The Institute for the Advancement of Criminal Justice (IACJ) is dedicated to the improvement of public protection through criminal justice research and education for crime victims and their survivors, prosecutors, and local law enforcement.

Debunking the Myths Attacking California’s Three Strikes Law and Demonstrating Its Effectiveness in Protecting the People of California

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IACJ President’s Message

by Jan Scully, District Attorney, Sacramento County

Welcome to the inaugural issue of the Journal of the Institute for the Advancement of Criminal Justice. We intend for this journal to provide a forum for the discussion of issues important to prosecutors and law enforcement as well as the crime victims and survivors they serve. The IACJ Journal will bring together academics, prosecutors, and guest commentators to research, analyze, and explain contemporary criminal justice issues. We hope to fill the void that exists in academic publications by presenting these issues from the prosecutor’s perspective. IACJ intends to spark a factual debate on key criminal justice issues where public opinion and debate is often unfortunately based on emotion rather than fact. In a symposium style, each issue of the IACJ Journal will focus on one topic. This inaugural issue is devoted to the Three Strikes law.

This Three Strikes issue emphatically denounces the much-touted idea that Three Strikes needs “fixing.” The articles contained in this issue reveal the truth, as substantiated by statistics based on actual cases: the people whom Three Strikes sought to get off the streets are off and in prison, deserving to be there. The era of a large number of people being sentenced under Three Strikes has passed, because, as intended, Three Strikes has prevented these career criminals from being released back out on the streets to commit more crimes and create new victims.

The Institute for the Advancement of Criminal Justice was established in 1995 as a nonprofit, nonpartisan private organization with section 501(c)(3) tax-exempt status. The mission of IACJ is to improve public protection through criminal justice research and education for crime victims and their survivors, prosecutors, and local law enforcement. To accomplish this mission, IACJ researches important criminal justice issues and disseminates the results to those involved in the administration of justice. More information about IACJ may be found on our Web site at www.iacj.org.

This journal is just the most recent in a line of programs and pursuits initiated by IACJ to further its mission. Through contributions and grants, we have successfully implemented several other projects.

One of IACJ’s most exciting new ventures is the partnership with the California District Attorneys Association in the Chapman University School of Law’s LL.M. in Prosecutorial Science degree program. Located in the City of Orange, Chapman’s law school is fully accredited by the American Bar Association. The Prosecutorial Science LL.M. program is the first in the nation designed exclusively for career prosecutors. IACJ is sponsoring 20 full-tuition scholarships for prosecutors enrolled in this program. For more information about the program, go to www.chapman.edu/law/programs/LLM_Prosec_Sci/.

The Chapman program builds upon IACJ’s ongoing financial support for the training of California prosecutors. In an era of budget cutbacks, an increasing number of prosecutors must pay for their own training seminars or forgo training altogether. IACJ strives to eliminate this dilemma by awarding training scholarships to prosecutors throughout the state. IACJ also continues to demonstrate its dedication to educating California’s prosecutors by providing financial support for training seminars.

Another significant IACJ contribution was the photo documentation project. In 1998, IACJ obtained more than $1 million from the Governor’s Office of Criminal Justice Planning. In partnership with Polaroid and Epson, IACJ used this money to distribute more than 4,500 pieces of photographic equipment and to train 194 California law enforcement agencies in evidentiary photo documentation at domestic violence and sexual assault crime scenes.

First published in 1998 and updated in 2001, the Victims’ Rights Manual is an IACJ effort to ensure that crime victims are not forgotten during the vigorous prosecution of criminals. IACJ teamed with the California Victim Compensation and Government Claims Board to produce this manual, that enables California prosecutors and victim advocates to easily research and cite victims’ rights laws. The manual also contains various sample letters, policies, forms, and restraining orders to assist prosecutors in further protecting crime victims.

On April 5, 2005, IACJ, along with the Office of the Governor and the California District Attorneys Association, hosted an event for the 25th Anniversary of National Crime Victims’ Week that recognized and honored the people and organizations in California that have advanced crime victims’ rights.

I am proud to be a part of the good works of IACJ and pleased to serve as President of the Board as we present our inaugural IACJ Journal. This issue reveals what I, as an elected district attorney, know: Three Strikes has closed the revolving door on the most serious and violent repeat offenders. If you already agree with this statement, we hope that you will use the articles contained in this journal to substantiate your conviction in public and private debates. If you disagree or are undecided about what Three Strikes has accomplished, we hope that the research contained in these articles will, if not sway your opinion, at least inspire further critical thinking about the success of the Three Strikes law.
Established in 1995, the Institute for the Advancement of Criminal Justice has continued to grow over the past 12 years in support of its purpose of improving public protection through criminal justice research and education for crime victims and their survivors, prosecutors, and local law enforcement.

During the 2005–06 presidency of Solano County District Attorney David Paulson, IACJ greatly increased its activity and the concept of a journal was conceived. Dave envisioned a scholarly publication with provocative articles written from the prosecutor’s perspective. The IACJ Journal exists because of Dave’s inspirational leadership and tireless efforts in seeking to educate and advocate for California prosecutors.

In this premiere issue, we have sought to debunk the myths attacking California’s Three Strikes law and its implementation. In 1994, I was a prosecutor in the Orange County District Attorney’s office and remember the dramatic effect the new Three Strikes law had on the violent gang criminals I was prosecuting. Governor Wilson, the Legislature, and the voting public sent a loud and clear message that they wanted dangerous recidivist offenders punished. Suddenly, the common question that arose in plea negotiations was, “Is this a strike?” This was the result of the tireless efforts of people such as Sacramento County District Attorney Jan Scully, Kern County District Attorney Ed Jagels, Orange County District Attorney Tony Rackaukas, Santa Barbara County District Attorney Tom Sneddon, Mike Reynolds, and all the other early leaders of the Three Strikes movement.

The publication of this journal is the culmination of more than two years of work from gaining commitments from authors, to editing, and then publication. I want to thank each of the authors for their hard work and patience as IACJ charted this new course. In particular, Tony Rackaukas took a strong position in advocating the effectiveness of the Three Strikes law and in addition to co-writing his own article, helped us to procure other articles as well. Also, Governor Pete Wilson graciously agreed to lend us his thoughts in a commentary for this inaugural issue. Every Californian is safer because of his advocacy on behalf of public safety and his tough stance on crime, culminating in his signing Three Strikes into law.

In addition to publishing this journal, IACJ will reach another milestone this year. On July 30, 2007, the Chapman School of Law, in collaboration with the California District Attorneys Association (CDA), will begin instruction on its new LL.M. in Prosecutorial Science program. Very few law schools offer an LL.M. in criminal law, and none specialize in an LL.M. program for criminal prosecutors. This advanced degree, which has received the acquiescence of the American Bar Association, will be available only to active prosecutors with five or more years of experience in the prosecution of crime. IACJ, along with CDA, is sponsoring full-tuition scholarships for prosecutors. This program is the direct result of the tireless efforts of two great leaders: Parham Williams, Vice President and Dean of Chapman University School of Law, and Grover Trask, retired Riverside County District Attorney and former president of the California District Attorneys Association. These visionaries are the program’s inaugural directors.

IACJ is blessed with an actively involved, supportive board of directors. Thank you to President Jan Scully for her skilled leadership of our Board and her unflagging dedication to serve the victims of crime, her fellow prosecutors, and law enforcement. In June, we will be pleased to welcome San Luis Obispo County District Attorney Gerald Shea as President. IACJ is honored by the active participation of all of our officers, directors, and honorary directors as well. District Attorneys John Poyner, Bonnie Dumanis, and Gary Liebersein; retired District Attorneys Michael Bradbury, Grover Trask, and Gary Yancey; Attorney at Law Bruce Harrington, Governor Pete Wilson, United States Attorney McGregor Scott, and Pepperdine Law School Dean Kenneth Starr, stand with IACJ in our purpose, lending us their experiences, enthusiasm, resources, and support.

I would like to thank our generous financial contributors. From the people who attend our fundraising dinners and bid on our auction items, to the district attorneys who earmark settlement monies for IACJ and share their limited budget funds with us, they give to IACJ because they agree that the public is better protected when prosecutors and law enforcement receive the best technical support and education. IACJ especially acknowledges Bruce Harrington, Dr. Henry Nicholas, and the Solano, Riverside, and San Diego district attorney’s offices.

I have been honored to serve as the Executive Director of IACJ and work together with its committed criminal justice leadership. In July, I will embark on a new challenge, as the Director of Research and Development for the American Prosecutors Research Institute at the National District Attorneys Association. Continuing with the same mission of educating and serving prosecutors, I will now focus nationally, striving to bring the successes that we have achieved in California to prosecutors all across the nation. I look forward to continuing to work with all of you as together we face new challenges and explore innovative ways to serve crime victims, prosecutors, and law enforcement.
From the Editor’s Desk

The Three Strikes Law Ensures Public Safety for All Californians

by David W. Paulson, District Attorney, Solano County

Over the past few years, there have been numerous attempts to “reform” California’s Three Strikes law. Most significant of these were Proposition 66, which was defeated in November 2004, and the controversial initiative proposal dubbed the “Three Strikes Reform Act of 2006,” which was replicated in SB 1642 (Romero) during the 2006 legislative session. In each instance, however, the proponent’s idea of “reform” was to let hundreds, if not thousands, of dangerous criminals out of prison. Contrary to the myth perpetrated by those who would dilute or even eliminate the law, the reality is that there is no need for any reform at all. In fact, the Three Strikes law has proven to be California’s most successful tool in achieving public safety.

Simply put, the efforts to reform Three Strikes are ill-conceived solutions for a problem that does not exist. Since its adoption by the Legislature, and later by the electorate in 1994, the Three Strikes law has had a dramatic impact on crime in California. Over the past 12 years, crime in California has dropped at a rate of nearly double the national average. There is no reasonable explanation for such a significant decline other than the effectiveness of the Three Strikes law.

The Three Strikes law grants wide discretion to district attorneys, and from the beginning we have implemented the law in a manner consistent with our community standards. Following a California Supreme Court decision in 1996, local and appellate courts have also exercised their discretion in determining which defendants are the “worst of the worst.” As a result, there are currently 8,056 career criminals spending at least 25 years in prison under Three Strikes. Significant to my point that reform is unnecessary, there were only 243 three-strike commitments in the entire state during 2006, more than 1,000 fewer commitments than in 1996. By example, Solano County had three commitments, and Los Angeles County had 23. This past year was not an anomaly. Since 2004, the annual number of three-strike commitments has been virtually flat. The “worst of the worst” are in prison where they belong, not in our neighborhoods committing more crimes and creating more victims. Three Strikes has slammed shut what was once a revolving door for career criminals.

Despite its effectiveness, myth continues to prevail over truth not only in the rhetoric of the so-called reformers but also in most of the articles and editorials about the Three Strikes law. Just to set the record straight, there was no “pizza thief” who was sentenced to life in prison under Three Strikes. Moreover, the current commitment offense for the vast majority of three-strike inmates was a serious or violent felony, not a petty crime. During 2003–2004, for example, only eight defendants in the entire state were convicted under Three Strikes. Moreover, the current commitment offense for the vast majority of three-strike inmates was a serious or violent felony, not a petty crime. During 2003–2004, for example, only eight defendants in the entire state were convicted under Three Strikes.

Although we anticipate further attacks on the Three Strikes law, we also expect that Californians will continue to be wary of any so-called reform—whether it purports to strengthen or weaken the law. Indeed, the articles in this inaugural issue of the IACJ Journal, written by a professor of law, a professor of political science, two elected district attorneys, and several deputy district attorneys, reflect California’s collective common sense with regard to the Three Strikes law. Consistent with IACJ’s mission, these articles are intended to inform the reader about the positive impacts of the Three Strikes law and the considerable threat to public safety if Three Strikes is changed in any way—to refute the myth and reveal the truth.
As a member of the Board of Directors of the Institute for the Advancement of Criminal Justice, I am very pleased to introduce this inaugural issue of our journal. When the Board determined to publish this journal, they sifted the universe of public safety issues to concentrate on a matter of enduring significance. It is entirely fitting that the subject of this first issue should be California’s Three Strikes law.

I had the privilege of signing this reform into law in March of 1994. The voters of California then endorsed it by passing Proposition 184 in November of 1994 with an approval rate of almost 72 percent. Three Strikes dramatically reduced serious and violent crime in the state. The years prior to its enactment had seen a disturbing increase in the rate of violent crime in California. But this law targets recidivist perpetrators and provides significantly increased periods of incarceration to ensure that these predators no longer have an unchecked opportunity to harm society. Because prosecutors and judges have employed this sentencing tool, crime rates—and particularly those for violent crime—have fallen markedly. Because all the facts of these cases and the histories of the perpetrators were rarely explored in depth, much of the public was persuaded of the unfairness and cruelty of Three Strikes. Proposition 66 would have restricted the future application of Three Strikes and guaranteed the re-sentencing and immediate release of thousands of incarcerated recidivists. A prevailing sentiment among the proponents of Proposition 66 was that the reach of Three Strikes was too broad and its application too harsh. The media were filled with tales of pizza and video cassette thieves serving 25 years to life. Because all the facts of these cases and the histories of the perpetrators were rarely explored in depth, much of the public was persuaded of the unfairness and cruelty of Three Strikes. The Proposition 66 campaign, and its lack of hard evidence and scholarly analysis, revealed the need for thorough, detailed studies of the actual impact of the Three Strikes law. The articles in this journal represent a serious and honest effort to counteract misapprehensions and media sound bites with quality research.

Advocacy on behalf of public safety and a tough stance on crime have been hallmarks of my 32 years of public service. I hope that California’s district attorneys will remember my remarks to them at their annual winter conference shortly after the November election in 2004. Because of the debates engendered by the last-minute defeat of Proposition 66 and the prospect, since realized, of further legislative proposals and initiatives seeking to weaken the protections of Three Strikes, I urged that there was an enduring need to maintain the law as it was passed in 1994. I believed in the critical need for Three Strikes to prevent recidivism and in its likely efficacy at the time I signed it, and my faith was not misplaced.

History has demonstrated its effectiveness and has produced no convincing evidence of abuse of its powers by prosecutors or judges. It is estimated that in the first decade of its enforcement, Three Strikes has spared two million Californians from becoming crime victims. As you read and consider the articles in this journal, I hope you will arrive at a similar conclusion as to its enduring need and strong justification.
INTRODUCTION

Cladius Johnson is no stranger to crime. In 1979 he was convicted of gang rape.¹ In 1985 he punched a woman in the face and stole her purse.² In 1988 he was sentenced to 16 months for carrying an automatic machine gun.³ Had California’s Three Strikes law been in effect, he could have received a sentence of 25 years to life.⁴ Instead, he was released and in 1989 he assaulted a woman with a deadly weapon.⁵ In 1995 he strangled and beat his wife into unconsciousness.⁶ Under California’s Three Strikes law, he received a sentence of 25 years to life for this last crime.⁷ Johnson’s story is not unique; there are other career criminals like him who committed crime after crime until California’s Three Strikes law removed them from circulation.⁸ Since its inception, California’s Three Strikes law has generated controversy. Aimed at incapacitating career criminals, it has been tagged as one of the toughest “tough on crime” statutes in the country.⁹ Has it been effective? Supporters say yes and point to individuals like Johnson, a criminal recidivist who is serving a long prison sentence.¹⁰ Opponents say no and argue that the law is overbroad because it hands down 25-years-to-life sentences for minor offenses like shoplifting a few videos¹¹ or stealing golf clubs.¹²

This article reviews the impact of the Three Strikes law over the last decade and concludes that, based on data that have been collected and the manner in which the law has been applied, it has proved effective. The first section of this article explores the history behind the legislation and the law itself.¹³ The second part of this article sets forth three reasons why the Three Strikes law has proved effective:¹⁴ (1) The Three Strikes law is carrying out its goals by incapacitating career criminals and deterring crime. Since its enactment, California’s crime rate has dropped, and for the first time in 18 years, parolees are leaving the state. (2) Contrary to initial concerns, the Three Strikes law has been implemented without substantially increasing state costs or overcrowding prisons. (3) The Three Strikes law has built-in safeguards that allow trial judges and prosecutors to exercise discretion to ensure that the law targets those who are career criminals. This discretion has been successfully exercised throughout the state. This is evidenced by the fact that most incarcerated third-strikers who are serving sentences of 25 years to life committed more than three serious or violent felonies.¹⁵

HISTORY OF THREE STRIKES LEGISLATION¹⁶

The murder of two young girls in the early 1990s raised California’s public awareness of the problems associated with criminal recidivism. In 1992, 18-year-old Kimber Reynolds was murdered during an attempted purse snatching by a paroled felon whose

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² Id.
³ Id.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ See, e.g., id. at 6–9 (providing stories of other individuals with criminal histories, including John Bunyard who was convicted of murdering two women; raping, assaulting, and kidnapping others in 1974; and finally sentenced to 28 years to life under the Three Strikes law for his 1996 conviction of attempting to commit a lewd and lascivious act on a 14-year-old girl).
¹³ See infra notes 16–44 and accompanying text.
¹⁴ See infra notes 45–144 and accompanying text.
criminal history included auto theft, gun, and drug charges. After her death, in April 1993, Kimber’s father advocated for the first legislation aimed at increasing sentencing for recidivist criminals. He testified before the California Legislature in support of a bill adopting a three strikes sentencing structure that provided for sentences of 25 years to life in prison for certain recidivist offenders. However, the bill was unsuccessful.

Then, only a few months after the bill was struck down, 12-year-old Polly Klaas was kidnapped out of her home and murdered. Polly’s murderer was also a career criminal who had been convicted of sexual assault, kidnapping, and burglary. Polly’s murder brought the issues of the Three Strikes law to the public and political forefront.

By March 1994, the Legislature passed the Three Strikes bill by a large majority. It was signed into law and codified in California Penal Code sections 667(b)–(i). That same month, Kimber’s father spearheaded a three strikes initiative (Proposition 184) gathering over 800,000 signatures. In November of the same year, California voters approved Proposition 184 by 72 percent. The new law was codified in California Penal Code section 1170.12. The approved ballot initiative, which is “virtually identical” to section 667, can only be amended or repealed by a new ballot measure or by two-thirds vote of the Legislature.

THREE STRIKES LAW NOW

Intent of the Three Strikes Law

According to section 667, the purpose of the Three Strikes law is “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.” The courts have specifically determined that the Three Strikes law is the articulation of a parallel sentencing scheme for specifically described recidivists, and is not an enhancement law. As Justice James A. Ardaiz of the Fifth Appellate District of California explained: “Three Strikes was intended to go beyond simply making sentences tougher. It was intended to be a focused effort to create a sentencing policy that would use the judicial system to reduce serious and violent crime.”

Two Provisions

Although commonly referred to as the Three Strikes law, section 667 increases sentencing for career criminals with a two-strikes and a three-strikes provision. For the two-strikes provision to take effect, the prosecutor must prove beyond a reasonable doubt that the defendant had at least one prior serious or violent felony. Under the two-strikes provision, the court must double the sentence of the felony charged.

For the three-strikes provision to take effect, the prosecutor must prove beyond a reasonable doubt that the defendant had at least two prior serious or violent felonies. Under the three-strikes provision, the court must impose a sentence of at least 25 years to life.
REASONS WHY THE LAW IS EFFECTIVE

The Three Strikes law has been in effect for more than 10 years. Enough time has therefore passed for data to be collected and for the law to undergo legal challenges. As set forth in this section, a study of the Three Strikes law since its enactment reveals there are three main reasons why it has been effective: (1) the Three Strikes law appears to be meeting its theoretical goals; (2) some of the initial concerns of the impact of the law have not occurred; and (3) the interpretation of the law has provided for built-in safeguards to ensure that the intent of the law is carried out.

Deterrent Effect

Data also suggest that the Three Strikes law has had a deterrent effect. One observation that suggests the Three Strikes law has had an incapacitation effect is that the number of sentenced third-strikers declined every year from 1996 through 2003. A similar decline occurred with second-strikers. Indeed, some claim that the drop in capital sentences since 2000 may be linked to the Three Strikes law. One possible interpretation of this decline is that there are fewer strikers every year because the law is doing its job. In other words, defendants who are habitual offenders are incapacitated and cannot commit any additional crimes while serving the longer sentence. Moreover, inmates who are strikers have more serious criminal histories than non-strikers. While this may seem obvious in that the Three Strikes law is aimed at habitual offenders, this fact is important because it again shows that the law is doing what it should. It is incapacitating felons who, based on their criminal history, are generally more likely than others to commit crimes.

Deterrent Effect

Data also suggest that the Three Strikes law has had a deterrent effect.
Specifically, California’s crime rate has decreased since the law was enacted in 1994. A 1999 FBI study determined that “[s]ince California enacted its three strikes law in 1994, crime has dropped 26.9 percent, which translates to 815,000 fewer crimes.” While numerous social and economic factors underlie crime rates, the correlation between the drop in California’s crime rate and the enactment of the Three Strikes law is notable. One interpretation of this correlation is that potential offenders may be deterred from committing crimes because of the possibility of serving longer sentences.

In fact, several studies and surveys have concluded that the Three Strikes law has had a deterrent effect. For example, in one survey, a majority of juvenile offenders said that if they knew that they would receive 25 years to life in prison they would not commit a serious or violent felony. A more recent study determined that the Three Strikes law has had a deterrent effect because it “reduces felony arrests rates among the class of criminals with 1 strike by 29 to 48 percent ... and among the class of criminals with 2 strikes by 12.5 percent.” Using an economic model, another study concluded that the Three Strikes law is actively deterring offenders from engaging in any criminal activity that would qualify as a first strike.

On another front, parole statistics also imply that the Three Strikes law has had a deterrent effect. Since the Three Strikes law was enacted, generally more parolees have left California than have come into the state. In the plurality opinion of Ewing v. California, United States Supreme Court Justice O’Connor noted this trend: “[a]n unintended but positive consequence of ‘Three Strikes’ has been the impact on parolees leaving the state. More California parolees are now leaving the state than parolees from other jurisdictions entering California. This striking turnaround started in 1994.” This could suggest that parolees who are career criminals leave the state because they fear a harsher sentence if they commit additional felonies.

The Three Strikes law brought about another interesting change related to parolees. In 2000, the California Department of Corrections changed how it supervised parolees who are second-strikers (meaning that their next felony could make them third-strikers because they already have two serious or violent felony convictions). Certain parole agents who have lighter caseloads are specially trained to work with second-strikers. As of March 2005, there were approximately 12,000 second-striker parolees under this specialized supervision. While the data is scant as to whether this specialized parole supervision deters crime, logically, it seems that the parole system is taking an extremely active role in working with second-strikers to discourage them from committing any further felonies.

Some critics of Three Strikes cite this specialized parole as costing California approximately $20 million annually. Based on this number, the average yearly cost to the state per parolee is about $1,700. In comparison, however, the average yearly cost to the state per inmate is $34,150. Thus, it costs approximately 20 times more every year to jail an offender than to keep a second-striker under specialized parole. Given the enormous disparity between these costs, it seems likely that the program, even if it is only

56. See Matthews, Benefits of the Three Strikes Disputed Study Finds Crime has Dropped Across the Board, Not Just in Cases Involving the Law, Fresno Bee (Nov. 9, 1999) p. A11. See also Janiskee & Ehrle, Crime, Punishment, and Romero: An Analysis of the Case Against California’s Three Strikes Law (2000) 39 Duq. L.Rev. 43, 45–46 (“Prosecutors in Los Angeles routinely report that felons tell them they are moving out of the state because they fear getting a second or third strike for a nonviolent offense.” (citation omitted)).
61. See Primer, supra note 12, at 21–22.
62. Id.
63. Id.
64. Id. at 22.
65. This number is derived by dividing the cost ($20 million) by the number of parolees (12,000).
67. This number is derived by dividing cost per year to the state for jailing an inmate ($34,150) by the cost for a specialized parolee ($1,700).
moderately successful, makes economic sense, not to mention the positive impact it has on preventing the human suffering of the would-be crime victim.

The Cost of Enforcing the Three Strikes Law Is Lower Than Predicted

Some opponents of the Three Strikes law were initially concerned that enforcement of the law would substantially increase costs to the state and cause overcrowding in prisons. However, the numbers over the last 10 years prove otherwise.

Three Strikes Has Not Overrun State Costs

There is no evidence to suggest that the Three Strikes law has drained the state budget as was predicted by critics in 1994. Instead, the expenditures for Youth and Adult Corrections have remained a relatively constant fraction of the state budget over the last 10 years. The expenditures in fiscal year 2004–05 amounted to 8.6 percent of the overall state budget, the same percentage as in fiscal year 1994–95 when the Three Strikes law was enacted. In fact, the Legislative Analyst’s Office in its most current report, which is somewhat critical of the Three Strikes law, concedes that the cost resulting from the law is “about one-half billion dollars annually,” less than one-fourth the projected cost.

Moreover, it does not appear that the Three Strikes law has created additional costs associated with a backlog in the courts. Instead, records current through 2002 show that since the law was enacted courts have a slightly reduced case load, and that the number of felony criminal trials has remained fairly constant (with 5,459 felony criminal trials in 1993 and 5,405 in 2002).

A new concern that has been raised is that longer sentences under Three Strikes result in older prisoners, which will increase costs owing to inmates with age-related illness. However, the issues associated with an aging prison population go well beyond any impact by Three Strikes for at least three reasons. First, the general population is getting older, and the prison population may simply reflect this. Second, as of 2004, over 82 percent of the inmates serving a sentence under Three Strikes were second-strikers and, thus, will not be in prison for life. Indeed, even those who are serving sentences of 25 years to life may be up for parole as early as 2019.

Finally, focusing solely on the costs of incarceration runs the risk of ignoring other costs. If a career criminal is left free to commit another crime, there are other costs. If a career criminal is left free to commit another crime, there are other costs. If a career criminal is left free to commit another crime, there are other costs. If a career criminal is left free to commit another crime, there are other costs. If a career criminal is left free to commit another crime, there are other costs. If a career criminal is left free to commit another crime, there are other costs. If a career criminal is left free to commit another crime, there are costs associated with investigating and prosecuting the crime, as well as the direct harm inflicted upon the crime victim. It seems reasonable that the social benefit of incarcerating career criminals may warrant incurring costs associated with caring for an elderly inmate. While an aging prison population is a valid concern, there are thoughtful proposals on how actively to address it aside from eradicating Three Strikes.

Three Strikes Has Not Overcrowded Prisons

Some critics of Three Strikes were initially concerned that by 2000 there would be approximately 230,000 strikers in prison, which would lead to overcrowded prisons. Because the prisons would be overcrowded, it was predicted that the state would have to build new prisons to house the increasing inmate population. However, neither of these predictions came true.

As of 2004, the total number of second- and third-strikers in prison was about 43,000, less than 20 percent of the projected number. Of these inmates, only about 7,500 were third-strikers. Thus, Three Strikes has not caused an inmate population explosion. Instead, the prison population has remained generally constant since about 1998.

68. See, e.g., Primer, supra note 12, at 15–35; see also, e.g., Zimering et al., supra note 55, at 135; Greenwood et al., Three-Strikes and You’re Out: Estimated Benefits and Costs of the California’s New Mandatory-Sentencing Law, RAND study 31, 25 (1994) [hereinafter Greenwood, RAND study].
69. Primer, supra note 12, at 22–23.
71. Id.
74. Id. at 47 (Superior Courts Table 3).
75. Primer, supra note 12, at 20–21; Vitiello & Kelso, supra note 11, at 943–947.
76. See, e.g., Ardaiz, supra note 33, at 28 (questioning whether Three Strikes affects “old criminals”).
77. Primer, supra note 12, at 20–21.
78. Id. at 21.
79. Id. at 15 (explaining that of the 43,000 inmates serving time in prison under Three Strikes law, more than 35,000 are second strikers).
80. See Vitiello & Kelso, supra note 11, at 947–951.
81. See, e.g., Greenwood, RAND study, supra note 68, at 25 (fig.4.5); see also Retrospective, supra note 1, at 25.
82. Primer, supra note 12, at 23.
83. Id. at 15–16.
84. See, e.g., Greenwood, RAND study, supra note 68, at 25, (fig.4.5) (projecting the prison population); Retrospective, supra note 1.
85. Primer, supra note 12, at 15.
Moreover, the state has not had to build new prisons due to striker inmates. While seven new prisons have opened (and one closed) since 1994, all but one of those prisons were planned to be built before the Three Strikes law was enacted. In fact, even a critic of the Three Strikes law conceded that “the state has not built any new prisons specifically for striker inmates.”

The Three Strikes Law Provides Built-In Safeguards

One of the most controversial aspects of the Three Strikes law is that the third strike can be triggered by any felony, not just one that is serious or violent. This provision has prompted criticism that the law is unduly harsh, as a minor offense can result in a long sentence. However, this overlooks the fact that the intent of the Three Strikes is to address recidivism; thus, a review of the defendant’s entire criminal history is required, not just a look at the last offense committed. The law provides for a number of built-in safeguards, including drug-treatment programs and judicial and prosecutorial discretion, to ensure that this intent is carried out.

Drug-Treatment Programs

Strikers whose final felony is a non-violent drug-related crime may be eligible to participate in a program of probation and drug treatment in lieu of a prison sentence. Defendants who are second- or third-strikers can still qualify for this program if for the last five years they (1) were out of prison, (2) were not on parole or probation, (3) had no other felony convictions, and (4) had no misdemeanor convictions involving physical injury or threat of physical injury. Upon successful completion of the program, the charges are dismissed.

This means that a third-striker who might have received a sentence of 25 years to life could be eligible for a drug treatment program so long as the striker’s history for the last five years did not show signs of criminal recidivism. With drug cases then, the Three Strikes law is only triggered when defendants have prior strikes and have recently continued a life of criminal activity. This is consistent with the spirit of the Three Strikes law, which is aimed at incarcerating career criminals. See generally Walsh, supra note 15.

Judicial Discretion

The Three Strikes law must be applied to every case that triggers the statute. Importantly, however, it does not strip either the trial judge or the prosecutor of the ability to exercise discretion independent from one another. Trial courts can exercise discretion in two ways.

First, in People v. Superior Court (Romero), the California Supreme Court held that a trial judge could, on his or her own motion pursuant to Penal Code section 1385(a), dismiss a prior strike in the interest of justice. To do so the trial court must consider both the defendant's constitutional rights and the interests of society. Not only can the trial court make this motion independently, but the defendant has the right to appeal the trial court’s failure to do so under the deferential abuse of discretion standard.

The court gave further guidance to the trial courts on how appropriately to exercise discretion under section 1385(a) in People v. Williams. To dismiss a prior strike, trial judges must determine whether or not the defendant is “within the spirit of the Three Strikes law” by considering defendant’s entire criminal record including: (1) the nature and

87. Primer, supra note 12, at 23.
88. Id.
89. Id.
90. See, e.g., id. at 15–35; Greenwood, RAND study, supra note 68; Vitiello & Kelso, supra note 11, at 927–30; Zimring, supra note 55, at 9.
93. See generally Walsh, supra note 15.
97. Cal. Pen. Code, § 1210.1(b)(1). Parole will not be available to “any defendant who previously has been convicted of one or more violent or serious felonies as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, respectively, unless the nonviolent drug possession offense occurred after a period of five years in which the defendant remained free of both prison custody and the commission of an offense that results in a felony conviction other than a nonviolent drug possession offense, or a misdemeanor conviction involving physical injury or the threat of physical injury to another person.” Id.
102. Id. at 530–531 (discussing that the trial court must explain “the reasons for the dismissal” and cannot dismiss a strike because of “judicial convenience,” “court congestion,” or “personal antipathy for the effect that the three strikes law would have on [a] defendant”).
105. Id. at 165 (Baxter, J., concurring in part and dissenting in part) (discussing that defendant’s criminal record and “conduct and the extended sentence mandated by that law are within the spirit of the Three Strikes law”). Id.
circumstances of his present felonies and prior strikes; and (2) the "particulars of his background, character, and [rehabilitation] prospects." 

Applying this standard to the defendant in Williams, the court reversed the trial court’s dismissal of a strike because the trial court had failed to set forth specific reasons for the dismissal. 

The court also found that there was nothing encouraging in the defendant’s “background, character, and prospects” that would suggest he was outside the spirit of the law. 

The court emphasized that the defendant’s prior convictions included three DUls, felony possession of a firearm, parole and probation violations, and a recent misdemeanor charge of spousal battery (a crime involving actual violence).

There have been cases where the trial courts have successfully applied the standards set forth in Williams and dismissed prior strikes in the interest of justice. For example, in People v. Garcia, the trial court did not abuse its discretion in dismissing prior strikes where defendant cooperated with police, his crimes were related to drug addiction, and his criminal history did not include any actual violence. In other cases, trial courts have also successfully exercised discretion in dismissing a prior burglary conviction as a strike, and in dismissing two strikes where the present crime was petty theft and the prior strikes were remote.

Thus, under this line of cases, trial judges can (and do) disregard prior convictions when they believe, given the nature and circumstances of the case and the defendant’s entire criminal history, a lesser sentence is warranted. 

A final way that trial judges may exercise discretion is when the charge is a “wobbler.” A wobbler is an offense that can be charged as either a felony or a misdemeanor and includes such charges as DUI and grand theft. 

At sentencing, trial courts on their own motions can decide that a wobbler should have been charged as a misdemeanor pursuant to Penal Code section 17(b).

In doing so, the trial court should be guided by “the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial,” and the “general objectives of sentencing.”

Applying this standard, the California Supreme Court has upheld the trial court’s decision to reduce a felony drug possession charge to a misdemeanor.

In Alvarez, although the defendant had prior convictions for residential burglaries, “[d]efendant was cooperative with law enforcement,” the prior convictions were “old and did not involve violence” and the defendant testified that he had been caring for a disabled friend.

Thus, section 17(b) allows another way that trial courts can exercise their discretion to determine an appropriate sentence under the Three Strikes law.

Prosecutorial Discretion

Prosecutors have three similar ways in which to exercise discretion in Three Strikes cases. First, prosecutors may ask the court to dismiss a strike if there is insufficient evidence to prove a prior conviction. Prosecutors often make this motion when there are out-of-state or older convictions because the evidence is insufficient to identify them as comparable strikes.

Second, the Three Strikes law specifically provides that prosecutors, like trial judges, may move to dismiss a prior felony conviction in the furtherance of justice at any time up until sentencing.

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106. Id. at 161.
107. Id. at 162–164.
108. Id. ("There is little about Williams’s present felony, or his prior serious and/or violent felony convictions that is favorable to his position. Indeed, there is nothing").
109. Id.
110. People v. Garcia (1999) 20 Cal.4th 490, 503 ("Cumulatively, all these circumstances indicate that defendant may be deemed outside the [Three Strikes] scheme's spirit, at least in part, and that the trial court acted within the limits of its section 1385 discretion." (citations omitted)).
113. For example, in one case that did not reach the appellate level, the trial judge dismissed a prior strike conviction so that the defendant was sentenced as a second-striker where his current felony was the sale of a controlled substance, but prior strikes were over ten years old and there was no recent criminal activity. Walsh, supra note 15, at 21–23.
114. In addition to Romero and Williams, there are other cases where the trial court was found to have abused its discretion in dismissing prior strikes. See, e.g., People v. Carter (1996) 49 Cal.App.4th 567; People v. Thornton (1999) 73 Cal.App.4th 42.
117. The prosecutor’s consent is not required for the court to reduce a wobbler to a misdemeanor. (Esteybar v. Municipal Court (1971) 5 Cal.3d 119.) The prosecutor may not circumvent the court’s ruling by refiling the offense as a felony in the trial court; nor by dismissing the misdemeanor and refiling as a felony, without the court’s consent. (Malone v. Superior Court (1975) 47 Cal.App.3d 313.)
120. Id. at 974–975.
121. Id. at 981.
123. See Walsh, supra note 15, at 15.
When deciding whether to make such a motion, prosecutors consider many of the same factors as set forth in Williams125 including: (1) the nature and circumstances of the defendant’s present felony and prior strikes; (2) whether the defendant has a history of violence or weapon use, and (3) the number of prior convictions and the time between them.126 Thus, for example, in one case a prosecutor successfully moved to dismiss a prior strike in furtherance of justice when the defendant’s third strike would have been a felony conviction of petty theft (she stole a $40 watch from her mother to support a drug habit).127

Third, while at the time of sentencing, a trial judge can change a wobbler offense from a felony to a misdemeanor, a prosecutor has the discretion to decide how the wobbler should be charged in the first place.128 When making decisions on how to charge a crime, prosecutors have the discretion whether to file charges, what crimes to charge against whom, and for wobblers, whether they should be charged as felonies or misdemeanors.129 In making these decisions, prosecutors consider the defendant’s criminal history and aggravating and mitigating circumstances.130 If a prosecutor decides to make the current charge a misdemeanor, then the Three Strikes law would not be triggered at all.131 Thus, if prosecutors are successful in exercising their discretion in any of these three ways, then a third-striker could be sentenced as a second-striker, and a second-striker could entirely avoid sentencing under the Three Strikes law.132

Impact of Safeguards

Both judges and prosecutors routinely exercise their discretion in Three Strikes cases. In fact, according to a recent study, 25 percent to 45 percent of third-strikers will have a prior strike dismissed by either a prosecutor or trial judge.133 In these cases then, three-strikers receive a sentence less than 25 years to life.134 This could be another reason why the prison population did not grow as initially predicted.135

Significantly, these built-in safeguards—the drug treatment program and judicial and prosecutorial discretion—seem to address some of the concerns raised by the provision of the Three Strikes law which mandates a 25-year-to-life sentence for any third felony (instead of a serious or violent felony). Critics often emphasize that offenders are imprisoned for 25 years to life because of minor offenses, such as petty theft.136 However, the argument that the law can or does result in sentences disproportionate to the crime focuses on the offense rather than the offender. A close look at the strikers’ criminal histories and the statistics show that even in instances where the final strike is for a minor offense the Three Strikes law worked as intended. For example, in Lockyer v. Andrade, the United States Supreme Court upheld as constitutional a three-strike sentence for a defendant who, during a 13-year period, not only attempted to escape from prison but also accumulated nine convictions, including three felony residential burglaries and several drug-trafficking offenses.137 Although his final strike was felony theft for stealing about $150 worth of videotapes,138 his criminal history evidenced a pattern of recidivism.139 The numbers also overwhelmingly show that strikers are not serving life sentences for ‘petty’ crimes. As of 2003, over 90 percent of the strikers in prison were second-strikers.140 Thus, even if the triggering strike was for a non-serious or non-violent felony, the vast majority of strikers are not serving life sentences. Moreover, for both second- and third-

127. Id. at 21–23.
129. Id.
130. See Walsh, supra note 15, at 20.
131. See e.g., Grosskreutz, supra note 17, at 434 (“Even a wobbler, which is an offense that can be charged and punished as a misdemeanor or a felony, can trigger the three strikes law. Yet California must punish the wobbler as a felony to trigger the three strikes law. In California, the prosecutor has the discretion to determine whether to prosecute the wobbler as a misdemeanor or felony.”).
132. One criticism of prosecutorial discretion is that it is so broad that disproportionate sentences arise. See, e.g., Primer, supra note 12, at 24–26; Gordon, supra note 128, at 507–508 (exploring the different ways counties apply the Three Strikes law). However, one study has determined that most prosecutors in urban areas have consistent internal policies that help guide their use of discretion to help facilitate consistent enforcement of the law. Walsh, supra note 15, at 33–49.
133. Walsh, supra note 15, at 25.
134. Id.
135. Id. at 26–27. See also Primer, supra note 12, at 23.
136. See e.g., Vitiello & Kelso, supra note 11, at 927–930.
138. Id. at 66, 70.
strikers, felony petty theft triggered the Three Strikes law in only five percent of the cases, and drug crimes in only 17 percent of the cases. 141

In fact, nearly two-thirds of the 7,500 third-strikers are currently in prison because their third strike was a violent or serious felony such as murder, sexual assault, kidnapping, robbery, assault, burglary, assault with a deadly weapon, or illegal possession of a weapon. 142 That means that most third-strikers are in prison for committing at least three serious or violent felonies.

The cases and statistics suggest that the safeguards are working. Some strikers are being referred to drug-treatment programs. And prosecutors and judges are using their discretion effectively to screen out those strikers who are not, as Williams emphasized, “within the spirit of the ‘Three Strikes’ law.” 143 The recognition that both prosecutors and judges have independent discretion has convinced at least one former critic of the law that Three Strikes has the proper safeguards to carry out the intent of the law—to incarcerate career criminals. 144

Ongoing Debate

This debate is far from over. 145 In 2004, it gave rise to a ballot initiative known as Proposition 66. 146 The proposition required that the final conviction triggering the law be only a violent or serious felony (rather than any felony) and that this change be applied retroactively. 147 Opponents of Proposition 66 argued that retroactively resentencing strikers would release some career criminals with long histories of serious and violent crime, including child molestation and murder. 148 Proposition 66 also placed other limitations on the law. For example, it reduced the number of felony offenses considered serious or violent and it allowed only one strike per prosecution. 149 After a thorough public debate, 150 Proposition 66 was rejected. 151

Two more related reform initiatives have recently been filed—the “Three Strikes Reform Act of 2006,” which would ease the law’s requirements, 152 and the “Repeat Criminal Offender/Three Strikes Fair Sentencing Act of 2006,” which would toughen portions of it. 153 “The Three Strikes Reform Act of 2006” proposed initiative is similar to the defeated Proposition 66 in two ways. First, the proposed Act would be applied

141. Id. at 28 (numbers are current through 2002).
142. Id. at 27–28.
143. People v. Williams (1998) 17 Cal.4th 148, 165 (Baxter, J., concurring and dissenting) (explaining that the defendant’s criminal record indicated he was such a person).
144. Fox, Preface to Retrospective, supra note 1, at i (San Mateo County District Attorney describing his changed position on California’s Three Strikes law).
145. Another potential issue that may arise deals with the United States Supreme Court case, United States v. Booker (2005) 543 U.S. 220, where the Court held that the mandatory Federal Sentencing Guidelines (“Guidelines”) were a violation of the Sixth Amendment. In Booker, the Court explained that the Guidelines could not be mandatory since they required judges, without juries, to rule on new facts that increased sentences beyond statutory maximums. Id. at 229, 248. See also Blakely v. Washington (2004) 542 U.S. 296 (holding unconstitutional a state trial court’s sentencing above statutory maximum where the sentencing required the judge to rule on new facts). It is unlikely that California’s Three Strikes law could be challenged on Booker (or Blakely) grounds because, unlike the Guidelines, a sentence under Three Strikes law does not require judges to rule on new facts. Instead, sentence enhancements under Three Strikes are based on prior convictions—facts that the United States Supreme Court held are not constitutionally required to go before a jury for consideration. See, e.g., Apprendi v. New Jersey (2000) 530 U.S. 466, 489–90 (holding that other than the fact of prior conviction, any fact that increases a sentence must be submitted to a jury); Dusenbery v. Alameda (E.D. Cal. 2005) 2005 WL 2346916, *5 (unpublished opinion) (denying a Sixth Amendment challenge to a Three Strikes sentence enhancement, explaining “[t]he court in Apprendi carved out facts relating to prior convictions as an exception to Apprendi holding that the jury must decide any fact which, if true, would increase the defendant’s sentence for the charged crime”). However, California law requires a jury trial to make findings regarding prior convictions that bring a defendant under the three strikes sentencing scheme. People v. Gonzales (2005) 131 Cal.App.4th 767, 775 (citation omitted).
147. Id.
152. Three Strikes Reform Act of 2006 (active) (Jan. 31, 2006) [hereinafter Three Strikes Reform Act] <http://ag.ca.gov/initiatives/pdf/sa2006rf0017_amdt_1_ms.pdf> (last visited Mar. 13, 2007). This initiative was first filed on November 14, 2005; however, the 2005 version was replaced by this 2006 version, which was modified in two ways: (1) it has fewer changes to what felonies count as strikes; and (2) it was co-authored by the Los Angeles District Attorney. See Three Strikes Reform Act of 2006 (inactive) (Nov. 15, 2005) <http://ag.ca.gov/initiatives/pdf/sa2005sf0125.pdf> (last visited Mar. 13, 2007).
retroactively only to inmates who had not previously been convicted of murder, rape, or child molestation.\textsuperscript{154} Thus, under this proposal, certain inmates who had already received a sentence for a non-serious felony would be eligible for resentencing.\textsuperscript{155} Moreover, similar to Proposition 66, this initiative would also require the third felony to be a serious or violent crime before triggering the statute.\textsuperscript{156} However, the definition of what would be considered “serious” or “violent” is slightly broader than Proposition 66.\textsuperscript{157} For example, unlike Proposition 66, this initiative would include arson of a structure, forestland, or property.\textsuperscript{158}

Nevertheless, the proposed “Three Strikes Reform Act of 2006” would still eliminate felonies that were not specifically enumerated in California Penal Code sections 1192.7(c) (defining “serious” felonies) and 667.5(c) (defining “violent” felonies).\textsuperscript{159} Thus, for example, this proposed initiative would eliminate the following as strikes: residential burglary (unless someone other than an accomplice is in the residence at the time of the burglary);\textsuperscript{160} grand theft of a firearm;\textsuperscript{161} any wobbler felonies committed for gang purposes;\textsuperscript{162} and any wobbler felonies with personal use of a deadly weapon,\textsuperscript{163} with personal use of a firearm,\textsuperscript{164} or with personal infliction of great bodily injury.\textsuperscript{165} Under this measure, if the third strike is a non-serious or non-violent felony, then the Act proposes that the sentence of the new felony be doubled, versus a sentence of 25 years to life.\textsuperscript{166}

A duplicate version of the “Three Strikes Reform Act of 2006” initiative has also been proposed as a bill to the California Legislature.\textsuperscript{167} Thus, this measure could come before California voters as an initiative if enough signatures are obtained; or it could become law if it gains the required two-thirds vote of the Legislature and signature of the governor.\textsuperscript{168}

The second proposed initiative, the “Repeat Criminal Offender/Three Strikes Fair Sentencing Act of 2006,” makes the law tougher by requiring only two felony strikes before rapists, child molesters, and murderers are given life sentences.\textsuperscript{169} For other strikes, however, the proposed measure would broaden judicial discretion by allowing the judge the choice of imposing third-strike sentences of 15 years to life, nine years to life, or a fixed nine-year term.\textsuperscript{170}

If either measure is passed, one scholar has concluded that it would have a “ripple effect” by spurring other states to revisit statutes dealing with sentencing minimums.\textsuperscript{171} Thus, the debate will once again be presented to the public. This can only be viewed as healthy because supporters and critics alike share the same goal—a statute that effectively incarcerates career criminals without being overbroad in practice.

CONCLUSION

Overall, the Three Strikes law has been effective. It has met its goals of incapacitating and deterring career criminals without straining the state budget or overcrowding the prisons.\textsuperscript{172} Since the Three Strikes law was enacted the crime rate in California has steadily dropped, and more parolees are leaving the state than coming in.\textsuperscript{173} It has also brought about a specialized parole supervision

\textsuperscript{154} Three Strikes Reform Act, supra note 152, at 5.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 2.
\textsuperscript{157} Id. at 5.
\textsuperscript{158} Proposition 66 changed the references to “arson” to only include California Penal Code section 451(a) and (b); whereas this new initiative includes all subdivisions of the arson statute, including 451(a) through (e). Compare id. at 3–4 with Proposition 66, supra note 146.
\textsuperscript{159} See Three Strikes Reform Act, supra note 152, at 2. (“Notwithstanding any other law and for the purposes of subdivisions (b) and (i), inclusive, a prior conviction of a serious or violent felony shall be defined as: (1) Any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state.”) (emphasis in original).
\textsuperscript{160} Cal. Pen. Code, § 459. See also Three Strikes Reform Act, supra note 152.
\textsuperscript{161} Cal. Pen. Code, § 489(d)(2).
\textsuperscript{162} Cal. Pen. Code, § 186.22(b) or (1)(A).
\textsuperscript{163} Cal. Pen. Code, § 12022(b).
\textsuperscript{164} Cal. Pen. Code, § 12022.5.
\textsuperscript{165} Cal. Pen. Code, § 12022.7.
\textsuperscript{166} Id. Although this initiative was co-authored by a local defense attorney and the Los Angeles District Attorney, other prosecutors were critical of the measure. See CDAA Takes Stance Against Cooley Three-Strikes Initiative, Metropolitan News-Enterprise (Mar. 6, 2006) <http://www.metnews.com/articles/2006/cdaa030606.htm> (last visited Mar. 13, 2007).
\textsuperscript{168} Hong, Bratton, Baca Support Attempts to Reform Three Strikes Law: The Law Enforcement Officials Back Efforts to Restrict Harsh Sentences to Those Whose Third Offense Is A Serious or Violent Crime, L.A. Times (Mar. 3, 2006) at p. 3. See also Editorial, 'Three Strikes' should Account for Minor Crimes, San Jose Mercury News (June 14, 2006) at p. 22A.
\textsuperscript{169} Repeat Criminal Offender Act of 2006, supra note 153.
\textsuperscript{170} Id.
\textsuperscript{172} See supra notes 45–89 and accompanying text.
\textsuperscript{173} See supra notes 59–60 and accompanying text.
aimed at preventing second-strikers from becoming third-strikers.\footnote{174}

Furthermore, the law has evolved in such a way that there are built-in safeguards to help assure that the law targets only defendants who are career criminals. Both prosecutors and judges have independent ways to exercise discretion to ensure that the law is justly applied.\footnote{175} These safeguards are working as shown by the fact that almost two-thirds of the three-strikers have committed at least three serious or violent felonies.\footnote{176} Even in those cases where the third strike was not serious or violent, the offender has a record of criminal recidivism.\footnote{177}

The Three Strikes law was not designed to focus upon the new crime committed, despite that the law is criticized for giving life sentences for a triggering felony that is non-serious or non-violent. Rather, the law focuses on individuals and determines whether the individuals merit longer sentences because of past aggravating criminal conduct. As Justice O'Connor explained, “[r]ecidivism is a serious public safety concern in California and throughout the Nation.”\footnote{178} The Three Strikes law was enacted to deal with this concern and the application of the law over the last decade shows that it is doing its job.

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\footnote{174}{See supra note 61 and accompanying text.}
Defining the Strike Zone: Discretion and the California Three Strikes Law

by Jennifer E. Walsh, Ph.D.

INTRODUCTION

When the California Three Strikes law was first introduced in 1993, violent crime in the Golden State hovered at record-high levels. The state posted a violent crime rate that was the third highest in the nation—1,077.8 crimes per 100,000 residents—and the second highest rate in state history. Only the record set the previous year—1,120 crimes per 100,000 residents—was worse. In addition, nearly 4,100 Californians were murdered or killed by non-negligent manslaughter, representing the highest single-year total since federal record keeping began in 1960.¹ One of those victims was a 12-year-old girl named Polly Klaas who was kidnapped from her bedroom during a slumber party and subsequently murdered. Her assailant, Richard Allen Davis, was a repeat offender who had recently been paroled after serving only half of his 16-year sentence for kidnapping.

Public outcry over Polly Klaas’s murder symbolized the pervasive concern that the criminal justice system was not holding serious offenders accountable for their actions. Public opinion polls in 1994 revealed that more than 80 percent of Americans considered crime to be a “very serious threat” to the nation and 85 percent believed that convicted criminals were treated too leniently.² Given the widespread approval for tougher sentencing measures, California lawmakers introduced and approved the mandatory sentencing law under the moniker “Three Strikes and You’re Out.” It was enacted under urgency clause conditions, which made it effective with the Governor’s signature on March 1, 1994.³ Meanwhile, citizen groups hurriedly gathered signatures to put an identical law before the voters in the November 1994 election. The initiative passed later that year with 72 percent of the vote.⁴

The goal of the Three Strikes law is to ensure that repeat offenders serve longer prison sentences for subsequent crimes. Accordingly, the law contains three provisions that work together to further this objective. First, the law counts all prior convictions for “serious” or “violent” felonies as eligible strikes. Crimes identified as “serious” or “violent” are listed in the state’s Penal Code and include offenses such as murder, forcible rape, robbery, kidnapping, and residential burglary.⁵ Second, the law requires longer prison sentences for “strike” offenders who continue to reoffend. Two strikers who are repeat offenders with one previous strike are sentenced to double the usual punishment; three strikers who are repeat offenders with two previous strikes are sentenced to a minimum prison term of 25-years-to-life. For both two and three strikers, enhanced sentences may be triggered upon conviction of any felony offense. Third, the law is considered to be mandatory. Prosecutors must charge all eligible offenders and may not plea bargain in strike cases, and judges must sentence eligible offenders to the required minimum term.

In the 12 years since its enactment, criticism of the Three Strikes law has been focused primarily on the size of the strike zone. Because any felony offense can trigger the mandatory minimum sentence, the law potentially applies to individuals who have committed the requisite serious and/or violent crimes in the past, but whose current conduct is comparatively minor. While the language of the law allows this to remain a theoretical possibility, the law also gives prosecutors and judges a substantial amount of directed discretion that may be used to shield undeserving offenders from the full effects of the law. Specifically, prosecutors may petition the court to set aside consideration of one or more prior convictions if there is insufficient evidence to prove their characterization as “strike” offenses. In addition, they may also petition the court to exclude one or more prior strikes from consideration if the dismissal of strikes would be “in the furtherance of justice.”⁶ Although the statutory language offers this discretion only to prosecutors, the California Supreme Court extended this same discretion to judges in the 1996 case People v. Superior Court (Romero).⁷

To date, much of the research on Three Strikes has attempted to evaluate its effectiveness in reducing crime, its cost, and its impact on California’s criminal justice system.
system. In comparison, few studies have considered how prosecutors and judges use their permissible discretion under the law, even though this use of discretion can dramatically affect how the law is implemented. This likely stems from the fact that data are difficult to acquire. There is no central database that records the decision of a prosecutor to seek the dismissal of prior strikes, and a judge’s decision to use discretion is found only by examination of individual case files. Nonetheless, because discretion is used frequently to narrow the strike zone and screen out less-serious offenders, an accurate description of the law’s effects must take actual prosecution and judicial practices into account. Failure to do so will lead to a distorted perception about the severity of the law and an exaggerated calculation of the law’s effect on offenders and its impact on the criminal justice system. Therefore, it is the purpose of this paper to examine how prosecutors use their discretion to dismiss prior strikes in the furtherance of justice and to explore the possible impact that the use of discretion might have on the implementation of the law.

**METHODOLOGY**

A survey was mailed to all of California’s 58 district attorneys in November 1998. The survey asked them a number of questions about their administrative policies for Three Strikes cases, their personal opinion about the law, and the level of support for the law among their constituents. A follow-up letter and another copy of the survey were mailed in December 1998. Between the two mailings, a total of 26 responses were received, 25 of which contained useable data. Five surveys were returned anonymously. Response rates from urban counties, which produced more than 90 percent of the state’s three-strike convictions, were very high. Three-fourths of the district attorneys from counties with populations greater than 1 million responded, and 86 percent of those from counties with populations ranging from 500,000 to 1,000,000 also responded. Response rates were lowest among small- and medium-sized counties with populations of less than 250,000.

**RESULTS**

Nearly all (92%) of the district attorneys responding to the survey indicated that they had used their discretion to petition the court for dismissal of a prior conviction under the provisions of the Three Strikes law. Only two respondents—both from very small counties (population less than 25,000)—stated that they had never used discretion to recommend dismissal of a prior strike. Sixty percent of the respondents also indicated that they had implemented internal policies to help them structure decision-making within their offices and two-thirds of these respondents were from large jurisdictions of 500,000 or more. Respondents who stated that they did not have formal procedures in place were primarily from small jurisdictions of 100,000 or less.

In the main part of the survey, district attorneys were asked to identify the factors that they considered before recommending that the court dismiss a prior conviction in the furtherance of justice. Overall, respondents consistently ranked

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**Table 1: Reasons Cited by District Attorneys as Justification for Exercising Discretion in Three Strikes Cases**

<table>
<thead>
<tr>
<th>Reasons for Dismissing a Prior Strike</th>
<th>Percent of DAs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current offense is trivial in nature</td>
<td>74</td>
</tr>
<tr>
<td>Prior strikes are remote in time</td>
<td>65</td>
</tr>
<tr>
<td>Defendant has no recent criminal history</td>
<td>65</td>
</tr>
<tr>
<td>Prior strikes are from singular incident</td>
<td>65</td>
</tr>
<tr>
<td>Defendant has no history of violence</td>
<td>57</td>
</tr>
<tr>
<td>Defendant has never been to prison</td>
<td>48</td>
</tr>
<tr>
<td>Defendant has no history of weapons use</td>
<td>39</td>
</tr>
<tr>
<td>Defendant has history of mental illness</td>
<td>39</td>
</tr>
<tr>
<td>Proof problems with prior strikes</td>
<td>65</td>
</tr>
<tr>
<td>Evidence problems with current case</td>
<td>48</td>
</tr>
<tr>
<td>Other</td>
<td>4</td>
</tr>
</tbody>
</table>

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9. One district attorney did not complete the survey, but instead sent a brief memo describing her county’s Three Strikes policy.

10. Respondents who wished to answer anonymously were asked to estimate their county size so that their responses could be included in all of the analyses. All five anonymous respondents complied with this request.

11. According to data from the state Department of Corrections and Rehabilitation at the time this survey was conducted, one of these two counties had produced no Three Strikes convictions and the other had produced only two. This may explain why discretion had not been used by these district attorneys.

12. The list of conditions represents items noted by prosecutors in preliminary interviews as being influential in their decision to use discretion in Three Strikes cases.
conditions relating to the nature of the current offense and the seriousness of the prior record as being the most important factors in the decision-making process. Moreover, they indicated a willingness to screen out offenders who committed a less-serious third-strike felony. For example, nearly three-fourths (74%) of the respondents indicated that they would use discretion for offenders who committed a trivial or de minimis offense. This is consistent with previous research studies that found that prosecutors use their charging discretion to bypass mandatory sentences when they consider the sentence too severe for the triggering offense.13

Since the Three Strikes law targets offenders who have serious criminal histories, prosecutors are also likely to reflect upon the nature of the prior record before deciding whether discretion is appropriate in a given case. Nearly two-thirds (65%) of district attorneys indicated that they considered whether the prior strikes were remote in time, were from a single criminal incident, or whether the defendant had been able to stay out of recent trouble when deciding to petition the court for dismissal of a prior strike. Almost three out of five (57%) prosecutors indicated that they also took into account the defendant’s lack of violent history when deciding if discretion was appropriate. Among the conditions, they were least likely to consider were lack of weapon use (39%) and a history of mental illness (39%). In general, district attorneys indicated that they were more concerned about the defendant’s offending behavior than they were about specific personal characteristics, although one respondent added that the defendant’s age and life expectancy was taken into consideration. A number of respondents also indicated that their decisions were not made based upon just one factor; instead, their review process took into account the offender’s entire record. As noted by one district attorney, “all the above [factors] are part of the circumstances to consider.”

When asked to identify conditions that would preclude their use of discretion, district attorneys almost unanimously (95%) indicated that they would withhold discretion and press for the full mandatory minimum sentence if the third strike was a “serious” or “violent” felony. This is consistent with previous findings that have found prosecutors to withhold discretion if the defense is severe.14 Most respondents also indicated that they would not use discretion if the defendant had a history of violence (90%), had a lengthy criminal record (86%), or if they believed that the defendant was likely to reoffend in the future (86%). These figures also support previous findings that defendants with more extensive prior records are likely to receive more severe case dispositions.15

Fewer district attorneys indicated that they would withhold discretion if the defendant had a history of weapon use (71%), if the strikes were accumulated separately (62%), or if the defendant had previously been sent to prison (52%). While it was expected that these factors would be considered in the decision-making process, it is likely that district attorneys do not weigh them heavily because it is assumed that most three strikers, as serious felons, will have one or more of these factors, such as prior prison confinement, in their records. Other responses provided by the respondents for denying discretion focused on specific characteristics: whether the strikes were accumulated when the offender was a juvenile, if the defendant had a history of sex offenses, or if the prior strikes were violent in nature.

Over two-thirds of the district attorneys responding to the survey strongly agreed that the Three Strikes law is a useful tool in the fight against crime. A majority also believed that the policy promotes justice. Four out of five felt that the Three Strikes law metes out the appropriate punishment for serious offenders and most were strongly opposed to efforts that would amend the law to

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make it less severe. More significantly, in light of present efforts to amend Three Strikes, 84 percent of the respondents rejected the idea of reforming the law to disqualify low-level felony offenses like “wobblers” as third strikes.

The survey also looked at whether district attorneys believed their constituency was concerned about the possibility of an offender being sentenced to the mandatory minimum for a non-violent offense. Because California’s Three Strikes law is distinct from many other state’s three-strikes-type laws in this respect, a few cases involving minor non-violent third strikes—such as the infamous “pizza thief” case—have generated a fair amount of media coverage. Although nearly one-third of the respondents felt that their constituents were less supportive of the law when the case involved a non-violent third strike, 56 percent felt that support had not changed since the law was first enacted. When broken down by respective political jurisdictions, the survey responses indicate that district attorneys from conservative counties believed that their constituents continue to support the law, even with the broad third-strike provision.

Table 3: District Attorney Opinion Responses

<table>
<thead>
<tr>
<th>Survey Statement</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
<th>Undecided</th>
<th>Undecided to State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Three Strikes is effective in fighting crime</td>
<td>68%</td>
<td>20%</td>
<td>0%</td>
<td>0%</td>
<td>8%</td>
<td>4%</td>
</tr>
<tr>
<td>Justice is promoted under the Three Strikes law</td>
<td>36%</td>
<td>48%</td>
<td>0%</td>
<td>0%</td>
<td>8%</td>
<td>8%</td>
</tr>
<tr>
<td>DA’s striking of priors promotes justice</td>
<td>56%</td>
<td>20%</td>
<td>4%</td>
<td>0%</td>
<td>8%</td>
<td>12%</td>
</tr>
<tr>
<td>Striking priors leads to unequal treatment</td>
<td>4%</td>
<td>16%</td>
<td>24%</td>
<td>40%</td>
<td>8%</td>
<td>8%</td>
</tr>
<tr>
<td>Striking priors distorts intent of the law</td>
<td>12%</td>
<td>12%</td>
<td>28%</td>
<td>40%</td>
<td>0%</td>
<td>8%</td>
</tr>
<tr>
<td>Judges should be able to strike priors</td>
<td>8%</td>
<td>24%</td>
<td>24%</td>
<td>20%</td>
<td>12%</td>
<td>12%</td>
</tr>
<tr>
<td>Judges strike priors more often than DAs</td>
<td>16%</td>
<td>16%</td>
<td>32%</td>
<td>16%</td>
<td>12%</td>
<td>8%</td>
</tr>
<tr>
<td>Three Strikes should be modified so that only violent felonies count as the third strike</td>
<td>4%</td>
<td>0%</td>
<td>48%</td>
<td>32%</td>
<td>4%</td>
<td>12%</td>
</tr>
<tr>
<td>Wobbler offenses should never count as the third strike</td>
<td>0%</td>
<td>4%</td>
<td>32%</td>
<td>52%</td>
<td>4%</td>
<td>8%</td>
</tr>
<tr>
<td>Serious offenders are more likely to get the punishment they deserve</td>
<td>60%</td>
<td>20%</td>
<td>0%</td>
<td>0%</td>
<td>12%</td>
<td>8%</td>
</tr>
</tbody>
</table>

**IMPLICATIONS**

The survey findings reveal that prosecutors base their decision to exercise discretion on the severity of the current offense and the seriousness of the prior strikes. Most district attorneys agree that they will use their discretion to petition the court for dismissal of one or more prior strike offenses if the offender’s current offense is a low-level felony and his criminal past is comparatively less severe. But almost unanimous consensus was reached regarding conditions that would preclude the use of discretion. Offenders who are convicted of serious or violent third strikes or offenders who present an ongoing danger to society are nearly certain to be excluded from consideration. Prosecutors would consider these offenders to fall into the category of offenders specifically targeted by the Three Strikes law, thus there would be no justification for recommending that a prior strike be dismissed.

Interviews with high-ranking officials within the district attorney’s offices of California’s five most populous counties in 2003 confirmed that the primary findings of the survey results still hold true.16 District attorneys continue to support the Three Strikes law as an effective, crime-fighting tool and feel that the ability to petition the court for the dismissal of

**Table 4: Constituent Support for Three Strikes by County Type**

<table>
<thead>
<tr>
<th>Perceived Political Culture</th>
<th>Yes</th>
<th>No</th>
<th>Unknown</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liberal</td>
<td>8%</td>
<td>4%</td>
<td>0%</td>
</tr>
<tr>
<td>Moderate</td>
<td>12%</td>
<td>12%</td>
<td>4%</td>
</tr>
<tr>
<td>Conservative</td>
<td>12%</td>
<td>40%</td>
<td>8%</td>
</tr>
<tr>
<td>Total</td>
<td>32%</td>
<td>56%</td>
<td>12%</td>
</tr>
</tbody>
</table>

Are Constituents Less Supportive of Three Strikes if Offense Is Non-Violent?

strikes ensures against possible injustices. Additionally, the factors identified in the survey that guide the decision to use discretion are still in use today. Internal policies require prosecutors to consider both the nature of the current offense and the seriousness of the criminal history before deciding to petition the court to remove one or more prior strikes from consideration. Additionally, all counties surveyed, with the exception of Los Angeles County, still require approval from a supervisor before discretion may be used.

Taken together, these findings confirm that prosecutorial discretion supports the function and purpose of the Three Strikes law. District attorneys may not have a formal statewide policy on how and when discretion ought to be used, yet there appears to be a clear consensus about what constitutes appropriate criteria for consideration. Offenders with lower-level third-strike felony convictions and criminal histories with mitigating factors may be judged to be outside the spirit of the law even though they technically qualify for the enhanced punishment. Furthermore, offenders with serious third strikes or aggravated criminal histories are almost universally viewed as a threat to public safety and are prosecuted fully under the provisions of the law.

Proposed revisions to reduce the pool of eligible offenders appear unnecessary as less deserving offenders are already excluded from consideration. Studies of actual practices reveal that prosecutors regularly use their discretionary authority to bypass the mandatory sentencing requirement for offenders who fall outside the spirit of the law. Furthermore, proposed revisions that would mechanically narrow the strike zone to include only those offenders who commit an aggravated third strike could potentially jeopardize public safety. Changes would also likely reduce the deterrent and incapacitative benefits of the law. Given that the current version of Three Strikes provides numerous safeguards to protect against unfair sentencing, revision seems neither warranted nor wise. As it is currently implemented, the California Three Strikes law removes dangerous recidivists from the community while continuing to ensure that offenders are justly sentenced.

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17. This support was also confirmed by the unanimous opposition to Proposition 66 by all of the state’s 58 District Attorneys in 2004. This ballot initiative, which was rejected by a slim majority of the voters, sought to place substantial restrictions on the types of crimes that could qualify as eligible “strike” offenses.

18. Walsh, supra, note 16.
Has the Three Strikes Law Been Properly Implemented Since Its Enactment or Has It Been Abused? Who Is Right—Its Critics or Its Supporters? What Do the Facts Say?

by Tony Rackauckas, Bill Feccia, and Brian Gurwitz

“It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts.”

— from Sherlock Holmes, by Sir Arthur Conan Doyle

The current Three Strikes statutes (Penal Code §§ 667(c), (d) & (e) and 1170.12 (a), (b) & (c)) have been criticized as too harsh and prone to misapplication and outright abuse. Some say that an inordinate number of defendants have been convicted of minor offenses and unfairly sentenced to life imprisonment. The press has circulated anecdotal examples purportedly demonstrating the unjustified use of the current law often with incorrect or incomplete factual summaries. Some have proposed reforming the current Three Strikes law to lessen these harsh applications.

These criticisms and drive for reform have focused on the fact that a life sentence may be imposed for current offenses that are not serious or violent felonies. Press reports and commentary often characterize the final strike in a belittling manner, describing it as an exceedingly minor offense. Consequently, critics assert without factual basis that the prisons are being flooded with offenders posing little or no threat to public safety, and that they should be released to make room for the truly serious and violent offenders.

But is this true? Has anyone applied a serious statistical analysis to this issue—one that explores how often a life sentence is actually imposed, the nature of the criminal history of those sentenced to life, and the effects of such a reform? It is, of course, not an easy task to go back a dozen or so years and get the records of all Three Strikes cases prosecuted in order to perform such an analysis. But, as Sherlock Holmes advised, it is necessary to gather the facts before drawing conclusions. Taking Holmes’ admonition to heart, the Orange County District Attorney’s Office conducted a study. The results, current to December 31, 2006, cover more than 13 years of Three Strikes cases prosecuted in Orange County.

Chart 1 compares the total number of defendants prosecuted as three strikers eligible to receive life sentences to those who actually received those life sentences. The data indicates that only 11.9 percent of all defendants subject to a life sentence under the current Three Strikes law have actually been sentenced to life. The remaining 88.1 percent received reduced sentences. This result does not support the argument that the Three Strikes statutes have been overused or abused. If that argument were true, one would expect to see a greater percentage of Three Strikes defendants receiving life sentences.

Chart 2 looks at the 11.9 percent who received life sentences and illustrates the breakdown between those convicted of a serious or violent felony and those convicted of other felonies. The total of those sentenced to life was almost evenly divided between defendants whose final felony conviction was a serious or violent felony (55%) and those whose final felony conviction was a less serious felony (45%). Therefore, reform

1. Those felonies characterized as serious felonies are specifically listed in California Penal Code section 1192.7(c); violent felonies are listed in Penal Code section 667.5(c).
2. Specifically, 4,686 defendants have been charged with third-strike priors in the 11 years between June 1995 and June 2006; 4,250 defendants’ cases have been completed.
measures that focus on eliminating or reducing life sentences for those convicted of the less serious felonies are directed at nearly half of all those sentenced to life (45%); this comprises only 5.36 percent of the total number of defendants prosecuted as third strikers (45 percent of 11.9 percent).

One might argue that because of this small percentage, a reform aimed at reducing the sentences of this apparently small group would not be detrimental to public safety. But this argument ignores the reality that a relatively small percentage of criminals are responsible for a disproportionately large percentage of total crime. To determine the impact on public safety of this small percentage of three strikers, one should look at their criminal records.

Examining criminal records will reveal the level of danger posed by the people who have been sentenced to life for non-serious felonies. It will also clarify the danger to public safety that would be created if the sentences of these defendants were reduced and they were released from custody. To be more specific, the impact of recently proposed reforms should be examined before drawing any conclusions.

The two proposals most recently advanced to amend the Three Strikes law include a 2004 ballot initiative, known as Proposition 66 (defeated at the polls), and legislation, SB 1642 (Romero). While the scope of the two proposals differed, each proposed dramatically curtailing the ability to prosecute a recidivist offender under the Three Strikes law when the current offense is classified as neither a serious nor a violent felony. The remaining charts summarize the effects of the most recently proposed reform, SB 1642, which is also the more restrictive of the two proposals.

Chart 3 takes a closer look at the 11.9 percent of three strikers who actually received life sentences and displays the anticipated effect of the proposed reform. The chart displays the percentage of defendants whose third strike was a serious or violent felony, as well as those whose third strike was not a serious or violent felony. This latter category is further divided into those that would be subject to release under the proposed amendments and those who, while having been convicted of a non-serious or violent felony, would still be subject to a life sentence under one of the exceptions.

The results show that about two-thirds of the 45 percent of three strikers sentenced to life on convictions of non-serious/violent felonies would be subject to release. This amounts to 30 percent

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3. This has been noted in a legislative finding. California Penal Code section 999b states in pertinent part, “The Legislature finds a substantial and disproportionate amount of serious crime is committed … by a relatively small number of multiple and repeat felony offenders, commonly known as career criminals.”

4. Proposition 66 would have precluded a life sentence under all circumstances where the current offense is neither serious nor violent. SB 1642 would preclude a life sentence for these offenses unless one of several statutory exceptions applies. If one of the exceptions applies, the court would retain discretion to impose an indeterminate life term. The exceptions include the following: (1) the current conviction is for a specified narcotics case, where a weight enhancement was pled and proved; (2) the current conviction is for a specified sex offense; (3) during the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person; and (4) any one of the defendant’s prior strike convictions was for a sexually violent offense, certain aggravated forms of child molestation, some homicides (murder and some forms of manslaughter), or any serious or violent felony punishable by life imprisonment.
of the total. Although not convicted of serious or violent offenses, 15 percent would not be subject to release since their convictions involved enhancements that were pled and proved. Therefore, under the recently proposed reform, 30 percent, almost a third, of all three strikers sentenced to life would be subject to release.

Does this 31 percent constitute no serious threat to public safety? To answer this question, the nature of the charged offenses need examination.

Chart 4 and the associated table display the nature of this group's final felony convictions. The two largest categories of the final convictions of defendants to be released are for theft-related (47%) and narcotic-related (42%) offenses. Together these comprise 89 percent of the total of those who will be released. An additional six percent includes crimes of violence that are not strikes, including assault with deadly force, assault with serious bodily injury, spousal abuse, and stalking. Two percent are other crimes, including reckless evading of police pursuit.

It is true that nearly 90 percent of those who have been sentenced to life and who would be released under the proposed reforms have been convicted of thefts or drug-related offenses, which are usually described as “minor” or “victimless” in the public debate over Three Strikes. If this were the end of the analysis, one might conclude that an inordinately large number of offenders posing little or no threat to the public safety are being sentenced to unjustifiably long prison sentences.

But is this true? Further inquiry into the criminal history of these offenders is necessary in order to answer this question appropriately.

First, examine the criminal records of all defendants sentenced to life, the entire 11.9 percent depicted in Chart 1. Chart 5 does this.

The records of these defendants indicate they are true threats to the public’s safety. More than half (55%) have serious or violent felonies charges and should be subject to life sentences.

Now examine the records of those whose charged offense was not a serious or violent felony, first for those who would not be released, then for those who would be under the proposed reform. Chart 6 examines the priors of those who would not be released.

5. Supporters of SB 1642 claim that judges would retain discretion in all cases to determine whether an offender should be resentenced under the new law. But the bill only gives judges discretion to determine whether “relief is warranted” and provides no guidance, standard of review, or clarification as to whether the court may consider anything other than whether the defendant would have been eligible for life imprisonment under the newly amended statute if it were in existence at the time of the earlier sentencing. Under well-established law, a new statute that lessens the penalty for an existing crime is considered retroactive unless the Legislature “clearly signals” a contrary intent. (People v. Nasalga (1996) 12 Cal.4th 784, 793.) Given the lack of clarity in SB 1642, this office believes that it is likely that the proposed law would be interpreted in a manner that would effectively grant release to all offenders who could not have been sentenced to life imprisonment had the law been in effect when their original sentences were imposed.
The records of these defendants are similar to those in the previous chart. But it can be conceded that this is consistent with the purpose of the exceptions in the proposed reforms, to exclude dangerous defendants from the benefits of the reform and release only those who are not such a threat to public safety. Next, look at the priors of defendants serving life sentences who would have been subject to release under the recently proposed reform to see what the differences are. Chart 7 summarizes this.

The results are remarkably similar to the previous two charts. What do Charts 5, 6, and 7 reveal?

Analysis of the findings shows that there are very few differences in the nature of the priors of those subject to release under the proposed amendments and those who are not. In short, three strikers who are in fact sentenced to life in prison possess very similar criminal histories irrespective of the nature of the final charged offense. It is critical to know this in order to assess the impact on public safety arising from any relaxation of the present Three Strikes law.

The differences between the records of both indicate little qualitative disparity between the menaces to public safety posed by either. For example, of those subject to release, two percent have sexual-violence strikes, versus 12 percent for those not subject to release. But of this same group, a far greater percentage have prior residential burglaries than do those not subject to release, 47 percent versus 33 percent. The remaining categories of prior strikes, which include robbery, assault, kidnapping,
and weapons/firearms crimes, show little if any difference between the two groups. In short, it appears that except for two categories of prior strikes, the prior-strike profiles of those subject to release and those who are not are virtually the same. The only difference appears to be that those who would be subject to release have fewer sexual-assault strikes (two percent versus 12 percent), but more residential burglary strikes (47 percent versus 33 percent), hardly a comforting statistic when one considers the serious and life-threatening crimes that often arise during residential burglaries.

What final conclusions should be drawn from these results? First, there is no overwhelming number of three strikes flooding the prison system. In fact, only a small percentage of those subject to a life sentence are actually receiving that sentence, barely over 12 percent. Second, individuals actually receiving life sentences are not minor criminals posing little or no threat to public safety; with only minor differences, the criminal histories among this group are the same. Third, defendants sentenced to life, while comprising a small percentage of all three strikers prosecuted, constitute a disproportionate threat to public safety regardless of the nature of their final offense. Fourth, prosecutors and judges have been properly exercising their discretion under the current law and thoroughly examining all of the facts and circumstances of a defendant’s background as well as his offense.

Finally, these facts tell us something else. Using anecdotal evidence of a defendant’s final offense to reach a conclusion that he is not a danger to society absent an examination of his criminal record is to theorize before one has data. It rests on the unsupported assumption that career criminals who pose a threat to public safety commit only serious or violent felonies, not less serious, unlisted felonies.

It will also be instructive to examine some of the individual cases of those defendants who would be released if the proposed reform was to be enacted. Here are some examples:

Defendant #1 was convicted of a second-degree burglary (459 second) on his third strike, a non serious/violent felony. He has 45 prior robbery strike convictions (Penal Code § 211) many with a firearm. These also include numerous robberies at banks where he threatened bank tellers. He has other numerous non-strike prior convictions and has been a registered sex offender since 1979.

Defendant #2 was an intensely jealous husband who repeatedly flew into rages during which he would beat his wife in the face with his closed fist. He would constantly stalk her at work and beat her whenever he saw her talking with another man, including once in a public restaurant. He finally beat her face bloody in her apartment prompting neighbors to call the police. Initially, the wife said she did not wish to testify as she was terrified of being killed by the defendant. The police with difficulty were able to obtain a statement, which she later recanted. Defendant #2 was convicted of spousal abuse (Penal Code § 273.5) as his third strike. He has 14 prior robbery convictions (Penal Code § 211 strikes) including multiple public restaurant robberies, some while armed with a gun, and a conviction for an attempted stabbing with a knife (a § 245(a) strike). And he is a member of a violent street gang.

Defendant #3 has three prior robbery strike convictions (Penal Code § 211) all while armed with a gun, a residential burglary strike conviction (a Penal Code § 459 first-degree) and a strike conviction for intimidation of a victim/witness (Penal Code § 136.1(c)). In addition to these strikes, he has prior convictions of assault with a deadly weapon (Penal Code § 245(a)), false imprisonment (Penal Code § 236), prisoner in possession of weapon, (Penal Code § 4502), a federal conviction for felon in possession of a firearm, and possession of illegal drugs for sale (Health & Safety Code § 11351). For his third strike, he was convicted of two counts of stalking (Penal Code § 646.9), neither codified as a serious or violent felony. The victim of Defendant #3’s stalking was his former girlfriend by whom he has two children, twin daughters. He had repeatedly threatened to kill his girlfriend by a shotgun blast to the head. On one occasion while the victim was nursing their children, the defendant had demanded to be fed first. When the victim continued to nurse her babies, the defendant grabbed her by the neck, placed a kitchen knife to her throat, and threatened to kill her. Unable to handle this brutality, the victim left Defendant #3. She found a new boyfriend who treated her and her daughters with kindness. A restraining order did not stop Defendant #3 from continuing to threaten the victim and her new boyfriend. When the boyfriend attempted to prevent Defendant #3 from beating the victim, Defendant #3 broke his nose after attempting to gouge out his eye.

After his conviction, and both before and after his sentencing, Defendant #3 blamed the victim and her boyfriend for his life sentence. He threatened to hire gangsters to attack them. He referred to them as “rats,” and stated, “if people acted like a rat, they would die like a rat.” He advised friends of the victim and her boyfriend to stay away from them as “those two are going down real soon.” He has claimed, “there are no rules or laws I must follow in dealing with all of you. See you in hell.” He has threatened that even from prison he can get gang members to kill them.

A consulting psychologist stated that Defendant #3 suffers from an anti-social personality disorder. Another psychologist familiar with the defendant stated that Defendant #3 “is going to end up killing somebody.” Yet a third psychologist who interviewed Defendant #3 reported that he threatened several times that if sentenced to a Three Strikes sentence, he
would be dangerous to authority figures such as law enforcement officers and others. He stated that the Three Strikes law will be repealed, that he will get out, and will live near his former girlfriend to keep her and her new boyfriend both looking over their shoulders. He has stated that he “will pay [them] both back for what they put [him] through,” and that once the Three Strikes law is repealed, “we won’t have to wait for Hell.” He wrote, “I can become a monster, but four people will suffer GREATLY from that and two of those will be our daughters.” The victims continue to live in fear for their lives and those of their children. Their friends describe them as fearful to go out of their house and scared to death.

These few anecdotes, taken from among many others, show that one can easily select alarming examples of three strikers to juxtapose against those cited by supporters of reform. Interestingly in the last example, simply saying the defendant was convicted of the non-serious/violent felony of stalking without delving into the specific facts of the case might lead one to conclude that this defendant represents a minimal threat to public safety. Looking at the facts of the particular case, as prosecutors and judges are required to do, leads to a quite different conclusion. The apparent paradox of the debate is that the critics of the Three Strikes law appear to be engaging in what they accuse prosecutors of doing, unjustly applying broad generalizations without truly assessing threats to the public safety by looking at the facts.6

The results of the analysis conducted by this office, in its view, demonstrate that using the type of anecdotal evidence that focuses solely on the perceived minor nature of the third strike is not an appropriate method to base important decisions likely to affect public safety for a long time to come. As this short foray into anecdotes shows, doing so could turn out to be, for someone, a capital mistake. And in the final analysis, a prosecutor’s job as a guardian of public safety is to make sure that does not happen, not just to react when it does.

Tony Rackaukas is currently serving his third term as Orange County District Attorney. He served as a prosecutor from 1972 to 1988 with the Orange County District Attorney’s Office where he personally tried over 100 serious and violent felony cases including 40 homicides. He was appointed Municipal Court Judge in 1990, elevated to the Superior Court Bench in 1993, and appointed Presiding Judge of the Appellate Department of the Superior Court in 1996. In the spring of 2006 he ordered and supervised the study and analysis of all Three Strikes prosecutions in Orange County from 1994 to June 2006, the results of which appear in this article.

Bill Feccia is a Senior Assistant District Attorney with the Orange County District Attorney’s Office. He has been an Orange County prosecutor since 1979 and has completed more than 100 jury trials including numerous career criminal and Three Strikes cases.

Brian Gurwitz is a Senior Deputy District Attorney with the Orange County District Attorney’s Office. In addition to trying cases in which defendants were prosecuted under the Three Strikes law, he has successfully defended the law before the California Supreme Court.

6. Supporters of SB 1642 might claim that some of the offenders described in the examples above intended to inflict great bodily injury on their victims, and thus they would not be released. But the bill specifically requires that allegation to be pled and proved before it would render a defendant eligible for life imprisonment, and no such allegation currently exists. Of course, double jeopardy and ex post facto prohibitions would preclude prosecutors from retrying these already-sentenced offenders in order to render them ineligible for release.
As a career prosecutor who handled a substantial number of second striker cases from early 1995 through 1999, I have often wondered if second striker defendants knew they were facing 25-years-to-life sentences when they chose to commit their felony offenses. Common sense told me they indeed knew such a result was possible if caught committing a felony. The amount of press coverage the Three Strikes law was getting at the time made it difficult to believe second strikers could not know. Nevertheless, a common claim from the second-strike defendants I handled was that they did not know. This was especially true for second strikers who had committed a non-serious or non-violent felony. Apparently, they thought their claim that “they were not aware of their predicament or they would not have committed the offense” could convince a prosecutor to give them another chance. The idea, however, was second-strikers knew a 25-years-to-life sentence loomed for them, so they would not re-offend. What reasonable person would? Honestly, this was an appealing notion since all prosecutors hope with each case that they have finally convinced the offender that crime does not pay.

Now, the question of whether second strikers know they face a 25-years-to-life sentence for any further felony conduct is answered. A report by the San Diego State University Research Foundation, which evaluates the effectiveness of the California Department of Corrections and Rehabilitation’s (CDCR) Second Striker Program (SSP) provides this knowledge. In the SSP, parolees released from prison with at least two serious or violent felony priors are closely monitored to, hopefully, reduce the likelihood that they will return to prison with a 25-years-to-life sentence.

The California Second Striker Program was initiated in the Governor’s Budget Act for fiscal year 2000/2001 as part of the funding granted to the then California Department of Corrections. The idea of the SSP was to give parolees with at least two serious or violent felony priors more intensive parole supervision and priority for placement in programs intended to rehabilitate them. Obviously, what the SSP also did was impart the knowledge to the second-striker parolee that any further felony conduct could subject him or her to a 25-years-to-life sentence.

The Second Striker Program was officially launched on July 1, 2001. The SSP took some time to get started in each of the four regions of parole. The Second Striker Program was officially launched on July 1, 2001. The evalu-

A Definitive Answer to the Question: Do Second Strikers Know They Are Facing 25-Years-to-Life Sentences?

by Kelly Keenan

1. “Second striker” for the purpose of this article means a person with at least two prior serious or violent felony convictions.
3. Evaluation, supra at 6
4. Id.
5. Evaluation, supra at 17.
6. Id.
7. Id. at 18.
9. Id. at 11.
10. Id.
11. Evaluation, supra at 11.
12. Id.
13. Id.
14. Id.
15. Id.
the SSP parolee population was getting out of prison for a commitment offense involving a violent felony. In fact, just over 70 percent of them were getting out of prison having just committed either a violent felony or a property crime. Only 20.8 percent of them were getting out of prison for drug offenses. Obviously, since they were getting out of prison, these second strikers had not received 25 years to life for their felony drug offenses. This compares to the non-SSP parolees where only 19.3 percent of them were getting out of prison for a commitment offense involving a violent felony and 35 percent of the non-SSP parolees were getting out of prison for drug offenses. On average, the second-striker parolees were five years older, had one more prior incarceration, and were twice as likely to have a recent commitment offense for a violent felony than the overall parolee population. Even these minimal characteristics suggest society still needs prosecutors armed with the Three Strikes law to monitor second strikers who reoffend in order to keep our communities safe.

One of the purposes of the evaluation of the Second Striker Program was to determine if the intensive supervision and increased programming for the second-striker parolees reduced 25-years-to-life sentences among them. Now, while the evaluation ultimately concluded that the SSP might have had some effect on reducing 25-years-to-life sentences, of greater interest is the other trends that study of the SSP parolees highlights for the public. The evaluation looked at historical data from CDCR to look at 25-years-to-life sentences, as a whole. One trend studied was the 24-month prison-return rates among parolees eligible for the Second Striker Program. During the period following the enactment of the Three Strikes law in 1994, 25-years-to-life sentences increased until 1998 but then began dropping until finally leveling off after 2001. While 25-years-to-life sentences were rising from 1994 to 1998, returns to prison for new terms other than 25 years to life for SSP-eligible parolees were decreasing. Interestingly, as 25-years-to-life sentences remained steady from 1998 to the end of 2003, the percentage of SSP-eligible parolees returning to prison for new terms other than 25 years to life also remained steady at about 10 percent. During this same period, the majority of SSP-eligible defendants were going back to prison on parole violations. Beginning in 1998, close to 60 percent of them were going back to prison on parole violations with that number dropping to 50 percent by the end of 2003.

The evaluation further went on to look at the 24-month prison-return rates among SSP-eligible parolees for the years 2000 through 2003 by each of the four regions of parole. The return rates to prison of SSP-eligible parolees showed some differences in how each region handled their 25-years-to-life parolees. Each of the four parole regions showed a decline in 25-years-to-life sentences from 2000 to 2003 with the exception of Region II, which showed 25-years-to-life sentences remained relatively stable from 2001 through 2003. Region III, which covers most of the Los Angeles County, showed the highest percentage of new 25-years-to-life sentences for their SSP-eligible parolees. In 2000, 1.7 percent of their SSP-eligible parolees were returned to prison with 25-years-to-life sentences. This declined over the next three years ending with one percent of their SSP-eligible parolees going to prison on a 25-years-to-life sentence in 2003. While Region III was higher than the other three regions, it was higher by no more than one percentage point. Region I and Region II showed a higher percentage of their SSP-eligible parolees going back to prison on parole violations than the other two regions. And a higher percentage of SSP-eligible parolees received a new court commitment other than 25 years to life.
in Regions III and IV than in the other two regions.\textsuperscript{34} Over the four years, Region III averaged 13.7 percent and Region IV averaged 11.4 percent 24-month return rates for these new court commitments.\textsuperscript{35}

Now one of the more interesting aspects of the evaluation of the SSP program was their exploration of what they call the “District Attorney Factor.”\textsuperscript{36} The evaluation tried to look at whether a few aggressive district attorneys in a few counties could have a statewide impact on the overall 25-years-to-life sentences since relatively few 25-years-to-life sentences are given compared to all new prison commitments.\textsuperscript{37} They attempted to quantify this so-called DA Factor by looking at the portion of 25-years-to-life sentences that were based on a commitment for a serious or violent felony offense.\textsuperscript{38} What the study found was that the passage of the Three Strikes law in 1994 until mid-1999, between 50 to 60 percent of 25-years-to-life sentences statewide among SSP-eligible defendants were based on the violation of a serious or violent felony.\textsuperscript{39} Since 1999, however, this percentage had steadily increased until near the end of the year 2003 when more than 80 percent of the 25-years-to-life sentences were for a serious or violent offense.\textsuperscript{40}

The study went on to look at the impact that Los Angeles County may have had on 25-years-to-life sentences in the state. For this evaluation, it was noted that 46 percent of all SSP-eligible parolees lived in Los Angeles County.\textsuperscript{41} Further comment noted that since the end of the year 2000, Los Angeles County had a policy of refraining from pursuing Three Strikes convictions on non-serious and/or non-violent offense.”\textsuperscript{42} With close to half of the SSP-eligible parolees in the state, how did Los Angeles County’s handling of their second-striker parolee population affect 25-years-to-life sentences throughout the state?

What the evaluation of the SSP found was that since 2000 the percentage of new 25-years-to-life sentences due to a conviction for serious or violent crime in Los Angeles County increased from more than 50 percent in 2000 to more than 80 percent by the end of 2003.\textsuperscript{43} Meanwhile, statewide excluding Los Angeles County, the percentage of new 25-years-to-life sentences due to serious or violent felony convictions also increased from about the same point as Los Angeles County at the start of 2000 peaking to just over 70 percent by the end of 2001.\textsuperscript{44} While the percentage of 25-years-to-life sentences due to serious or violent felony convictions continued to rise in Los Angeles County from that point, the rest of the state fluctuated around 70 percent from 2001 to the end of 2003.\textsuperscript{45}

The conclusions of the evaluation of the California Second Striker Program was that since 2000, the proportion of 25-years-to-life sentences due to serious or violent felonies increased particularly in Los Angeles County, suggesting the “criteria for three strike convictions have gradually tightened statewide.”\textsuperscript{46} The evaluation did not do any kind of empirical study to determine if this increase was due to the policies of district attorneys or a greater proclivity of judges to exercise their discretion not to give 25-years-to-life sentences. No conclusion should be made as to the DA Factor because of this. But it does appear the Three Strikes law is being used more temperately over time.

What are we to conclude from “An Evaluation of California Second Striker Program” report? Parolees facing 25 years to life for their next felony offense receive specialized treatment from parole. They have greater supervision and more access to programs. Has this succeeded in decreasing 25-years-to-life sentences among the second-striker parolee population? In the end, this evaluation did not provide a definitive answer. But it does show several interesting trends. One, the second striker population is still a group that we should continue to monitor with enhanced penalties. While they are an older population on average, they have more prison commitments and are a little over two times more likely to have committed a violent felony for their last prison commitment. Two, courts statewide are less likely to give 25-years-to-life sentences and more likely to give those sentences on violent or serious felonies than in the past. From this it appears prosecutors statewide are continuing to use their discretion wisely in protecting the community from this dangerous parolee population. And lastly, when prosecutors do exercise their discretion, they can be assured that if they are dealing with a parolee with two or more serious or violent felonies, he (since 97.2 percent are male) committed his felonious conduct with full knowledge that a prosecutor would decide whether he deserves to go to prison for 25 years to life.

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\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Evaluation, supra at 36.
\textsuperscript{37} Id. at 33.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 34.
\textsuperscript{40} Id.
\textsuperscript{41} Evaluation, supra at 34.
\textsuperscript{42} Id.
\textsuperscript{43} Evaluation, supra at 35.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
Reflections on the Journey of the Three Strikes Law

by Mike Reynolds

Following the murder of our daughter Kimber in 1992, my wife and I invested our life's savings of $65,000 toward the enactment of a new law designed to prevent serious and violent recidivist criminals from committing new crimes and harming new victims after serving short "time outs" in prison.

As parents, we devoted our lives to providing for and investing in our children. We made sure they had proper healthcare, a good education, and that they were instilled with values that would make them good citizens. The one thing that we could not prepare them for was to go out into a world where they would be confronted by violent criminals, fresh out of prison and high on drugs. It took three years of our lives to turn Three Strikes and You're Out into law.

Prior to the enactment of Three Strikes, opponents of the initiative made many predictions and projections.

1. In five years, California would need 20 more prisons.
2. By the year 2000, the California prison population would be over 250,000.
3. The California court system would be jammed with cases.

From the beginning, we believed that a 10-year time span would replace the negative predictions with positive facts that could be substantiated by a performance-based evaluation. In evaluating any law, three things should be considered.

1. Is it accomplishing what it promised (e.g., reducing crime)?
2. Is it cost effective (e.g., how many prisons have been added)?
3. Is it fair (e.g., is each case evaluated on its own merits)?

It is clear that Three Strikes has met these tests rather well. Even so, I cannot help remembering a conversation I had with a man at a dinner party shortly after the passage of Three Strikes. He was the chief of staff for a well-known, liberal legislator in Sacramento. My question to him was, "In 10 years, if crime is down, no new prisons have been built, and it is clear that Three Strikes works, will you still oppose it?" His answer was, "Yes." I asked him why. He responded, "Ideology." I pressed him further, "If the law works, how will you oppose it?" He answered, "No matter what kind of law, you can always find a case that you can point to as unjustly applied … and that becomes the lever to undo it."

Indeed, he was correct. Today, regardless of how well Three Strikes has worked or how cost effective it has been, there is, and will continue to be, an effort to dismantle it. While Three Strikes has been policy at its best, it has also, unfortunately, been politics at its worst.

No one can hurt my daughter any more. But for those who have children and grandchildren and want to provide an environment for them to live and grow, free from the street violence that cost our family so dearly, I have a message. Stay committed. If freedom belongs to the vigilant, then be vigilant and keep Three Strikes strong. Law-abiding citizens should not and cannot live in fear.

Mike Reynolds spearheaded the Three Strikes initiative in 1994.
Doing Time on the Installment Plan: Three Strikes Defendants Profiled

by Thomas Sneddon

Editor's Note: This article was originally published in 2000 and was based on the author's approximately five years of experience at the time with California's Three Strikes law.

In the late 1970s, 80s, and early 90s, they were called “career criminals,” and virtually every prosecutor’s office had a specialized unit devoted to handling them. These were the 20 percent of the criminals whom a RAND study said were responsible for 80 percent of the crime.¹ Then, in the late 1980s and early 90s, the use of violence and weapons to commit crime escalated to unacceptable dimensions. Enter the Three Strikes law as the Legislature's and the public's response to their safety concerns.

So, who are the Three Strikes offenders? What are their profiles? What resources—human, societal, and criminal justice—are they already consuming, and what is their impact?

Three Strikes Offender Profile
Santa Barbara County

Average age — 31+
Average new arrest — every 5.9 months
Average new conviction — every 9 months
Average per offender — 3.4 felony convictions; 3.5 adult probations; 2.2 probation failures; 2.6 state prison commitments; 2.7 paroles; 2.4 parole revocations
Average adult custody time — 87.3 months (7.3 years)

The average Three Strikes defendant in Santa Barbara County is just over 31 years of age. Almost half have extensive juvenile records with formal criminal-justice contacts beginning as early as age 11, and at the latest, at age 14. Some are illegal aliens. None of the juvenile arrests, probations, adjudications, or custodial commitments has been factored into the following early-profile statistics.

An analysis of the 13 adult years—from age 18 to the average profile age of 31—reveals the group has spent 59 percent of their adult life in custody. In reality, they are already doing time on the installment plan. They average a new arrest once every six months. They suffer a new conviction once every nine months and a new probation every 20.4 months. They are convicted of a new felony every 18 months. The criminal histories detailing their frequent and repeated contacts with the criminal justice system are startling enough, but more significantly, they demonstrate the magnitude of the criminal justice resources that their unlawful behavior consumes.

Parole and probation attempts are equally notable for their failures and inordinate consumption of criminal justice resources. The group averages 3.5 adult probations with a failure rate of 64 percent. The parole average was 2.7 with a failure rate of 81 percent. The offenders' probation reports chronicle repeated attempts toward rehabilitation, replete with participation in drug and alcohol programs. The recurring nature of those failures speaks volumes about the inevitability of these offenders' chances of successfully living a crime-free life, much less a productive one. Their rate of commitment to state prison is also high. Their average total time sentenced to prison is over 10 years, eight months. That is significant because in the past, they received a 50 percent credit; thus, they actually served only five years and four months of that time. Under the Three Strikes law, credits are reduced to only 20 percent. Had the Three Strikes reduced-credit provisions been the law earlier, each Three Strikes defendant would have had eight fewer arrests, 2.4 fewer felony convictions, and 1.8 fewer state prison commitments.

The RAND study estimates substantial crime reduction from Three Strikes.² A RAND study devoted to analyzing the impacts of the Three Strikes law generally concedes its impact on crime reduction and victims. It seems ironic that we are so willing to invest millions into prevention and rehabilitation programs that have historically proven only marginally successful, and yet we hesitate and call too costly a similar investment when RAND concluded that for every $1 million spent implementing the Three Strikes law, we would prevent four rapes, 11 robberies, 24 aggravated assaults, 22 burglaries of a serious nature, and one arson.³ Put in these human terms, taxpayers and voters have little question what their first choice would be. The vast majority would see it as one of the few good government returns on their investment and, as such, explains much about why the public at large supported and continues to support the Three Strikes law.

The Three Strikes concept is a sound one. Moreover, its detractors' almost myopic focus on the prison costs and prison population affords no recognition to the deterrent effects of Three Strikes and the assured reduction in crime victimization.

Thomas Sneddon served six terms as the District Attorney of Santa Barbara County (1982–2006). He also served as President of the California District Attorneys Association and as a member of the Board of Directors of the National District Attorneys Association.

2. Id.
3. Id.
4. Id. at 19.
Since the 2004 publication of the Prosecutors’ Perspective on California’s Three Strikes Law by the California District Attorneys Association, more than 40 published opinions dealing with the Three Strikes law have been issued by California courts. These opinions cover a range of issues from what qualifies as a valid strike prior, court discretion to dismiss priors, to claims of cruel and unusual punishment. This article highlights these case developments.

QUALIFICATION AS A VALID STRIKE OFFENSE

Several published cases address the requirements for convictions to qualify as strike priors in California. These cases address out-of-state convictions, gang-related offenses, as well as issues of timing and proof.

Out-of-State Convictions

People v. Laino (2004) 32 Cal.4th 878. The Supreme Court of California held that the defendant’s Arizona plea to aggravated assault qualified as a strike prior despite the fact that the defendant had successfully completed a “diversion” program in Arizona and had the case dismissed. The court held that California courts need not give full faith and credit to penal judgments of other states, and that California courts are free to determine whether an out-of-state plea qualifies as a conviction under the Three Strikes law.

People v. Carter (2005) 36 Cal.4th 1114. The California Supreme Court held that the defendant’s residential burglary convictions from Oregon and Alaska qualified as strike priors in California. Although the foreign burglary statutes failed to meet the “least adjudicated elements” test in that they required only an intent to commit “any crime” rather than larceny or any felony, an examination of the record of conviction demonstrated that defendant committed an offense that qualified under the California burglary statute.

People v. McGee (2006) 38 Cal.4th 682. The trial court found that the defendant’s Nevada robbery convictions failed to meet the “least adjudicated elements” test, but the record of conviction showed that they involved conduct that met all the elements of the California robbery statute. The California Supreme Court held that the trial court properly concluded that the Nevada convictions qualified as strikes. The trial court’s refusal to let the validity of the strike priors be decided by a jury did not violate the defendant’s constitutional right to a jury trial, notwithstanding the holding in Apprendi.

Additional cases held that under the “least adjudicated elements” test, neither a Nebraska conviction for child sexual assault, nor a Utah conviction for aggravated robbery qualified as a strike prior in California. Similarly, a Texas burglary and robbery conviction was held insufficient to qualify as strike priors in California.

Gang Enhancements

Several published cases addressed the issue of gang enhancements in the Three Strikes context.

People v. Briceno (2004) 34 Cal.4th 451. The California Supreme Court held that Proposition 21, the Gang Violence and Juvenile Crime Prevention Act, makes a serious felony of any felony offense committed for the benefit of a criminal street gang within the sentence enhancement provisions of Penal Code section 186.22(b)(1) as well as the substantive offense of active participation in a criminal street gang in Penal Code section 186.22(a).

People v. Bautista (2005) 125 Cal.App.4th 64. The court of appeal held that imposition of a five-year, serious-felony-prior enhancement was permissible because, even though the trial court erred by not submitting the question of personal use of a firearm to the fact finder, the jury’s true finding on the Penal Code section 186.22 allegation was deemed tantamount to a finding that the current offense was a “serious felony.” It was held improper, however, to impose an additional five-year gang enhancement under section 186.22(b)(1)(B), which applies to gang crimes that qualify as serious felonies under section

On remand, the court of appeal considered and agreed with the defendant's claim that his Eighth Amendment right against cruel and unusual punishment was violated by the 25-years-to-life sentence.

**People v. Martinez (2005) 132 Cal.App.4th 531.** The court of appeal rejected the claim that Penal Code section 654 required the trial court to stay any additional punishment for a true finding on a Penal Code section 186.22 enhancement because that finding was based on the same act or conduct used to support a serious-felony enhancement under Penal Code section 667(a)(1). The court held that the five-year gang-enhancement penalty may be imposed so long as the current felony is serious for some reason other than the conduct that brings section 186.22(b)(1) into play in the first place.

**People v. Watts (2005) 131 Cal.App.4th 589.** The court of appeal held that the defendant's plea to the crime of carrying a loaded firearm in public did not qualify as a serious-felony prior because the plea did not necessarily include an admission to every element of Penal Code section 186.22(a). Without proof of every element of the gang statute, a conviction fails to meet the requirements of Briceno.

**Timing Issues**

**People v. Medina (2005) (S137729).** Review granted and opinion superceded November 30, 2005. Previously published at 132 Cal.App.4th 149. The court of appeal addressed the question of when a conviction becomes effective for Three Strikes purposes. At his trial, Medina attacked the prosecutor in open court immediately following the reading of a jury's guilty verdict but before the jury was polled. The court held that the defendant had been “convicted” of the prior crime at the time he committed the new offense.

**Proof of Great Bodily Injury or Weapons Use in Assault Offenses**

Two published cases emphasize the requirement that Penal Code section 243(d) battery and section 245 assault convictions are not strike offenses unless they involve findings of great bodily injury or personal use of a deadly weapon. A conviction for battery with serious bodily injury is not automatically a serious felony under Three Strikes because the definitions of serious bodily injury and great bodily injury are different. An ambiguous reference in the abstract of judgment, listing the offense as “[a]ssault causing great bodily injury with a deadly weapon” is insufficient to qualify the offense as a strike prior.

**CRIMINAL THREATS AND WITNESS INTIMIDATION**

Two cases discuss this. All felony violations of Penal Code section 136.1, prohibiting intimidation of victims or witnesses, are serious felonies for purposes of the Three Strikes law. In addition, all felony violations of Penal Code section 422, formerly known as “terrorist threats,” are strike offenses, not solely threats of violence against government or community.

**DISCRETION TO DISMISS STRIKE PRIORS UNDER ROMERO**

Several cases addressed the issue of the court’s discretion to dismiss strike priors in the furtherance of justice, as authorized by the Romero decision.

**People v. Carmony (2004) 33 Cal.4th 367.** The sentencing court declined to dismiss any of the Three Strikes priors of a defendant currently charged with failing to register under Penal Code section 290. The court focused on defendant’s lengthy criminal history, which included two Penal Code section 245 assaults, a section 288(a), two other section 290 convictions, and “a yearly visit to prison most of his adult life.” The court concluded that these factors, together with defendant’s poor work record and lack of future prospects, showed he “certainly” fit within the intent of the Three Strikes law.

The defendant appealed and the court of appeal reversed, holding that the trial court abused its discretion by not dismissing any of the defendant’s strike priors. The court of appeal focused exclusively on the current offense, characterizing it as “the most technical violation of the Penal Code section 290 registration requirement we have seen.” The California Supreme Court then reversed the court of appeal and remanded the case. The supreme court held that the trial court properly balanced all the relevant factors while the court of appeal wrongly focused solely on the current offense. The trial court did not abuse its discretion in concluding that the defendant fit within the intent of the Three Strikes law.

11. On remand, the court of appeal considered and agreed with the defendant’s claim that his Eighth Amendment right against cruel and unusual punishment was violated by the 25-years-to-life sentence.
People v. Burgos (2004) 117 Cal.App.4th 1209. The court held that the failure to dismiss one of the defendant’s two related strike priors was an abuse of discretion where the prior convictions for attempted carjacking and attempted robbery arose from a single act, statutes defining those offenses precluded punishment for both, the defendant’s other criminal history consisted of misdemeanors, and the defendant’s current offenses of second-degree robbery and assault were not particularly serious.

People v. Thimmes (2006) 138 Cal.App.4th 1207. The sentencing court was leaning in favor of dismissing a strike, but decided against doing so based on the judge’s erroneous belief that the defendant had been advised at the time of his earlier Penal Code section 422 plea that the conviction could be used as a strike prior in the future. The failure to correct the court’s misimpression amounted to ineffective assistance of counsel requiring reversal and a remand for a new Romero hearing.

People v. Wallace (2004) 33 Cal.4th 738. The California Supreme Court held that a lower court abused its discretion by dismissing a strike prior solely because the magistrate at the preliminary examination declined to hold the defendant to answer.

People v. Philpot (2004) 122 Cal.App.4th 893. The refusal to dismiss the prior serious felony convictions of a defendant convicted of unlawfully taking and driving a vehicle, grand theft, and misdemeanor battery was not an abuse of discretion. The court relied on the defendant’s continuous criminal history, his parole violations, the seriousness of present and past offenses, and the seemingly grim prospects for rehabilitation.

**CALCULATION OF SENTENCE**

Several cases address the areas involved in calculating sentences, including multiple counts, conduct credits, statute of limitations, retrial of priors allegations, and claims of cruel and unusual punishment.

Multiple Counts

People v. Williams (2004) 34 Cal.4th 397. The California Supreme Court held that while serious-felony-prior enhancements can only be applied once in a determinate-term sentence, serious-felony-prior enhancements are to be applied individually to each count of a Three Strikes case sentenced indeterminately.

People v. Misa (2006) 140 Cal.App.4th 837. The court allowed the imposition of a serious-felony-prior enhancement on the indeterminate term for the offense of torture, notwithstanding that the enhancement was also imposed on the determinate term for an assault count in the same case.

People v. Coker (2004) 120 Cal.App.4th 581. The defendant’s sentence on two counts of robbery was properly calculated by adding two enhancements for discharge of a firearm (Penal Code section 12022.53(c)) and discharge of a firearm causing great bodily injury (Penal Code section 12022.53(d)), notwithstanding a provision limiting imposition of these enhancements when another provision of law provides for a longer term of imprisonment. Although the defendant was sentenced pursuant to the Three Strikes law, which resulted in a longer term of imprisonment than the firearm enhancements, the limiting language was construed to refer to other sentencing-enhancement statutes, which did not include the Three Strikes law.

People v. Casper (2004) 33 Cal.4th 38. The California Supreme Court held that the Three Strikes law required imposition of consecutive sentences for all of the defendant’s 35 current felony convictions, even though the trial court had dismissed the strike allegations as to all but one count. Unless the crimes arose in the same occasion, consecutive sentencing was required.

**Conduct Credits**

People v. Philpot (2004) 122 Cal.App.4th 893. The court held that the defendant was entitled to presentence conduct credits even though he was sentenced to an indeterminate term under the Three Strikes law.

In re Young (2004) 32 Cal.4th 900. The Supreme Court held that a 12-month reduction of sentence, available to an inmate who performed a heroic act, was not subject to the 20 percent limitation on sentencing credits imposed under the Three Strikes sentencing scheme.

**Statute of Limitations**

People v. Turner (2005) 134 Cal.App.4th 1591. The court held that the maximum punishment for an offense, which is the basis for determining the appropriate statute of limitations, refers to the punishment prescribed for the commission of the offense itself, without regard to the alternate indeterminate life term that may be imposed pursuant to the Three Strikes law.

Retrial of Priors Allegations

**People v. Barragan (2004) 32 Cal.4th 236.** The Supreme Court of California held that retrial of a strike allegation is permissible where a trier of fact finds the allegation to be true but an appellate court reverses the finding for insufficient evidence. The prosecution is not required to establish that it had discovered new evidence that could not have been presented at the first trial through the exercise of due diligence.\(^{12}\)

Claims of Cruel and Unusual Punishment

**People v. Carmony (2005) 127 Cal.App.4th 1066.** The court of appeal held that punishment of 25 years to life was so grossly disproportionate to the defendant's technical violation of the sex-offender-registration law as to violate state constitutional proscription against cruel or unusual punishment.

**People v. Meeks (2004) 123 Cal.App.4th 695.** The court of appeal held that the defendant's failure to register on his birthday and on a change of address were each separate, continuing offenses. The court held that a sentence of 25 years to life did not constitute cruel and/or unusual punishment under the state or federal constitutions.

**People v. Poslof (2005) 126 Cal.App.4th 92.** The court of appeal held that a Three Strikes sentence of 25 years to life following a Penal Code section 290 conviction was not a cruel and unusual punishment. Upon review of all the evidence in the case, as well as a consideration of factors such as protecting society, the court concluded that the defendant's lengthy sentence is a permissible means of punishing defendant and deterring others from committing future crimes.

**Ramirez v. Castro (2004) 365 F.3d 755.** The Ninth Circuit held that the petitioner's 25-years-to-life sentence for his third-strike offense of petty theft with a prior was grossly disproportionate to the crimes committed in violation of the Eighth Amendment. The core conduct of the petitioner's third offense was a nonviolent shoplift of a $199 VCR, and his prior criminal history was comprised solely of two convictions for second-degree robbery, which arose from relatively minor shoplifting incidents.

**Banyard v. Duncan (2004) 342 F.Supp.2d 865.** The federal district court held that the defendant's 25-years-to-life sentence for possession of a single-use quantity of cocaine violated the gross disproportionality principle of the Eighth Amendment's cruel and unusual punishment clause. The court based its ruling on the five-year maximum penalty without Three Strikes law, the lack of clear criminal pattern, and the non-egregious nature of the current offense.

Michael Zachry is a Deputy District Attorney in San Diego County.
The Factors a District Attorney Uses to Decide Whether to Pursue a Three Strikes Case

In 2004, the California District Attorneys Association led the successful opposition to Proposition 66. After the election, a Three Strikes Committee was created to educate the public about the Three Strikes law and its application. Under the leadership of Contra Costa District Attorney Robert Kochly and San Bernardino County Deputy District Attorney Dwight Moore, the committee surveyed all 58 district attorney offices in California and solicited input from all counties on how Three Strikes cases were prosecuted across the state. The following list of suggested guidelines for filing a Three Strikes case were developed from the information gathered and approved by the Board of Directors.

The following “interest of justice” factors are considered in deciding whether to pursue a case under the Three Strikes law:

I. The nature and circumstances of the present offense, including, but not limited to:
   A. Seriousness of present offense
      1. Serious or violent felony
      2. Extent of injury
      3. Weapon involvement
   B. Extent of defendant’s involvement
   C. Whether defendant was on probation or parole or in prison at time of offense
   D. Other facts relating to the crime(s) in either aggravation or mitigation under California Rules of Court 4.421(a) and 4.423(a).

II. The particulars of the defendant’s background, character and prospects, including, but not limited to:
   A. Defendant’s age and history or pattern of criminality
   B. Facts of strike priors
   C. Age/remoteness of strike priors
   D. Length of time between criminal acts and custodial status during that time
   E. Dangerousness to community
   F. History of violence
   G. History of weapons possession or use
   H. Number of prior prison commitments
   I. Other facts in aggravation or mitigation relating to the defendant under California Rules of Court 4.421(b) and 4.423(b).

III. After consideration of these factors, does the defendant and/or the defendant’s conduct fall outside the spirit of the Three Strikes law, either in whole or in part? (See People v. Williams (1998) 17 Cal.4th 148.)
Statewide Three Strikes Commitments by Year

Each year since the implementation of the Three Strikes law, the number of convictions statewide has steadily declined, as those who repeatedly commit serious/violent crime have been incarcerated and thus unable to re-offend. In 1996, a Three Strikes sentence was imposed on 1,248 defendants, but the number dropped to 684 in 2000. During 2006, only 243 California defendants received a Three Strikes sentence. As a result, less than 0.2% of all persons prosecuted for a felony in 2006 were ultimately sentenced under the Three Strikes law.

Three Strikes Timeline—1994 to Present


1995  AB 1444 (Kuehl) — opposed by CDAA / failed to pass out of Assembly Public Safety Committee.


SB 1998 (Vasconcellos) — opposed by CDAA / vetoed by Governor Wilson.

1999  AB 2447 (Wright and Washington) — opposed by CDAA / failed passage on Assembly floor.
SB 79 (Hayden) — opposed by CDAA / failed passage on Senate floor.
SB 873 (Vasconcellos) — opposed by CDAA / vetoed by Governor Davis.

2001  AB 1652 (Goldberg) — opposed by CDAA / failed passage.
AB 1790 (Goldberg) — opposed by CDAA / failed to pass out of Senate Appropriations Committee.


2003  AB 112 (Goldberg) — opposed by CDAA / sent to inactive file at author’s request.

2004  Proposition 66 defeated on November 2, 2004 by 52.7% of California voters.

SB 1642 (Romero) — opposed by CDAA / never removed from inactive file.

2007  AB 1133 (Dymally) — opposed by CDAA / failed to pass out of Assembly Public Safety Committee.
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