

## **Career Criminals Targeted:**

### **The Verdict Is In, California's Three Strikes Law Proves Effective**

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## **INTRODUCTION**

Cladius Johnson is no stranger to crime. In 1979 he was convicted of gang-rape. In 1985 he punched a woman in the face and stole her purse. In 1988 he was sentenced to sixteen months for carrying an automatic machine gun. Had

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California's Three Strikes law been in effect, he could have received a sentence of twenty-five years to life. Instead, he was released and in 1989 he assaulted a woman with a deadly weapon. In 1995 he choked and beat his wife into unconsciousness. Under California's Three Strikes law he received a sentence of twenty-five years to life for this last crime.<sup>1</sup> 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.<sup>2</sup>

Since its inception, California's Three Strikes law has generated controversy. Aimed at incarcerating career criminals, it has been tagged as one of the toughest "tough on crime" statutes in the country. Has it been effective? Supporters say yes and point to individuals like Johnson, a criminal recidivist who is serving a long prison sentence.<sup>3</sup> Opponents say no and argue that the law is overbroad because it hands down twenty-five years to life sentences for minor offenses like shoplifting a few videos<sup>4</sup> or stealing golf clubs.<sup>5</sup>

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<sup>1</sup> California District Attorneys Association, *Prosecutors' Perspective on California's Three Strikes Law – A 10-Year Retrospective* 5-6 (2004), <http://www.cdaa.org/WhitePapers/ThreeStrikes.pdf> [hereinafter "Retrospective"].

<sup>2</sup> See, e.g., *id.* at 7-8 (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 twenty-eight 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).

<sup>3</sup> See, e.g., Bill Jones, *Why the Three Strikes Law Is Working in California*, 11 STAN. L. & POL'Y REV. 23, 24 (1999).

<sup>4</sup> See, e.g., Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 932-33 (2004) (citing such cases as *Lockyer v. Andrade*, 538 U.S. 63 (2003)).

<sup>5</sup> See, e.g., Legislative Analyst's Office, *A Primer: Three Strikes, the Impact After More Than a Decade* 12 (2005), <http://www.lao.ca.gov/PubDetails.aspx?id=1342> [hereinafter "Primer"] (citing *Ewing v. California*, 538 U.S. 11, 14 (2003)).

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. The second part of this article sets forth three reasons why the Three Strikes law has proved effective: (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 eighteen 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 twenty-five years to life committed more than three serious or violent felonies.<sup>6</sup>

## **HISTORY OF THREE STRIKES LEGISLATION<sup>7</sup>**

The murder of two young girls in the early 1990s raised California's public awareness of the problems associated with criminal recidivism. In 1992,

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<sup>6</sup> See generally Jennifer E. Walsh, *Tough for Whom? How Prosecutors and Judges Use Their Discretion to Promote Justice Under the California Three-Strikes Law* 27 (2004), <http://www.cdaa.org/CDAAMember/WalshMono.pdf> (concluding that nearly two-thirds of all incarcerated third-strikers committed, as their final felony, a serious or violent felony).

<sup>7</sup> See generally *Ewing*, 538 U.S. at 14 (explaining the history of California's Three Strike law).

eighteen-year-old Kimberly Reynolds was murdered during an attempted purse-snatching by a paroled felon whose criminal history included auto theft, gun, and drug charges.<sup>8</sup> After her death, in April 1993, Kimberly'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 which provided for sentences of twenty-five years to life in prison for certain recidivist offenders. However, the bill was unsuccessful.<sup>9</sup>

Then, only a few months after the bill was struck down, twelve-year-old Polly Klaus 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.<sup>10</sup>

By March 1994, the Legislature, by a large majority, passed the Three Strikes bill,<sup>11</sup> which was signed into law and codified in California Penal Code sections 667(b)-(i). That same month, Kimberly's father spearheaded a three

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<sup>8</sup> Scott A. Grosskreutz, Comment, *Strike Three: Even Though California's Three Strikes Law Strikes Out Anadrade, There Are No Winners in This Game*, 43 WASHBURN L.J. 429, 433-34 (2004).

<sup>9</sup> Dan Morain, *A Father's Bittersweet Crusade*, L.A. TIMES, Mar. 7, 1994, at A1.

<sup>10</sup> Grosskreutz, *supra* note \_\_\_\_, at 433.

<sup>11</sup> The Assembly passed the bill by a 63-9 vote, and the Senate passed the bill by a 29-7 vote. *Official California Legislative Information, Complete Bill History for AB 971*, [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab\\_0951-1000/ab\\_971\\_bill\\_history](http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_0951-1000/ab_971_bill_history) (last visited Mar. 1, 2006).

strikes initiative (Proposition 184) gathering over 800,000 signatures.<sup>12</sup> In November of the same year, California voters approved Proposition 184 by seventy-two percent. The new law was codified in California Penal Code section 1170.12.<sup>13</sup> The approved ballot initiative, which is “virtually identical” to section 667,<sup>14</sup> can only be amended or repealed by a new ballot measure or by two-thirds vote of the Legislature.<sup>15</sup>

### THREE STRIKES LAW NOW

**Intent of 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.”<sup>16</sup> The court has 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.<sup>17</sup> As Justice 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

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<sup>12</sup> *Three Strikes and You're Out: Stop Repeat Offenders, Re: Mike's Response to Anne Gearan's*, 9 April 2003, AP Justice Kennedy/Three Strikes Article, 2003 April, [http://www.threestrikes.org/mrcomments\\_6.html](http://www.threestrikes.org/mrcomments_6.html) (last visited Mar. 1, 2006).

<sup>13</sup> Institute of Governmental Studies, University of California, *Proposition 66: Limitation on the Three Strikes Law*, [http://www.threestrikes.org/mrcomments\\_6.html](http://www.threestrikes.org/mrcomments_6.html) (last visited Mar. 1, 2006).

<sup>14</sup> *People v. Hazelton*, 14 Cal. 4th 101, 105 (1996) (finding that sections 667 and 1170.12 were “virtually identical”).

<sup>15</sup> CAL. PENAL CODE § 667(j) (West 2006). See also *Hazelton*, 14 Cal. 4th at 105 (stating that “[T]he proponents of the initiative stated that its purpose was to ‘strengthen’ the legislative version”).

<sup>16</sup> § 667(b).

<sup>17</sup> See, e.g., *People v. Fowler*, 72 Cal. App. 4th 581 (Ct. App. 1999); *People v. White Eagle*, 48 Cal. App. 4th 1511 (Ct. App. 1996).

reduce serious and violent crime.”<sup>18</sup> The focus of the law, therefore, is on the defendant’s conduct – namely whether the defendant has failed to obey the law in the past.<sup>19</sup>

**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<sup>20</sup> 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.<sup>21</sup>

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 twenty-five years to life.<sup>22</sup>

**Requirement of Prior Serious or Violent Felony:** For either provision to be triggered, the defendant must have been convicted of a “serious or violent felony.” A serious or violent felony includes such crimes as murder, rape,

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<sup>18</sup> James A. Ardaiz, *California’s Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 12 (2000).

<sup>19</sup> See *People v. Fowler*, 72 Cal. App. 4th 581 (Ct. App. 1999).

<sup>20</sup> CAL. PENAL CODE § 667(f)(1).

<sup>21</sup> § 667(e)(1).

<sup>22</sup> §§ 667(e)(2)(A)(i)-(iii). Note that Proposition 21 (effective on Mar. 8, 2000 and codified as section 667.1 of the Penal Code) made some changes in statutes to which the Three Strikes law refers, including those relating to violent and serious felonies. Section 667.1 applies to offenses committed on or after March 8, 2000; however, for offenses committed before then, statutes are applied as they existed on June 30, 1993. See CAL. PENAL CODE §§ 667(h) and 667.1.

robbery, kidnapping, and carjacking.<sup>23</sup> Prior convictions count, regardless of when they occurred,<sup>24</sup> and regardless if they are out-of-state so long as the conviction would be an equivalent offense in California.<sup>25</sup>

While the prior felony has to be serious or violent, the current felony charged does not have to be so.<sup>26</sup> It is this last provision of the statute that has caused much controversy over California's Three Strikes law. While many other states and the federal government, have sentencing statutes aimed at career criminals similar to Three Strikes, most of these laws require that the final strike also be a serious or violent felony.<sup>27</sup>

## **REASONS WHY THE LAW IS EFFECTIVE**

The Three Strikes law has been in effect for more than ten years. Thus, time has passed for data to be collected and for the law to undergo legal challenges. As set forth in this section, there are three main reasons why a look at the Three Strikes law since its enactment shows that it has been effective; specifically (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.

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<sup>23</sup> § 667(d)(1) (referring to section 667.5(c) (defining serious felonies) and section 1192.7(c) (defining violent felonies)).

<sup>24</sup> § 667(c)(3).

<sup>25</sup> § 667(d)(2). Sections 667(d)(3)(A)-(E) provide the occasions when a juvenile adjudication counts as a strike.

<sup>26</sup> §§ 667(e)(1), (e)(2)(A).

<sup>27</sup> See, e.g., *Ewing*, 538 U.S. at 15, 24. See also *People v. Ruiz*, 44 Cal. App. 4th 1653 (Ct. App. 1996) (California's Three Strikes scheme is consistent with nationwide pattern of substantially increasing sentences for habitual offenders).

## 1. Data suggest that the theoretical goals of Three Strikes are being met:

There at least two theoretical reasons that support the legislative intent of California's Three Strikes law. First, supporters of the law believed it would have an incapacitation effect. This means that repeat offenders would be jailed for longer periods of time, during which they would be incapable of committing new crimes.<sup>28</sup> Second, supporters of the law believed it would have a deterrent effect, meaning that possible offenders would be deterred from committing crimes because of the potential for harsher sentences under the Three Strikes law.<sup>29</sup> The statistics of the last decade imply that the Three Strikes law has had both an incapacitation and deterrent effect.

**Incapacitation Effect:** One observation that suggests that the Three Strikes law has had an incapacitation effect is that the number of sentenced third-strikers has declined every year since 1996.<sup>30</sup> A similar decline has occurred with second-strikers.<sup>31</sup> Indeed, some claim that the drop in capital sentences since 2000 may be linked to the Three Strikes law.<sup>32</sup> One possible interpretation of this 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.

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<sup>28</sup> *Ewing*, 538 U.S. at 14.

<sup>29</sup> *Id.* See also *Primer*, *supra* note \_\_\_, at 31.

<sup>30</sup> See California Department of Corrections and Rehabilitation, *Inmates with Two and Three Strikes*, [http://www.corr.ca.gov/divisionsboards/csa/fsod/jail\\_profile\\_summary/jps\\_annual\\_rep\\_99/2\\_3\\_strike\\_inmates.doc](http://www.corr.ca.gov/divisionsboards/csa/fsod/jail_profile_summary/jps_annual_rep_99/2_3_strike_inmates.doc) (last visited Mar. 1, 2006); *Retrospective*, *supra* note \_\_\_, at 17-18.

<sup>31</sup> *Id.*

<sup>32</sup> Phillip Reese, *Fewer Are Sent to Death: Experts Divided On Reasons Why Capital Sentences Have Declined Since 2000*, SACRAMENTO BEE, Feb. 18, 2006.

Moreover, inmates who are strikers have more serious criminal histories than non-strikers.<sup>33</sup> 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.<sup>34</sup>

**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.<sup>35</sup> A 1999 FBI study determined that "since California enacted its three strikes law in 1994, crime has dropped 26.9 percent, which translates to 815,000 fewer crimes."<sup>36</sup> While numerous social and economic factors underlie crime rates,<sup>37</sup> 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,

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<sup>33</sup> A report from the Legal Analyst's Office, which is critical of the Three Strikes law, concedes that on average second- and third-strikers "have been convicted for an average of three prior felony offenses, including an average of two prior serious or violent felonies. By comparison, the rest of the inmate population has an average of one prior felony offense, including 0.2 serious or violent felonies." *Primer*, *supra* note \_\_\_, at 18.

<sup>34</sup> See, e.g., Andy Furillo, *Three Strikes – The Verdict: Most Offenders Have Long Criminal Histories*, SACRAMENTO BEE, Mar. 31, 1996, at A1 (an investigative article concluding that, "[I]n the vast majority of the cases, regardless of the third strike, the [law] is snaring long-term habitual offenders with multiple felony convictions").

<sup>35</sup> California Department of Justice, Office of the Attorney General, *Crime in California, 1983-2003*, <http://caag.state.ca.us/cjsc/glance/cht1.htm> (last visited Mar. 15, 2006). See also Bill Jones, *Why the Three Strikes Law is Working in California*, 11 STAN. L. & POL'Y REV. 23, 24 (1999) (giving statistics for the drop in specific types of violent crime in California, and also comparing California's drop in the crime rate to the nation's crime rate).

<sup>36</sup> John R. Schafer, *The Deterrent Effect of the Three Strikes Law*, *FBI Law Enforcement Bulletin*, Apr. 1999, [http://www.threestrikes.org/tsperspective\\_1.html](http://www.threestrikes.org/tsperspective_1.html).

<sup>37</sup> See, e.g., Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1082-96 (2004).

several studies and surveys have concluded that the Three Strikes law has had a deterrent effect.<sup>38</sup>

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.<sup>39</sup> A more recent study determined 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."<sup>40</sup> 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.<sup>41</sup>

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.<sup>42</sup> In the plurality opinion of *Ewing v. California*, U.S. Supreme Court Justice O'Connor noted this

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<sup>38</sup> See, e.g., Ardaiz, *supra* note \_\_\_, at 12-15; California Department of Justice, Office of the Attorney General, *Three Strikes and You're Out – Its Impact on the California Criminal Justice System After Four Years* at 8-10 (1998) [hereinafter "1998 Attorney General Report"]. But see Vitiello, *supra* note \_\_\_, at 1082-96 (2004); Franklin E. Zimring et al., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001).

<sup>39</sup> Jon Matthews, *Benefit of the Three Strikes Disputed*, THE FRESNO BEE, Nov. 9, 1999, at A11. See also Brian P. Janiskee & Edward J. Erlner, *Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law*, 39 DUQ. L. REV. 43, 45-46 (2000) ("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)).

<sup>40</sup> Eric Helland & Alexander Tabarrok, *Does Three Strikes Deter? A Non-Parametric Estimation* 12, <http://www.threestrikes.org/ThreeStrikesATaba.pdf> (last visited Mar. 15, 2006).

<sup>41</sup> Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two-and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159 (2002). But see Vitiello, *supra* note \_\_\_, at 1090-96.

<sup>42</sup> Jones, *supra* note \_\_\_, at 24-25. See also Bill Jones, *Three Strikes and You're Out Five Years Later* (1998), [http://www.threestrikes.org/bjones98\\_pgtwo.html](http://www.threestrikes.org/bjones98_pgtwo.html).

trend: “[A] 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.”<sup>43</sup> 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 case loads, are specially trained to work with second-strikers.<sup>44</sup> As of March 2005, there were approximately 12,000 second-striker parolees under this specialized supervision.<sup>45</sup> 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 twenty million dollars annually.<sup>46</sup> Based on this

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<sup>43</sup> *Ewing*, 538 U.S. at 26 (citing 1998 Attorney General Report, *supra* note \_\_\_, at 10).

<sup>44</sup> *Primer*, *supra* note \_\_\_, at 21-22.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 22.

number the average yearly cost to the state per parolee is about \$1,700.<sup>47</sup> In comparison, however, the average yearly cost to the state per inmate is \$33,581.<sup>48</sup> Thus, it costs approximately twenty times more every year to jail an offender than to keep a second-striker under specialized parole.<sup>49</sup> Given the enormous disparity between these costs it seems likely that the program, even if it is only moderately successful, makes economic sense, not to mention the positive impact it has on preventing the human suffering of the would-be crime victim.

## **2. 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.<sup>50</sup> However, the numbers over the last ten 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.<sup>51</sup> Instead, the expenditures for Youth and Adult Corrections have remained a relatively constant fraction of the state budget over the last ten years. The expenditures in fiscal year 2004-05 amounted to 8.6% of the overall

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<sup>47</sup> This number is derived by dividing the cost (\$20 million) by the number of parolees (12,000).

<sup>48</sup> California Department of Corrections, [http://www.corr.ca.gov/CommunicationsOffice/facts\\_figures.asp](http://www.corr.ca.gov/CommunicationsOffice/facts_figures.asp) (last visited Mar. 15, 2006).

<sup>49</sup> This number is derived by dividing the cost per year to the state for jailing an inmate (\$33,581) by the cost for a specialized parolee (\$1700).

<sup>50</sup> See, e.g., *Primer*, *supra* note \_\_\_, at 15-35. See also, e.g., Zimring, *supra* note \_\_\_; Peter Greenwood, et al., *Three-Strikes and You're Out: Estimated Benefits and Costs of the California's New Mandatory-Sentencing Law*, RAND study (1994).

<sup>51</sup> *Primer*, *supra* note \_\_\_, at 22-23.

state budget,<sup>52</sup> the same percentage as in fiscal year 1994-95 when the Three Strikes law was enacted.<sup>53</sup> 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.<sup>54</sup>

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<sup>55</sup> 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).<sup>56</sup>

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.<sup>57</sup> However, the issues associated with an aging prison population go well beyond any impact by Three Strikes<sup>58</sup> for at least three reasons.<sup>59</sup> First, the general population is getting older, and the prison

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<sup>52</sup> Legislative Analyst's Office, State of California Expenditures, *Historical Expenditures 1984-85 to 2004-05*, Section 5000 Youth and Adult Corrections, [http://www.lao.ca.gov/sections/econ\\_fiscal/Historical\\_Expenditures\\_Pivot.xls](http://www.lao.ca.gov/sections/econ_fiscal/Historical_Expenditures_Pivot.xls).

<sup>53</sup> *Id.*

<sup>54</sup> *Primer, supra note* \_\_\_, at 22-23

<sup>55</sup> See Judicial Counsel of California, *2003 Court Statistics Report: Statewide Case Load Trends 1992-1993 through 2001-2002*, Superior Courts Tables 2 & 7, <http://www.courtinfo.ca.gov/reference/documents/csr2003.pdf> (last visited Mar. 1, 2006).

<sup>56</sup> *Id.* at Superior Courts Table 3.

<sup>57</sup> *Primer, supra note* \_\_\_, 20-21; Vitiello & Kelso, *supra note* \_\_\_, at 943-47.

<sup>58</sup> See, e.g., Ardaiz, *supra note* \_\_\_, at 28 (questioning whether Three Strikes affects "old criminals").

<sup>59</sup> *Primer, supra note* \_\_\_, at 20-21.

population may simply reflect this.<sup>60</sup> Second, as of 2004, over 82% of the inmates serving a sentence under Three Strikes were second-strikers and, thus, will not be in prison for life.<sup>61</sup> Indeed, even those who are serving sentences of twenty-five 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 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, aside from eradicating Three Strikes, on how actively to address it.<sup>62</sup>

**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.<sup>63</sup> Because the prisons would be overcrowded, it was predicted that the state would have to build new prisons to house the increasing inmate population.<sup>64</sup> However, neither of these predictions came true.

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<sup>60</sup> *Id.* at 21.

<sup>61</sup> *Id.* at 15.

<sup>62</sup> See Vitiello & Clark, *supra* note \_\_\_\_, at 947-51.

<sup>63</sup> See, e.g., Greenwood, RAND study, *supra* note \_\_\_\_.

<sup>64</sup> *Primer*, *supra* note \_\_\_\_, at 23.

As of 2004, the total number of second- and third-strikers in prison was about 35,000,<sup>65</sup> less than 15% of the projected number.<sup>66</sup> Of these inmates, only about 7,500 are third-strikers.<sup>67</sup> Thus, Three Strikes has not caused an inmate population explosion. Instead, the prison population has remained generally constant since about 1998.

Moreover, the state has not had to build new prisons due to striker inmates.<sup>68</sup> 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.<sup>69</sup> In fact, even a critic of the Three Strikes law conceded that “the state has not built any new prisons specifically for striker inmates.”<sup>70</sup>

### **3. 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.<sup>71</sup> 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

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<sup>65</sup> *Id.* at 15-16.

<sup>66</sup> *See, e.g.,* Greenwood, RAND study, *supra* note \_\_\_\_; *Retrospective*, *supra* note \_\_\_\_.

<sup>67</sup> *Primer*, *supra* note \_\_\_\_, at 15.

<sup>68</sup> *Id.* at 23.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See, e.g., id.* at 15-35; Greenwood, RAND study, *supra* note \_\_\_\_; Vitiello & Clark, *supra* note \_\_\_\_, at 927-30; Zimring, *supra* note \_\_\_\_.

committed.<sup>72</sup> The law provides for a number of built-in safeguards, including drug-treatment programs<sup>73</sup> and judicial and prosecutorial discretion,<sup>74</sup> to ensure that this intent is carried out.

**Drug-Treatment Programs:** Strikers whose final felony is a nonviolent drug-related crime may be eligible to participate in a program of probation and drug treatment in lieu of a prison sentence.<sup>75</sup> 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.<sup>76</sup> Upon successful completion of the program, the charges are dismissed.<sup>77</sup>

This means that a third-striker who might have received a sentence of twenty-five 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

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<sup>72</sup> CAL. PENAL CODE § 667(b). *See also* Ardaiz, *supra* note \_\_\_\_, at 13-14.

<sup>73</sup> CAL. PENAL CODE § 1210.1.

<sup>74</sup> *See generally* Walsh, *supra* note \_\_\_\_.

<sup>75</sup> § 1210.1(a). This law, initially Proposition 36, was passed by ballot initiative in 2000 and became effective in July 2001.

<sup>76</sup> § 1210.1(b)(1). *See also* *People v. Davis*, 79 Cal. App. 4th 251 (Ct. App. 2000) (holding that the Three Strikes law does not preclude participation in deferred entry of judgment).

<sup>77</sup> § 1210.1(d).

activity. This is consistent with the spirit of the Three Strikes law which is aimed at incarcerating career criminals.<sup>78</sup>

**Judicial Discretion:** The Three Strikes law must be applied to every case that triggers the statute.<sup>79</sup> 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.<sup>80</sup> To do so the trial court must consider both the defendant's constitutional rights and the interests of society.<sup>81</sup> 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.<sup>82</sup>

The court gave further guidance to the trial courts on how appropriately to exercise discretion under section 1385(a) in *People v. Williams*.<sup>83</sup> 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 circumstances of his present felonies and

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<sup>78</sup> CAL. PENAL CODE § 667(b).

<sup>79</sup> §§ 667(f)-(g).

<sup>80</sup> *People v. Sup. Ct. (Romero)*, 13 Cal. 4th 497, 529-30 (1996).

<sup>81</sup> *Romero*, 13 Cal. 4th at 530-31 (explaining that the trial court must explain "the reasons for 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").

<sup>82</sup> *People v. Carmony*, 33 Cal. 4th 367 (2004).

<sup>83</sup> *People v. Williams*, 17 Cal. 4th 148, 161 (1998).

prior strikes; and (2) the “particulars of his background, character, and [rehabilitation] prospects.”<sup>84</sup> 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.<sup>85</sup> The court also found that there was nothing encouraging in defendant’s “background, character and prospects” that would suggest he was outside the spirit of the law.<sup>86</sup> The court emphasized that the defendant’s prior convictions included four DUIs, felony possession of a firearm, parole and probation violations, and a recent misdemeanor charge of spousal battery (a crime involving actual violence).<sup>87</sup>

There have been cases where the trial courts have successfully applied the standards set forth in *Romero* and *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.<sup>88</sup> In other cases, trial courts have also successfully exercised discretion in dismissing a prior burglary conviction as a strike,<sup>89</sup> and in dismissing two strikes where the present crime was petty theft and the prior

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 165.

<sup>86</sup> *Id.* at 162-64.

<sup>87</sup> *Id.*

<sup>88</sup> *People v. Garcia*, 74 Cal. App. 4th 310 (Ct. App. 1999) (stating, “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)).

<sup>89</sup> *In re Saldana*, 57 Cal. App. 4th 620 (Ct. App. 1997).

strikes were remote.<sup>90</sup> Thus, under this line of cases, trial judges can (and do)<sup>91</sup> 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.<sup>92</sup>

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<sup>93</sup> and grand theft.<sup>94</sup> At sentencing, trial courts on their own motions<sup>95</sup> can decide that a wobbler should have been charged as a misdemeanor pursuant to Penal Code section 17(b).<sup>96</sup> 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."<sup>97</sup>

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<sup>90</sup> *People v. Bishop*, 56 Cal. App. 4th 1245 (Ct. App. 1997).

<sup>91</sup> 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 \_\_\_, at 21-23.

<sup>92</sup> 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*, 49 Cal. App. 4th 567 (Ct. App. 1996); *People v. Thorton*, 73 Cal. App. 4th 42 (Ct. App. 1999).

<sup>93</sup> CAL. VEH. CODE § 23536.

<sup>94</sup> CAL. PENAL CODE § 490.

<sup>95</sup> The prosecutor's consent is not required for the court to reduce a wobbler to a misdemeanor. *Esteybar v. Mun. Ct.*, 5 Cal. 3d 119 (1971). 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. Super. Ct.*, 47 Cal. App. 3d 313 (Ct. App. 1975).

<sup>96</sup> CAL. PENAL CODE § 17(b).

<sup>97</sup> *People v. Super. Ct. (Alvarez)*, 14 Cal. 4th 968, 978 (1997) (citations omitted).

Applying this standard, in *Alvarez*, the California Supreme Court upheld the trial court's decision to reduce a felony drug possession charge to a misdemeanor.<sup>98</sup> Although the defendant had prior convictions for residential burglaries, defendant 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."<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup>

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.<sup>102</sup> When deciding whether to make such a motion prosecutors consider many of the same factors as set forth in *Williams*<sup>103</sup> including: (1) the nature and circumstances of the defendant's present felony and

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<sup>98</sup> *Id.* at 972-74.

<sup>99</sup> *Id.* at 981.

<sup>100</sup> CAL. PENAL CODE § 667(f)(2).

<sup>101</sup> See Walsh, *supra* note \_\_\_, at 15.

<sup>102</sup> CAL. PENAL CODE §§ 1385, 667(f)(2).

<sup>103</sup> *Williams*, 17 Cal. 4th at 161.

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.<sup>104</sup> 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).<sup>105</sup>

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. 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. In making these decisions, prosecutors consider the defendant's criminal history and aggravating and mitigating circumstances.<sup>106</sup> If a prosecutor decides to make the current charge a misdemeanor then the Three Strikes law would not be triggered at all.

Thus, if the 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.<sup>107</sup>

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<sup>104</sup> Walsh, *supra* note \_\_\_, at 20.

<sup>105</sup> *Id.* at 21-23.

<sup>106</sup> *Id.* at 28.

<sup>107</sup> One criticism of prosecutorial discretion is that it is so broad that disproportionate sentences arise. See, e.g., Primer, *supra* note \_\_\_, at 24-26; Loren Gordon, *Where to Commit a Crime if You Can*

**Impact of Safeguards:** Both judges and prosecutors routinely exercise their discretion in Three Strikes cases. In fact, according to a recent study, 25% to 45% of third-strikers will have a prior strike dismissed by either a prosecutor or trial judge.<sup>108</sup> In these cases, then, three-strikers receive a sentence less than twenty-five years to life. This could be another reason why prison population did not grow as initially predicted.<sup>109</sup>

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 twenty-five year to life sentence for any third felony (instead of a serious or violent felony). Critics often emphasize that offenders are imprisoned for twenty-five years to life because of minor offenses, such as petty theft.<sup>110</sup> 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

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*Only Spare A Few Days to Serve the Time: The Constitutionality of California's Wobbler Statutes as Applied in the State Today*, 33 S.U. L. REV. 497, 507-08 (2004) (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 \_\_\_, at 33-49.

<sup>108</sup> Walsh, *supra* note \_\_\_, at 25.

<sup>109</sup> *Id.* at 26. See also *Primer*, *supra* note \_\_\_, at 23.

<sup>110</sup> See, e.g., Vitiello & Clark, *supra* note \_\_\_, at 927-30.

thirteen-year period, not only attempted to escape from prison but also accumulated nine convictions, including five felony residential burglaries and several drug-trafficking offenses.<sup>111</sup> Although his final strike was felony theft for stealing about \$200 worth of videotapes,<sup>112</sup> his criminal history evidenced a pattern of recidivism.<sup>113</sup>

The numbers also overwhelmingly show that strikers are not serving life sentences for “petty” crimes. As of 2003, over 90% of the strikers in prison were second-strikers.<sup>114</sup> 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-strikers, felony petty theft triggered the Three Strikes law in only 5% of the cases, and drug crimes in only 17% of the cases.<sup>115</sup>

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.<sup>116</sup> That means that most third-strikers are in prison for committing at least three serious or violent felonies.

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<sup>111</sup> *Lockyer v. Andrade*, 538 U.S. 63, 63-66 (2003).

<sup>112</sup> *Id.* at 66.

<sup>113</sup> See also *People v. Riggs*, No. E019488, 1997 WL 1168650 (Cal. Ct. App. Dec. 17, 1997) (unpublished opinion), *cert. denied*, 525 U.S. 1114 (1999) (upholding sentence of defendant whose third strike was stealing a bottle of vitamins when his criminal history included thirteen prior felony convictions for robbery, forgery, receiving stolen property, check fraud, attempted burglary, and various other drug offenses).

<sup>114</sup> Walsh, *supra* note \_\_\_, at 27-28.

<sup>115</sup> *Id.* at 28 (numbers are current through 2002).

<sup>116</sup> *Id.* at 27.

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 to effectively screen out those strikers who are not, as *Williams* emphasized, “within the spirit of the Three Strikes Law.”<sup>117</sup> 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.<sup>118</sup>

**Ongoing Debate:** This debate is far from over.<sup>119</sup> In 2004, it gave rise to a ballot initiative known as Proposition 66. 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.<sup>120</sup> Opponents of Proposition 66 argued that retroactively resentencing strikers would release

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<sup>117</sup> *Williams*, 17 Cal. 4th at 162.

<sup>118</sup> *Retrospective*, *supra* note \_\_\_, at *Preface* i (written by San Mateo County District Attorney James P. Fox).

<sup>119</sup> Another potential issue that may arise deals with the recent United States Supreme Court case, *United States v. Booker*, 543 U.S. 220 (2005), 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 it required judges, without juries, to rule on new facts that increased sentences beyond statutory maximums. *See id.* at 249. *See also Blakely v. Washington*, 542 U.S. 296 (2004) (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 – a fact that is not required to go before a jury for consideration. *See, e.g., Apprendi v. New Jersey*, 506 U.S. 466, 488-90 (2000) (holding that other than fact of prior conviction, any fact that increases a sentence must be submitted to a jury); *Dudney v. Alameida*, 2005 WL 2346916, \*5 (E.D. Cal. 2006) (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*’s holding that the jury must decide any fact which, if true would increase the defendant’s sentence for the charged crime.”).

<sup>120</sup> *Proposition 66*, <http://www.keep3strikes.org/LimitationsOn3Strikes.PDF> [hereinafter “*Proposition 66*”] (last visited Mar. 15, 2006).

some career criminals with long histories of serious and violent crime, including child molestation and murder.<sup>121</sup> 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.<sup>122</sup> After a thorough public debate,<sup>123</sup> Proposition 66 was rejected.<sup>124</sup>

Two more related reform initiatives have recently been filed – “The Three Strikes Reform Act of 2006,” which would ease the law’s requirements;<sup>125</sup> and “The Repeat Criminal Offender/Three Strikes Fair Sentencing Act of 2006,” which would toughen portions of it.<sup>126</sup> “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 retroactively only to inmates who had not previously been convicted of murder, rape, or child molestation.<sup>127</sup> Thus, under

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<sup>121</sup> See, e.g., *Release Reports*, [http://www.keep3strikes.org/release\\_reports.asp](http://www.keep3strikes.org/release_reports.asp) (last visited Mar. 15, 2006).

<sup>122</sup> See, e.g., *The Truth About Proposition 66*, <http://www.keep3strikes.org/facts.asp> (last visited Mar. 15, 2006).

<sup>123</sup> See, e.g., *id.*; *Proposition 66: Limitation on “Three Strikes” Law*, <http://www.igs.berkeley.edu/library/htThreeStrikesProp66.htm#Topic5> (last visited Mar. 15, 2006).

<sup>124</sup> Proposition 66 was defeated by 52.7%. *California General Election, November 2, 2004, State Ballot Measures*, <http://vote2004.ss.ca.gov>Returns/prop/00.htm>.

<sup>125</sup> *The Three Strikes Reform Act of 2006(active)* (Jan. 31, 2006), <http://caag.state.ca.us/initiatives/pdf/sa2006rf0017.pdf> [hereinafter “*The Three Strikes Reform Act*”]. 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/sa2005rf0125.pdf>.

<sup>126</sup> *The Repeat Criminal Offender/Three Strikes Fair Sentencing Act of 2006* (filed Feb. 3, 2006), [http://caag.state.ca.us/initiatives/pdf/sa2006rf0005\\_amdt\\_1\\_s.pdf](http://caag.state.ca.us/initiatives/pdf/sa2006rf0005_amdt_1_s.pdf) and <http://caag.state.ca.us/initiatives/pdf/SA2006RF0021.pdf> [hereinafter “*Repeat Criminal Offender Act of 2006*”] (last visited Mar. 1, 2006).

<sup>127</sup> *The Three Strikes Reform Act*, *supra* note \_\_\_\_, at 5.

this proposal, certain inmates who had already received a sentence for a non-serious felony would be eligible for re-sentencing.<sup>128</sup> Moreover, similar to Proposition 66, this initiative would also require the third felony be a serious or violent crime before triggering the statute. However, the definition of what would be considered “serious” or “violent” is slightly broader than Proposition 66.<sup>129</sup> For example, unlike Proposition 66, this initiative would include arson of a structure, forestland, or property.<sup>130</sup>

Nevertheless, the proposed “The 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). 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);<sup>131</sup> grand theft of a firearm;<sup>132</sup> any wobbler felonies committed for gang purposes;<sup>133</sup> and any wobbler felonies with personal use of a deadly weapon,<sup>134</sup> with personal use of a firearm,<sup>135</sup> or with personal infliction of great bodily injury.<sup>136</sup> Under this measure, if the third strike is a non-serious or non-violent felony, then the Act

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Proposition 66 changed the references to “arson” to only include Cal. 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 \_\_\_\_.

<sup>131</sup> CAL. PENAL CODE § 459. *See also The Three Strikes Reform Act, supra* note \_\_\_\_.

<sup>132</sup> CAL. PENAL CODE § 489(d)(2).

<sup>133</sup> CAL. PENAL CODE § 186.22(b)(1)(A).

<sup>134</sup> CAL. PENAL CODE § 12022(b).

<sup>135</sup> § 12022.5.

<sup>136</sup> § 12022.7.

proposes that the sentence of the new felony be doubled, versus a sentence of twenty-five years to life.<sup>137</sup>

A duplicate version of the “The Three Strikes Reform Act of 2006” initiative has also been proposed as a bill to the California Legislature.<sup>138</sup> 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.<sup>139</sup>

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.<sup>140</sup> For other strikes, however, the proposed measure would broaden judicial discretion by allowing the judge the choice of imposing third-strike sentences of fifteen years to life, nine years to life, or a fixed nine-year term.<sup>141</sup>

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<sup>137</sup> *Id.* Although this initiative was co-authored by a local defense attorney and the Los Angeles California District Attorney, other prosecutors have already been critical of the measure. See *CDAAs Takes Stance Against Cooley Three-Strikes Initiative*, MetNews, Mar. 6, 2006, <http://www.metnews.com/articles/2006/cdaa030606.htm> (last visited Mar. 13, 2006).

<sup>138</sup> S.B. 1642, 2006 Leg. (Cal. 2006) (introduced Feb. 24, 2006), [http://www.leginfo.ca.gov/pub/bill/sen/sb\\_1601-1650/sb\\_1642\\_bill\\_20060224\\_introduced.pdf](http://www.leginfo.ca.gov/pub/bill/sen/sb_1601-1650/sb_1642_bill_20060224_introduced.pdf) (last visited Mar. 13, 2006).

<sup>139</sup> Peter H. Yong, *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, <http://www.latimes.com/news/local/politics/cal/la-me-strikes3mar03,1,2681532.story?coll=la-news-politics-california>. See also Mercury News Editorial, *‘Three Strikes’ should Account for Minor Crimes*, THE MERCURY NEWS, June 14, 2006, <http://www.mercurynews.com/mld/mercurynews/news/opinion/14814371.htm>.

<sup>140</sup> *Repeat Criminal Offender Act of 2006*, *supra* note \_\_\_\_.

<sup>141</sup> *Id.*

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.<sup>142</sup> Thus, the debate will once again be presented to the public. This can only be viewed as healthy since 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. 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. It has also brought about a specialized parole supervision aimed at preventing second-strikers from becoming third-strikers.

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. 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.<sup>143</sup> Even in those cases where the third

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<sup>142</sup> Daniel B. Wood, *Proposed Initiatives in California Would Give Judges More Leeway in Sentencing*, THE CHRISTIAN SCIENCE MONITOR, Feb. 28, 2006, <http://www.csmonitor.com/2006/0228/p01s03-usju.html>.

<sup>143</sup> *Walsh*, *supra* note \_\_\_\_, at 27.

strike was not serious or violent, the offender has a record of criminal recidivism.<sup>144</sup>

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, "Recidivism is a serious public safety concern in California and throughout the Nation."<sup>145</sup> 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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<sup>144</sup> See, e.g., *Andrade*, 538 U.S. at 63-66; *Riggs*, 1997 WL 1168650.

<sup>145</sup> *Ewing*, 538 U.S. at 26.