"In the Furtherance of Justice": The Effect of Discretion on the Implementation of California's Three Strikes Law

Jennifer Edwards Walsh*
Ph.D. Candidate
Claremont Graduate University

Abstract

Under the California three-strikes law, all traditional forms of prosecutorial discretion have been eliminated by the legislature—all except the ability of the prosecutor to dismiss a prior strike conviction "in the furtherance of justice." Earlier reports seemed to indicate that this discretion was creating an unequal application of the law as some prosecutors used this discretion more frequently than others, yet none examined this issue empirically. In this paper, I analyze the use of this discretion and conclude that prosecutors are not treating offenders disparately with their ability to strike a strike, nor are they using their discretion in a way that encourages sentence leniency. Rather, they are applying the law, and using their discretionary authority, in accordance with crime control goals. Prior strikes are stricken only in those cases that involve less serious crimes or defendants who present a reduced risk of recidivism and a lesser degree of culpability.

Prepared for delivery at the 1999 Annual Meeting of the American Political Science Association, September 2-5, 1999. Copyright by the American Political Science Association.

---

* I would like to thank Harold Becker, Joseph Bessette, and Craig Volden for their time and helpful suggestions throughout the various stages of this project. I also wish to thank Deputy District Attorney Gregg McClain and the San Diego County District Attorney's Office for their invaluable assistance in providing data for this analysis. Please send comments to: jenwalsh@pacbell.net, or School of Politics and Economics, Department of Politics and Policy, Claremont Graduate University, 160 E. Tenth Street, Claremont, CA 91711.

Introduction

On March 7, 1994, a habitual offender sentencing law—colloquially known as "Three-Strikes and You're Out"—went into effect in the state of California. Unlike most new laws that are enacted quietly with only a brief mention in the local newspaper prior to the start of the New Year, the official rendering of the three-strikes law was treated as an important public event. Reporters took notes and media crews collected sound bites as Republican Governor Pete Wilson signed into law this popular, yet controversial, sentencing measure.

The purpose of the three-strikes law was to ensure longer prison sentences for repeat offenders through the use of mandatory minimum sentences for recidivists with prior felony convictions. Through this law, the legislature penalized repeat felony offenders by stipulating an automatic 25-year-to-life indeterminate sentence for all offenders who were convicted of a third felony and had at least two serious prior felonies. The law also targeted second-time offenders by prohibiting probation and requiring their sentences to be doubled automatically upon conviction of the second felony offense. Combined, these efforts signaled an attempt by the legislature to ensure that recidivists who continued to commit crimes would not have an immediate opportunity to re-offend.

The California three-strikes measure also sought to eliminate most discretionary behavior of prosecutors and judges which might be used to mitigate the effects of the law. For example, it prohibited prosecutors from plea-bargaining in eligible three-strikes cases. It also eliminated any discretion that a judge might have in reducing the sentence below the mandatory minimum. The intent of the law was clear: repeat felony offenders would be punished severely. Despite the strong language, the legislature did authorize prosecutors to dismiss a prior strike conviction (or "strike a strike") when it was "in the furtherance of justice." This authorization was initially denied to the judges, but in 1996 the California Supreme Court in the case *People v. Superior Court (Romero)*[1] extended this authorization to judges as

[1] [53 Cal.Rptr.2d 789 (Cal. 1996)]

well. Today, both prosecutors and judges have the ability to strike a prior strike "in the furtherance of justice."

Though the primary intent of the three-strikes law was substantive in nature, its enactment also had secondary systemic implications. Over the previous fifteen years, California's criminal justice system had been moving away from the paradigm of rehabilitation toward a penological theory that was more punitive in nature. As "get tough" political rhetoric grew, incarceration increasingly became a tool for retributive and incapacitative purposes rather than corrective ones. Though there might have been remnants of support for rehabilitation prior to three-strikes, the passage of the new law effectively stamped them out. The paradigmatic shift away from the sentencing goal of rehabilitation was complete.

Given this new theoretical context, state legislators and other crime control advocates were concerned that even the limited amount of discretion permitted under California three-strikes might be used to mitigate the full effects of the law. Opponents of three-strikes, however, have endorsed the ability of prosecutors and judges to "strike a strike" as a way of negating a law that is seen as excessively punitive. Although interest in this use of discretion has been high because of its potential to derail efforts to incarcerate recidivist offenders, no study prior to this one has been able to identify the reasons through which prosecutors are striking strikes, nor has any research been able to systematically characterize those cases in which discretion is being used. This study addresses both of these deficiencies.[2]

In this paper, I explain the contextual background of the California three-strikes law as it reflects the shift from rehabilitation to incapacitation, the current disdain for discretionary action, and the problem of recidivism which has prompted legislators to prescribe mandatory penalties for the career criminal. I also detail general theories underlying prosecutorial discretion. Finally, I propose two hypotheses about the use of prosecutorial discretion under the California three-strikes law, positing that the prosecutor's decision to strike a prior strike does not cause disparities in treatment but rather reinforces the

[2] Although the use of judicial discretion is important for an accurate understanding of how the California three-strikes law is being implemented, this paper will focus only on the use of prosecutorial discretion.

prosecutor's crime control perspective. To evaluate this use of discretion, I utilize: 1) District Attorney survey data; and 2) information culled from three-strikes cases filed in San Diego County. The hypotheses testing is done through tabular analysis using the survey data and logit analysis using the three-strikes case data from San Diego.

The results from this study are substantial. First, despite the fact that state District Attorneys do not coordinate policy with one another, they appear to be in remarkable agreement over the types of factors that would qualify (and disqualify) a three-strikes case for discretionary treatment. There was a clear consensus, for example, that a minor third strike by a non-violent offender was appropriate justification for striking a strike. Furthermore, in evaluating the San Diego cases for use of discretion, I found that prosecutors are likely to base their decision on crime-control variables, including factors related to the offender's propensity toward violence and likelihood to re-offend. The use of discretion appears to be targeted at those offenders who have committed fewer, non-aggravated crimes and who are less culpable in comparison with other eligible three-strike offenders. Because the California version of three-strikes casts the broadest net across the criminal spectrum, it catches offenders for minor felonies such as shoplifting and marijuana possession. Many would argue that prosecutors are using their discretionary authority to restore a sense of balance—and justice—to the system by disqualifying these minor cases.

Review of the Literature

Shift from Rehabilitation to Incapacitation

The use of rehabilitation—punishment for corrective measure—was the dominant sentencing theory from our colonial ancestry through the mid- to late 1970's. Reforming the offender was the primary goal, and tools of punishment were used to correct and chastise him. Corporal punishment was first used to remedy spiritual malfeasance (Forer 1994; Friedman 1992; Stith and Cabranes 1998), but was later replaced with the use of incarceration. As secular European Enlightenment theories found favor

among leaders, physical punishment in a post-constitutional setting was considered to be "cruel and unusual" (Alschuler 1978; Forer 1994; Gaes 1998; Ignatieff 1992; Stith and Cabranes 1998).

Packaged in both spiritual or secular contexts, the rehabilitation model sought to stop the offender from re-offending (Farrington 1987; Forer 1994; Von Hirsch 1976). To accomplish this task, judges were given the discretionary authority to tailor prison sentences to the therapeutic needs of the individual, and parole boards were established with the authority to release prisoners from the balance of their sentences when rehabilitation treatment had been successfully completed (Von Hirsch 1976). Statutory provisions established the baseline eligibility for parole, usually requiring that the offender serve one-third of their maximum sentence, however all other decisions regarding the release and conditions of parole were left to the parole board (Morris and Tonry 1990; Stith and Cabranes 1998; Wilson 1983).

Despite enjoying widespread support from the beginning of the twentieth century, by the mid-1970's the rehabilitative penal philosophy had begun to fall out of favor with lawmakers and the public. A primary cause for declining support was the growing body of evidence that seemed to indicate that rehabilitation did not work. While initial research seemed to support the effectiveness of the rehabilitation approach (Wilson 1983), later studies correcting for methodological flaws revealed that traditional treatment therapies, including vocational, academic, and psychological programs, were not effective at all; they failed to impact the rate of recidivism among offenders exposed to treatment (Farrington 1987).[3] As one scholar summarized the body of research, "almost every means of rehabilitating criminals has been tried, and almost nothing seems to work" (Alschuler 1978, 552).

Another criticism of the rehabilitation model rested on the use of judicial discretion in sentencing. Under the indeterminate sentencing scheme so commonly paired with the rehabilitation model, judges were able to vary each sentence in order to tailor the punishment to the relevant facts of each case. This freedom to alter sentences based upon subjective criteria produced a number of problems including disparities between cases, sentences that were not justified given the facts of the case, and accusations that

[3] A summary of rehabilitation studies can be found in (Gaes 1998).

judges were discriminating on the basis of extra-legal factors such as race and class (Dow 1981; Frankel 1972; Petersilia and Turner 1987).

Though the rehabilitation model had been discredited in the eyes of many policymakers, the problem of recidivism continued to concern crime control advocates, especially after studies revealed that a small number of chronic offenders committed a grossly disproportionate amount of crime. For example, an analysis of a juvenile birth cohort revealed that 18 percent of the recidivating delinquents committed 51 percent of the total crime reported (Wolfgang, Figlio, and Sellin 1972, 247). Similarly, the Rand Corporation also found that 10 percent of active burglars committed more than 230 burglaries each per year (Greenwood and Abrahamse 1982, xiii). Another study tracking parolees revealed that approximately 5 percent of the prisoners had been charged with 45 or more offenses before and after their release from prison and 26 percent had been charged with at least 20 offenses (Beck and Shipley 1989). Still another agency reported that while out on parole for an average of 13 months, a group of 156,000 offenders committed at least 6,800 murders, 5,500 rapes, 8,800 assaults, and 22,500 robberies (Cohen 1995).

Embracing lengthier pre-determined sentences, lawmakers tried to mitigate the effect of recidivism by using the resources of the penal system to hinder the offender's ability to commit further crimes. The decision to use an incapacitative strategy to combat recidivism, however, produced another dilemma. Policymakers were asked to distinguish between a general theory of incapacitation, which stipulated long sentences for *all* repeat offenders, and selective incapacitation, which utilized longer sentences only for those offenders who had the highest risk of reoffending. Although "the best predictors of future criminal behavior appear to be measures of prior criminal behavior" (Gottfredson and Gottfredson 1986, 271), giving all repeat offenders lengthy prison sentences is problematic, especially if offenses are relatively minor and prison resources are scarce. Additionally, the use of collective or general incapacitation concerned theorists who favor a "just deserts" approach to punishment because it escalates the scale of imprisonment beyond what the offender deserves (Von Hirsch 1987).

In contrast, the theory of selective incapacitation proposed that the more likely the prisoner is to re-offend, the longer he should be incarcerated (Greenwood and Abrahamse 1982; Von Hirsch 1987). Studies attempting to predict which offenders are most likely to recidivate have pointed to statistically significant predictors such as juvenile convictions and recent drug use. Other variables including convictions with multiple counts, prior prison terms, and prior felony convictions were evaluated in the prediction models, but were not found to be significant (Greenwood and Abrahamse 1982). More recent empirical studies have demonstrated that the best predictors of future behavior are measures of prior criminal behavior (Gottfredson and Gottfredson 1986). Demographic variables, such as low socioeconomic status, unstable family structure, and early antisocial behavior, have also been statistically correlated with the propensity to re-offend (Farrington 1987). Drug offenders have high rates of criminal activity (Wish and Johnson 1986) as do younger offenders between the ages of 17 and 22 (Tonry 1996, 139).

While mathematical models have been able to identify variables that correlate with recidivism, prediction models continue to carry unacceptably high error rates. Of particular concern are false-positive errors which classify as recidivists those offenders not likely to re-offend, needlessly exposing them to longer periods of incarceration (Gottfredson and Gottfredson 1986). Unfortunately for theorists, the false-positive error rate, in excess of 50 percent in some studies, remains an insurmountable obstacle to implementation (Farrington 1987; Von Hirsch 1987).

Through fluctuating support for various forms of incapacitation one principle has remained constant: discretion by prosecutors and judges in sentencing decisions should be limited. Although discretionary authority exists throughout our system of government (Davis 1969), legislators have focused its reform efforts on the criminal justice system partially because of the negative connotations derived from its long-time association with arbitrariness and prejudice under rehabilitation, and partially because discretion within the system is so pervasive. As noted by one author, "what we call the criminal justice 'system' is nothing more than a sum total of a series of discretionary decisions by innumerable officials" (Walker 1993, 4).

Prosecutorial Discretion

Of all the discretionary influences that a prosecutor has within the criminal justice system (discretion to file and dismiss charges and allegations), the use of the plea bargain is both the most common and the most reviled (Walker 1993). Over time, prosecutors have resorted to using the plea bargain as a way to handle an ever-burgeoning case load (Dow 1981; McCoy 1998; National Institute of Justice 1997). Standard reviews of plea bargaining indicate that close to 90% of all felony filings result in a plea bargain conviction (Bessette 1997; Carp and Stidham 1993; Misner 1996; Neubauer 1997). Because of this widespread use and the fact that the essence of a plea bargain means reduced sentences for the defendant, the plea bargain has often been the focal point in discussions of discretionary abuse and leniency in sentencing (Alschuler 1978; Bessette 1997; Morris 1974).

Prosecutorial discretion in plea bargaining has also been target of numerous empirical studies. However, empirically investigating plea bargaining has proven difficult because plea bargaining is usually an informal process and it is difficult to establish quantitatively how this process is accomplished. Because systemic analysis has been hampered by the lack of uniform data reporting (U.S. Sentencing Commission 1991), the existing empirical literature on plea bargaining primarily focuses on practices within a specific jurisdiction.

Scholars have found that in evaluating plea bargaining, the policy decisions of the chief prosecutor must be interpreted in light of his role in the criminal justice system. The prosecutor is at the same time an elected public official, the chief law enforcement official with the power to file criminal charges, and a bureaucrat responsible for the administration of a complex department (Jacoby 1979). Because the prosecutor is shaped and influenced by these roles, the policies that are enacted within that jurisdiction reflect the values as expressed through those roles. Unlike other positions in the criminal justice system, the role of the prosecutor is not a neutral one. Rather, the prosecutor is an advocate of the state to pursue and seek punishment for those individuals who violate the law. As such, the prosecutor typically uses her influence to enact policies that advance this goal.

Influenced by this institutional role, the prosecutor uses plea bargaining as a policy tool to control crime. Prosecutors who enact restrictive plea bargaining practices attempt to reduce crime through the elimination of more lenient sentences for criminals (Worden 1990). When plea bargaining is allowed, research has shown that is tied to legal variables which are directly related to either the criminal conduct or the criminality of the offender. Offenders who commit serious crimes as evaluated by the severity of the charge and/or harm to the defendant are less likely to receive prosecutorial leniency than those who commit less serious offenses. Similarly, during the negotiation process, prosecutors closely evaluate the criminality of the offender, as defined by his prior criminal record, measured either in number of felony convictions or number of previous arrests. Other offender-related variables include age of the defendant, as a measurement of criminality over time, and drug use (Holmes, Daudistel, and Farrell 1987; Jones 1977; McDonald, Rossman, and Cramer 1979; Miller 1994; Neubauer 1974).

Other studies have explored the impact of social status—or extra-legal variables—on the plea bargaining decision, but to date, the results are inconclusive. One group of studies seems to reveal that social status variables such as race/ethnicity, class, and gender have a significant, but negative, impact on the prosecutor's decision to plea bargain. Offenders who are black and/or poor often face harsher treatment than those defendants who are white and/or wealthy (Zatz 1987). Another study found that while sociological factors were significantly linked to how they were handled during the plea negotiation process, minority defendants were treated more favorably than white offenders (Holmes, Daudistel, and Farrell 1987). Determinate sentencing schemes have tried to eliminate the influence of sociological factors in the sentencing process and follow-up reports have indicated some measure of success (Miethe 1987).

Prosecutorial discretion has also been linked to dispositional factors, or factors related to the probable outcome of the case. Not surprisingly, prosecutors who fear that the defendant will be acquitted at trial will press for a negotiated plea beforehand. Prosecutors are more likely to press for a plea bargain if they fear losing the case in a jury trial, therefore, the strength of the case as measured by the quality of evidence has been found to be a significant predictor in the plea process (Neubauer 1974).

Mandatory Sentences

In response to findings that judicial discretion produced sentencing disparity, legislatures across the nation began to impose mandatory minimum sentences as a way to reduce variation and to assist with crime control efforts (National Institute of Justice 1982).[4] By "conveying [a] message that certain crimes are especially grave," mandatory penalties for specific crimes would deter potential violators from pursuing those particular offenses (National Institute of Justice 1997, 2). Despite the enhancements, however, researchers have concluded that mandatory laws have had no measurable deterrent effect on the targeted offenses (National Institute of Justice 1982; National Institute of Justice 1997; Tonry 1996). Similarly, the incapacitation effects of mandatory minimums have been difficult to isolate, given that effects will not show until after the original sentence was scheduled to end (Kessler and Levitt 1998) and the possibility that measured effects may also be explained by other external factors such as demographic changes or policing practices (National Institute of Justice 1982; Tonry 1996).

Although the implementation of mandatory minimums also sought to limit the amount of discretion being exercised in sentencing decisions, discretion within the criminal justice system appears to imitate the physical law of matter: it is neither created nor destroyed—it merely changes in composition. Despite numerous attempts at eliminating discretion through determinate sentencing schemes, mandatory sentences, and prohibitions against plea bargaining, research has repeatedly demonstrated that discretion has not disappeared but has been displaced (Alschuler 1978; Jesilow 1997; National Institute of Justice 1982; Stith and Cabranes 1998; Tonry 1996). One metaphorical description of this displacement compares the use of discretion within the criminal justice system to a tube of toothpaste. Squeezing discretion out of one area does not diminish the amount of discretion; it just moves the "bulge" of discretion to another part of the system (Stith and Cabranes 1998, 126).

[4] By 1994, the U.S. Department of Justice reported that Congress and all 50 States had enacted at least one mandatory sentencing law (Tonry 1996).

The persistence of discretion likely has much to do with our concept of justice. Given our common-law heritage, we have come to expect variation within the law in order to accommodate personal circumstance. We anticipate that first-time offenders will be given a lighter sentence and that recidivists will be punished more severely. We also expect juvenile offenders to be treated differently from adult offenders. In implementing sentencing policies, it is expected that criminal justice personnel will be allowed a measurable amount of discretion in order to distinguish between offense and offender circumstances (Alschuler 1978). This discretion is used to combat the arbitrariness that is inherent of all mandatory sentencing laws. The arbitrariness of these laws "is apparent on their face: all defendants, whatever their personal circumstances and whatever the circumstances of their crimes, are subject to the same minimum amount of punishment" (Stith and Cabranes 1998, 123).

The inflexibility of the mandatory sentences has led to various avoidance strategies on the part of police, prosecutors, and judges. When harsh sentences are required, and all other traditional discretionary options have been removed, prosecutors and judges will use their remaining influence to side-step the requirements of the law in order to avoid imposing sentences they feel are unjust. Police may decrease arrests for that particular crime (Tonry 1996), prosecutors may change plea negotiation practices "to circumvent what they felt were 'unreasonable' sentencing policies" (Miethe and Moore 1989, 5), and judges have balked at mandatory statutes by purposely acquitting defendants that would have otherwise been convicted (Tonry 1996, 147).

California's Version of Three-Strikes

At first glance, the 1994 California three-strikes law seems like just another mandatory sentence, enacted as another crime control strategy by a legislature and a public that was weary from doing battle with crime. Yet, despite overwhelming bipartisan support, high public opinion ratings (Balzar 1994; Hayward and Izumi 1996), and recent evidence which suggests that the crime rate has in fact decreased since its enactment (Lungren 1998), the California three-strikes law has been severely criticized in both mainstream and academic press. Among concerns about high cost and aging prison populations

(Greenwood 1994) are objections to the arbitrariness of the law as represented by disproportionate sentences for non-violent and minor offenders (Shiraldi and Ambrosio 1997; Shiraldi and Godfrey 1994; Zimring 1996). Unlike other states which have more stringent requirements for the third strike, the California law is triggered by *any* third felony, which means that repeat offenders are at risk for even minor felony offenses (Turner 1995).

Of special concern are those felonies that are known as "wobblers." Wobblers are lesser felony offenses that stipulate fines or jail time as alternative punishments. In California, wobbler offenses include misdemeanors that are elevated to felony status because of the defendant's prior record (Meeker and Pontell 1985). Petty theft, for example, is normally a misdemeanor, except when committed by an offender who has a prior theft conviction.[5] Cases involving minor instances of drug possession or driving under the influence are additional examples of wobbler offenses. Although the offenses may be minor, wobbler offenses are eligible to be counted as third strikes if the offender's prior record contains two or more serious felony priors. For example, one California three-strikes case involved an offender who stole a package of meat to feed his family (Schiraldi 1994). The low value of the meat, $5.62, would have normally classified this offense as a misdemeanor petty theft. However, because this individual had two prior strike offenses, the petty theft charge was elevated to a felony, which then counted as a qualifying third strike.

The usual response to critics who point out the possible injustices with sentencing sometime to life in prison for a minor offense is to reiterate the seriousness of the defendant's prior record. As a habitual offender law, three-strikes is only invoked on those who have repeatedly committed serious and/or violent crimes.[6] However, it can also be mentioned that under the California law, a defendant guilty solely of three property offenses (e.g., two residential burglaries and a petty theft) is eligible to receive a 25-year-to-life sentence. As noted by Zimring, this type of offender will receive a lengthier sentence than a non-three strikes defendant found guilty of second-degree murder (Zimring 1996, 248). It

[5] California Penal Code §666.

[6] See Appendix A for a listing of statutorily defined serious and violent felonies.

is the seeming lack of proportionality invoked by three-strikes that produces the most concern. Even those who have suffered the ills of crime have paused to consider the ramifications for defendants. As Marc Klaas, the father of Polly Klaas whose murder propelled three-strikes into the national spotlight, commented, "I've had my car broken into and my radio stolen and I've had my daughter murdered, and I know the difference" (Domanick 1998).

Despite these problems, the legislature purposely eliminated most expressions of discretion by judges and prosecutors. The three-strikes law states that "it is the intent of the Legislature…to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."[7] Specifically, the law prohibits the judge from granting probation or a suspended sentence;[8] orders that judges not consider the lapse in time between the last serious felony prior and the instant offense in imposing the sentence;[9] and prohibits the judge from sentencing a three-strikes defendant to an alternate institution.[10] It also instructs prosecutors to apply the law in every eligible case and prohibits them from using prior felony convictions as negotiation tools in plea bargaining.[11]

Although the list of conditions regarding the application of the law appears to constrain all discretionary impulses, sandwiched among the "do's" and the "don'ts," PC §667(f)(2) states

> 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.[12]

This subsection allows the prosecutor two discretionary activities: 1) to dismiss a prior strike (and forgo the three-strikes allegation) in the furtherance of justice; and 2) to dismiss a prior strike when evidence proving the conviction is lacking. The courts, however, are only authorized to strike a strike for

---

[7] Penal Code §667(b)
[8] Penal Code §667(c)(2)
[9] Penal Code §667(c)(3)
[10] Penal Code §667(c)(4)
[11] Penal Code §667(f)(2)
[12] Penal Code §1385 (a) is ambiguously worded, but essentially allows judge s to grant the motion of prosecutors who are petitioning the dismissal of a prior felony in the furtherance of justice.

evidentiary reasons. Pursuant to PC §1385, judges are prohibited from using their discretion to dismiss prior felony convictions apart from evidentiary reasons. [13]

Not surprisingly, judges complained about the discretionary power that had been authorized for the prosecutors, but not for them. Some judges reluctantly imposed the full sentence under the law, but noted on record that they were doing so only under duress. Others devised ways around the law, mirroring the avoidance behavior observed under mandatory sentencing laws of the 1970's. A Los Angeles Superior Court Judge expressed his frustration with the law soon after its enactment in 1994. "I refuse to dispense injustice. I wasn't put here to annihilate people because some politically hungry morons wanted (me) to" (Colvin 1994, A-1).

Judges who circumvented the measure were frequently reversed on appeal. Two years after its implementation, the issue of whether or not judges had the authority to exercise discretion in three-strikes cases came before the California Supreme Court. In *People v. Superior Court (Romero)* (1996), the state high court issued an upset ruling which extended to judges the authority to strike a prior strike "in the furtherance of justice." The court ruled that the legislature had not specifically prohibited that exercise of judicial discretion and to deny the judges the same exercise of power granted to the prosecutors was to upset the separation of powers doctrine established by the state constitution.

The state Supreme Court also noted that the phrase "in the furtherance of justice" is currently without legislative meaning. In previous cases, the court had defined this phrase to mean "consideration both of the constitutional rights of the defendant and the interests of society represented by the People." [14] Using this definition in the context of three-strikes, the judge or the prosecutor must take into account the *individual characteristics of the crime and the offender* and balance them against the crime control or *incapacitative benefit to society*. This balancing of interests answers the problem of arbitrary, uniform inflexibility that can lead to unjust results. In this one case, the court reasserts the need to accommodate

[13] Penal Code Section 1385 (b) clearly states clearly that "this section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667."

[14] *People v. Romero*, 53 Cal.Rptr.2d 789 (Cal. 1996)

the variations in human experience in light of the authority of the legislature to prescribe specific punishment for a group of offenders.[15]

The potential problem with this type of unstructured discretionary authority is that not every prosecutor or judge evaluates those competing interests in the same way. When unstructured discretion was at its peak during the rehabilitation era, one of the common side effects was variation—or worse, disparity—in sentencing. When each judge was allowed to interpret the needs of the individual without guidance from a central agency or authority, variances based upon personal biases were commonly found.

Anecdotal reports and preliminary studies have alleged that prosecutors differ in their treatment of three-strikes offenders. For example, a 1996 *Los Angeles Times* article reported that large disparities existed between the use of discretion in San Diego and San Francisco, with prosecutors in the former county pursuing three-strike candidates more aggressively than in the latter (Perry 1996). A recent study by the Justice Policy Institute also found differing levels of enforcement across the state (Males, et al 1999). Although these preliminary reports have hinted that prosecutors are exercising their discretion unfairly, no study to date has examined the use of discretion of prosecutors or judges against the standard "in the furtherance of justice."

Data Analysis

Although quantitative studies have focused on the fiscal impact and crime control benefits of the California three-strikes law (Greenwood 1994; Lungren 1998; Males, et al 1999; Stolzenberg and D'Alessio 1997), none have addressed the use of discretion. A paucity of available quantifiable data has been an obstacle for researchers who wish to focus on this issue. While the state Department of Corrections statistical unit can track three-strike offenders though the system, they are unable to provide crucial criminal history data on these offenders. At one time, the state maintained a longitudinal database system (OBTS) that compiled information on individual offenders as they moved in and out of the

[15] In the follow-up case *People v. Williams* (Cal. 1998), the court clarified the use of discretion by requiring judges to give the full sentence as required by the three-strikes law to those defendants whose past and present conduct fall within "the spirit" of the law.

criminal justice system (Maltz 1984; Zatz 1987), however it was eliminated in the budget crises of the early 1990's. Thus, to facilitate testing the hypotheses for this study, two original sources of data were collected specifically for this analysis.

Hypothesis 1: Use of prosecutorial discretion produces disparity

The first hypothesis to be tested is the assumption that *the use of prosecutorial discretion produces disparity*. As stated earlier, anecdotal reports seem to indicate that the prosecutors' use of discretion under three-strikes has produced extreme variances in treatment—variances which have reached the threshold of disparity. In order to evaluate the state-wide use of discretion under three-strikes, a self-administered questionnaire was constructed and sent to all of the state's fifty-eight District Attorneys. The purpose of the questionnaire was to collect responses that could be used to compare the use of discretion on a county-wide level in order to evaluate the degree to which prosecutors vary on their use of discretion. The questionnaire featured questions about administrative procedures for three-strikes cases, opinions on the three-strikes law and information related to the demographic characteristics of their jurisdiction.[16]

After two separate mailings, a total of 27 responses was received, with 25 providing utilizable data. Although the prosecutors had the option of responding anonymously, 21 of the 25 respondents provided their name and county jurisdiction. While the response rate corresponds to 43% of the entire population surveyed (25 of 58 District Attorneys), and is a bit lower than the recommended minimum response rate of 50-60% (Babbie 1992; Rea and Parker 1992), it does represent almost all of those counties shouldering the vast majority of the state's three-strikes case load. Using only the information from the 21 counties that identified themselves on their responses, it can be ascertained with state Department of Corrections data that these counties account for *more than 75% of the state's total share of three-strikes convictions.* Adding the four additional counties that responded anonymously would conceivably increase this percentage beyond the 80% mark, especially since two of the anonymous

[16] A copy of the questionnaire is included as Appendix B.

responses came from large jurisdictions (population size greater than 100,000), and therefore likely contributed significantly to the state's three-strikes load as well. Information detailing county demographic data, three-strike conviction totals, and survey response status is provided in Table 1. Using this information, it can also be ascertained that many of the non-respondents actually contributed little or not at all to the state's three-strike case load, which presumably explains their non-response.

In the survey, a majority reported that they filed three-strikes charges against all eligible defendants and almost all (92%) of the respondents indicated that they had used their discretionary authority to strike a prior strike (see Table 2 for a summary of survey findings). When asked about the frequency of their discretionary use, a plurality of respondents (30.4%) indicated that they struck a strike in less than 20% of the cases, although another sizeable group (26.1%) indicated that they used discretion in 21-40% of eligible three-strikes cases. [17]

A solid majority of district attorneys (65%) reported having established guidelines or procedures for the striking of prior strikes. Out of the given justifications for striking strikes, the most frequently cited reasons are all related to the characteristics of the offense and the propensity of the offender to recidivate. For example, 74% of the respondents indicated that they would strike a strike if the current offense was trivial. This was followed by equal numbers selecting as justification remote prior strikes, strikes from a single incident, and no recent criminal history (65%). The least cited reasons were lack of weapon use and history of mental illness (39%). A defendant who has spent a considerable amount of time remaining crime free, or who "slipped up" only once in a single incident (e.g., a robbery withmultiple victims) is also viewed as less of a risk for recidivism than a defendant who has prior strikes from two or more separate instances or a recent proliferation of serious criminal activity.

[17] District Attorneys varied in their timing of striking a strike. A minority of respondents (typically from smaller counties) chose to strike a strike *before* filing the initial three-strike charges. A majority, however, preferred to file charges first, then proceed with discretion as appropriate.

Table 1: Three-Strike Convictions by County

County	Population Size[a]	Location	Three-Strike Convictions[b]	State Percentage	Survey Response[c]
Alameda	**1,408,000**	**Northern**	**58**	**1.3**	**Yes**
Alpine	**1,200**	**Northern**	**0**	**0.0**	**Yes**
Amador	33,700	Northern	1	0.0	
Butte	201,600	Northern	23	0.5	
Calaveras	38,350	Northern	0	0.0	
Colusa	**18,500**	**Northern**	**2**	**0.0**	**Yes**
Contra Costa	**900,700**	**Northern**	**56**	**1.3**	**Yes**
Del Norte	**28,900**	**Northern**	**2**	**0.0**	**Yes**
El Dorado	147,600	Northern	10	0.2	
Fresno	**786,800**	**Central**	**124**	**2.8**	**Yes**
Glenn	26,950	Northern	3	0.1	
Humboldt	127,700	Northern	0	0.0	
Imperial	142,600	Southern	2	0.0	
Inyo	**18,500**	**Central**	**0**	**0.0**	**Yes**
Kern	639,800	Southern	221	5.1	
Kings	122,800	Central	29	0.7	
Lake	55,100	Northern	7	0.2	
Lassen	34,150	Northern	0	0.0	
Los Angeles	**9,603,000**	**Southern**	**1840**	**42.1**	**Yes**
Madera	114,300	Central	14	0.3	
Marin	245,900	Northern	33	0.8	
Mariposa	16,150	Central	1	0.0	
Mendocino	86,900	Northern	2	0.0	
Merced	204,400	Central	24	0.5	
Modoc	10,150	Northern	2	0.0	
Mono	**10,600**	**Northern**	**1**	**0.0**	**Yes**
Monterey	371,500	Central	22	0.5	
Napa	123,300	Northern	11	0.3	
Nevada	88,800	Northern	2	0.0	
Orange	2,722,300	Southern	239	5.5	
Placer	217,900	Northern	9	0.2	
Plumas	20,600	Northern	0	0.0	
Riverside	**1,441,200**	**Southern**	**160**	**3.7**	**Yes**
Sacramento	1,159,000	Northern	254	5.8	
San Benito	46,600	Central	3	0.1	
San Bernardino	**1,624,900**	**Southern**	**230**	**5.3**	**Yes**
San Diego	**2,794,800**	**Southern**	**411**	**9.4**	**Yes**
San Francisco	**778,100**	**Northern**	**22**	**0.5**	**Yes**
San Joaquin	545,200	Northern	57	1.3	
San Luis Obispo	239,000	Southern	15	0.3	
San Mateo	**715,400**	**Central**	**37**	**0.8**	**Yes**
Santa Barbara	405,000	Southern	38	0.9	
Santa Clara	**1,689,900**	**Central**	**178**	**4.1**	**Yes**
Santa Cruz	250,200	Central	10	0.2	
Shasta	**165,000**	**Northern**	**20**	**0.5**	**Yes**
Sierra	3,360	Northern	0	0.0	
Siskiyou	44,700	Northern	2	0.0	
Solano	383,600	Northern	13	0.3	
Sonoma	**437,100**	**Northern**	**9**	**0.2**	**Yes**
Stanislaus	**427,600**	**Central**	**55**	**1.3**	**Yes**
Sutter	**76,800**	**Northern**	**2**	**0.0**	**Yes**
Tehama	55,400	Northern	7	0.2	
Trinity	13,250	Northern	4	0.1	
Tulare	**360,400**	**Central**	**58**	**1.3**	**Yes**
Tuloumne	**52,800**	**Central**	**2**	**0.0**	**Yes**
Ventura	**730,800**	**Southern**	**31**	**0.7**	**Yes**
Yolo	156,800	Northern	5	0.1	
Yuba	61,400	Northern	7	0.2	
		Overall Total	4368	100.0	
		Total from Survey Responses	3298	75.5	

[a] Source: California State Association of Counties (http://csac.counties.org): 1999.
[b] Source: State of California, Department of Corrections, Data Analysis Unit: July 6, 1998. Numbers reflect total accumulated three-strikes convictions as reported by the counties.
[c] Survey responses listed here do not include four that were returned anonymously.

Table 2: Survey Responses – Use of Discretion

Files three-strike charges against all eligible defendants:		Uses discretion to strike a strike in three-strikes cases:	
68%	Yes	92%	Yes
32%	No	8%	No

Frequency of discretion in three-strike cases (DA):		Frequency of discretion in three-strike cases (Judge):	
30.4%	Less than 20% of cases	72.0%	Less than 20% of cases
26.1%	21-40% of cases	24.0%	21-40% of cases
17.4%	41-60% of cases	0.0%	41-60% of cases
13.0%	61-80% of cases	0.0%	61-80% of cases
8.7%	More than 80% of cases	4.0%	More than 80% of cases
4.4%	*Missing data*		

Reasons for striking a strike:		Reasons for *not* striking a strike:	
74.0%	Current offense is trivial	91.0%	Current offense is serious in nature
65.0%	Prior strikes are remote in time	83.0%	Defendant likely to re-offend
65.0%	Defendant has no recent criminal history	83.0%	Defendant has history of violence
65.0%	Prior strikes from singular incident	78.3%	Defendant has lengthy criminal record
61.0%	Proof problems with prior strikes	70.0%	Prior strikes are recent in time
56.5%	Defendant has no history of violence	65.0%	Defendant has history of weapon use
48.0%	Defendant has never been to prison	56.5%	Priors strikes accumulated separately
43.5%	Case likely to end in acquittal	48.0%	Defendant has prison priors
39.0%	Defendant has no history of weapons use		
39.0%	Defendant has history of mental illness		

Respondents allowed to select more than one response

Office has established guidelines for striking a strike:		Striking of prior strike done in exchange for guilty plea:	
65.2%	Yes	39.1%	Yes
34.8%	No	34.8%	No
		26.1%	*Undecided*

Although the survey data does not account for all variances within a prosecutor's office or across jurisdictions, the information does support the rejection of the first hypothesis which states that *the use of prosecutorial discretion produces disparity*. In justifying this conclusion, several findings can be noted. First, District Attorneys appear to be trying to reduce variation within the jurisdiction through the use of guidelines or other procedures that keep the use of discretion in check. Several of the large jurisdictions, including Los Angeles, San Diego, Riverside, Santa Clara, San Mateo, and Ventura counties, have established written guidelines which aid deputy prosecutors in their evaluation of cases that seem worthy of discretionary treatment. These guidelines emphasize the need for deputies to strictly adhere to the provisions of the law and often require the approval of a supervisor or other official.

In addition, the District Attorneys appear to be in strong agreement over the types of legal factors which would qualify a defendant for discretionary treatment. For example, nearly three-fourths of those responding indicated that they would strike a strike for defendants who were guilty of a *de minimis* or minor felony offense. Other prime candidates included defendants who had committed their prior strikes in a single incident and offenders who had committed their strike offenses a long time ago or had since remained crime-free. These findings also concur with the results of previous studies which found that legal variables such as the prior felony conviction history and number of charges filed were significantly correlated with the use of prosecutorial discretion (Holmes, Daudistel, and Farrell 1987).

Conversely, prosecutors reached a near-unanimous consensus that a prior strike should not be stricken if the current offense was serious in nature or if the defendant had a history of violence or a propensity to re-offend. This reinforces prior findings which indicate that prosecutors are less likely to use discretion in cases that involved serious offenses or a high number of total arrests (Gottfredson and Gottfredson 1986). Furthermore, response statistics indicate that the District Attorneys have a similar perspective on who is deserving of discretionary treatment, emphasizing variables related to the seriousness of the offense and the perceived risk that the defendant would pose if returned to the community. In short, tantamount to Justice Potter Stewart's famous obscenity-case standard, the District Attorneys consensus over a case that qualifies for discretionary treatment can be described as "they know it when they see it."

Although the results of the survey indicate that prosecutors can account for the variance in discretionary treatment, there may be a difference in treatment between jurisdictions that is not accounted for by this analysis. Certainly not all District Attorneys prosecute cases identically, and this normal fluctuation in operating procedures may affect the degree to which discretion is being exercised. Another factor which may affect the variance in implementation is the quality of cases that a jurisdiction may receive. For example, Northern California is well-known for its proliferation of drug-related offenses, while Southern California is notorious for its more violent crimes, such as drive-by shootings and bank robberies. If comparing only *rates of three-strikes prosecutions*, it might appear that prosecutors in

Northern California are using their discretionary influence more liberally than their Southern California counterparts, when the discrepancies are more likely to be explained by the types of cases themselves.

Hypothesis 2: Prosecutors use discretion to further crime control objectives

The second hypothesis tests for the underlying motivations for the use of prosecutorial discretion. As stated earlier, much of the criticism of prosecutorial discretion has to do with their use of plea bargaining to facilitate rapid processing of criminal cases (Church 1978; Dow 1981; McCoy 1998; National Institute of Justice 1997; Newman 1978). These studies found that prosecutors used the incentive of a more lenient sentence in order to resolve the case with a quick guilty plea. In California, the legislature has tried to counter this by specifically prohibiting plea bargaining in three-strikes cases. Yet, as mentioned previously, the legislature has agreed to allow prosecutors to discount prior strikes "in the furtherance of justice." Within this small window of opportunity, research suggests that prosecutors, as chief law enforcement officers and advocates of the state, will use their discretionary authority to reinforce crime control goals (Jacoby 1979; Worden 1990). In doing so, prosecutors often use their discretion based upon legal variables, such as offense seriousness and criminal history information (Holmes, Daudistel, and Farrell 1987; McDonald, Rossman, and Cramer 1979).

Because no statewide data currently exists, testing of this hypothesis is made possible through data obtained from the San Diego County District Attorneys' Office. From March 1995 through 1997, San Diego County used a designated "Three-Strikes Unit" to handle the incoming three-strike cases (Perry 1995). Designed as a "fast-track" to avoid gridlock that had threatened to overwhelm the state's larger counties (Abrahamson 1996; Center for Urban Analysis 1994; Corrections 1995), the District Attorney, Paul Pfingst, and the San Diego team established guidelines by which to review cases for the purpose of striking a strike (Perry 1996). When the decision was made to strike a strike, this team was also held responsible for documenting this use of discretion. This documentation contained the reasons or *justifications for striking a strike* (or in some cases, reasons for not striking a strike), *information on the instant offense*, a *summary of the defendant's criminal history*, and the *disposition of the instant case*.

The District Attorney's office also documented each time a judge exercised his discretion to strike a strike, along with the justification required at the time of sentencing. [18] In all, there were 256 three-strike cases reviewed as a part of this study; 70 cases resulted in the dismissal of a prior strike by the prosecutor and another 74 by the judge. [19]

In addition to its availability, the three-strikes data from San Diego County is useful for a number of reasons. First, San Diego is the second largest county in the state with 2.79 million residents, second only to Los Angeles county. San Diego also represents 9.4% of the state's accumulated three-strike convictions, which again is second only to Los Angeles (see Table 1). Furthermore, the three-strikes data available includes a number of variables related to offender conduct and criminal history which can be used to test this hypothesis regarding the use of prosecutorial discretion. Finally, the San Diego data, in addition to documenting instances of prosecutorial and judicial discretion, also maintained records on cases in which no discretion to strike priors was exercised.

The three-strikes case data can be broken into two categories: criminal history data and subjective evaluation data. The criminal history data is collected from documents including the official Information Summary (filed when the defendant is formally charged with a crime), probation reports, and out-of-state records. This information is then translated into specific variables related to the offender's criminal history, such as: nature of the current offense(s), nature of the prior strike convictions, number of other felony convictions, prior prison commitments, and prior convictions for drug offenses.

The variables that comprise the subjective evaluation data are taken from the San Diego guidelines established to justify striking a strike, and include items such as no weapon use, *de minimis* current offense, no history of violence, and no prior prison commitments. Because San Diego prosecutors were required to cite one or more of these factors before they could strike a strike, the use of prosecutorial

---

[18] Although the courts did not have the formal authorization to strike prior strikes prior to the *Romero* case decided in June, 1996, per the California Supreme Court, three-strike cases sentenced prior to *Romero* were eligible for review and resentencing by the original court. The District Attorney's files contain information on judicial discretionary decisions that were applied to original 1995 cases through this review and resentencing process.

[19] Four cases received discretionary treatment by both prosecutor and judge (the DA struck the first prior strike and the judge struck the second).

discretion can be linked back to this subjective data.[20] These variables, although subjectively created, help to test for the motivational impetus that underlies the use of discretion. The summary statistics for all variables are included in Table 3.

To facilitate a quantitative analysis, the subjective evaluation variables and the presence of drug convictions were coded as bivariate dummy variables ("1" if they were present or cited in the decision to strike a strike; "0" if they were not). Other variables such as number of prison priors and length of time between last strike offense and current offense were recorded numerically. Attempting to describe the seriousness of a crime numerically, however, is a more complicated task. The California three-strikes law makes no distinction between eligible offenders and its application for all who have two or more serious felony priors means that a two-time robber and a two-time murderer qualify for the same sentence. The literature suggests that prosecutors go beyond mere counting of offenses when evaluating a case for possible discretionary treatment, instead looking at the seriousness of the offense and the culpability of the defendant (Gottfredson and Gottfredson 1986; Holmes, Daudistel, and Farrell 1987; Smith 1984) ; the criminal history is evaluated on a multidimensional basis (Roberts 1997).

In order to assess this evaluation statistically, each of the offender's current and prior strike offenses are ranked according to their relative seriousness using a scale created from the Minnesota Sentencing Guidelines system. Several studies have used Minnesota data directly or applied the same scale to similar jurisdictions (Barry and Green 1981; Beck and Shipley 1989; Miethe 1987; Miethe and Moore 1985; Miethe and Moore 1989; Moore and Miethe 1986; Stolzenberg and D'Alessio 1994). The Minnesota format is widely used because it can be applied in other settings and because its construction is compatible with most sentencing schemes (Barry and Green 1981).

[20] All decisions to strike a strike were approved by Deputy District Attorney Gregg McClain, who was also the supervisor of the District Attorney's Three-Strikes Unit.

Table 3: Summary Statistics for Variables *

Variable	Mean	S.D.	Value Range Min.	Value Range Max.	Valid Observations
Severity of current offense – count 1 (most severe charge)	3.044	2.358	1	12	250
Severity of current offense – count 2	1.184	1.967	0	11	250
Severity of current offense – count 3	.372	1.127	0	6	250
Severity of current offense – count 4	.096	.490	0	5	250
Total severity of current offenses	4.732	4.90	1	30	250
Severity of first strike (most severe)	6.940	1.566	5	13	248
Severity of second strike	6.282	.974	5	12	248
Severity of third strike	2.197	3.054	0	9	249
Severity of fourth strike	.800	2.071	0	9	250
Severity of strike offenses	16.706	6.850	10	54	248
Total Number of Prison Priors	1.975	1.460	0	7	246
Number of Years Between Last Strike and Current Offense	8.788	5.841	0	32	245
Use of Discretion by Prosecution	.272	.446	0	1	250
Drug convictions	.585	.494	0	1	248
Evaluations:					
De minimis offense	.253	.436	0	1	249
Prior strikes are remote in time	.193	.395	0	1	249
Defendant has no recent criminal history	.084	.278	0	1	249
Defendant has never been to prison	.056	.231	0	1	249
Facts of prior strikes are mitigatin g	.112	.317	0	1	249
Defendant has no history of violence	.124	.331	0	1	249
Defendant has no history of weapons possession or use	.104	.306	0	1	249
Defendant has documented history of mental illness	.032	.177	0	1	249
Prior strikes have proof problem s	.044	.206	0	1	249
Defendant currently has serious medical problems	.016	.126	0	1	249
Prior strikes came from the same case	.224	.418	0	1	246
Defendant has mitigating personal characteristics	.145	.352	0	1	249
Facts of current offenses are mitigat ing	.149	.356	0	1	242

* Outliers excluded based upon the following criteria:
1) total current offenses > 15 (2 observations deleted) ; 2) total strike offenses > 10 (4 observations deleted)

Using the framework of the Minnesota Guidelines model as a guide, specific California Penal Code violations were placed on an ordinal scale according to their severity, and ranked in consideration of the following factors.[21] First, only felony offenses were placed onto the severity scale, since inclusion of misdemeanor offenses would inflate the score of a repeat offender (Roberts 1997). Secondly, the scale distinguishes between "serious" and "non-serious" offenses as defined in California law under Penal

[21] The information for the Minnesota Sentencing Guideline grid was taken from (Miethe and Moore 1989); modifications were made in part with reference to (Barry and Green 1981).

Codes §1192.7(c), §1192.8 and §667.5(c) respectively. Within each of these two classification groups, the offenses were ranked according to the prescriptive sentence and relative harm to others. Offenses that had similar penalties were distinguished from one another on the severity scale if one posed a greater threat of harm than the other.[22] Wobbler offenses are included on the scale because they are only eligible for a third strike as felonies. A copy of the scale with representative offenses can be found in Table 4.

It should be noted that the seriousness of the crimes are represented ordinally but not in a perfect ratio order. Ideally, the scale would assign numbers to criminal offenses that would have exact ratio properties (Rossi and Henry 1980), but because the scale is anchored according to the penalties prescribed the legislature (which are themselves not presented in perfect ratio order), it follows that the scale in this study will have the same limitation.[23] It is unlikely that any other scale would be able to present this information in perfect ratio order either, since a ranking of crime seriousness requires an element of subjectivity (Roberts 1997).

Early reports from other counties indicated that only a small fraction of offenders (20%) were accused of a violent current offense with the majority of cases involved petty theft or drug abuse charges (Colvin 1994). Additional statistics indicate that up to 85% of three-strike offenders are convicted for non-violent instant offenses (Davis, Estes, and Shiraldi 1996). A look at the offense seriousness within this dataset of three-strike cases reveals that 30% of the defendants had been convicted of "wobbler" offenses as their most severe current offense, and only 22% of three-strike defendants committed a current offense that would qualify as a serious or violent felony—the standard that qualifies previous felonies as "strikes" (see Table 5). Furthermore, over 60% of three-strike defendants committed the equivalent to residential burglary as their most serious strike offense, with only a few offenders scoring high upon the severity scale (see Table 6).

---

[22] For example, the state legislature has specified a det erminate sentence range of 2-4-6 years for simple robbery and 3-5-7 years for armed robbery. Although the sentence for armed robbery is not much higher than that of simple robbery, it does represent a greater potential harm to the victim, and thus is categorized one step higher on the severity scale.

[23] For example, a "serious" felony offense is given more weight by the legislature because it counts as a strike, yet the penalty may actually be less than a non-serious offense).

Table 4: Offense Severity Scale

Representative Offense	Sentence Range	Severity Level	CA status
Petty theft with a prior theft-related offense Possession of marijuana	Jail or Prison (Indeterminate)	1	Wobbler
Possession of controlled substance Indecent exposure with a prior offense	Prison (Indeterminate)	2	Non-serious
Battery against a police officer Failure to register as sex offender with prior offense	Prison (16mo — 3 yrs)	3	Non-serious
Possession of purchase for sale of controlled substance Involuntary manslaughter	Prison (2 – 6 yrs)	4	Non-serious
Grand theft with firearm Attempted simple robbery or residential burglary	Prison (16mo — 3 yrs)	5	Serious
Residential burglary (1st degree) Simple robbery	Prison (2 – 6 yrs)	6	Serious
Armed robbery Robbery (1st degree)	Prison (3 – 7 yrs)	7	Serious
Forcible rape Arson of inhabited structure	Prison (3 – 8 yrs)	8	Serious
Assault with deadly weapon (with GBI) Robbery of home or person using ATM machine	Prison (3 – 9 yrs)	9	Serious
Voluntary Manslaughter Kidnapping (when victim is under age 14)	Prison (3 – 11 yrs)	10	Serious
Murder (2nd degree)	Prison (15-Life)	11	Serious
Murder (1st degree)	Prison (25-Life)	12	Serious
Kidnapping (so as to commit robbery, rape, or sodomy)	Prison (Life with parole)	13	Serious
Murder (1st degree with special circumstances)	Prison (Life w/o parole or Death)	14	Serious

Table 5: Frequency of Severity Rankings (Current Offense)

Current Offense Severity (Count 1)*	Frequency	Percentage	Offense Type
1	105	41.02%	Wobbler
2	41	16.02%	Non-serious
3	1	0.39%	Non-serious
4	52	20.30%	Non-serious
5	1	0.39%	Serious
6	46	17.97%	Serious
7	2	0.78%	Serious
8	2	0.78%	Serious
9	1	0.39%	Serious
10	1	0.39%	Serious
11	1	0.39%	Serious
12	3	1.17%	Serious

* Count 1 is the most severe of all the current charges

Table 6: Frequency of Severity Rankings (Strike Offenses)

Strike Offense Severity (Strike 1)	Frequency	Percentage	Strike Offense Severity (Strike 2)	Frequency	Percentage	Offense Type
5	2	0.79%	5	17	6.72%	Serious
6	158	62.45%	6	193	76.28%	Serious
7	24	9.49%	7	15	5.93%	Serious
8	23	9.09%	8	12	4.74%	Serious
9	31	12.25%	9	14	5.53%	Serious
10	6	2.37%	10	0	0.00%	Serious
11	2	0.79%	11	1	0.40%	Serious
12	3	1.19%	12	1	0.40%	Serious
13	4	1.58%	13	0	0.00%	Serious

Data for each of the statistical models was analyzed using logistic regression, employing a standard logit equation:

$$\text{logit } P = b_0 + b_1X_1 + b_2X_2 + \ldots + b_kX_k$$

where P is the dependent variable, X_1—X_k are the independent variables, and b_0—b_k are coefficients generated by the model.

To test the crime control motivation of prosecutors, the bivariate dependent variable "DA Discretion" was tested against a group of independent variables broken down into three categories, each representing a separate subgrouping of related components. The first of the three subgroups, Model 1, consists of variables related to the increased likelihood of recidivism by the offender. It is expected that prosecutors are more likely to use prosecutorial discretion when the likelihood of recidivism is reduced. The bivariate dependent variable is the *use of prosecutorial discretion*, as measured by the decision to strike a prior strike. The independent variables include: *time period between offenses* (based upon the number of years between the last strike and current offense), *remote prior strikes* (as coded by the prosecutor evaluating the case using subjective criteria), *no recent criminal history* (coded by the prosecutor, signifying a clean felony record in recent years), *prior strikes from same case* (cited if strikes arose from the same incident), and *drug abuse* (as measured by previous drug convictions). The hypothesis, variable list, and expected directions of the logit coefficients for Model 1 are summarized in Figure 1.

Figure 1: Hypothesis and Variables for Model 1

Hypothesis	Variables
In using their discretionary authority to strike a prior conviction, prosecutors will be more likely to strike a prior strike if the likelihood of recidivism is decreased.	Dependent variable: DA Discretion Independent variables: • Years between last strike and current offense (+) • Prior strikes remote in time (+) • No recent criminal history (+) • Strikes from same case (+) • Drug addiction (-)

Figure 2: Results for Model 1

Variable	Logit Coefficient[a]	Standard Error	Logistic Coefficient[24]	Expected Direction
Years between last strike and current offense	-0.0405	.0314	.9603	Yes
Prior strikes are remote in time	**1.4497***	**.4031**	**4.2619**	**Yes**
Defendant has no recent criminal history	**1.2576†**	**.5399**	**3.5171**	**Yes**
Prior strikes came from the same case	0.5817	.3562	1.7892	Yes
Drug convictions	0.3837	.3292	1.4677	No
constant	-1.4850	-4.3410	--	--
Number of observations	243		**χ^2 30.72***	
Log-likelihood	-126.76			

[a] Figures are unstandardized logit coefficients. The decision to use discretion is coded 1 if *prosecutorial discretion* is used to strike a strike, 0 if the prosecutor chose not to strike a strike.

[b] Numbers in bold are significant as follows: * Significant at p<.001. ** Significant at p<.005. †Significant at p<.01. ‡ Significant at p<.05. Observed probability levels based on a one-tailed test.

Consistent with their emphasis on crime control, it is expected that the use of discretion will be significantly correlated with those variables that are related to the defendant's likelihood to recidivate. This model, which evaluates the decision to strike a strike against variables which measure various aspects of recidivism, is in fact highly significant at the 99.9999% level ($\chi^2 = 30.72$). Individual variables that are significantly different from zero include the evaluation factors *prior strikes remote in time* and *no recent criminal history*. These results indicate that prosecutors are over three times more likely to strike a

[24] Logistic coefficients can be changed into odds ratios by subtracting the coefficient from 1 and then converting the number into a percentage. For example, a one unit increase in the independent variable *years between last strike and current offense* yields a 4% decrease in the odds of the dependent variable (*DA Discretion*) taking the value of 1 (1.00 - .9603 = .0397 or 4%). Likewise, the variable *drug convictions* produces a 47% increase in the odds that prosecutors will strike a prior strike.

strike when *prior strikes remote in time* is cited and two-and-a-half times more likely to strike a strike when *no recent criminal history* is cited.[25]

Previous studies, including a major analysis of felony offenders by Gottfredson and Gottfredson, indicate that the best statistical prediction of a defendant's likelihood to recidivate is the length and activity of his own criminal career (Gottfredson and Gottfredson 1986; Greenwood and Abrahamse 1982). It appears as if prosecutors in this study are corroborating this assessment as well. By justifying the decision to strike a strike because the defendant has managed to remain relatively crime free (misdemeanor offenses are generally not counted as noteworthy offenses in this evaluation process), prosecutors are essentially stating their confidence in the defendant's returning to a law-abiding lifestyle once the prison term for the current offense has ended.

Interestingly, the variable calculating the number of years between the last strike and the current offense is not significantly different from zero. This may be due to the fact that this variable is also capturing the effect of the defendant's age on the decision to strike a strike, since the well-seasoned career criminal would have theoretically have a longer time span between the last strike and the current offense, whereas a younger defendant would have less intervening time between the two offenses. Age has been a significant predictor of recidivism in other studies (Tonry 1996), as has the age at which criminal activity began (Gottfredson and Gottfredson 1986; Greenwood and Abrahamse 1982), but could not be directly tested with the information available in this dataset. Although not significant, this variable is negatively correlated with the decision to strike a strike as expected. The longer the criminal career, as measured here by the intervening time between the last strike and the current offense, the more likely it is that the defendant will continue to re-offend, and the less likely the chances that the prosecutor will exercise discretion to strike a strike.

Another surprising result is that the variable *drug convictions* also failed to vary significantly from zero, nor was it negatively correlated with the decision to strike a strike as expected. In previous

---

[25] Odds ratios were converted using the previous formula: When the independent variable *prior strikes remote in time* is increased by one unit (from 0 to 1), there is a 326% increase in the odds that prosecutorial discretion will be exercised (4.26 – 1.00 = 3.26 or 326%).

studies drug offenders have been statistically linked with high rates of recidivism (Greenwood and Abrahamse 1982; Wish and Johnson 1986), and it was expected to be a significant predictor in this study as well. One possible explanation for its non-significance here is the high number of three-strike candidates in this study which have had at least one prior drug conviction. Out of 254 cases (2 cases had missing data), 149 or 58.7% indicated the presence of a drug conviction. Because so many three-strike offenders have had prior drug problems, it is very likely that prosecutors are not considering drug abuse to be an important criterion in determining which defendants should qualify for discretionary treatment.

Model 2

The second subgrouping of variables concentrated in Model 2 tests the use of discretion against variables related to the mitigating characteristics of the defendant and the case as presented through the presence of specific moderating factors. Once again, the dependent variable is the prosecutor's decision to strike a strike. This time, however, the independent variables include: *no history of violence* (coded by the prosecutor based upon an assessment of the defendant's criminal history), *no history of weapons possession or use* (also coded by the prosecutor based upon criminal history information), *documented history of mental illness* (coded by the prosecutor if a legal determination of mental instability has been made), *proof problems* (noted by the prosecutor if the defendant's prior strikes are not properly documented, and therefore are unable to be proven in court), *serious medical condition* (noted by the prosecutor if the defendant appears to be suffering from a chronic or terminal debilitating condition), and *mitigating personal characteristics* (coded by the prosecutor if the defendant appears to have a supportive family, steady employment record, or a pattern of successful completion of parole). The hypothesis, variable list, and expected directions of the logit coefficients for Model 2 are summarized in Figure 3.

Figure 3: Hypothesis and Variables for Model 2

Hypothesis	Variables
In using their discretionary authority to strike a prior conviction, prosecutors will be more likely to strike a prior strike if there are mitigating factors present in either the case or in relation to the defendant.	Dependent variable: DA Discretion Independent variables: • No history of violence (+) • No history of weapons use (+) • Mental illness (+) • Proof problems (+) • Serious medical condition (+) • Mitigating personal characteristics (+)

Figure 4: Results for Model 2

Variable	Logit Coefficient[a]	Standard Error	Logistic Coefficient	Expected Direction
Defendant has no history of violence	1.0160	.6587	2.2438	Yes
Defendant has no history of weapons possession or use	**2.6050***	**.7427**	**12.9976**	**Yes**
Defendant has documented history of mental illness	**2.5350****	**.9366**	**13.2849**	**Yes**
Prior strikes have proof problems	**3.0521***	**.8189**	**21.1592**	**Yes**
Defendant currently has serious medical problems	1.0481	1.2696	4.8473	Yes
Defendant has mitigating personal characteristics	- 0.5253	.5435	.5307	No
constant	- 1.6676	.2053		
Number of observations	249	χ^2	**56.92***	
Log-likelihood	-117.53			

[a] Figures are unstandardized logit coefficients. The decision to use discretion is coded 1 if *prosecutorial discretion* is used to strike a strike, 0 if the prosecutor chose not to strike a strike.
[b] Numbers in bold are significant as follows: * Significant at p<.001. ** Significant at p<.005. †Significant at p<.01. ‡ Significant at p<.05. Observed probability levels based on a one-tailed test.

In working with mandatory sentences like the California three-strikes law, prosecutors likely recognize that "rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases" (Davis 1969, 17). Adjusting the requirements of the law to meet this need is not a new practice for prosecutors; discretion within the criminal justice system is pervasive (Misner 1996; Rhynhart 1985; Walker 1993). However, given the purpose of three-strikes, prosecutors are expected to be mindful of the crime control impact that their decisions will have upon the community at large by only striking prior strikes for those defendants and cases that present mitigating circumstances. This expectation is confirmed through the significance of this model at the 99.9999% level ($\chi^2 = 56.92$).

Variables that measure significantly different from zero include *no history of weapons possession or use*, *documented history of mental illness*, and *proof problems for prior strikes*. Prosecutors are over ten times more likely to strike a strike for those defendants who do not have a history of weapons use or who have a documented case of mental illness. Although part of the high odds statistics can be traced to the small number of cases correlated with each of these factors (a total of 22 for *no weapons use* and 6 for *mental illness*), its significance to the evaluation process cannot be completely discounted. A defendant who has committed the minimum of three offenses without the aid of a weapon presents a lessened degree of dangerousness, which is a commonly cited mitigating factor. Using similar reasoning, a defendant that has a documented case of mental illness is less culpable than a three-strikes defendant who does not.

The variable *proof problems* is unique because it documents those cases in which the prosecutors feel that they are unable to get a three-strikes conviction in court due to evidentiary problems. David Neubauer found that prosecutors are more likely to plea bargain cases that are likely to end in an acquittal, thus the quality of evidence can be a significant predictor in the use of discretion (Neubauer 1974). Here, the odds of having a strike stricken are increased twenty times when prosecutors cite proof problems. Part of this can be explained by the small case numbers; out of 11 cases in which proof problems were noted, 9 resulted in a prior strike dismissal, although it also makes logical sense that if prosecutors perceive that the strikes will be thrown out by the court anyway because of evidentiary problems, they will go ahead and make the dismissal on their own.

Finally, the multi-faceted variable *mitigating personal characteristics* was cited infrequently by prosecutors. Out of 256 cases, it was used only 8 times to justify dismissing a strike (judges in San Diego County, on the other hand, used this 28 times to justify their dismissal actions). Given its relative disuse, it is not surprising to find that this variable is both non-significantly different from zero and in the wrong direction.

Model 3

In Model 3, the final subgrouping tests the use of discretion against variables related to the seriousness of the defendant's criminal offenses. The dependent variable, the decision to strike a strike, is measured with the following independent variables: *total severity of current offenses* (the severity score of all current offenses is totaled), *total severity of strike offenses* (the severity score of all previous strike offenses is totaled), *number of prison priors* (prison priors that qualify as sentencing enhancements are included), *minor current offense* (coded by the prosecutor if current offense is a minor felony), *mitigating prior strikes* (coded by the prosecutor if criminal conduct in prior strikes is less than what is normally presumed for this offense), and *mitigating current offense* (coded by the prosecutor if the defendant's involvement in the current offense is less than what is normally presumed for this offense). The hypothesis, variable list, and expected directions of the logit coefficients for Model 3 are summarized in Figure 5.

Figure 5: Hypothesis and Variables for Model 3

Hypothesis	**Variables**
In using their discretionary authority to strike a prior conviction, prosecutors will be more likely to strike a prior strike if the seriousness of the current and prior strike offenses are less severe.	Dependent variable: DA Discretion Independent variables: • Total severity of current offenses (-) • Total severity of strike offenses (-) • Number of prison priors (-) • Minor current offense (+) • Mitigating prior strikes (+) • Mitigating current offense (+)

Figure 6: Results for Model 3

Variable	Logit Coefficient[a]	Standard Error	Logistic Coefficient	Expected Direction
Severity of current offense (sum of all charges)	.0053	.0380	1.0053	No
Severity of strike offenses (sum of all strike convictions)	-.0367	.0312	.9640	Yes
Total number of prison priors	**-.5209***	.1489	.5940	Yes
De minimis current offense	**2.1341***	.3853	8.4500	Yes
Facts of prior strikes are mitigating	**1.7925***	.5309	6.0048	Yes
Facts of current offense are mitigating	- .3771	.4904	.6859	No
constant	- .4162	.6526	--	--
Number of observations	244	**c² 79.96***		
Log-likelihood	-102.45			

[a] Figures are unstandardized logit coefficients. The decision to use discretion is coded 1 if *prosecutorial discretion* is used to strike a strike, 0 if the prosecutor chose not to strike a strike.
[b] Numbers in bold are significant as follows: * Significant at p<.001. ** Significant at p<.005. † Significant at p<.01. ‡ Significant at p<.05. Observed probability levels based on a one-tailed test.

Of all of the legal variables that can impact the use of discreti on, seriousness of the crime consistently rank as the most significant. Offenders who had harmed their victim were less likely to have their cases dismissed (Holmes, Daudistel, and Farrell 1987) or receive a reduced sentence (Smith 1984). The decision to dismiss a case was also found to correlate with offense severity and the seriousness of the first charge (Gottfredson and Gottfredson 1986). In this model, the decision to strike a prior strike as based upon the seriousness of the criminal record is highly significant at the 99.9999% level ($\chi^2 = 79.96$).

Individual variables which reach the level of statistical significance from zero include *number of prison priors*, *de minimis offense*, and *mitigating facts of prior strikes*. One of the strongest variable within this group is the variable measuring the number of prison priors. The likelihood of the prosecutor striking a strike in a given case decreases by 41% for each additional prior prison commitment on the offender's record. One of the subjective evaluations, *de minimis* offense, usually cited when the third strike is a "wobbler" offense, increases the likelihood of the prosecutor striking a strike over seven and a half times when compared to other three-strike cases. Additionally, when the facts of the prior strikes are mitigating or not as serious in nature as the charge might indicate (for example, the defendant is convicted for residential burglary, yet the victim is his own mother and the offense is perpetrated in the home he shares with her), the likelihood of the prosecutor striking a strike is five times as great.

The fact that neither the current offense severity variable nor the strike offense severity variable is significant is surprising. The literature is rich with prior studies that confirm the importance of offense seriousness on the use of discretion. Part of the problem may lie with the severity scale, since criminal offenses are not presented in a perfect ratio order, however similar scales have been used in other studies without any significant consequences. Rather, what is likely driving the non-significance here is the fact that most of the three-strike offenders have similar offenses.

Data presented in Tables 5 and 6 reveals that most of the three-strikes defendants are actually committing offenses that rank low on the severity scale. As noted earlier, most of the current offenses being prosecuted as third strikes fell below the serious crime threshold and over three-fifths of the three-strike defendants committed an offense equivalent to residential burglary as their most serious strike offense. The remaining 40% of strike offenses were also congregated at the lower end of the strike severity scale. Only 6% of the three-strike defendants committed an offense equal to or worse than voluntary manslaughter. Second-strike numbers are even more dramatic; approximately 83% of all three-strike offenders committed strike offense no greater than the equivalent of residential burglary for their second strike. Considering that most of the current and strike offenses measured here are tightly packed around a small range of scale rankings, the non-significance in the analysis reflects the fact that prosecutors are less likely to distinguish between cases based upon offense seriousness when deciding whether or not to strike a strike.

Model 4

As a test for data robustness, each of the sub-models analyzing the use of prosecutorial discretion is included in a larger model. Although the number of independent variables triples, their individual importance to the use of discretion remains essentially the same. Variables that were previously significantly different from zero and remain so in this final model include *prison priors, de minimis current offense, remote prior strikes, no recent criminal history, mitigating prior strikes, no history of weapons use, documented history of mental illness,* and *proof problems*. The only newly significant

variable is *personal mitigating characteristics*. It has a high coefficient, yet it is in the wrong direction. Again, this is likely caused by having relatively few cases in which this variable is cited by prosecutors in their decision to strike a strike. Results for Model 4 can be found in Figure 7.

Figure 7: Model 4 – Prosecutorial Use of Discretion

Variable	Logit Coefficient[a]	Standard Error	Logistic Coefficient	Expected Direction
Severity of current offenses (sum of all charges)	- 0.0377	.0670	.9630	Yes
Severity of strike offenses (sum of all strike convictions)	- 0.0226	.0491	.9776	Yes
Total number of prison priors	**- .5958***[b]	.1960	.5511	Yes
Years between last strike and current offense	0.0334	.0495	1.0340	Yes
De minimis offense	**1.5388****	.5293	4.6591	Yes
Prior strikes are remote in time	**1.1156**‡	.6006	3.0515	Yes
Defendant has no recent criminal history	**2.2479****	.7533	9.4677	Yes
Facts of prior strikes are mitigating	**2.0236****	.7134	7.5658	Yes
Defendant has no history of violence	- 0.1845	1.0908	.8345	No
Defendant has no history of weapons possession or use	**2.8752**‡	1.2604	17.7284	Yes
Defendant has documented history of mental illness	**3.9114***	1.1999	49.9672	Yes
Prior strikes have proof problems	**4.1847***	1.0183	65.6759	Yes
Defendant currently has serious medical problems	1.8986	1.4141	6.6763	Yes
Prior strikes came from the same case	0.4814	.5814	1.6183	Yes
Defendant has mitigating personal characteristics	**- 2.1276****	.8176	.1191	No
Facts of current offenses are mitigating	0.0141	.6679	1.0142	Yes
Drug convictions	0.0406	.4774	1.0414	No

Number of observations	240	Modal	73.3%
Log-likelihood	-66.099	Correctly predicted	91.8%
χ^2	**146.16***	Reduction of error[c]	69.3%

[a] Figures are unstandardized logit coefficients. The decision to use discretion is coded 1 if *DA discretion* is used to strike a strike, 0 if the DA chose not to strike a strike.
[b] Numbers in bold are significant as follows: * Significant at p<.001. ** Significant at p<.005. † Significant at p<.01. ‡ Significant at p<.05. Observed probability levels based on a one-tailed test.
[c] The reduction in error (ROE) statistic is defined by the formula: (% Correctly Predi cted - % Modal)/(100 - % Modal)

Overall, the four models allow the discretionary actions of prosecutors to be compared against criminal history data and factors derived from the subjective evaluation data. The results of each support the hypothesis that prosecutors use their discretionary authority to strike prior strikes in accordance with crime control goals. The factors that increased the likelihood of discretion being used were all related to an assessment of potential crime control risk to the community. Offenders who were not seen to be typical recidivists, characteristics that were indicative of a reduced criminal character, and a reduced degree of offense seriousness (expressed mainly through the number of prison priors) all contributed to the decision to exercise discretion. Although the coefficients and/or odds ratio figures are artificially high for the variables derived from the subjective evaluation data (higher correlation is assumed because they

are by design tied to the decision to strike a strike), their importance for testing this hypothesis is derived from the relative importance placed on each by prosecutors as they are compared to each other.

Conclusion

The California three-strikes law has received a great deal of media attention because of its relative harshness to similar measures. Its broad third strike encourages prosecutors and judges to exercise their limited discretionary authority in ways that reduces the culpability of offenders who commit minor third-strike felony offenses. Contrary to popular opinion, however, this analysis suggests that discretion is not being used haphazardly or irresponsibly. Rather, this study offers reassurance that prosecutors are acting in accordance to the standard "in the furtherance of justice" set forth by the legislature.

In particular, this study found that in a statewide survey of District Attorneys there was a large degree of consensus over the types of cases that would qualify for leniency. Almost three-fourths of prosecutors said that they would strike a prior strike if the current offense was trivial. Another two-thirds said that they would justify striking a strike if the strike offenses were remote in time or if the defendant had remained crime free in the interim. Over 90% of respondents also agreed that a strike would not be stricken if the defendant had been charged with a serious current offense and four-fifths agreed that the defendant would not qualify for lenient treatment if he was likely to re-offend or had a history of violence.

The analysis of prosecutorial discretion within San Diego County found that prosecutors were over three times more likely to strike a prior strike if the strike offense was remote in time and almost twelve times more likely to strike a prior strike if the defendant had no history of weapons possession. Similar to the survey findings, prosecutors in San Diego County were seven and a half times more likely to exercise discretion in those cases in which the current offense was trivial. They were also over 40% less likely to strike a prior strike for every additional prison prior accumulated by the defendant.

Both hypotheses tested with survey data and three-strikes case information from San Diego County indicate that prosecutors are not using their discretionary authority to strike a strike in a disparate manner nor are they striking prior strikes based on extra-legal factors. Although race data was not made available for this analysis, the strong performance of crime control variables in this study supports the conclusion that prosecutors are in fact using their allowable discretion in a manner that reinforces their theoretical crime control perspective.

Abrahamson, Alan. 1996. 25% of Three-Strikes Cases Go to Trial, Straining Courts. *Los Angeles Times*, July 2, 1996, A-18.

Alschuler, Albert W. 1978. Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing. *Pennsylvania Law Review* 126: 550-577.

Babbie, Earl. 1992. *Practicing Social Research*. Belmont, California: Wadsworth Publishing Company.

Balzar, John. 1994. The Target: Repeat Offenders. *Los Angeles Times*, March 24, 1994, A-5.

Barry, Donald M. and Alexander Green. 1981. Sentencing Versus Prosecutorial Discretion: The Application of a New Disparity Measure. *Journal of Research in Crime and Delinquency* , no. July 1981: 254-271.

Beck, Allen J. and Bernard E. Shipley. 1989. Recidivism of Prisoners Released in 1983: U.S. Department of Justice, Office of Justice Programs.

Bessette, Joseph M. 1997. In pursuit of criminal justice. *Public Interest* : 61-72.

Carp, Robert A. and Ronald Stidham. 1993. *Judicial Process in America*. Washington, D.C.: Congressional Quarterly, Inc.

Center for Urban Analysis, Office of the County Executive, Santa Clara County, California. 1994. Assessing the Impact of AB971 'Three Strikes, You're Out' on the Justice System in Santa Clara County, California. Santa Clara: Santa Clara County Board of Supervisors, Bench/Board Committee.

Church, Thomas. 1978. Plea Bargaining, Concessions and the Courts: Analysis of a Quasi-Experiment. In *The Invisible Justice System: Discretion and the Law*, ed. Burton Atkins and Mork Pogrebin: Anderson Publishing Company.

Cohen, Robyn L. 1995. Probation and Parole Violators in State Prison, 1991: U.S. Department of Justice, Office of Justice Programs.

Colvin, Richard Lee and Ted Rohrlich. 1994. Courts Toss Curveballs to '3 Strikes'. *Los Angeles Times*, October 23, 1994, A-1.

Commission, United States Sentencing. 1991. The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining. Washington, D.C.: United States Sentencing Commission.

Corrections, State Sheriffs' Association Dentention and Corrections Subcommittee and Board of. 1995. Three Strikes Jail Population Report.

Davis, Christopher, Richard Estes, and Vincent Shiraldi. 1996. "Three Strikes": The New Apartheid. San Francisco: Center on Juvenile and Criminal Justice.

Davis, K.C. 1969. *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press.

Domanick, Joe. 1998. Dumb Kid, Petty Crimes: a Life Term? *Los Angeles Times*, July 24, 1998, B-9.

Dow, Paul. 1981. *Discretionary Justice: A Critical Inquiry*: Ballinger Publishing Company.

Farrington, David P. 1987. Predicting Individual Crime Rates. In *Prediction and Classification: Criminal Justice Decision Making*, ed. Don M. Gottfredson and Michael Tonry, 9:429. Chicago: The University of Chicago Press.

Forer, Lois G. 1994. *A Rage to Punish*. New York: W.W. Norton & Company.

Frankel, M. E. 1972. *Criminal Sentences: Law Without Order*. New York: Hill and Wang.

Friedman, Lawrence. 1992. The Devil is Not Dead: Exploring the History of Criminal Justice. In *Theory and Methods in Criminal Justice History Part 1*, ed. Eric H. Monkkonen, 11:pp. 52-69; 349. Munich: K.G.Saur Verlag GmbH & Co.

Gaes, Gerald G. 1998. Correctional Treatment. In *The Handbook of Crime & Punishment*, ed. Michael Tonry, 1998:712-738. New York: Oxford University Press.

Gottfredson, Stephen D. and Don M. Gottfredson. 1986. Accuracy of Prediction Models. In *Criminal Careers and "Career Criminals"*, ed. Alfred Blumstein, Jacqueline Cohen, Jeffrey A. Roth, and Christy A. Visher, 2:212-290. Washington, D.C.: National Academy Press.

Greenwood, Peter, C. Peter Rydell, Allan f. Abrahamse, Jonathan P. Caulkins, James Chiesa, Karyn E. Model, Stephen P. Klein. 1994. Three Strikes and You're Out: Estimated Benefits and Costs of California's New Mandatory-Sentencing Law. Santa Monica, CA: RAND.

Greenwood, Peter and Allan Abrahamse. 1982. Selective Incapacitation. Santa Monica: The Rand Corporation.

Hayward, Steven and Lance T. Izumi. 1996. Crime and Punishment in California: Are We Too Tough or Not Tough Enough?: Pacific Research Institute.

Holmes, Malcolm D., Howard C. Daudistel, and Ronald A. Farrell. 1987. Determinants of Charge Reductions and Final Dispositions in Cases of Burglary and Robbery. *Journal of Research in Crime and Delinquency* 24, no. 3: 233-254.

Ignatieff, Michael. 1992. State, Civil Society, and Total Institutions: A Critique of Recent Social Histories of Punishment. In *Theory and Methods in Criminal Justice History Part 1*, ed. Eric H. Monkkonen, 11:pp. 286-325. Munich.

Jacoby, Joan E. 1979. The Charging Policies of Prosecutors. In *The Prosecutor*, ed. William F. McDonald:75-97. Beverly Hills: Sage Publications, Inc.

Jesilow, Jon'a Meyer and Paul. 1997. *"Doing Justice" in the People's Court: Sentencing by Municipal Court Judges*. Edited by Austin T. Turk. SUNY series in new directions in crime and justice studies". Albany, NY: State University of New York Press.

Jones, Juanita. 1977. Prosecutors and Public Defenders: Cooperative Relationships and Non-Negotiable Cases. In *The Invisible Justice System: Disrection & the Law*, ed. Burton Atkins and Mark Pogrebin:198-203: Anderson Publishing Co.

Kessler, Daniel and Steven D. Levitt. 1998. Using Sentence Enhancements to Distinguish between Deterrence and Incapacitation. *Journal of Law and Economics* Forthcoming.

Lungren, Dan. 1998. "Three Strikes and You're Out" -- Its Impact on the California Criminal Justice System After Four Years. Sacramento: California Attorney General's Office.

Males, Mike, Dan Macallair, and Khaled Taqi-Eddin. 1999. Striking Out: The Failure of California's "Three Strikes and You're Out" Law. San Francisco: Justice Policy Institute.

Maltz, Michael D. 1984. *Recidivism.* Edited by Peter H. Rossi. Quantitative Studies in Social Relations. Orlando: Academic Press, Inc.

McCoy, Candace. 1998. Prosecution. In *The Handbook of Crime & Punishment*, ed. Michael Tonry:803. New York: Oxford University Press.

McDonald, William F., Henry H. Rossman, and James A. Cramer. 1979. The Prosecutor's Plea Bargaining Decisions. In *The Prosecutor*, ed. William F. McDonald:151-197. Beverly Hills: Sage Publications, Inc.

Meeker, James W. and Henry N . Pontell. 1985. Court Caseloads, Plea Bargains, and Criminal Sanctions: The Effects of 17P.C. in California. *Criminology* 23, no. 1: 119-143.

Miethe, Terance D. 1987. Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion. *Criminology* 78, no. 1: 155-176.

Miethe, Terance D. and Charles A. Moore. 1985. Socioeconomic Disparities Under Determinate Sentencing Systems: A Comparison of Preguideline and Postguideline Practices in Minnesota. *Criminology* 23, no. 2: 337-363.

Miethe, Terance D. and Charles A. Moore. 1989. Sentencing Guidelines: Their Effect in Minnesota: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice.

Miller, J. Langley and John J. Sloan, III. 1994. A Study of Criminal Justice Discretion. *Journal of Criminal Justice* 22, no. 2: 107-123.

Misner, Robert. 1996. Recasting Prosecutorial Discretion. *The Journal of Criminal Law & Criminology* 86, no. 3: 717-777.

Moore, Charles A. and Terance D. Miethe. 1986. Regulated and Unregulated Sentencing Decisions: An Analysis of First-Year Practices Under Minnesota's Felony Sentencing Guidelines. *Law & Society Review* 20, no. 2: 253-277.

Morris, Norval. 1974. *The Future of Imprisonment*. Edited by Sanford Kadish Norvil Morris, James Vorenberg, Stanton Wheeler, Marvin E. Wolfgang. Studies in Crime and Justice. Chicago: The University of Chicago Press.

Morris, Norval and Michael Tonry. 1990. *Between Prison and Probation*. New York: Oxford University Press.

National Institute of Justice, Office of Development, Testing and Dissemination. 1982. Mandatory Sentencing: The Experience of Two States: U.S. Department of Justice.

National Institute of Justice, Office of Justice Programs. 1997. Key Legislative Issues in Criminal Justice: Mandatory Sentencing: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice.

Neubauer, David. 1974. After the Arrest: The Charging Decision in Prairie City. In *The Invisible Justice System: Discretion and the Law*, ed. Burton Atkins and Mark Pogrebin:p. 172-186: Anderson.

Neubauer, David. 1997. *Judicial Process: Law, Courts, and Politics in the United States*. Fort Worth: Harcourt Brace.

Newman, Donald. 1978. The Negotiated Plea Process. In *The Invisible Justice System: Discretion and the Law*, ed. Burton Atkins and Mork Pogrebin: Anderson Publishing Company.

Perry, Tony. 1995. 'Three-Strikes' Law Spawns Specialist System in San Diego County. *Los Angeles Times*, March 14, 1995, A-3.

Perry, Tony and Maura Dolan. 1996. Two Counties at Opposite Poles of '3 Strikes'. *Los Angeles Times*, June 24, 1996.

Petersilia, Joan and Susan Turner. 1987. Guideline-based Justice: Prediction and Racial Minorities. In *Prediction and Classification: Criminal Justice Decision Making*, ed. Don M. Gottfredson and Michael Tonry, 9:429. Chicago: The University of Chicago Press.

Rea, Louis M. and Richard A. Parker. 1992. *Designing and Conducting Survey Research*. Jossey-Bass Social and Behaviorial Sciences Series, Jossey-Bass Public Administration Series, and Jossey-Bass Management Series. San Francisco: Jossey-Bass Inc.

Rhynhart, Fred. 1985. Judicial Discretion in Pretrial Release. In *Discretion, Justice, and Democracy: A Public Policy Perspective*, ed. Carl F. Pinkele and William C. Louthan:134. Ames: The Iowa State University Press.

Roberts, Julian V. 1997. The Role of Criminal Record in the Sentencing Process. In *Crime and Justice: a review of research*, ed. Michael Tonry, 22:433: 303-362. Chicago: University of Chicago Press.

Rossi, Peter H. and J. Patrick Henry. 1980. Seriousness: A Measure for All Purposes? In *Handbook of Criminal Justice Evaluation*, ed. Malcolm W. Klein and Katherine S. Teilmann:489-505. Beverly Hills: Sage Publications, Inc.

Schiraldi, Vincent, Peter Y. Sussman and Lanric Hyland. 1994. Three Strikes: The Unintended Victims. San Francisco, CA: Center on Juvenile and Criminal Justice.

Shiraldi, Vincent and Tara- Jen Ambrosio. 1997. Striking Out: The Crime Control Impact of "Three Strikes" Laws. Washington, DC: The Justice Policy Institute.

Shiraldi, Vincent and Michael Godfrey. 1994. Racial Disparities in the Charging of Los Angeles County's Third "Strike" Cases. San Francisco: Center on Juvenile and Criminal Justice.

Smith, Douglas A. 1984. The Plea Bargaining Controversy. *The Journal of Criminal Law & Criminology* 77, no. 3: 949-967.

Stith, Kate and Jose A. Cabranes. 1998. *Fear of Judging: Sentencing Guidelines in the Federal Courts*. Chicago: The University of Chicago Press.

Stolzenberg, Lisa and Stewart J. D'Alessio. 1994. Sentencing and unwarranted disparity: an empirical assessment of the long-term impact of sentencing guidelines in Minnesota. *Criminology* v. 32, no. May 1994: p. 301-10.

Stolzenberg, Lisa and Stewart J. D'Alessio. 1997. "Three strikes and you're out": the impact of California's new mandatory sentencing law on serious crime rates. *Crime & Delinquency* v. 43, no. Oct. 1997: p. 457-69.

Tonry, Michael. 1996. *Sentencing Matters*. New York: Oxford University Press.

Turner, Michael G. 1995. 'Three Strikes and You're Out' Legislation: A National Assessment. *Federal Probation* 59.

Von Hirsch, Andrew. 1976. *Doing Justice: The Choice of Punishments*. New York: Hill and Wang.

Von Hirsch, Andrew. 1987. *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*. Crime, Law, and Deviance. New Brunswick: Rutgers University Press.

Walker, Samuel. 1993. *Taming the System*. New York: Oxford University Press.

Wilson, James Q. 1983. *Thinking About Crime*. New York: Vintage Books.

Wish, Eric D. and Bruce D. Johnson. 1986. The Impact of Substance Abuse on Criminal Careers. In *Criminal Careers and "Career Criminals"*, ed. Alfred Blumstein, Jacqueline Cohen, Jeffrey A. Roth, and Christy A. Visher, 2:52-88. Washington, D.C.: National Academy Press.

Wolfgang, Marvin E., Robert M. Figlio, and Thorsten Sellin. 1972. *Delinquency in a Birth Cohort*. Edited by Norval Morris (Chairman). Studies in Crime and Justice. Chicago: University of Chicago Press.

Worden, Alissa Pollitz. 1990. Policymaking by prosecutors: the uses of discretion in regulating plea bargain. *Judicature* 23, no. 6: 335-340.

Zatz, Marjorie S. 1987. The Changing Forms of Racial/Ethnic Biases in Sentencing. *Journal of Research in Crime and Delinquency* 24, no. 1: 69-92.

Zimring, Franklin E. 1996. Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California. *Pacific Law Journal* 28: 243 - 256.

Appendix A: Qualifying Strike Offenses

Violent Felonies: PC 667.5(c)

- Murder or voluntary manslaughter
- Attempted murder
- Mayhem
- Forcible rape
- Forcible sodomy
- Forcible oral copulation
- Lewd acts on a child under the age of 14 years
- Continuous sexual abuse of a child
- Forcible penetration with a foreign object
- Conspiracy to commit rape
- Exploding or destructing of device with intent to murder
- Any felony punishable by death or imprisonment in the state prison for life
- Any felony in which the defendant personally inflicts great bodily injury on any person (other than an accomplice) or any felony in which the defendant uses a firearm
- Arson causing great bodily injury
- Residential robbery with dangerous weapon use
- Carjacking with a dangerous weapon
- Robbery, 1st degree (residential robbery by two or more persons)
- Kidnapping of a child

Serious Felonies: PC 1192.7(c), 1192.8

Section 1:

Offenses listed in this section are duplicates of the offenses listed in the violent felony listings in PC 667.5

Section 2:

- Assault with intent to commit rape, mayhem, sodomy, oral copulation, or robbery
- Assault with a deadly weapon or instrument on a peace officer
- Assault by a life prisoner on a non-inmate
- Assault with a deadly weapon by an inmate
- Arson
- Exploding a destructive device or any explosive with intent to injure
- Exploding a destructive device or any explosive causing great bodily injury or mayhem
- Residential burglary
- Robbery or bank robbery
- Kidnapping
- Holding of a hostage by a person confined in a state prison
- Attempt to commit a felony punishable by death or imprisonment in the state prison for life
- Any felony in which the defendant personally used a dangerous or deadly weapon
- Selling heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug to a minor
- Conspiracy to sell heroin or cocaine base to a minor
- Grand theft involving a firearm
- Carjacking
- Throwing a caustic substance on another person with the intent to injure
- Assault with a deadly weapon or instrument on a firefighter
- Gross vehicular manslaughter while intoxicated
- Driving a vehicle in the commission of an unlawful act causing great bodily injury
- Operating a vessel in the commission of an unlawful act causing great bodily injury
- Flight or attempt to elude a pursuing peace officer causing death or serious bodily injury to any person
- Driving Under the Influence which causes great bodily injury
- Any attempt to commit a crime listed here other than an assault

Appendix B: California District Attorney Questionnaire

Administrative Procedure – Three Strike Cases

1. Does your jurisdiction file **three-strike** charges against all eligible defendants?

   ❒ Yes
   ❒ No (*If you answered "no," please explain your jurisdiction's **three-strike** filing policy in the space below*)

2. Has your office ever stricken a prior strike conviction in a **three-strikes** case "in the furtherance of justice"?

   ❒ Yes (*please answer questions 3-7*)
   ❒ No (*please skip to question 8*)

3. In your estimation, how often does your office strike prior convictions in **three-strike** cases?

   ❒ Less than 20% of all three-strike cases
   ❒ 21 – 40% of all three-strike cases
   ❒ 41 – 60% of all three-strike cases
   ❒ 61 – 80% of all three-strike cases
   ❒ More than 80% of all three-strike cases

4. Under what conditions will your office strike a prior conviction in a **three-strikes** case? (*Please check all that apply.*)

   ❒ Current offense is trivial in nature
   ❒ Defendant has never been to prison
   ❒ Prior strikes are remote in time
   ❒ Defendant has no history of violence
   ❒ Prior strikes are from a singular incident
   ❒ Defendant has no history of weapons use
   ❒ Defendant has no recent criminal history
   ❒ Defendant has documented history of mental illness
   ❒ Defendant's prior strikes are difficult to prove
   ❒ Defendant is likely to be acquitted by jury

   ❒ Other ____

   ❒ Other ____

5. If your office decides ***not*** to strike a prior in a **three-strikes** case, which factors **most** influence this decision? (*Please check all that apply.*)

   ❒ Current offense is serious in nature
   ❒ Prior strikes are recent in time
   ❒ Prior strikes were accumulated separately
   ❒ Defendant has lengthy criminal record
   ❒ Defendant has already served time in prison
   ❒ Defendant has a history of violence
   ❒ Defendant has a history of weapons use
   ❒ Defendant is likely to re-offend

   ❒ Other ____

   ❒ Other ____

6. Does your office have any established guidelines or procedures regarding the striking of priors in **three-strikes** cases? *(e.g. all deputies are required to get approval before striking a prior; department has specific written guidelines, etc.)*

   ❒ Yes *(If possible, please attach a copy of any written guidelines and return with this questionnaire)*
   ❒ No

7. If a prior strike is stricken in a **three-strikes** case, do you expect the defendant to plead guilty to the current offense in exchange?

   ❒ Yes
   ❒ No

   For either answer, please explain below:

8. In your estimation, how often do *judges* in your jurisdiction strike priors in **three-strike** cases?

- ❒ Less than 20% of all three-strike cases
- ❒ 21 – 40% of all three-strike cases
- ❒ 41 – 60% of all three-strike cases
- ❒ 61 – 80% of all three-strike cases
- ❒ More than 80% of all three-strike cases

9. What factors do you feel judges consider in making a decision to strike a prior in a **three-strikes** case?

- ❒ Current offense is trivial in nature
- ❒ Prior strikes are remote in time
- ❒ Prior strikes are from a singular incident
- ❒ Defendant has no recent criminal history
- ❒ Defendant is *not* likely to re-offend
- ❒ Defendant has never been to prison
- ❒ Defendant has no history of violence
- ❒ Defendant has no history of weapons use
- ❒ Defendant has documented history of mental illness
- ❒ Minimum sentence is too harsh
- ❒ Other ______________________________
- ❒ Other ______________________________

Personal Opinion

10. Beside each of the statements presented below, please indicate whether you Strongly Agree (**SA**), Agree (**A**), Disagree (**D**), Strongly Disagree (**SD**), or are Undecided (**U**).

		SA	A	D	SD	U
a)	The three-strikes law is an effective crime fighting tool	❒	❒	❒	❒	❒
b)	Justice is promoted under the three-strikes law	❒	❒	❒	❒	❒
c)	Permitting prosecutors to strike priors in three-strike cases promotes justice	❒	❒	❒	❒	❒
d)	Striking priors in three-strike cases leads to unequal treatment among defendants	❒	❒	❒	❒	❒
e)	Striking priors in three-strike cases distorts the intent of the law	❒	❒	❒	❒	❒
f)	Judges should be permitted to strike prior convictions in three-strike c ases	❒	❒	❒	❒	❒
g)	Judges strike prior convictions in three-strike cases more often than prosecutors	❒	❒	❒	❒	❒
h)	The California state legislature should modify the current three-strikes law so that only violent felonies qualify as third strikes	❒	❒	❒	❒	❒
i)	Wobbler offenses should never be counted as third-strike offenses	❒	❒	❒	❒	❒
j)	The enactment of the three-strikes law has made it more likely that serious offenders get the punishment they deserve	❒	❒	❒	❒	❒

Demographic Information

11. On average, how would you describe the political climate of your jurisdiction relative to that of the state?

- ❒ Very liberal
- ❒ Somewhat liberal
- ❒ Moderate
- ❒ Somewhat conservative
- ❒ Very conservative

12. During the past four years, ho w has the importance of three-strikes to your constituents changed?

- ❒ Declined in importance
- ❒ Increased in importance
- ❒ No change in importance

13. Given media coverage of notorious three-strikes cases such as the "pizza thief" case, do you feel your constituents are less supportive of the use of three-strikes when the current charge is non-violent?

❒ Yes
❒ No

Please feel free to comment below or on the reverse of this page:

Identification

If you are comfortable with providing your identity, please write your name and jurisdiction area in the space below:

Name: ____

County: ____

If you prefer to remain anonymous, please answer the following questions:

A. What is the population of your jurisdiction?

❒ Less than 25,000
❒ 25,000 – 49,999
❒ 50,000 – 99,999
❒ 100,000 – 249,999
❒ 250,000 – 499,999
❒ 500,000 – 1,000,000
❒ Greater than 1,000,000

B. Where is your jurisdiction located?

❒ Northern California
❒ Central California
❒ Southern California

Survey Follow-up

(*For follow-up information, please make sure you have provided your name in the space above*)

❒ Please contact me for further information on this subject matter. My phone no. is: (__________) ___________