1998 Attorney-General report's methodology. The report

84. See MARK H. MOORE ET AL., *DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE* 53 (1984).

85. See *id.* at 49.

86. See *id.* at 49–50 (explaining that a prosecutor may choose not to introduce evidence of prior crimes because it might weaken a case that is certain to result in conviction).

87. See, e.g., Ardaiz, *supra* note 48, at 8 (describing the target group of Three Strikes as “people who have demonstrated a repeated pattern of criminal behavior”); see also Jones, *supra* note 26, at 23–24 (discussing the origins of three strikes).

88. See, e.g., Lockyer v. Andrade, 123 S. Ct. 1166, 1169–70 (2003) (stealing less than \$200 worth of video tapes); Ewing v. California, 123 S. Ct. 1179, 1183 (2003) (stealing \$1200 worth of golf clubs); Brown v. Mayle, 283 F.3d 1019, 1021, 1023 (9th Cir. 2001) (consolidated cases involving stealing three video tapes and stealing a steering wheel alarm), *vacated by* 123 S. Ct. 1509 (2003); People v. Barrera, 82 Cal. Rptr. 2d 755, 757 (Cal. Ct. App. 1999) (forging a \$400 check); People v. Drew, 47 Cal. Rptr. 2d 319, 321 (Cal. Ct. App. 1995) (possessing codeine).

89. See *supra* notes 75, 84 and accompanying text.

90. See, e.g., ZIMRING & HAWKINS, *supra* note 78, 126–27 (finding the increase in incarceration rate has substantially less of an impact on crime rates than claimed by proponents); ZIMRING ET AL., *supra* note 4, at 96 (finding the amount of general deterrence is significantly less than claimed by proponents); Linda S. Beres & Thomas D. Griffith, *Did “Three Strikes” Cause the Recent Drop in California Crime? An Analysis of the California Attorney General’s Report*, 32 LOY. L.A. L. REV. 101, 104–26 (1998) [hereinafter *Analysis of AG’s Report*] (challenging the methodology used in prior studies); Beres & Griffith, *supra* note 4, at 129–38 (questioning whether Three Strikes targets the right offenders); Males & Macallair, *supra* note 75, at 68 (finding that the largest drop in crime rate was for those under 24 years old rather than for those between 30 and 40 years old); Vitiello, *Overblown Promises*, *supra* note 23; David Shultz, *No Joy in Mudville Tonight: The Impact of “Three Strikes” Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL’Y 557, 572–74 (2000) (discussing alternative explanations for the drop in crime rate).

aggregated pre-Three Strikes data, masking the pre-1994 decline in the crime rate:

The violent crime rate rose sharply in 1989 and 1990 and rose by lesser amounts in 1991 and 1992. The pattern reversed in 1993, one year before Three Strikes, when the violent crime rate declined by 4.1%. . . . The AGR conceals the fact that the violent crime rate began to fall the year before Three Strikes was adopted by lumping the year 1993 with the years 1990-92 when the violent crime rate rose.⁹¹

Probably the most thorough study to date, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA, demonstrated graphically that crime rates were declining before passage of Three Strikes and continued to decline at the same rate after its passage.⁹² Other data also raise questions about Three Strikes' proponents' claims: for example, while crime was declining, the decline was steepest among younger felons, not older felons more likely to be subject to Three Strikes' provisions.⁹³

PUNISHMENT AND DEMOCRACY did not rely on aggregate data, but looked at arrest records of no-, one- and two-strike offenders to see who was committing what kinds of crimes.⁹⁴ Their findings cast doubt on the effectiveness of Three Strikes. Among their findings were the following: the amount of crime committed by third-strike offenders amounted to only about 3.3% of the total amount of crime; one- and two-strike offenders committed only about 10.5% of all of the crimes committed.⁹⁵ The study also found that the targeted population did not commit more than their proportionate share of crime.⁹⁶ In addition, offenders subject to third-strike sentences are not a particularly violent group. As I have written elsewhere, summarizing the authors' findings,

91. *Analysis of AG's Report*, *supra* note 90, at 107.

92. *See ZIMRING ET AL.*, *supra* note 4, at 88 fig.6.1.

93. *See Analysis of AG's Report*, *supra* note 90, at 121, 124-25. As pointed out by Professors Beres and Griffith, other data undercut the AG's report. For example, they addressed the AG's claim that crime declined more sharply in California than elsewhere in the nation. But during the mid-1990s, the drop in violent crime was greatest among urban minority youth in California as elsewhere. Hence, states with significant numbers of minority youths living in urban centers experienced the largest decline in their crime rates. Massachusetts and New York have similar populations of urban youth, but did not enact three strikes statutes, and experienced drops in crime rates similar to the decline in California. *Id.* at 127-30.

94. *See ZIMRING ET AL.*, *supra* note 4, at 43-56.

95. *See id.* at 59.

96. *See id.* at 43-46, 59.

[N]o-strike and one-strike felons are arrested for violent offenses approximately in proportion to their numbers in the total number of those arrested for all offenses. But third-strike offenders actually are less likely to be arrested for violent offenses when the authors compare how often they were arrested for a felony and how often they were arrested for a crime of violence.⁹⁷

No- and one-strike felons committed about 22 non-violent crimes for every violent crime. By comparison, felons subject to third-strike penalties committed only one violent crime in 33 crimes.⁹⁸

Thus, the data demonstrate that Three Strikes does not successfully incarcerate the class of criminal defendants whom the law targeted.⁹⁹ That conclusion is not surprising in light of the arguments raised above: the law's provisions are too broad, for example, because it makes residential burglary a first or second strike and any felony a third strike;¹⁰⁰ none of its provisions singles out particularly active offenders, and its lack of a washout period and sweeping provisions increase the likelihood that qualifying offenders are aging felons.¹⁰¹

Elsewhere, I have criticized Three Strikes because it produces disproportionate punishment.¹⁰² Here, I want to focus on another problem with the law: the misallocation of resources resulting from Three Strikes. As indicated above, incarceration is expensive and typically costs more than the concomitant savings.¹⁰³ If Three Strikes were going to save California money through reduction in crime, it was because the law would lead to the incarceration of dangerous felons, whose violent crimes are more costly than non-violent crimes. That simply has not happened.¹⁰⁴

When Three Strikes became law, some commentators projected that the law would result in massive increases in the prison population.¹⁰⁵ That has

97. Vitiello, *Overblown Promises*, *supra* note 23, at 273 (citing ZIMRING ET AL., *supra* note 4, at 47, 59).

98. See ZIMRING ET AL., *supra* note 4, at 47.

99. See Vitiello, *Overblown Promises*, *supra* note 23, at 273.

100. See CAL. PENAL CODE § 667.5(c)(9) (West 1999) (including residential burglary); CAL. PENAL CODE § 667(e)(2)(A) (West 1999) (qualifying any felony as a third strike).

101. See generally CAL. PENAL CODE § 667 (West 1999); see CAL. PENAL CODE § 667(c)(3) (West 1999) (lacking a washout period).

102. See Vitiello, *Return to Rationality?*, *supra* note 22, at 454–55.

103. See *supra* text accompanying notes 55, 82.

104. See *supra* notes 92–101 and accompanying text.

105. The impact on the prison system was less severe than projected because one- and two-strike defendants commit only about 10% of all felonies. Hence, their numbers are relatively small by comparison to all potential inmates. ZIMRING ET AL., *supra* note 4, at 134.

not happened.¹⁰⁶ But, Three Strikes has had an incremental effect on the prison population, and this effect will continue to grow. During the first few years, it did not account for a significant increase in the prison population because most third-strike offenders would have served some prison time anyway¹⁰⁷ and because they represent a small percentage of all criminal offenders.¹⁰⁸ But the impact of third-strike offenders began when, but for Three Strikes, the offenders would have been released, and the impact of prisoners sentenced under the Three-Strikes Law will culminate between 2009 and 2014 when “the system will contain 20 years’ worth of sentenced offenders.”¹⁰⁹

During the economic boom during the late 1990s, California did not have to make hard budgetary choices. It could fund education, increase prison construction, pay for prison guards, and give Californians a tax cut.¹¹⁰ Those days are gone.¹¹¹ While the legislature and the Governor struggle with a massive deficit, they are unwilling to roll back a pay raise for prison guards.¹¹² At the same time, continued prison construction is unlikely.

As a result, California must recognize that prison resources are finite. In that setting, Three Strikes’ misallocation of resources becomes apparent. As the data demonstrate, Three Strikes fills prison cells with offenders who are not particularly dangerous and who are aging.¹¹³ Not only are they less dangerous as they age, but they are also more expensive to maintain. In addition to the cost of prison construction, the state pays about \$26,000 per

106. See *infra* note 172.

107. See ZIMRING ET AL., *supra* note 4, at 135.

108. See *supra* note 95 and accompanying text (stating that third-strike offenders commit about 3.3% of the total amount of crime).

109. ZIMRING ET AL., *supra* note 4, at 135. The authors’ point understates the total impact of third strike sentences. They estimated the peak impact based on twenty years of experience with Three Strikes and appear to have used twenty years on the assumption that Three Strikes’ prisoners would be eligible for release after serving twenty years of their minimum 25 year sentences. That is certainly a plausible, if not the most plausible, reading of the statute. See CAL. PENAL CODE § 667(c)(5) (West 1999) (allowing up to 20% good time credits). After the publication of PUNISHMENT AND DEMOCRACY, the State Supreme Court held that the 20% reduction in sentence does not apply to the 25 year minimum term of imprisonment. Hence, an offender must serve a minimum of twenty-five years. *In re Cervera*, 16 P.3d 176, 179–81 (Cal. 2001).

110. See Greg Lucas, *Senate OKs Generous State Budget*, S.F. CHRON., Aug. 11, 1998, at A17 (describing the \$75.2 billion state budget which includes \$22.3 billion for education and \$1.4 billion in tax cuts); Robert B. Gunnison, *Prison Guards Win 12% Pay Increase*, S.F. CHRON., Aug. 26, 1998, at A20.

111. See *supra* note 13.

112. See Gregg Jones, *Union Backs Off on Talks Over Pay Concessions*, L.A. TIMES, Mar. 1, 2003, at B8 (reporting that the legislature approved a contract between Governor Davis and California’s prison-guards union that will increase guards’ pay by as much as 37% over the next five years).

113. See *supra* notes 66–71 and accompanying text.

year to warehouse an average offender.¹¹⁴ By contrast, older felons cost the state between \$40,000 and \$70,000 per year.¹¹⁵ When those figures are projected into the future, the results are staggering.¹¹⁶ Three Strikes prevents early release for third-strike felons.¹¹⁷ Without additional prison cells, aging, not especially dangerous offenders, will occupy cells that are not available for younger, more violent felons. That is a poor allocation of resources.

III. JUDICIAL AND LEGISLATIVE SOLUTIONS?

The obvious answer to the looming crisis created by Three Strikes is for the legislature to fix the problem. Alternatively, when the democratic process fails, courts may step into the breach. This section reviews the failure of the courts to remedy the problem of excessive punishment. It then discusses whether California's legislature is likely to solve the problem.

Prior to Polly Klaas's kidnapping, the state legislature gave Three Strikes short shrift.¹¹⁸ The public response to her kidnapping was overwhelming.¹¹⁹ Her kidnapper was a repeat offender who would still have been in prison had Three Strikes been the law.¹²⁰ Three Strikes quickly appeared to be the solution to a perceived violent crime wave.¹²¹ Three Strikes' proponents took advantage of public sentiment to get the measure on the ballot and to pressure the legislature into rapid passage of the law, with little input from any of the typical interest groups.¹²² Despite early opposition by diverse groups, including the California District Attorneys' Association, political opposition disappeared during the short and aggressive campaign for the law's passage.¹²³ The legislature first passed a statutory version of the law by an overwhelming majority; the voters then approved the measure by an almost 3-to-1 margin.¹²⁴ A provision that would almost certainly have

114. Turley, *supra* note 77, at 12.

115. *See id.*

116. Using "conservative" estimates, Turley estimated that in year 2025 it would cost over \$4 billion to house prisoners above age 60. *Id.* at 13. This amount is slightly more than the entire California Department of Corrections budget for 2002. *See id.* at 11, 13.

117. *See supra* note 109 (discussing the California Supreme Court decision that rejected good-time reductions for third-strike felons).

118. *See Vitiello, "Three Strikes" and the Romero Case, supra* note 27, at 1644.

119. *See id.* at 1655.

120. Eric Bailey, *Assembly Public Safety Committee Turns Tough*, L.A. TIMES, Jan. 25, 1994, at A3.

121. *See Vitiello, "Three Strikes" and the Romero Case, supra* note 27, at 1656 n.72.

122. *See Vitiello, Return to Rationality?, supra* note 22, at 411-12.

123. *See id.* at 413 & n.98, 414.

124. The bill passed the Assembly on a vote of 63 to 9 and passed the Senate on a vote of 29 to 7. ASSEMBLY FINAL HISTORY, 1993-94 Reg. Sess. 260 (Oct. 6, 1994). Proposition 184 was approved by 71.85% of the electorate. STATEMENT OF VOTE, GENERAL ELECTIONS, Nov. 8, 1994, at 107.

escaped voters' attention was a requirement that the legislature could amend the law only with a two-thirds vote.¹²⁵

The requirement of a super-majority and the hesitation of politicians to take on powerful pro-punishment lobbying groups explain why efforts to reform Three Strikes have thus far failed in the legislature.¹²⁶ On occasion, courts step into the breach when the democratic process stalls.¹²⁷ But the courts have seldom intervened in Three Strikes cases.¹²⁸

Shortly after the law's passage, a number of state trial court judges found specific Three Strikes sentences excessive,¹²⁹ in violation of the state constitutional prohibition against cruel or unusual punishment.¹³⁰ The district courts of appeal have uniformly disagreed.¹³¹ Apart from one dictum,¹³² state appellate courts have left no room to argue that a Three Strikes sentence is excessive. The state supreme court has yet to consider the question,¹³³ but in light of the uniformity among lower appellate courts, it may have little incentive to do so.

In 1999, and again in 2001, four United States Supreme Court justices questioned the legality of some Three Strikes sentences.¹³⁴ In *Riggs v. California*, Justice Stevens agreed with the Court's decision to deny the grant of the writ of certiorari, but wrote a short opinion in which he laid out a number of concerns about the legality of Riggs' 25-years-to-life sentence.¹³⁵ Riggs' third strike was petty theft, ordinarily a misdemeanor, escalated to a felony because of Riggs' prior record of theft.¹³⁶ Justice Stevens questioned whether the state should be allowed to double count a defendant's recidivist

125. See CAL. PENAL CODE § 667(j) (West 1999) ("The provisions of this section shall not be amended by the Legislature except by statute passed in each house . . . two-thirds of the membership concurring . . .").

126. For a discussion of several failed amendments, see *infra* notes 187–89 and accompanying text.

127. See Vitiello, "Three Strikes" and the Romero Case, *supra* note 27, at 1700–02.

128. See Michael Vitiello, *California's Three Strikes and We're Out: Is Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. (forthcoming Spring 2004) (manuscript at 30, 87) (on file with author) [hereinafter Vitiello, *Judicial Activism*].

129. See *supra* note 6 and accompanying text.

130. See CAL. CONST. art. I, § 17 ("Cruel or unusual punishment may not be inflicted or excessive fines imposed.")

131. See *supra* note 7 and accompanying text.

132. See *People v. Cluff*, 105 Cal. Rptr. 2d 80, 87–88 (Cal. Ct. App. 2001) (dictum) (noting "that the severe penalty imposed on [Defendant] appears disproportionate by any measure").

133. See *Durden v. California*, 531 U.S. 1184 (2001) (Souter & Breyer, J.J., dissenting).

134. See *Riggs v. California*, 525 U.S. 1114, 1115 (1999); *id.* at 1116 (Breyer, J., dissenting); *Durden*, 531 U.S. at 1184, 1184 (Souter & Breyer, J.J., dissenting).

135. See *Riggs*, 525 U.S. at 1114 (Stevens, Souter, & Ginsburg, J.J.) ("This pro se petition for certiorari raises a serious question concerning the application of California's "three strikes" law . . . to petty offenses").

136. See *id.*

conduct.¹³⁷ He also alluded to possible double jeopardy problems and questioned whether the state might be punishing Riggs for earlier crimes for which he had already been punished.¹³⁸ Finally, he suggested that Riggs' case came within *Solem v. Helm*,¹³⁹ which held that a term of imprisonment imposed on a recidivist with a record of relatively petty crimes violated the Eighth Amendment prohibition against cruel and unusual punishment.¹⁴⁰

In November, 2001, the United States Court of Appeals for the Ninth Circuit followed Justice Stevens' invitation and held that an offender's sentence of 50-years-to-life violated the Eighth Amendment.¹⁴¹ Convicted of two separate instances of petty theft, Leandro Andrade received a minimum term of 50 years; as a result he will not be eligible for release until he is 87 years old.¹⁴² Shortly after the panel decided *Andrade*, a separate panel of the Ninth Circuit extended its holding to two cases in which the defendants faced terms of 25-years-to-life in prison, again in cases in which the third strike was petty theft.¹⁴³

Any hope that the Ninth Circuit decisions would provide a modest judicial reform of Three Strikes was short-lived. The Supreme Court decided *Lockyer v. Andrade*¹⁴⁴ and *Ewing v. California*¹⁴⁵ during the 2002 Term, leaving little room to argue that Three Strikes sentences violate the Eighth Amendment. The Court decided *Andrade* on narrow technical grounds: because the case was before the lower court on a petition for the writ of habeas corpus, federal law requires that a state prisoner show not only that the state court decision was wrong but that the decision was an unreasonable application of clearly established Supreme Court precedent.¹⁴⁶ But its decision in *Ewing v. California*,¹⁴⁷ a case that came directly from the state courts on the writ of certiorari, forecloses virtually all challenges under the Eighth Amendment.¹⁴⁸

137. *See id.* at 1115.

138. *See id.*

139. 463 U.S. 277 (1983).

140. *Id.* at 303.

141. *See Andrade v. Attorney Gen. of Cal.*, 270 F.3d 743, 747 (9th Cir. 2001), *rev'd*, 123 S. Ct. 1166 (2003).

142. *Id.* at 749–50.

143. *See Brown v. Mayle*, 283 F.3d 1019, 1028–37 (9th Cir. 2002) (reversing sentences of 25-years-to-life for two defendants, one for attempting to steal three videotapes and the other for attempting to steal a steering wheel alarm), *vacated by* 123 S. Ct. 1509 (2003).

144. 123 S. Ct. 1166 (2003).

145. 123 S. Ct. 1179 (2003).

146. *See Andrade*, 123 S. Ct. at 1172 (relying on 28 U.S.C. § 2254(d)(1) (2002)).

147. 123 S. Ct. 1179 (2003).

148. *See generally* Vitiello, *Judicial Activism*, *supra* note 128 (manuscript at 3).

Ewing produced several opinions without a majority opinion.¹⁴⁹ Justices Scalia¹⁵⁰ and Thomas¹⁵¹ argued that the Eighth Amendment is inapplicable to terms of imprisonment. Justice O'Connor's plurality opinion found that *Ewing's* sentence was not so long as to be grossly disproportionate to his crime and his career of criminal conduct.¹⁵² The plurality left open some questions about the scope of proportionality review; nonetheless, the five justices who voted to uphold *Ewing's* 25-years-to-life sentence left little room to argue that Three Strikes' sentences violate the Eighth Amendment.¹⁵³

One state supreme court opinion leaves some wiggle room for modest reform of Three Strikes. *People v. Superior Court (Romero)*¹⁵⁴ involved an offender whose prior strikes consisted of a 1984 conviction for an attempted burglary of an inhabited dwelling and a 1986 conviction for a burglary of an inhabited dwelling; his third strike was the charge of possession of 0.13 grams of cocaine base.¹⁵⁵ The trial court offered to strike one of the prior felony convictions if *Romero* pled guilty.¹⁵⁶ The prosecutor argued that the court lacked the power to strike a prior felony absent a motion by the prosecutor.¹⁵⁷ The trial court disagreed and sentenced *Romero* to a term of 6 years in prison, instead of 25-years-to-life.¹⁵⁸ The district court of appeal reversed.¹⁵⁹

The supreme court reversed and held that the statute authorized the trial court, on its own motion, to strike a prior felony.¹⁶⁰ The court had to interpret subsection 667(f)(2), which provides that the prosecutor "may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction."¹⁶¹ It provides further that the judge's discretion is

149. See 123 S. Ct. at 1181 (Syllabus).

150. *Ewing*, 123 S. Ct. at 1190.

151. *Id.* at 1191.

152. *Id.* at 1185, 1187.

153. See Frank O. Bowman III, *Ewing v. California: The Supreme Court Takes a Walk on "Three Strikes" Laws . . . And That's Fine*, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW, JURIST, at <http://jurist.law.pitt.edu/forum/forumnew103.php> (Mar. 24, 2003).

154. 917 P.2d 628 (Cal. 1996).

155. See 917 P.2d 628 (Cal. 1996) (listing *Romero's* felony convictions: a 1980 conviction for second degree burglary, a 1984 conviction for attempted burglary of an inhabited dwelling, a 1986 conviction for first degree burglary of an inhabited dwelling, and convictions for possession of a controlled substance in 1992 and 1993).

156. See *id.* at 632.

157. See *id.*

158. See *id.*

159. See *id.*

160. See *id.* at 640-41.

161. CAL. PENAL CODE § 667(f)(2) (West 1999).

limited to cases in which “there is insufficient evidence to prove the prior felony conviction.”¹⁶² Despite a substantial argument that the statute allowed the court to strike a prior felony only upon a motion from the prosecutor (based on express language and evidence of the drafters’ intent),¹⁶³ the court held that the statute intended to leave intact the trial court’s authority under § 1385 to dismiss a case or reduce a charge on its own motion.¹⁶⁴ The court read the statute as it did to avoid a conflict with the state constitution; after reviewing its case law interpreting the state constitutional doctrine of separation of powers, the court said that, were the statute read to make the court dependent on the prosecutor’s motion, the statute would violate the state constitution.¹⁶⁵

Some commentators argued that *Romero* would effectively eliminate disproportionate sentences.¹⁶⁶ At least one commentator has suggested that *Romero* has not had the intended effect: despite a strict standard of review (the district courts review the trial courts’ decisions for an abuse of discretion),¹⁶⁷ district courts of appeal have overturned trial court decisions when trial courts have struck prior felonies.¹⁶⁸ The state supreme court has offered some guidance on how a trial court should exercise its discretion.¹⁶⁹ But commentators have raised serious questions about how judges and prosecutors are currently exercising their discretion.¹⁷⁰

Data from the California Department of Corrections suggest that prosecutors are invoking Three Strikes less frequently and that courts are invoking their authority to strike prior felonies¹⁷¹ more often than they did in the first years after its passage.¹⁷² Trial courts and prosecutors are exercising

162. *Id.*

163. *See Romero*, 917 P.2d at 643.

164. *See id.* at 646.

165. *See id.* at 632–39.

166. *See* Brian P. Janiske & Edward J. Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California’s Three Strikes Law*, 39 DUQ. L. REV. 43, 60 (2000).

167. *See* Rebecca Gross, Comment, *The “Spirit” of the Three Strikes Law: From the Romero Myth to the Hopeful Implications of Andrade*, 32 GOLDEN GATE U. L. REV. 169, 178, 188 (2002).

168. *People v. Patton*, 46 Cal. Rptr. 2d 702, 707–08 (Cal. Ct. App. 1995) (modifying a three-strikes sentence to 25-years-to-life when the trial court sentenced Patton to a more lenient 9-years-to-life because his prior offenses did not “arouse violence”); *People v. Gore*, 44 Cal. Rptr. 2d 244, 247–48 (Cal. Ct. App. 1995) (reversing a lower court’s decision to strike a prior felony conviction “in furtherance of justice”); *People v. Superior Court (Romero)*, 37 Cal. Rptr. 2d 364, 382 (Cal. Ct. App. 1995) (reversing the trial court’s order to strike a prior felony).

169. *See generally* *People v. Williams*, 948 P.2d 429 (Cal. 1998).

170. *See* Marion, *supra* note 34, at 29; Bowers, *supra* note 35, at 1165.

171. *See* *People v. Superior Court (Romero)*, 917 P.2d 628 (Cal. 1996) (granting a trial court the discretion to strike prior felonies on its own motion).

172. In the first two full years after Three Strikes was enacted, 1995 and 1996, the average annual number of third-strike offenders sentenced to prison was 1,328. If this rate held steady, and accounting

their discretion in widely different ways around the state.¹⁷³ That has led to county-by-county variations, which has resulted in “uneven justice,”¹⁷⁴ and undercut the law, which aimed for uniform treatment of defendants.¹⁷⁵ Disparity derives from widely different attitudes towards the law in different counties across the state.¹⁷⁶ Even if some discretionary regional differences are inevitable, in some parts of the state prosecutors are still using Three Strikes in questionable cases, ones in which punishment is likely to be excessive—that is, the amount of anticipated social protection does not justify the long terms of imprisonment imposed on some of the defendants currently incarcerated under the law.¹⁷⁷

for the 152 offenders sentenced in 1994, the number of third strike offenders that would have been imprisoned through 2002 would be 10,776. See JOHN CLARK ET AL., U.S. DEP’T OF JUSTICE, NCJ 165369, “THREE STRIKES AND YOU’RE OUT”: A REVIEW OF STATE LEGISLATION 4 (1997), available at <http://www.ncjrs.org/pdffiles/165369.pdf> (using data provided by the California Department of Corrections). However, as of December 31, 2002 only 7,626 third strike offenders were behind bars. INSTITUTION POPULATION, *supra* note 71, at tbl.1.

Moreover, in 1997 the California Department of Corrections projected that the total number of second- and third-strike offenders imprisoned would exceed 55,000 by 2002. FAMILIES TO AMEND CALIFORNIA’S THREE STRIKES, LATEST STATISTICS, at <http://www.facts1.com/general/stats.htm> (last modified Dec. 12, 2003) (using California Department of Corrections estimates that were reported in a Legislative Analyst’s office paper on October 14, 1997 at the Assembly Committee on Public Safety in Los Angeles). In fact, as of December 31, 2002 the total was significantly less than estimated at 42,703. See INSTITUTION POPULATION, *supra* note 71, at tbl.1.

The numbers above, coupled with the view of commentators, suggest that prosecutors are using Three Strikes less frequently, and courts are striking Three Strikes sentences more frequently over time. See, e.g., Marion, *supra* note 34, at 36–38 (explaining that recently in drug cases in San Diego county the prosecution permitted a reduced sentence in 22 percent of cases, and the court reduced the sentence in 51 percent of cases).

173. See Bowers, *supra* note 35, at 1165.

174. See Marion, *supra* note 34, at 30, 41 (examining 185 Three Strikes case files in San Diego county).

175. See Bowers, *supra* note 35, at 1184 (arguing that “integrity” in the law demands consistent application of Three Strikes throughout California).

176. See Marion, *supra* note 34, at 32, 40–41. The San Diego District Attorney’s office prosecutes Three Strikes cases much more often than the San Francisco District Attorney’s office. This disparity may be due in part to the public’s view of Three Strikes in each respective area. Seventy-six percent of San Diego’s voters supported the Three Strikes initiative compared to just 43 percent of San Francisco voters. *Id.* at 41. Frequency of use of Three Strikes shows no correlation to the decline in crime rate. In fact, the crime rate in San Francisco, the county least likely to invoke Three Strikes, declined much more than did the crime rate in Sacramento and Los Angeles counties, where the law was invoked seven times more frequently than in San Francisco. See Males & Macallair, *supra* note 75, at 67–68.

177. See Marion, *supra* note 34, at 38–40. For example, prosecutorial discretion in San Diego County was exercised to strike two prior violent convictions and sentence an offender to eleven years. See *id.* However, when this offender is compared to several others who received 25-years-to-life with no prior violent felonies, the author noted that “it is difficult to discern any principled basis for imposing a 25-years-to-life sentence . . .” *Id.* at 40. Other offenders sentenced to twenty-five years to life include one for possessing .05 grams of heroin. That offender had committed two residential burglaries, two commercial burglaries, and a non-violent jail escape. Another offender was found guilty of possession of .21 grams of rock cocaine. She had previously been convicted of a robbery, felony drug sales, and four misdemeanor convictions. Yet another offender was convicted of petty

While *Romero* created some leeway, it has not addressed at least two important concerns. First, it has not led to consistent standards for the application of judicial discretion. Second, it has not eliminated the unwarranted expense of Three Strikes. Further no other court offers much hope for judicial reform of Three Strikes' excesses.

Legislative reform may prove as difficult as judicial reform. The obvious barrier is the requirement of a two-thirds majority.¹⁷⁸ PUNISHMENT AND DEMOCRACY,¹⁷⁹ one of the most important books on Three Strikes, has argued that reform of Three Strikes is not likely. The authors contend that Californians believe that Three Strikes represented a shift in penal philosophy from soft to hard on crime and that the law is responsible for the decline in crime.¹⁸⁰ In addition, the authors doubt that empirical data will counteract the strong intuitive appeal that severe sanctions work.¹⁸¹

In addition, PUNISHMENT AND DEMOCRACY argued that few, if any, interest groups will line up in favor of reform.¹⁸² Single-issue groups have disproportionate influence in the legislature.¹⁸³ When it comes to crime, single-issue groups almost all support get-tough-on-crime legislation.¹⁸⁴ As a result of the influence of money in politics, few politicians are likely to take on powerful groups like the National Rifle Association and the California Corrections and Peace Officers Association.¹⁸⁵ Politicians have learned harsh lessons when their opponents have tarnished them as soft on crime.¹⁸⁶

Thus far, PUNISHMENT AND DEMOCRACY's thesis finds support in the failure of reform legislation to date. Legislators have placed several bills in the hopper. For example, some would have limited Three Strikes by requiring that the final felony be a serious or violent felony.¹⁸⁷ More recently,

theft charges after stealing a \$235 purse from Nordstrom's. He had two prior strikes for convenience store robberies. *See id.*

178. *See* CAL. PENAL CODE § 667(j) (West 1999).

179. ZIMRING ET AL., *supra* note 4.

180. Vitiello, *Overblown Promises*, *supra* note 23, at 280 (discussing ZIMRING ET AL., *supra* note 4).

181. *See id.*

182. *See* ZIMRING ET AL., *supra* note 4, at 222.

183. *Id.* at 173.

184. *See* Vitiello, *Overblown Promises*, *supra* note 23, at 280.

185. *See* Vitiello, *Return to Rationality?*, *supra* note 22, at 411 n.88.

186. *See* Pfingst et al., *supra* note 63, at 726–28, 739. The voters, in November 1986, linked the California Supreme Court's actions to a rising crime rate and ousted Justices Bird, Reynoso, and Grodin. *Id.* at 730. In 1994, with eighty percent of the voters supporting the Three Strikes bill, *id.* at 739, Reynolds' message to the Assembly was clear: pass the Three Strikes law or the voters will do it for you. *See* Vitiello, *Return to Rationality?*, *supra* note 22, at 412–13.

187. SB 1517 specified that certain non-violent felonies would not result in sentence enhancement under Three-Strikes for the current conviction. *Third Reading of SB 1517, before Assembly Comm. on Public Safety Analysis*, 2001–2002 Reg. Sess. (Cal. Apr. 1, 2002). AB 1790 would require that the

Assembly Member Jackie Goldberg unsuccessfully sponsored a bill that would have placed an initiative on the ballot to the same effect.¹⁸⁸ To date, the legislature has passed only two bills calling for further study of Three Strikes; but Governors Wilson and Davis, both strong supporters of Three Strikes, vetoed that legislation.¹⁸⁹

As discussed above, California's budget crisis may change the political climate for reform.¹⁹⁰ Empirical data support reform efforts: rational use of prison resources can save money without jeopardizing public safety.¹⁹¹ Public opinion has shifted, and a significant majority of Californians now favor reforming Three Strikes.¹⁹² Economic realities and the shift in public sentiment make a discussion of sentencing reform worthwhile. This Article examines the shape of possible reform in the next section.¹⁹³

current conviction be for a serious or violent felony in order to qualify for Three-Strikes sentence enhancement. *Third Reading of AB 1790, before Assembly Comm. on Appropriations*, 2001–2002 Reg. Sess. (Cal. May 22, 2002). AB 112 is identical to AB 1790, requiring that the current convictions be for, serious or violent felonies to enhance a sentence. *Third Reading of AB 112, before Assembly Comm. on Public Safety Analysis*, 2003–2004 Reg. Sess. (Cal. Jan. 13, 2003).

188. *See id.*

189. SB 2048 would examine the costs and benefits of the “Three Strikes” law and have findings to the Legislature on or before July 1, 1999. SENATE RULES COMMITTEE, SENATE FLOOR ANALYSIS OF SB 2048, at 1 (July 7, 1998). Governor Pete Wilson vetoed this bill. GOVERNOR'S VETO OF SB 2048 (Sept. 13, 1998). SB 873 requires a study on the costs of the “Three Strikes” law. SENATE RULES COMMITTEE, ANALYSIS OF SB 873, at 1–2 (Sept. 1, 1999). This bill was vetoed by Governor Gray Davis as well. *Id.* at 9.

190. *See supra* notes 13, 110–12 and accompanying text.

191. *See supra* notes 113–17 and accompanying text. In addition to outright release of aging felons, the state should consider less expensive alternatives to incarceration in prison. Those alternatives range from house arrest to intensively supervised parole.

192. Polling data suggest that over 60% of likely voters would vote to amend Three Strikes to limit it to violent felons. Two organizations, Families to Amend California's Three-Strikes and Citizens Against Violent Crime, hired a well-established firm, Fairbank, Maslin, Maullin and Associates, to conduct the survey. From January 4–7, 2002, the firm contacted 650 people likely to vote in the next election; the survey had a margin of error of 3.8%. The survey asked a series of questions, resulting in some important findings: about 74% “approve of the specific provision of the [proposed] initiative that would require mandatory increased sentences only when convictions are for violent felonies;” 73% disapprove of the current provisions that can give a third-time non-violent felon a life sentence; about 65% favor amending the current law. *See* Citizens Against Violent Crimes, *Voter Survey*, at <http://www.amend3strikes.org/voters.htm> (last visited Jan. 24, 2004) [hereinafter *Voter Survey*]. *See generally* Families to Amend California's Three-Strikes, *Home Page*, at <http://www.facts1.com> (last modified Jan. 26, 2004); Fairbank, Maslin, Maullin & Associates, *Home Page*, at <http://www.urbanlogic.com/fmma/index.htm> (last visited Jan. 23, 2004).

193. *See* discussion *infra* Part IV.B.2.

IV. INCREMENTAL, MODEST REFORM?

A. Wholesale Reform¹⁹⁴

When I first wrote about Three Strikes, I argued that California should reexamine its entire sentencing scheme. Specifically, I urged that the legislature should establish a sentencing commission.¹⁹⁵ A sentencing commission could make recommendations for sentencing reform “out of the glare of the media.”¹⁹⁶ More generally, as Marc Klaas, Polly Klaas’s father has argued, I contended that Three Strikes may provide too little punishment for some offenders, and too much for others.¹⁹⁷ My argument was that, whether through recommendations of a sentencing commission or by action of the legislature on its own, California should reexamine its entire sentencing scheme.¹⁹⁸ For example, given the reality that prison resources are finite, I questioned whether California allocates resources wisely when it sends a felon like Jesus Romero¹⁹⁹ to prison for a minimum of 25 years, but caps possible punishment for a robber to a term of nine years in prison.²⁰⁰

Since that time, what I have learned about sentencing commissions has confirmed my belief that California would benefit from such an institution charged with wholesale sentencing reform.²⁰¹ Not all commissions are

194. In addition to the reforms that I propose, legislators and active proponents of reform, like Families to Amend California’s Three Strikes (FACTS), have proposed legislation to limit Three Strikes to cases in which the felon’s third felony is a violent or serious felony. *See supra* note 187. To avoid the requirement of a super-majority, they have also proposed bills that would put a similar limitation before the voters as a ballot initiative, originating in the legislature. *See supra* note 188. Especially the latter approach makes sense and, given a shift in current public opinion about Three Strikes, see *Voter Survey, supra* note 192, at 1 (discussing a public policy poll conducted by Fairbank, Maslin, Maulin & Associates that revealed, among other things, that 65% of likely voters would vote ‘yes’ to amend perceived flaws in California’s Three-Strikes laws), such a measure has some chance of success if it can get out of the legislature.

This Article focuses on two alternatives to such a measure. My discussion of legislation creating a sentencing commission urges a more ambitious reform, while my discussion of legislation directing the exercise of trial court’s discretion is a narrower approach that may provide a fallback position if more sweeping reform is unsuccessful.

195. Vitiello, *Return to Rationality?*, *supra* note 22, at 461.

196. *Id.*

197. *Id.* at 454.

198. *Id.* at 455–62.

199. *See supra* notes 66–71 and accompanying text.

200. *Id.* at 454.

201. The American Law Institute (ALI) is currently involved in a major project to re-draft the sentencing provisions of the Model Penal Code. Although the sentencing sections of the Model Penal Code were the least influential sections of the code, the ALI hopes that the new sentencing sections will have the same dramatic effect that the Model Penal Code has had on criminal law. *See* MODEL PENAL CODE: SENTENCING: REPORT (Apr. 11, 2003) [hereinafter MPC REPORT]; *see also* MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 1) (June 3, 2003) [hereinafter MPC Preliminary

created equal; for example, the federal sentencing guidelines have earned few supporters and many critics.²⁰² But many participants in the criminal justice system, across a broad political spectrum, are enthusiastic in their praise of a number of state commissions.²⁰³ For example, a committee of the American Law Institute is currently drafting new sentencing provisions of the Model Penal Code; in its current form, the draft includes sections creating a commission and enumerating its powers.²⁰⁴

That report catalogues advantages of a commission-guidelines system.²⁰⁵ A number of the specific advantages relate to the thesis of this Article. Adoption of sentencing commissions has led to consistent, principled individual sentencing decisions.²⁰⁶ While removing policymaking about criminal punishment from “the glare of the political process,”²⁰⁷ a commission, consisting of “representatives from all sectors of the criminal-justice system and from the general public”²⁰⁸ creates the opportunity for

Draft 1].

202. MPC REPORT, *supra* note 201, at 48, 72.

203. *Id.* at 48–50, 72–74.

204. See MPC Preliminary Draft 1, *supra* note 201, at 42–53 (codifying the preliminary text for a sentencing commission).

205. MPC REPORT, *supra* note 201, at 49–50. Among many of the advantages of a sentencing commission are:

The consistent application of law, policy, and principle to individual sentencing decisions. The articulation of starting points for sentencing decisions, as opposed to the total absence of such guidance in the cavernous penalty ranges of indeterminate-sentencing codes. New visibility of the decision rules for sentencing, giving rise to new opportunities to study and debate those rules. A vastly improved capacity for systemwide policy-making, including an ongoing process of ensuring that penalties for discrete crime classifications make sense when matched against one another. The enlargement of judicial discretion to make effective choices about punishments in the cases before them, particularly in prison cases. Improved information about how the sentencing system operates, and the creation of an ethic in legislative and other domains that high-quality information should drive policy. The ability to make accurate predictions of future sentencing patterns, in the aggregate and line-by-line by offense type, enabling the production of credible fiscal-impact forecasts when changes in guidelines or laws affecting punishment are proposed New tools to better understand and attack imbalances in criminal punishments as they affect minority communities. The development of a common law of sentencing, through which sentencing judges explain their decisions in selected cases, appellate courts may review those decisions, and judges are the primary actors in the evolution of sentencing policy. The formation of sentencing commissions composed of representatives from all sectors of the criminal-justice system and from the general public, to work toward informed positions of sentencing policy that carry credibility as reflecting the views of all relevant constituencies. The removal of at least some policymaking about criminal punishment from the glare of the political process. A sensible alternative to the proliferation of mandatory-penalty laws; one that can produce predictable sentencing results overall, and can reflect public concern about violent crime, while preserving judicial discretion in individual cases.

Id. (bullet points omitted).

206. *Id.* at 49.

207. *Id.* at 50.

208. *Id.*

greater transparency. By contrast, in non-commission systems, many decisions about sentencing are subject to little public scrutiny. Systemwide policy-making ensures “that penalties for discrete crime classifications make sense when matched against one another.”²⁰⁹ Once guidelines are in place, litigants are able to challenge specific sentences, allowing appellate courts to develop a common law of sentencing.²¹⁰ Participants in the criminal justice system have identified these (and other) advantages of the commission system from empirical observations of state sentencing commission systems.²¹¹

One of the most important benefits that states have derived from adoption of a commission system is better “resource management.”²¹² Elsewhere, state budget crises have forced state governments to address correctional expenditures with an eye towards improving long-term planning.²¹³ That is, states with commissions in place are able to make reasoned decisions about punishment in light of available correctional resources. In many instances, guidelines have significantly increased penalties for violent crimes; the commissions have had to accommodate the increased incarceration of violent felons by reducing imprisonment for nonviolent offenders.²¹⁴ Some states have given commissions authority over sentencing policy generally, not just

209. *Id.* at 49.

210. *See id.* at 66.

211. *See id.* at 46–48.

212. *Id.* at 72.

213. *Id.* at 72–73. In discussing the advantages of sentencing commissions, the ALI states:

It is now possible to tell legislators and other policymakers, with reasonable precision, what the price tag of a change in penalties will be, whether large or small, global or offense-specific. It is further possible to build in mechanisms to ensure that there is willingness to fund needed resources (or live within the constraints of existing resources) as a regular part of the lawmaking process.

If desired, a sentencing commission can be instructed to do its work in light of available or funded facilities

Id. at 79.

214. *Id.* at 80–81. As observed by the Report:

[M]ost state sentencing commissions have crafted guidelines to increase penalties for serious violent offenses, sometimes very substantially. Usually, however, “toughness” on violence has been paired with guidelines fashioned to reduce penalties for specific categories of nonviolent offenses. Because the most serious crimes occur in far smaller numbers than less serious crimes, many commissions have found that large incremental increases in punishments for violent offenses may be offset with modest incremental decreases in sanctions for property crimes.

Id.

The point is worth underscoring because some Three Strikes proponents have dismissed reformers’ arguments by contending that they oppose incarceration for convicted felons. *See Scheidegger & Rushford, supra* note 54, at 59.

prisons. That has allowed commissions to divert less serious offenders out of prisons into other kinds of facilities or other community-based programs.²¹⁵

The advantages for California should be obvious. During the 1980s and 1990s, the state's prison population grew without regard to resources.²¹⁶ As indicated, a number of states, some of which are "tough-on-crime" states, have used sentencing commissions to make rational allocation of prison resources, stemming indiscriminate prison growth without sacrificing public safety.²¹⁷ Given California's budget crisis, that is precisely what California must do now.

California should adopt a sentencing commission system. The problem with that solution is that if the legislature were to adopt enabling legislation without a super-majority, Three Strikes sentences would be off the table. The more plausible route would be for the legislature to place an initiative on the ballot that would create a sentencing commission to create sentencing guidelines, including guidelines for the appropriate use of Three Strikes. Passage of sweeping legislation may be a long shot. But several constituencies might support broad reform efforts, including those concerned about excessive punishment and fiscal conservatives troubled by poor allocation of resources.²¹⁸

B. A More Modest Reform

Because sweeping reform may be difficult, I have proposed elsewhere that California should adopt incremental reforms.²¹⁹ When I started work on this Article, my hypothesis was that a simple majority of the legislature could adopt legislation implementing an initiative and that the super-majority requirement applies only if the legislation modifies or amends the Three Strikes law. I proposed to argue that, in light of the state supreme court's *Romero* decision, which gave trial courts discretion to strike prior felonies,²²⁰

215. MPC REPORT, *supra* note 201, at 81–82.

216. See ZIMRING, *supra* note 4, at 155–59 (discussing the growth in the California prison system population to the point where it is a larger prison system than that of the United Kingdom, France, Canada, Germany, Italy, or Japan).

217. MPC REPORT, *supra* note 201, at 80–84.

218. As I have observed elsewhere:

Over a decade ago, liberal activist Jonathan Turley was able to convince prison officials and legislators in Louisiana to back a program designed to secure the release of older prisoners who represented a low risk of recidivism. He did so by presenting economic, rather than humanitarian, arguments to a conservative audience. Advocates of reform should follow his example in pursuing changes in Three Strikes.

Vitiello, *Overblown Promises*, *supra* note 23, at 287.

219. *Id.* at 285–89.

220. *People v. Superior Court (Romero)*, 917 P.2d 628 (Cal. 1996).

the legislature could adopt a law guiding that discretion. For reasons discussed below, I do not believe that my original thesis is correct. But in reviewing *Romero*, I have developed a new thesis. Because *Romero* held that Three Strikes did not intend to exempt Three Strikes from the requirements of § 1385²²¹ (a statute generally applicable to the exercise of trial court discretion), a simple majority of the legislature is free to amend that provision.

Hence, my proposal: below, I argue in favor of a system of guided discretion under § 1385. Like a sentencing guideline system, the law would direct trial courts to ascribe points to an offender's criminal history. The point total would determine the appropriate sentence from the available sentencing options, absent some compelling reasons justifying a departure from the guidelines. Such a system would address a concern raised by the supreme court—that the legislature has not given guidance about how courts should exercise their discretion under § 1385. The court has offered limited guidance, leaving too much discretion with sentencing judges. Properly construed, a law focusing on the exercise of sentencing discretion can result in more sensible system-wide use of prison resources.

1. *Implementing Three Strikes*

Case law establishes that a simple majority of the legislature can adopt legislation implementing an initiative.²²² But that case law does not appear to allow amendment to Three Strikes. Proposition 13, reforming California's property tax system, is a typical situation in which such legislation was appropriate.²²³ As is often the case with constitutional provisions, Proposition 13 did not include the necessary level of detail to direct taxing authorities. A simple majority of the legislature was able to adopt tax statutes to implement the law.²²⁴ Outside that context, the legislature may not add to, subtract from, or clarify Three Strikes absent a super-majority.²²⁵

Imposing a super-majority seems to violate principles of representative democracy.²²⁶ But the California constitution and case law support such a

221. *Id.*

222. Because the voter initiative, Proposition 13 (codified as CAL. CONST. art. XIII A, § 4) [hereinafter Prop. 13], involved the modification of a comprehensive set of taxation laws, the legislature necessarily adopted or modified taxation statutes to reflect the intent of the voters. *See, e.g., Munkdale v. Giannini*, 41 Cal. Rptr. 2d 805, 807 (Cal. Ct. App. 1995).

223. *See supra* note 222.

224. *Id.*

225. *See Franchise Tax Bd. v. Cory*, 145 Cal. Rptr. 819 (Cal. Ct. App. 1978).

226. The obvious counter-argument to concerns that our institutions are not always based on simple majority rule is to point to the important policy reasons that justify departure from those

requirement. The constitution provides that the electors may “propose statutes and amendments to the Constitution and to adopt or reject them.”²²⁷ The constitution allows the voters to retain entirely to themselves the power to amend an initiative.²²⁸ The voters may exercise the lesser power of allowing the legislature to amend the law subject to whatever conditions they may impose; that is, they may lawfully impose a requirement of a super-majority.²²⁹ Some commentators have argued that the initiative process violates the United States Constitution, which provides for a Republican form of government.²³⁰ But as long as the initiative process is constitutional, the requirement of a super-majority is most likely constitutional as well. That is so because of United States Supreme Court case law upholding similar requirements of a super-majority.²³¹

Because Three Strikes is a comprehensive statute, California’s courts are not likely to find latitude for the legislature to “implement” its provisions. That means that the legislature must muster a two-thirds majority to amend Three Strikes. Further, short of an unforeseen constitutional challenge, the super-majority requirement is constitutional.

2. *Modifying § 1385*

Romero suggests an alternative route to a legislative reform free from the requirement of a super-majority. This section reviews that route.

As discussed above, *Romero* resolved conflicting interpretations of § 667(f)(2) of the California Penal Code, which provides:²³²

principles. See ZIMRING ET AL., *supra* note 4, at 204–09. In PUNISHMENT AND DEMOCRACY, the authors discuss the Federal Reserve and central banks as the “most prominent example of the explicit design of government institutions to insulate decision making from democratic control.” *Id.* at 204. The central banks are designed to avoid inflationary pressures that would be exerted by popular will. *Id.* at 204–05. One certainly can argue that criminal sentencing is one that does not justify requiring a legislative super-majority.

227. CAL. CONST. art. II, § 8(a).

228. Proposition 103 Enforcement Project v. Quackenbush, 76 Cal. Rptr. 2d 342, 347–48 (Cal. Ct. App. 1998).

229. *Id.* If the voters choose to give the legislature the power to amend an initiative, that power is subject to whatever conditions the voters attach. *Id.*

230. The “Guarantee Clause” states: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” U.S. CONST. art. IV, § 4; see also Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951 (2001).

231. *Gordon v. Lance*, 403 U.S. 1 (1971) (upholding against an equal protection challenge a West Virginia law requiring a super-majority of the voters before a political subdivision could incur bond indebtedness).

232. See *supra* notes 160–65 and accompanying text for a discussion of *Romero*.

The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.²³³

Uncertain was whether a court could strike a prior felony on its own motion (and thereby, remove a case from the Three Strikes provisions or to make a third strike felon subject only to second strike provisions) only if the evidence that the defendant committed the prior felony were insufficient or whether the court could also strike a prior felony in furtherance of justice, consistent with § 1385.²³⁴

The statute seems to limit the court's ability to strike a felony "in furtherance of justice" on its own motion because it specifies that only the prosecutor may do so.²³⁵ In addition, a reading that would deprive the court of that power is consistent with the legislative history. For example, Mike Reynolds, whose dogged efforts led to the passage of the law, believed "liberal" judges could not be trusted to enforce the law's extreme penalties.²³⁶

The supreme court concluded to the contrary—that the legislation did not intend to limit judges' authority under § 1385.²³⁷ The court's analysis is detailed and thorough.²³⁸ But for purposes of this Article, the court's specific holding is most important. Section 1385 gives the court, on its own motion, the authority to dismiss an action against a defendant "in the furtherance of

233. CAL. PENAL CODE § 667(f)(2).

234. Compare *Romero*, 917 P.2d at 640–49 (granting a trial court the discretion to strike prior felonies on its own motion), with *People v. Bailey*, 44 Cal. Rptr. 2d 205, 210 (1995) (reversing a trial court's decision to strike a prior felony on its own motion in the furtherance of justice).

235. CAL. PENAL CODE § 1385.

236. See Vitiello, "Three Strikes" and the *Romero Case*, *supra* note 27, at 1656–61, 1690–91.

237. See *Romero*, 917 P.2d at 632–46 (holding that to deny a trial court the authority to strike a felony on its motion would violate the California Constitution and that California's Three-Strikes legislation did not express a clear intent of the legislature to eliminate a court's power to strike a prior felony or to dismiss in the interests of justice under section 1385); see also Vitiello, "Three Strikes" and the *Romero Case*, *supra* note 27, at 1693–94 (discussing the *Romero* decision clarifying the trial courts' power to strike prior felonies under Penal Code sections 667 and 1385).

238. *Romero*, 917 P.2d at 632–46. Elsewhere, I have argued that the court rejected the most plausible reading of the text and the statute's legislative history but that the court's position that the contrary reading of the statute would have raised serious separation-of-powers concerns was sound. Vitiello, "Three Strikes" and the *Romero Case*, *supra* note 27, at 1693–1700. Despite that disagreement with the way that the court reached its result, the opinion is, in fact, detailed and thorough in its discussion, working through numerous arguments and offering close readings of the text.

justice.”²³⁹ That provision applies to criminal cases generally. While the legislature may abrogate that authority entirely, the court will not infer an intent to do so absent a clear legislative directive.²⁴⁰

Despite the arguments that the language and history of Three Strikes demonstrate an intent to abrogate § 1385 in Three Strikes cases, the court read the statute to the contrary in order to avoid a violation of California’s constitutional separation of powers doctrine.²⁴¹ The case law interpreting the California constitution found that, while the legislature could deprive courts of the power of dismissal entirely, the legislature could not create the power to dismiss and then condition its exercise on approval of the district attorney.²⁴² Dismissal in furtherance of justice is a judicial function that the California constitution prevents from being shared with the executive.²⁴³ As a result, had the court concluded that § 667(f)(2) deprived the court of the ability to strike a prior felony on its own motion, that provision would have violated the state constitution.²⁴⁴

The court then read the statute as leaving intact a judge’s power to dismiss under § 1385. That was the case, in part, because § 1385 is a general grant of power in criminal cases, and the court will not imply an intent to abrogate that power absent a clear intent to do so.²⁴⁵ Hence, § 667(f)(2)’s reference to § 1385 was sufficiently ambiguous to survive the court’s close textual reading.²⁴⁶

Thus, Three Strikes incorporates judicial discretion to strike prior felonies consistent with § 1385. Because *Romero* held that Three Strikes left § 1385 intact, the legislature should be able to modify § 1385 without achieving a

239. CAL. PENAL CODE § 1385(a).

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

241. *Id.* at 636–37.

242. *People v. Tenorio*, 473 P.2d 993 (Cal. 1970). The court stated, “[t]he judicial power is compromised when a judge . . . wishes to exercise the power to dismiss but finds that before he may do so he must bargain with the prosecutor.” *Id.* at 996. The Court was also disturbed by the fact that “the discretion section 11718 purports to vest in prosecutors is unreviewable, and may therefore be exercised in a totally arbitrary fashion.” *Id.*

243. *See id.* at 995–97; *see also* CAL. CONST. art III, § 3.

244. *Romero*, 917 P. 2d at 636–38.

245. *Id.* at 639–40.

246. *Id.* In *Romero*, the defendant argued that under § 1385(b), which does not allow a judge to strike a prior felony for the purpose of sentence enhancement, Three Strikes was a sentencing scheme and not an enhancement. Therefore, the judiciary’s power of discretion would remain intact. But then, the court noted that under § 667, the legislature *did* grant someone the power to strike a prior felony, and the power to strike under § 1385(a) can only rest in the judiciary. The supreme court concluded that it would make no sense to grant power under § 667 and preclude its exercise under § 1385(b). Thus, sections 667 and 1385 lacked sufficient clarity to abrogate the judiciary’s power of discretion. *See* the supreme court’s discussion concerning the lack of statutory clarity in *Romero*, 917 P.2d at 644–47.

super-majority because that law was adopted without any special requirements of a super-majority for its amendment.²⁴⁷ Further, *Romero* even invited the legislature to define “in furtherance of justice” when it commented that the legislature’s failure to do so left appellate courts “with the task of establishing the boundaries of the judicial power conferred by the statute.”²⁴⁸ As developed below, legislation might be crafted to narrow the exercise of trial courts’ discretion to assure that they impose Three Strikes sentences only in those cases that are most appropriate.

V. NARROWING DISCRETION

Above, this Article focused on why reforming Three Strikes is important: it causes a misallocation of resources, often in cases where the punishment is disproportionate to the crime.²⁴⁹ A distinct problem has arisen as well: prosecutors and judges apply the law so inconsistently that it has led to “uneven justice” across the state.²⁵⁰

While prosecutors typically have wide discretion in charging decisions, Three Strikes’ drafters intended that prosecutors charge every defendant who qualified as a third-strike offender and then to allow the prosecutor to move to strike a prior felony.²⁵¹ Thereafter, the prosecutor could move to strike a prior felony only because dismissal would be in furtherance of justice or because evidence supporting the conviction was insufficient; or the court could do so if the evidence was insufficient.²⁵² But that is not how prosecutors and courts have applied the law.²⁵³ Full implementation of the law would worsen the law’s excesses. But current implementation produces undesirable results: gross variations from county to county are

247. The California Supreme Court found that the judiciary’s discretion, under § 1385, is limited by the amorphous concept “in furtherance of justice.” *Romero*, 917 P.2d at 648. But because Three Strikes was the implementation of a voter initiative, the legislature could modify or amend § 1385, by a simple majority, to give effect to the true intent of the voters. For a discussion of modifying or amending an initiative, see *supra* note 222 and accompanying text.

248. *Romero*, 917 P.2d at 648 (quoting *People v. Orin*, 533 P.2d 193, 199 (Cal. 1975)).

249. See, e.g., *supra* notes 66–71 and accompanying text (discussing Jesus Romero and Leandro Andrade, both Three Strikes’ prisoners whose records indicate that they are not particularly dangerous).

250. See Marion, *supra* note 34, at 29 (describing that “uneven justice” resulted from “significant geographic disparities in its use, widespread incarceration of non-violent offenders, and increased impact on racial minorities”).

251. See *id.* at 31, 37.

252. See *id.* at 31–32.

253. See *id.* at 36–38. The author, conducting a study of San Diego County Three Strikes case files, illustrates the inconsistency in applying Three Strikes through several cases. See *id.* at 37–38. For example, in drug cases, the prosecution “permitted a reduced sentence in 22 percent of the drug cases while the court reduced sentences in 51 percent of the drug cases.” *Id.* at 37.

inappropriate.²⁵⁴ Further, in some counties, prosecutors continue to use the law to prosecute defendants like Leandro Andrade, resulting in disproportionate punishment that contributes little to social protection and misallocates resources.²⁵⁵ Further, while fewer third-strike felons are being sentenced to prison over time, their total numbers are still significant.²⁵⁶

Prosecutorial discretion in charging offenders may be so ingrained in our system that calling for its reform is naive.²⁵⁷ Similar problems do not arise with efforts to limit the inequity that results from the exercise of judicial discretion. For example, thirty years ago, Judge Marvin E. Frankel brought attention to gross disparity in criminal sentences. In his book *CRIMINAL SENTENCES: LAW WITHOUT ORDER*, he argued that “the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”²⁵⁸ He cited several problems in the then-prevailing system of indeterminate sentencing: judges not only had broad latitude in pronouncing a sentence but were given no guidance in how to exercise that discretion.²⁵⁹ Even fundamental questions like those relating to the justification or purpose of punishment were left to individual judges.²⁶⁰ Further, the law required no explanation for why a judge chose a particular sentence.²⁶¹

Frankel went beyond an indictment of the current sentencing system. He championed use of a federal sentencing commission.²⁶² Part of the commission’s responsibility was to be the development of presumptive sentences based on numerous objective factors relating to the gravity of the offense.²⁶³ His goal was to achieve less disparity among sentences and greater justice to those imprisoned.²⁶⁴

254. See Bowers, *supra* note 35, at 1182 (demonstrating the unacceptable application of Three Strikes by asking the reader to “[i]magine for a moment that the legislature announced that any felony could constitute a third strike in San Diego, but that only a violent or serious crime would trigger the law in San Francisco or Alameda”).

255. See *supra* notes 66–71 and accompanying text.

256. As of December 31, 2002, the number of third-strike offenders behind bars in California was 7,626. INSTITUTION POPULATION, *supra* note 71, at tbl.1. See also discussion *supra* note 172.

257. See WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 13.2(a) (3d ed. 2000) (describing the prosecutor’s discretion as “firmly entrenched in American law”).

258. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973) [hereinafter FRANKEL].

259. See *id.* at 7.

260. See *id.*

261. See *id.* at 42–43.

262. See *id.* at 118–24.

263. See *id.* at 114.

264. See FRANKEL, *supra* note 258, at 111–15.

Frankel was hardly alone in his critique of excessive judicial discretion in determining criminal sentences. CRIMINAL SENTENCES was part of the movement in favor of determinate sentencing and sentencing commissions.²⁶⁵ Both of those developments were premised on his view that unbridled sentencing discretion is inappropriate.²⁶⁶

The implementation of Three Strikes raises some of the concerns that Judge Frankel identified. Depending on the courtroom, a defendant may face no or little jail time or 25 years-to-life for the same conduct.²⁶⁷ Apart from the discretion that prosecutors may exercise outside the courtroom, even the prevailing standard governing judicial discretion, acting in “furtherance of justice,” is at best “amorphous,” as the state supreme court has recognized.²⁶⁸

In absence of legislative action, the state supreme court has attempted to narrow the exercise of judicial discretion under § 1385. *People v. Williams* addressed the problem in the context of a Three Strikes sentence.²⁶⁹ *Williams* held that a court had to exercise its discretion to advance the goals of the particular sentencing scheme.²⁷⁰ That required a balance of both individual constitutional rights (specifically, relating to proportional sentencing) and “society’s legitimate interests.”²⁷¹ Factors like court congestion or antipathy to the severe consequences for the defendant, without more, are extrinsic to the sentencing scheme, and, therefore, irrelevant to the proper exercise of the court’s discretion.²⁷² But the court should consider factors “intrinsic to the scheme, such as the nature and circumstances of the defendant’s present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects.”²⁷³

265. See Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1019–26 (1991) (discussing several works that critiqued indeterminate sentencing); see also *id.* at 1027–32 (discussing the federal sentencing guidelines and other sentencing reforms).

266. See FRANKEL, *supra* note 258, at 5. Many commentators argue that at least some of Frankel’s proposals have been carried too far. The federal sentencing commission and guidelines are considered a failure. See MPC REPORT, *supra* note 201, at 48, 115–25. Mandatory minimum sentences, the antipode of unbridled sentencing discretion, have led to injustice. *Id.* at 109–12.

267. Consider the crime of “petty theft,” which is ordinarily a misdemeanor punishable by fine, a term of imprisonment not to exceed six months, or both. CAL. PENAL CODE § 490 (West 1999). However, when a defendant has committed certain prior offenses, “petty theft” may be treated as a felony under California’s Three-Strikes law. *People v. Terry*, 54 Cal. Rptr. 2d 769, 771 (Cal. Ct. App. 1996). In *Andrade*, the defendant was convicted of two counts of petty theft and sentenced to 25-years-to-life. *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003); see also discussion *supra* notes 66–71 and accompanying text.

268. *People v. Superior Court (Romero)*, 917 P.2d 628, 648 (Cal. 1996).

269. *People v. Williams*, 948 P.2d 429 (Cal. 1998).

270. *Id.* at 436–37.

271. *Id.* at 437.

272. *Id.*

273. *Id.*

Williams and *Romero* offer a roadmap for a modest legislative reform of Three Strikes. Modeled on sentencing-guideline legislation, California might adopt a sentencing scheme that would create objective criteria to determine whether a court should impose a sentence under Three Strikes or, instead, strike a prior felony in furtherance of justice.

Like *Williams*' command, successful sentencing guideline systems have attempted to achieve maximum social protection consistent with proportional punishment.²⁷⁴ In typical guideline states, a sentencing commission develops standards to guide judges' sentencing decisions.²⁷⁵ Enabling legislation directs the commission to follow guiding principles.²⁷⁶ For example, the legislature may direct the commission to assess cost of incarceration in light of social protection.²⁷⁷ It may require the commission to assess the appropriate punishment consistent with specific goals of punishment, like the need for retribution and deterrence, but limited by the principle of proportionality.²⁷⁸

The commission's major initial responsibility is to translate general goals into guidelines to govern case-specific sentences.²⁷⁹ Thus, with general goals

274. See, e.g., FLA. STAT. ANN. § 921.0014(1)(a) (West 2001); MICH. COMP. LAWS ANN. §§ 777.50(1), 777.56, 777.57 (West 2002 & Supp. 2003); Minn. Sentencing Guidelines, Guideline II, Subdivision B, MINN. STAT. ANN. app. § 244 (West 2003); OR. ADMIN. R. 213-004-0006(1) (2002); WASH. REV. CODE ANN. § 9.94A.525 (West 2003 & Supp. 2004); see also MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 2 June 3, 2003) [hereinafter MPC Preliminary Draft 2]. Even though each sentencing guideline system is unique, each uses the offender's criminal history, severity of the current offense, culpability for the current offense, etc., to determine the appropriate sentence. By using the characteristics of each individual offender, a sentencing-guideline system can impose a much more appropriate sentence than a one-size-fits-all sentencing system.

275. See, e.g., Minn. Sentencing Guidelines, Guideline II, Subdivision B. The Minnesota system has a criminal history index which includes: "(1) prior felony record; (2) custody status at the time of the offense; (3) prior misdemeanor and gross misdemeanor record; and (4) prior juvenile record for young adult felons." *Id.* A criminal history score is calculated by totaling the points from each category. Weights are then assigned to the scores for each category, as required by the sentencing guideline. *Id.* at Subdivision B(1). The final total will determine the presumptive sentence for the current conviction. The statute does allow for judicial discretion in adjusting the presumptive sentence if the case involves "substantial and compelling circumstances." *Id.* at Subdivision D.

276. See MPC Preliminary Draft 2, *supra* note 274, at 5, 9. The ALI's model sentencing code is being developed by studying the sentencing guideline statutes from the state codes discussed *supra* note 275. The ALI states, regarding the establishment and purpose of the sentencing commission, that the commission shall ". . . perform its work and provide explanations for its actions consistent with the purposes of the sentencing and corrections system . . ." *Id.* at 9 (New Section 6A.01(e)).

277. See, e.g., ARK. CODE ANN. § 16-90-802(d)(4)(C) (requiring the commission to "monitor compliance with sentencing standards [and] assess their impact on the correctional resources of the state").

278. The Arkansas sentencing commission is charged with "review[ing] the classifications of crimes and sentences and mak[ing] recommendations for change when supported by information that change is advisable to further the adopted sentencing policy goals of the state." *Id.* § (d)(5).

279. The Maryland General Assembly codified its intent in establishing a guideline sentencing commission. Among other things, the Assembly intended the commission to create guidelines that are

established, the commission identifies characteristics relevant to the appropriate punishment.²⁸⁰ In many jurisdictions, the commission creates numerical guidelines by assigning numerical scores to certain offender and offense characteristics and places those factors on a grid.²⁸¹

The commission may create a grid, for example, with a vertical axis representing the offense score, which gives a score for specific aspects of the offender's criminal conduct (increasing the score, for example, if the crime was one of violence),²⁸² and a horizontal axis measuring the offender's score, which focuses on the offender's record.²⁸³ After the commission has created the grid, a sentencing court must assess the particular offender's characteristics and find a presumptive sentence on the grid.²⁸⁴

Other jurisdictions use a step-by-step formula to assess the sentence. The court must assess the seriousness of the crime, make adjustments for the offender's criminal history, and determine a final score.²⁸⁵ The court then translates the score into a presumptive criminal sentence.²⁸⁶ Some jurisdictions require an assessment of additional factors, including whether the current offense is similar to prior crimes²⁸⁷ and how much time has elapsed since the prior crimes.²⁸⁸

"fair and proportional." MD. CODE ANN. CRIM. PRO. § 6-202 (2001).

280. *See, e.g., id.* § 6-208.

281. *E.g.,* Minn. Sentencing Guidelines, Guideline II, subdivision B (defining the point values for each offense). Once the points are assigned, they are totaled and the presumptive sentence is found on a grid. *Id.* at Guideline IV.

282. *Id.* at Guideline IV. The vertical axis in the Minnesota presumptive sentencing grid represents the severity level for the present offense. When an offender is convicted of multiple offenses, the most severe convicted offense determines the present offense severity level. *Id.* at Guideline II, Subdivision A. Felony offenses are divided into eleven levels, from low (Severity Level I), to high (Severity Level XI). *Id.* As an example of the Minnesota severity levels, theft of property valued at \$2500 or less is a level II crime whereas second-degree murder is a level XI crime. *Id.* at Guideline IV. First-degree murder is exempted from the list and carries a mandatory sentence of life imprisonment. *Id.* at Guideline II, Subdivision A.

283. *Id.* at Guideline II, Subdivision B. Minnesota divides criminal history into four categories. *See* discussion *supra* note 275. The offender is assigned points of particular weights for every prior felony conviction as well as extended jurisdiction juvenile convictions. *Id.* at Subdivision B(1). The weights assigned to prior convictions are determined by the severity level of each prior offense. *Id.*

284. *See id.* at Guideline II, Subdivision C; *see also* MPC Preliminary Draft 2, *supra* note 274, at 35 (New Section 7.XX).

285. *See, e.g.,* FLA. STAT. ANN. § 921.0014(1)–(2) (West 2001). In Florida, a weighted score is given to the current offense, denominated as the primary offense. The number of points for the primary offense range from four points, for a level one offense, to 116, for a level ten offense. Unlike Minnesota, multiple convictions are counted into the point total, but they carry less weight. Certain factors will then influence the score, such as injury to a victim, a crime that is sexual in nature, and drug trafficking. Points for prior offenses are added to the points for the primary offense to determine the recommended sentence.

286. *Id.* § 921.0014.

287. *See, e.g.,* 204 PA. CODE § 303.4(a) (2003). Depending on the justification for punishment, the similarity of the prior offense to the current offense may be highly relevant. Retributivists, for

One of the obvious goals of a guideline system is reducing disparity among sentences.²⁸⁹ Nonetheless, case-specific factors may weigh against imposition of a particular sentence. Depending on the jurisdiction, the guideline sentence is a presumptive sentence, leaving the judge some discretion in departing from that sentence.²⁹⁰ Guideline systems reflect a preference that judges exercise that discretion rather than other actors in the criminal justice system.²⁹¹ Judges are more accountable than other actors; their decisions are public and the relevant legislation may require them to provide a written explanation for any departure from the guidelines.²⁹²

example, have difficulty justifying additional punishment based on an offender's past conduct. Punishment cannot be for the prior offenses because, for a retributivist, the offender has paid his debt to society. Some retributivist scholars have argued that where an offender is now punished for conduct similar to his past criminal acts, society is justified in punishing the offender. The earlier punishment reflected a willingness of society to show lenience to allow the offender to learn from his punishment. The current punishment is only that which the offender deserves, without any continuing forbearance. For a more detailed discussion of the philosophical debate surrounding recidivist statutes, see Vitiello, *Judicial Activism supra* note 128 (manuscript at 49–60). Those systems that add points based on the similarity of the current offense to past criminal conduct are influenced by that kind of reasoning.

288. See, e.g., FLA. STAT. ANN. § 921.0014(1)(b); MICH COMP. LAWS ANN. § 777.50(2); Minn. Sentencing Guidelines, Guideline II, Subdivision B(1)–(2). Minnesota's criminal history index includes the custody status of the offender at time of the current conviction. If a defendant is on probation, parole, supervised release, conditional release, or confined in a jail, workhouse, or prison during the commission of the current offense, extra points are added to the criminal history index score. *Id.* Subdivision B(2).

289. See FRANKEL, *supra* note 258, at 61, 111–15.

290. Many commentators have criticized the federal sentencing commission. The federal guidelines employ the concept of “real offenses” and “alleged offenses” that allow sentence enhancements based on “uncharged relevant conduct.” See Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 176 (1995). Advocates of the “real offense” and “alleged offense” approach argue that it allows judges to counteract prosecutorial discretion during charging and plea negotiations. See DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES 55 (Daniel J. Freed ed., 1988). However, critics argue that the price exacted on constitutional values is too high. *Id.* Under “real offense” sentencing, an offender may be sentenced based on crimes for which he has not been convicted, having the effect of lowering the standard of proof from beyond a reasonable doubt to a preponderance of the evidence, the standard used for considerations of fact in sentencing. *Id.* at 54–55. For a detailed list of criticisms of the federal sentencing guidelines, see MPC REPORT, *supra* note 201, at 115–25 (discussing the overwhelming complexity and rigidity of the federal sentencing guidelines).

291. The goal of sentencing guidelines was to create a system of uniform and proportional criminal sentencing. However, it would be hard to disagree that a specific sentence will not be appropriate in every situation. Judicial sentencing discretion has been considered preferable in sentencing guidelines because the judiciary is “the most accountable.” Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 689 (1993).

292. *Id.* Systems vary on their approaches to departure from the guidelines, with some jurisdictions disfavoring departure. See, e.g., KANS. STAT. ANN. § 21-4716(a) (2002) (requiring a “substantial and compelling” reason to deviate from the presumptive sentence). Some guidelines include specific factors that may militate in favor of an upward or downward departure. FLA. STAT. ANN. § 921.0016(3)–(4). Other schemes list factors, such as race and sex, that the court may not consider in deciding whether to depart from the presumptive sentence. MICH. COMP. LAWS ANN. § 769.34(3) (West 2000).

*Williams*²⁹³ suggests the limits of a court's ability to frame a coherent guideline system. There, the supreme court identified some general considerations to govern the exercise of trial courts' sentencing discretion under the "in furtherance of justice" standard.²⁹⁴ But the generality of those factors and the deference that appellate courts must show the trial court's exercise of discretion²⁹⁵ have not remedied the gross disparity in Three Strikes cases that critics have identified.²⁹⁶

Any legislation along the guidelines model would have to conform to the general guidelines spelled out in *Romero*²⁹⁷ and *Williams*;²⁹⁸ if not, presumably, the court would view the law as an attempt to amend Three Strikes.²⁹⁹ But the legislature could draft legislation similar to guideline statutes described above that would be consistent with supreme court case law interpreting the "spirit" of Three Strikes.³⁰⁰

For example, *Williams* held that a court had to exercise its discretion to advance the goals of the particular sentencing scheme.³⁰¹ In context, that required an examination of principles of proportionality and the protection of societal interests.³⁰² Justice Mosk indicated that society has an interest in the prosecution of criminal offenses.³⁰³ A second goal might be the overall efficient management of its prison resources. Those general factors are virtually identical to the general goals articulated in statutes creating sentencing commissions.³⁰⁴

Three Strikes' proponents might argue that Three Strikes' drafters intended for the sentencing scheme to be mandatory for anyone coming within the provisions of the law.³⁰⁵ Certainly, even some of the law's critics have acknowledged that the courts and prosecutors do not appear to have given effect to the intended mandatory effect of the law.³⁰⁶ *Williams* and

293. *People v. Williams*, 948 P.2d 429 (Cal. 1998).

294. *Williams*, 948 P.2d at 435–36.

295. *See People v. Superior Court (Romero)*, 917 P.2d 628, 648 (Cal. 1996).

296. *See Marion*, *supra* note 34, at 29; *Bowers*, *supra* note 35, at 1182.

297. 917 P.2d at 648.

298. 948 P.2d at 435–36.

299. Courts regularly define a statute as an amendment even if it only seeks to clarify an existing law. *See Franchise Tax Bd. v. Cory*, 145 Cal. Rptr. 819, 822 (Cal. Ct. App. 1978) (citing *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796, 798–99 (S.D. Cal. 1950)); *Mobilepark W. Homeowners Ass'n v. Escondido Mobilepark W.*, 41 Cal. Rptr. 2d 393, 398–99 (Cal. Ct. App. 1995).

300. *Williams*, 948 P.2d at 436.

301. *Id.* at 436–37.

302. *Id.*

303. *Id.*

304. *See, e.g., supra* note 279.

305. *See, e.g., Ardaiz*, *supra* note 48, at 212; *Jones*, *supra* note 26, at 23–25.

306. *See, e.g., Vitiello*, "Three Strikes" and the *Romero Case*, *supra* note 27, at 1690–1700; *Bowers*, *supra* note 35, at 1175–80.

Romero rebut those arguments: *Romero* found the law's intent sufficiently ambiguous to reject that argument;³⁰⁷ *Williams* makes clear that the Three Strikes sentencing scheme is not mechanical.³⁰⁸ The court is explicit that discretion should be exercised in light of principles of proportionality and other factors.³⁰⁹ Implicit in the *Williams* court's discussion is a recognition that the law targeted the most serious repeat offenders, the murderers, rapists and child molesters identified in campaign literature, and that courts may use their discretion to avoid its improper use in cases not involving any similar risk of social harm.³¹⁰

Williams does not allow courts to consider some factors like court congestion or antipathy to the severe consequences for the defendant, extrinsic to the sentencing scheme.³¹¹ But the court should properly consider factors "intrinsic to the scheme, such as the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects."³¹² Those are the kinds of directives that state legislatures have given sentencing commissions.³¹³

Using legislation, instead of evolving judicial standards, offers a number of advantages. Sentencing guidelines create greater uniformity—one of the problems existing under the current administration of Three Strikes in California.³¹⁴ More importantly, legislative standards can weed out the kinds of cases that misallocate resources.³¹⁵ If California adopted a model using points ascribed to an offender's criminal past and current offense, offenders who have no crimes of violence in their past and whose current offense is not a violent offense should have low point totals.³¹⁶ The guidelines would then require a trial court to strike a prior felony "in furtherance of justice," absent

307. See *People v. Superior Court (Romero)*, 917 P.2d 628, 641–42 (Cal. 1996).

308. *Williams*, 948 P.2d at 435–36.

309. *Id.*

310. *Id.* at 437.

311. *Id.*

312. *Id.*

313. For a discussion of sentencing guidelines and the factors that various systems use to determine a presumptive sentence, see *supra* notes 282–88.

314. See *Marion*, *supra* note 34, at 29, 36–38.

315. See, e.g., *supra* notes 66–71 and accompanying text. In the 1980s and 1990s many states established sentencing guidelines to manage resources and control growing prison populations. See Leonard Orland & Kevin R. Reitz, *Epilogue: A Gathering of State Sentencing Commissions*, 64 U. COLO. L. REV. 837, 839–40 (1993); see also MPC REPORT, *supra* note 201, at 72–79.

316. See, e.g., Minn. Sent. Guidelines II & IV (providing presumptive sentences of between eighteen and twenty-two months for nonviolent criminals even when the current sentence is calculated using the maximum criminal history score).

some reasoned basis to deviate from the presumptive standard.³¹⁷ If a court deviated from the guidelines, by either failing to strike a prior felony or striking a prior felony in a case where the guidelines created a presumption against a strike, as the law now requires,³¹⁸ the court would have to justify the decision in a written order.³¹⁹

Such a sentencing scheme would be an improvement over the existing hit-or-miss application of Three Strikes. Further, it would begin reducing the number of felons entering the prison system whose long sentences are unwarranted. The effect of such a statute would be to create greater equality among third-strike defendants and proportionality for individual third-strike defendants.

VI. CONCLUSION

For many years, the nation looked to California as a trendsetter. For much of the 1980's and 1990's, it became a trendsetter in the movement to incarcerate large numbers of felons.³²⁰ It now runs the second largest prison system in the free world.³²¹ But as empirical evidence now demonstrates, California's massive prison system and draconian sentencing laws guarantee poor use of resources: limited social protection cannot justify the cost of warehousing many felons serving long prison sentences.³²²

The challenge for California is how to reform itself. Three Strikes saddled California with a requirement of a super-majority for legislative reform. Both the prison union and victims' groups have extraordinary sway with the legislature. But California's worsening financial conditions may have a silver lining for those interested in responsible sentencing policy.

One trend that California has not followed is the recourse to sentencing commissions. In many states, commissions have proven to be effective in

317. *Williams*, 948 P.2d at 435–37.

318. *Id.*

319. *See, e.g.*, FLA. STAT. ANN. § 921.0016(1)(c) (requiring a written statement delineating the reasons for a departure from a presumptive sentence); Minn. Sent. Guidelines II, Subdivision D. The requirement of a written order explaining the exercise of discretion allows the appellate courts to develop a common law of sentencing, further guiding the exercise of judges' discretion when they depart from the guidelines. MPC REPORT, *supra* note 201, at 66.

320. *See Vitiello, Return to Rationality?*, *supra* note 22, at 409–10.

321. *See ZIMRING ET AL.*, *supra* note 4, at 17, 18 fig.2.1. Based on 1990 figures, California had a prison population of 97,309. This figure was more than the prison population of England and Germany combined. *Id.* at 18 fig.2.1. Today, California's inmate population has grown to 160,315 but is no longer the largest in the free world. The federal government's inmate population recently surpassed that of California. *Number Imprisoned Exceeds 2 Million, Justice Dept. Says*, WASH. POST, Apr. 7, 2003, at A4.

322. *See supra* notes 66–117 and accompanying text.

improving the allocation of prison resources and other available sentencing options. They have achieved efficiency without serious risk to public safety.

This Article has urged legislative reforms. Alternatively, it has argued in favor of broad reform that would adopt the commission model. As Marc Klaas has argued, California may provide too little punishment for some violent felons, while it provides too much time for non-violent felons. A commission could reexamine California's skewed priorities.

It has also argued for less sweeping reform. Using the sentencing guidelines model, California could adopt a statute that would guide judges in their exercise of discretion when they decide whether to impose 25-years-to-life sentences under Three Strikes. Such a scheme could avoid unnecessary incarceration of aging felons who no longer pose a serious social risk and create greater statewide uniformity in the application of the law.