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A Tale of Three Strikes Slogan Triumphs over Substance as our Bumper-Sticker Mentality Comes Home to Roost

Victor S. Sze

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**A TALE OF THREE STRIKES:
SLOGAN TRIUMPHS OVER SUBSTANCE AS OUR
BUMPER-STICKER MENTALITY COMES
HOME TO ROOST**

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I. INTRODUCTION

On March 7, 1994, California Governor Pete Wilson signed into law the bill with a one-line zinger for a name: Three Strikes and You're Out (three strikes or Statute).¹ While the catch-phrase "three strikes" has enjoyed immense popularity,² the substance of the Statute has inspired the following responses:

1. Daniel M. Weintraub, '3 Strikes' Law Goes into Effect, L.A. TIMES, Mar. 8, 1994, at A1.

The three strikes bill passed by the legislature amended California Penal Code § 667. Act of Mar. 7, 1994, ch. 12, § 1, 1994 Cal. Stat. 56-59 (codified at CAL. PENAL CODE § 667 (West Supp. 1995)). Three strikes was enacted once again, with minor changes, on November 8, 1994, by voter initiative as Proposition 184. *Final California Election Returns*, L.A. TIMES, Nov. 10, 1994, at A23. The Statute is now codified at California Penal Code § 1170.12. CAL. PENAL CODE § 1170.12 (West Supp. 1995). [All further references to California Penal Code § 1170.12 will be to West Supp. 1995.]

Unless otherwise specified, all statutory subsection references will be to California Penal Code § 1170.12, and all statutory section references will be to the California Penal Code.

2. As of July 28, 1994, 86% of the public registered recognition of the Three Strikes and You're Out initiative, as opposed to 37%, 38%, and 41% for the other three ballot initiatives. Edward Epstein, *Poll Finds Few Voters Know About Fall Initiatives: 'Three Strikes' Measure Is the Only Exception*, S.F. CHRON., July 28, 1994, at A17.

"It's appalling that something so poorly written could be foisted on the public."³

"This is so poorly drafted, it is the full employment bill for lawyers."⁴

"I favor a three-strikes law, but it must be a rational policy and focus on serious and violent offenders, not something like [a theft of old clothing]."⁵

"The people who pushed this (law) through have treated us as if we were the enemy."⁶

These are not the opinions of bleeding-heart champions of criminals' rights, but of the very prosecutors whose job it is to put law breakers away. While district attorneys, including the ones quoted above, support the three-strikes concept,⁷ the Statute itself has caused dismay and consternation among participants in every phase of criminal prosecution.⁸ This Comment describes how three strikes was born of impassioned outrage and then, under election-year pressures, rammed through the legislature despite warnings of drafting errors and unworkable provisions.⁹ The Statute was then adopted by voter initiative¹⁰ in an election characterized by an angry electorate.¹¹

The result is a law whose scatter-gun, shot-in-the-dark approach is the statutory equivalent of the \$500 hammer.¹² Just as the wide availability of ten-dollar hammers makes it outrageous to spend nearly \$500 of taxpayers' hard-earned money on equivalent hammers, the cost and inefficiency, and even counter-efficiency, of three strikes

3. Harriet Chiang, *Law Frustrates Prosecutors: Chaotic Enforcement of '3 Strikes'*, S.F. CHRON., June 30, 1994, at A1, A8 (quoting San Mateo district attorney James Fox).

4. Tupper Hull, *'3 Strikes' Backers Fight On: State Senate Votes for Identical Bill, Despite Warnings*, S.F. EXAMINER, Feb. 18, 1994, at A25 (quoting Ventura County district attorney Michael Bradbury).

5. Adam Pertman & Jonathan S. Franklin, *'3 Strikes' Laws Lead to Some Snarled Prosecutions*, BOSTON GLOBE, May 30, 1994, at 1, 12 (quoting San Francisco district attorney Arlo Smith).

6. Reynolds Holding, *Lawyers Expect Legal Battle on '3 Strikes'*, S.F. CHRON., Mar. 9, 1994, at A1 (alteration in original) (quoting Contra Costa deputy district attorney Douglas Pipes).

7. Dan Morain, *Lawmakers Jump on '3 Strikes' Bandwagon*, L.A. TIMES, Jan. 31, 1994, at A3.

8. See Richard L. Colvin & Ted Rohrlich, *Courts Toss Curves at '3 Strikes'*, L.A. TIMES, Oct. 23, 1994, at A1.

9. See *infra* part II.

10. *Final California Election Returns*, *supra* note 1, at A23.

11. *Democratic Wipeout, Voter Anger and California's Challenge*, L.A. TIMES, Nov. 10, 1994, at B6.

12. See Ruth Ryon, *Keynoter Advocates Spending Cuts*, L.A. TIMES, Oct. 6, 1985, at 8 (Real Estate) (noting that government paid \$471 for hammer).

is also outrageous when compared to what California *could* have had.¹³ Among its flaws, three strikes allows the worst offenders to get out of prison in less than twenty-one years;¹⁴ it defeats marginal deterrence;¹⁵ it decreases sentences in many second-strike cases;¹⁶ and it preempts the death penalty.¹⁷ And just as the defense that the \$500 hammer really does drive nails is grossly insufficient, so too is the defense that three strikes really does prevent crime—far better results could have, and should have, been obtained.

And not only is three strikes a galloping boondoggle, it is one that is riddled with excruciating errors in drafting¹⁸ and ambiguities of intent,¹⁹ that, if not for the Statute's actual enactment, could only be described as comical.

Lastly, and most importantly, three strikes contains provisions which offend both conscience and Constitution: It perverts the relation between crime and punishment,²⁰ and denies equal protection²¹ and due process.²²

The Statute, it will be shown, could not, or at least should not, have been passed on its merits. Its passage, rather, is a reflection of the legislature's pavlovian response to the uproar-du-jour: It was the one habitual offender bill which could be invoked in two words, and described in one sentence. The fact that it was later passed by voter initiative does not absolve legislators—it is their job to defeat bad legislation, not encourage it.

13. *See infra* part IV.

14. *See infra* part IV.A.1.

15. *See infra* part IV.B.2.a.

16. *See infra* part IV.A.3.

17. *See infra* part IV.A.4.

18. Among the more innocuous errors is the following example: Paragraph (a)(2) provides that "[p]robation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense." CAL. PENAL CODE § 1170.12(a)(2). The California Judicial Council's Standing Advisory Committee gives this response: "The phrase 'prior offense' technically is incorrect because the court in sentencing the defendant on the current violation does not sentence on the prior offense." Memorandum from the Judicial Council of California Criminal Standing Advisory Committee to Presiding Judges and Sole Judges of the Trial Courts 4 (Mar. 18, 1994) (on file with *Loyola of Los Angeles Law Review*) [hereinafter Judicial Council Memorandum].

19. *See* Judicial Council Memorandum, *supra* note 18, at 3-13 (identifying 26 unresolved issues).

20. *See infra* part IV.

21. *See infra* part VI.

22. *See infra* part VII.

II. THE BIRTH OF THREE STRIKES

A. *A Daughter Is Murdered*

The story of three strikes begins on the night of June 29, 1992, the night Joe Davis tried to snatch Kimber Reynolds's purse.²³ Kimber was a bright, energetic eighteen year old—she had earned good grades, been elected to her high school senate, and played varsity tennis.²⁴ After graduating from high school, she left her home in Fresno to attend the Fashion Institute of Design and Merchandising, located in a tough part of downtown Los Angeles.²⁵

But it was not in the big city that Kimber was attacked—she had returned home to Fresno that June to attend a wedding as a bridesmaid.²⁶ On the night of the attack, Kimber had just finished having dinner with a friend at a local restaurant, and was about to climb back into her parked car when Davis and an accomplice approached on a stolen motorcycle.²⁷ Davis made a grab for Kimber's purse; when she put up a struggle, Davis put a .357 magnum to her head, pulled the trigger, and sped away.²⁸ Left behind was Kimber Reynolds, mortally wounded, purse lying nearby.²⁹

A short time later, Mike Reynolds, Kimber's father, would be awakened by a phone call informing him that his daughter had been shot.³⁰ Kimber would die two days later.³¹

B. *A Statute Is Born*

Mike Reynolds's grief soon turned to outrage. Joe Davis, it turned out, was a drug dealer who, despite a history of violent crime, had been released on parole just two months earlier.³² And, Reynolds soon found, Davis was not unique. A recent study conducted by the RAND Corporation found that in California the average murderer could expect to be incarcerated for a paltry 4.2 years, a robber 2.9

23. George Skelton, *A Father's Crusade Born from Pain*, L.A. TIMES, Dec. 9, 1993, at A3.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Joe Davis died a few days later in a shoot-out with police. *Id.*

32. *Id.*

years, and one convicted of assault, a mere 2.6 years.³³ The National Center for Policy Analysis concluded that “[t]he reason we have so much crime is that for many people, the benefits outweigh the costs.”³⁴ Mike Reynolds decided he was going to raise the costs—“I just don’t want others to go through the same sadness my family has endured,” he said.³⁵

Reynolds, who earned his living as a photographer,³⁶ put together a statute of siren-song simplicity. It would, in brief, double the defendant’s sentence upon a second felony conviction, and, upon a third felony conviction, provide an indeterminate life term.³⁷ The minimum of the indeterminate life term was to be either triple what the sentence otherwise would have been, or twenty-five years, whichever was longer.³⁸ There was no requirement that any of the felonies be violent; prior convictions could be of either violent or serious felonies, and the current conviction³⁹ could be for *any* felony.⁴⁰ The Statute also precluded sentences of probation,⁴¹ and counted juvenile adjudications⁴² as prior strikes.⁴³ To this statute Reynolds attached a name borrowed from a phrase familiar on the lips and in the ears of every American: Three Strikes and You’re Out.

The initial attempt to pass Reynolds’s law in the California Assembly, sponsored by Assembly members Bill Jones and Jim Costa,⁴⁴ was blocked by the Assembly Committee on Public Safety.⁴⁵ Frustrated by the legislative process, Reynolds decided to pitch his law

33. PETER W. GREENWOOD ET AL., *RAND CORP., THREE STRIKES AND YOU’RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA’S NEW MANDATORY SENTENCING LAW 58* (1994) (citing 1990 California Department of Corrections data).

34. Jerry Seper, *System Fails to Stop Repeat Offenders*, WASH. TIMES, Dec. 15, 1993, at A7 (quoting National Center for Policy Analysis).

35. Tupper Hull, *A Father’s Crusade to Lock Up Criminals*, S.F. EXAMINER, Dec. 8, 1993, at A1 (quoting Mike Reynolds).

36. Skelton, *supra* note 23, at A3.

37. CAL. PENAL CODE § 1170.12(c).

38. *Id.*

39. “Current conviction” is used to denote the conviction for which the defendant is being sentenced under three strikes.

40. CAL. PENAL CODE § 1170.12(a).

41. *Id.* § 1170.12(a)(2).

42. References to juvenile adjudications will be limited to those concerning juveniles between 16 and 18 years of age, stemming from acts which would constitute crimes if committed by adults. *See id.* § 1170.12(b)(3)(A).

43. *Id.* § 1170.12(b)(3).

44. Telephone Interview with Rod Rimmer, Member, Three Strikes and You’re Out Committee (Sept. 16, 1994).

45. Skelton, *supra* note 23, at A3.

directly to the people through a voter initiative.⁴⁶ Using support from the National Rifle Association, the Gun Owners of California, and the California prison guard union, along with his own savings, Reynolds began circulating petitions to place his law on the November 1994 ballot.⁴⁷

The initiative was given a huge boost in October of 1993 when Polly Klaas, a twelve-year-old Petaluma, California girl, was kidnapped from her bedroom during a slumber party.⁴⁸ She was later found brutally murdered,⁴⁹ and a transient with a string of convictions for violent crimes admitted responsibility.⁵⁰ Polly Klaas's kidnapping and murder triggered an explosion of public fury against violent crime. The day after Polly's body was found, so many people attempted to call the Three Strikes and You're Out hotline that the entire Fresno area "800" system was jammed.⁵¹

The public uproar sparked by Polly Klaas's murder spurred the Assembly to reconsider Reynolds's law.⁵² It was reintroduced by Jones and Costa as Assembly Bill 971, the widest-ranging of five competing bills dealing with habitual offenders.⁵³ And this time, in an election year in which crime was far and away the most important issue,⁵⁴ few legislators dared stand in its way.⁵⁵

In fact, legislators' fear of the public's anticrime fervor went beyond the possibility of being turned out of office. Tom Umberg, a

46. Dan Morain, *A Father's Bittersweet Crusade*, L.A. TIMES, Mar. 7, 1994, at A1; Morain, *supra* note 7, at A3.

47. Morain, *supra* note 7, at A3. The National Rifle Association was so instrumental in landing the three strikes initiative on the ballot that the initiative has been referred to as the "Reynolds/NRA" initiative. CALIFORNIA ASSEMBLY WAYS AND MEANS COMM., COMMITTEE REP. FOR 1993 CAL. ASSEMBLY BILL NO. 971, 1993-94 Regular Sess., available in LEXIS, Legis Library, Cacom File [hereinafter WAYS AND MEANS COMM. REP.].

48. *Suspect Charged in Killing of Polly Klaas*, L.A. TIMES, June 1, 1994, at B8.

49. Richard C. Paddock et al., *Klaas Suspect Twisted Legal System Since '70s*, L.A. TIMES, Dec. 12, 1993, at A1.

50. *Id.*

51. Morain, *supra* note 7, at A3.

52. Telephone Interview with Rod Rimmer, *supra* note 44.

53. The other bills were Assembly Bills 1568, 2429, 167, and 9X. CALIFORNIA SENATE COMM. ON JUDICIARY, SENTENCING: THREE STRIKES 9-10 [hereinafter JUDICIARY COMM. REP.].

54. Andy Furillo, *Fear of Crime Grips Politics*, SACRAMENTO BEE, Mar. 6, 1994, at A1, A20; see Jerry Gillam, *Lawmakers Take Quick Aim at Crime*, L.A. TIMES, Jan. 4, 1994, at A3 (reporting that Gov. Wilson called special legislative session concerning crime). The issue of crime was later joined in the political spotlight by the furor over illegal immigration. See, e.g., Cathleen Decker, *Rivals for Senate, Governor Battle Across State*, L.A. TIMES, Nov. 7, 1994, at A1.

55. See Eric Bailey, *Assembly Public Safety Committee Turns Tough*, L.A. TIMES, Jan. 25, 1994, at A3, A34.

member of the Assembly Committee on Public Safety, received several death threats after arguing against three strikes on radio talk shows.⁵⁶ “I’m going to vote for these turkeys,” said state Senator Leroy Greene, “because my constituents want me to.”⁵⁷

With minimal opposition among legislators, the five bills sailed through the Assembly committees without a hitch.⁵⁸ The Ways and Means Committee approved the lot of them, despite not having an answer as to how much they would cost taxpayers except that it would be “in the billions.”⁵⁹ Even the liberal-dominated Committee on Public Safety,⁶⁰ which had blocked the Statute during its first introduction, approved it by a vote of seven to one.⁶¹

But even while three strikes was steamrolling through the legislative process, voices of warning were being raised.⁶² Legislators received complaints that three strikes was sloppily drafted and would result in needless litigation.⁶³ “I knew there were going to be some big, big problems,” said George Williamson, chief assistant to the California Attorney General, despite his and his boss’s support of the Statute.⁶⁴ “We were aware that there were some drafting concerns which were significant. We were also advised by line prosecutors that they perceived some problems.”⁶⁵

Many of these errors were, and still are, quite obvious and could easily have been corrected with the changing of a word, or a few words. The warnings, however, were beaten back by the Statute’s champions, Bill Jones, Jim Costa, and Mike Reynolds, who successfully fought off every effort to amend their statute.⁶⁶ “It may not be exactly what everyone wants,” Jones later said, “but there’s no

56. *Id.* at A34.

57. Dan Morain, *‘Three Strikes’ Bill Clears State Legislature*, L.A. TIMES, Mar. 4, 1994, at A1, A26 (quoting California state senator Leroy Greene).

58. Bailey, *supra* note 55, at A3. Richard K. Rainey, member of the Assembly Committee on Public Safety, reported that, “[w]e’re getting bills out I never thought we’d get out.” *Id.* (quoting Richard K. Rainey).

59. WAYS AND MEANS COMM. REP., *supra* note 47.

60. Morain, *supra* note 7, at A3.

61. WAYS AND MEANS COMM. REP., *supra* note 47.

62. The California District Attorneys Association opposed the Statute. Dan Morain, *Citing ‘3 Strikes,’ Lawyers to Shun Plea Bargains*, L.A. TIMES, Mar. 9, 1994, at A1, A15.

63. *Id.*

64. *Id.* (quoting George Williamson, chief assistant to the California Attorney General).

65. *Id.* (quoting George Williamson, chief assistant to the California Attorney General).

66. Bill Ainsworth, *Judicial Council Raises Doubt About ‘Three Strikes’ Law: Memo Suggests Some Sections Could Be Unconstitutional*, RECORDER (S.F.), Mar. 22, 1994, at 1.

doubt that California now has the toughest criminal law in the country.’ ”⁶⁷

Touted as “the toughest criminal law in the country,” three strikes, flaws and all, became the litmus test for toughness on crime.⁶⁸ No matter what the opinions of the individual legislators were, their votes were caught up in the tide of public opinion; a vote against three strikes could only be seen as a vote for weakness, a vote for criminal hugging. The glaring flaws in the Statute became inconsequential. As one observer put it,

[t]he people are afraid of the criminals, and the politicians are afraid of the people. So the politicians will vie to talk toughest, good slogans will take the place of good policy and bad ideas will be enacted. The politics of crime leaves no room for a real discussion of policy, particularly when so few leaders have the guts to be honest about crime.⁶⁹

Assembly Speaker Willie Brown was among the few who had the nerve and political standing to speak up.⁷⁰ Brown expressed fear that, because of the overwhelming public pressure, three strikes would be passed without rational discourse.⁷¹ Legislators, according to Brown, had shown “‘zero courage’ ” on three strikes because “‘they like their jobs and want to be reelected. . . . We have all bailed out on this one.’ ”⁷² When asked whether he would work to bring about the needed discourse, he replied, “‘I got out of the way of this train because I am a realist.’ ”⁷³

Three strikes easily won this frenetic, headlong rush through the legislature, passing in March 1994, and taking effect immediately.⁷⁴

67. *Id.* (quoting California Assembly member Bill Jones).

68. “[I]t seems unlikely that an incumbent in a contested race would run the risk of being perceived as soft on crime by supporting an option to the ‘three strikes’ law and ballot initiative.” Carl Ingram, *Support Sought for ‘3 Strikes’ Alternative*, L.A. TIMES, June 10, 1994, at A3.

69. Susan Estrich, *Politics of Crime Skips Over Issues*, ARIZ. REPUBLIC, Mar. 10, 1994, at B7.

70. See William Endicott, *Proportion vs. Politics*, SACRAMENTO BEE, Jan. 15, 1994, at A3; Jerry Gillam, *Legislators Fear Public on ‘3 Strikes,’ Brown Says*, L.A. TIMES, Mar. 2, 1994, at A3.

71. Gillam, *supra* note 70, at A3.

72. *Id.* (quoting California Assembly Speaker Willie Brown).

73. *Id.* (quoting California Assembly Speaker Willie Brown).

74. Weintraub, *supra* note 1, at A21.

The vote was overwhelming in both chambers: fifty-nine to ten in the Assembly,⁷⁵ and twenty-nine to seven in the Senate.⁷⁶

The passage of three strikes in the legislature, however, did not quell the anticrime, antiviolenze frenzy which had seized (and nearly throttled) the California political scene. Politicians continued to stumble over one another in their race to prove themselves tough, tougher, toughest. In August of 1994, Governor Wilson, a Republican, staged an anticrime rally to cheer legislators on as adjournment of the legislative session neared and the opportunities to pass additional crime bills diminished.⁷⁷ When supporters of Kathleen Brown, the Democratic challenger for the Governor's seat, showed up to join the "bipartisan" rally, they were ordered to lay down the anticrime signs they had brought.⁷⁸ At one point, the Governor's chief economist, Philip Romero, carrying his own sign, was seen jousting with Brown supporters for position before news cameras.⁷⁹ To borrow the words of one newspaper, the political fur flew.⁸⁰

Neither did the legislature's passage of three strikes stop Mike Reynolds's drive to have his law adopted into the state constitution through a ballot initiative. The initiative, according to Reynolds, was needed as insurance against what he saw as attempts to weaken or undermine his law.⁸¹ "They've held [the four other bills] like a trump card," said Reynolds.⁸² "They've forced our hand."⁸³

But in light of the numerous shortcomings of three strikes, an effort was made in the legislature to give voters a choice by placing an alternative sentence enhancement initiative on the 1994 ballot. The alternative initiative would focus on violent offenders like the ones that killed Kimber Reynolds and Polly Klaas.⁸⁴ Governor Wilson responded with a promise to veto any such effort.⁸⁵ A Wilson spokes-

75. Greg Lucas, *Assembly Passes '3 Strikes' Bills*, S.F. CHRON., Feb. 1, 1994, at A13.

76. Vlae Kershner, *State Senate Approves '3 Strikes' by Big Margin*, S.F. CHRON., Mar. 4, 1994, at A3.

77. Ken Chavez, *Political Fur Flies at Wilson Anti-Crime Rally*, SACRAMENTO BEE, Aug. 9, 1994, at A3.

78. *Id.*

79. *Id.* Wilson's office later explained the scene by saying that the rally permit had been obtained not by the Governor's office, but by a victims group, and that Wilson's own people were warned not to carry signs. *Id.*

80. *Id.*

81. Weintraub, *supra* note 1, at A1 (quoting Mike Reynolds).

82. Morain, *supra* note 57, at A26 (alteration in original) (quoting Mike Reynolds).

83. *Id.* (quoting Mike Reynolds).

84. See Ingram, *supra* note 68, at A3. The alternative proposal would require the current conviction to be for a violent felony. *Id.*

85. *Id.*

person, noting that over 800,000 signatures were gathered to place the three strikes initiative on the ballot, said that the people “‘have already spoken And there is a big difference between 800,000 people and a couple of legislators trying to trip up the governor.’”⁸⁶ Wilson’s veto promise was ultimately successful in keeping the alternative proposal off the 1994 ballot.⁸⁷ “‘Voters have a choice in November,’” said Costa, “[t]hey can vote for [three strikes] or they can vote against it.”⁸⁸ On November 8, 1994, the three strikes initiative, the only sentence enhancement initiative available to voters, was approved by seventy-two percent of the California electorate.⁸⁹ By doing so, the people of California adopted three strikes as a part of the California Constitution,⁹⁰ and a two-thirds vote of the Assembly will be required to repeal or amend it.⁹¹

In discussing the shortcomings of three strikes, the issue is not whether three strikes prevents crime. It does.⁹² So do many other anticrime proposals.⁹³ Rather, the question for Californians is this: Which proposal would reduce the most crime, do it most effectively, and do it without violating the California and U.S. Constitutions? Three strikes accomplishes none of these rudimentary goals.

86. Hallye Jordan, *Backers Defend Alternative to ‘Three Strikes’*, L.A. DAILY J., June 10, 1994, at 1, 5 (quoting Wilson spokesperson Paul Kranhold).

87. *See id.*

88. Ingram, *supra* note 68, at A29 (quoting California Assembly member Jim Costa).

89. *Final California Election Returns*, *supra* note 1, at A23.

90. Rene Lynch, *‘3 Strikes’ Case Leniency Is Out in O.C.*, L.A. TIMES, Oct. 23, 1994, at A41.

91. CAL. CONST. art. XVIII, § 1.

92. GREENWOOD ET AL., *supra* note 33, at 27-29. I feel a twinge of trepidation in writing that three strikes prevents crime. A Three Strikes and You’re Out Committee circular announced the Greenwood/RAND study under the bold-type headline: “RAND SAYS 3 STRIKES REDUCES SERIOUS CRIME BY ALMOST 30%.” *RAND Says 3 Strikes Reduces Serious Crime by Almost 30%* (Three Strikes and You’re Out Committee, Sacramento, Cal.), Sept. 21, 1994 (on file with *Loyola of Los Angeles Law Review*). In the text, the Committee alludes to the negative conclusions of the study as “‘a collection of half-truths.’” *Id.* (quoting Mike Reynolds).

There is evidence that the crime rate has declined since the implementation of the three strikes bill. Yvette Cabrera, *Violent Crime Declines Sharply in Central L.A.*, L.A. TIMES, Oct. 30, 1994, at 3 (City Times). But other evidence indicates that this downward trend began long before the Statute’s passage. Thaa Walker, *Crime Down in Bay Area—but Fear Stays High*, S.F. CHRON., Jan. 10, 1994, at A1. The decrease therefore cannot be attributed solely to three strikes.

In fact, there has been a general decline in felonies in major U.S. cities, whether or not they are under a three strikes-type law. In a survey of the 22 largest cities, the New York Police Department found that the rate of felonies has decreased in all but two. Clifford Krauss, *Urban Crime Rates Falling This Year*, N.Y. TIMES, Nov. 8, 1994, at A14.

93. GREENWOOD ET AL., *supra* note 33, at xiii.

III. THE COST OF THREE STRIKES: A DEBATE WITH BUT ONE-AND-A-HALF SIDES

The concern most often expressed during the Statute's approval process was that California, already in the throes of an economic downturn, did not have the finances to house the increased prison population which would result.⁹⁴ While estimates have varied, the general consensus is that costs of building the new prisons and housing additional prisoners will be "in the billions."⁹⁵

Speculation on how many billions of dollars three strikes will cost, however, has no importance beyond fiscal planning; as with any major purchase, the relevant question is not just "how much does it cost," but also "is it the most effective?"

But the back-and-forth over the naked dollar amounts attached to three strikes is important for the political weight it carries, being for most people the most readily digestible issue relating to three strikes. After all, who can argue with cold, hard dollar figures? This debate, too, quickly took on a farcical quality.

Wasting no time in responding to criticism regarding three strikes's costs, Philip Romero, Governor Wilson's chief economist, issued a report in March 1994, purporting that the Statute would actually result in a *savings*.⁹⁶ The report's conclusions were eventually included in arguments supporting the three strikes initiative in the California Ballot Pamphlet, which was distributed to all voters.⁹⁷

In his report, for which crucial figures were obtained from a study conducted in the early 1980s by the RAND Corporation,⁹⁸ Romero posits the following argument: Assume that the typical inmate, before

94. See CALIFORNIA ASSEMBLY COMM. ON PUBLIC SAFETY, COMMITTEE REP. FOR 1993 CAL. ASSEMBLY BILL NO. 971, 1993-94 Regular Sess., available in LEXIS, Legis Library, Cacom File; JUDICIARY COMM. REP., *supra* note 53, at 10-11; WAYS AND MEANS COMM. REP., *supra* note 47.

95. See ASSEMBLY APPROPRIATIONS COMM., COMMITTEE REP. FOR 1993 CAL. ASSEMBLY BILL NO. 971, 1993-94 Regular Sess., available in LEXIS, Legis Library, Cacom File (stating cost of three strikes will be "several billion dollars"); WAYS AND MEANS COMM. REP., *supra* note 47 (estimating cost of three strikes to be in billions); GREENWOOD ET AL., *supra* note 33, at 31 (estimating three strikes will cost \$5.5 billion per year for next 25 years).

96. Philip J. Romero, *How Incarcerating More Felons Will Benefit California's Economy* (Governor's Office of Planning and Research, Sacramento, Cal.) Mar. 31, 1994 (on file with *Loyola of Los Angeles Law Review*); Dan Morain, *Wilson Advisor Says '3 Strikes' Will Save Money*, L.A. TIMES, Apr. 7, 1994, at A3.

97. CALIFORNIA SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET 35-37 (1994) [hereinafter BALLOT PAMPHLET].

98. Romero, *supra* note 96, at 1.

incarceration, committed about twenty crimes a year.⁹⁹ At a cost to society of \$10,000 per crime, including medical bills, property destruction, lost earnings, and so forth, the total cost per year of the inmate's crimes would be \$200,000.¹⁰⁰ If, by the year 2001, three strikes results in the incarceration of an additional 84,000 prisoners, the state's populace will have saved \$16.8 billion.¹⁰¹ Romero compares this figure to his estimate that, during the same period, the state will spend \$2.7 billion building and operating the additional prisons needed as a result of the Statute.¹⁰²

As pleasing as Romero's conclusions may have been to California voters, how those conclusions were reached is questionable. While Romero's report repeatedly bills itself as "conservative"—eight times in seven pages—it makes some startling leaps in logic. For instance, as an example of a cost of crime, Romero cites tourism revenues lost as a result of the latest Los Angeles riots totalling "\$2-3 billion."¹⁰³ But he gives no explanation of how three strikes could possibly have either prevented the riots—which sprang from long-simmering racial tensions¹⁰⁴—or somehow have kept the riots from exposing the racial tensions which exist in Los Angeles and thereby damaging the city's image as a tourism venue.

Romero's calculations on the savings that will result from the prevention of crime are no less mystic. While conceding that his estimates are "arbitrar[y],"¹⁰⁵ Romero plows ahead, using the figures and reaching conclusions on just how many billions of dollars above and beyond its costs three strikes will save California.¹⁰⁶ It is not known if Romero meant for these arbitrary figures to be among the conservative conclusions reached by his report, or if he meant for them to fall into a separate category of "arbitrary."

But the most telling assessments of Romero's analysis come from the authors of the very studies upon which Romero based his report. "I don't agree with him," said Peter Greenwood, author of the RAND study.¹⁰⁷ The RAND Corporation had raised objections to

99. *Id.* at 6.

100. *Id.* at 4.

101. *Id.* at 1.

102. *Id.* at 5.

103. *Id.* at 2.

104. See, e.g., John L. Mitchell, *Punitive Damages from Police in King Beating Rejected*, L.A. TIMES, June 2, 1994, at A1 (reporting that racial tensions persist long after riots).

105. Romero, *supra* note 96, at 3.

106. *Id.* at 3-5.

107. Ken Chavez, '3 Strikes' to Pare Crime Costs, Study Says, SACRAMENTO BEE, Apr. 7, 1994, at A6 (quoting Peter Greenwood).

such use of its study earlier, during the committee approval process, by issuing a statement to the Ways and Means Committee protesting the “ ‘erroneous references to RAND data and findings.’ ”¹⁰⁸ The loss attributable to the average crime, said Greenwood, is actually \$1000 to \$2000—one-fifth to one-tenth the figure used by Romero.¹⁰⁹ The actual cost of three strikes, according to RAND’s 1994 analysis,¹¹⁰ is an additional \$5.5 billion per year on top of what Californians already spend.¹¹¹ Another author cited by Romero, Mark A.R. Kleiman of Harvard, said Romero’s conclusions are “ ‘just plain wrong.’ ”¹¹²

Chiming in on the debate is Franklin E. Zimring, a professor at Boalt Hall School of Law and director of the Earl Warren Legal Institute at the University of California, Berkeley.¹¹³ Criminals, according to Zimring, could not have actually committed crimes of the severity and at the rate claimed by Romero.¹¹⁴ Zimring makes the observation that, if Romero’s claims were true, given the number of people incarcerated since 1980, “ ‘the crime rate should be less than zero.’ ”¹¹⁵

In light of the dubious accuracy of Romero’s claims, suits and countersuits sprang up over their inclusion in the ballot pamphlet.¹¹⁶ Opponents of three strikes sued to have Romero’s claims stricken from the ballot pamphlet, along with language which could lead readers to believe erroneously that three strikes focused on violent crimes.¹¹⁷ Supporters of three strikes countersued to exclude from the ballot pamphlet statements that three strikes would be applicable to both violent and nonviolent offenders, as well as references to Polly Klaas, whose family now opposed the Statute.¹¹⁸ Besieged on both sides, the judge who heard the case played Solomon and refused to delete any of the arguments, ordering only that some of the language

108. WAYS AND MEANS COMM. REP., *supra* note 47 (quoting RAND Corp.).

109. Morain, *supra* note 96, at A18.

110. GREENWOOD ET AL., *supra* note 33. RAND’s 1994 study focuses specifically on three strikes and is referred to as the “RAND study” in the remainder of this Comment.

111. *Id.* at 18. California now spends \$4.5 billion on its criminal justice system. The cost of three strikes represents a 122% increase. *Id.*

112. Morain, *supra* note 96, at A18 (quoting Mark A.R. Kleiman).

113. Vlae Kershner, ‘3 Strikes’ Initiative on Fall Ballot, S.F. CHRON., Apr. 7, 1994, at A18.

114. *Id.*

115. *Id.* (quoting Franklin E. Zimring).

116. Tupper Hull, ‘3 Strikes’ Claim Stays in Pamphlet, S.F. EXAMINER, Aug. 16, 1994, at A5.

117. Pamela J. Podger, *Wording for ‘3 Strikes’ Ironed Out*, FRESNO BEE, Aug. 16, 1994, at A3.

118. Hull, *supra* note 116, at A5.

in support of the Statute be slightly toned down.¹¹⁹ Both sides declared victory.¹²⁰ Contrary to after-the-fact spin doctoring by the pro-three strikes camp,¹²¹ the judge never ruled on the veracity, or lack thereof, of Romero's claims.¹²²

But, in any discussion of the costs of three strikes, the ultimate question is not whether three strikes is too expensive¹²³—the price of safety is unquantifiable. The question, rather, is whether, relative to what California *could* have had, three strikes is an effective, efficient means of achieving the desired reduction in crime. As will be shown in the next part of this Comment, it is neither effective nor efficient, but is in fact counter-effective in a great many cases.

IV. THREE STRIKES WORKS BACKWARDS

Three strikes purports to be aimed at stopping violent crime. In reality it is focused on, and expends a vast portion of California's resources on, nonviolent, nonserious offenders.

The Three Strikes and You're Out Committee, sponsor of the three strikes initiative,¹²⁴ declares:

The initiative represents the courage, determination, and aspirations propelling Mike Reynolds and all others who endeavor to strengthen society's resistance to the merciless onslaught of brutality and violence. Violent repeat felons bear the brunt of the blame for the deterioration in the quality of life in this state. This initiative will spearhead the assault on violent crime. So much is at stake; our efforts to regain control of our streets and neighborhoods must not fail.¹²⁵

119. Podger, *supra* note 117, at A3.

120. *Id.*

121. *Id.*

122. *Id.*

123. Curiously, in a poll conducted by the *Los Angeles Times*, less than half of those surveyed expressed willingness to pay higher taxes in order to fund three strikes. Daniel M. Weintraub, *The Times Poll: Residents Balk When Asked to Pay for '3 Strikes'*, L.A. TIMES, Apr. 2, 1994, at A1. The survey also found that only 22% were willing to accept cuts in funding for higher education in order to pay for three strikes. *Id.* at A21. Higher education is seen as a likely loser in the three-strikes-induced budget squeeze. *Three Strikes for Higher Ed?*, SACRAMENTO BEE, Mar. 21, 1994, at B12.

124. BALLOT PAMPHLET, *supra* note 97, at 36.

125. *A Response to Murder* (Three Strikes and You're Out Committee, Sacramento, Cal.), Aug. 31, 1994 (on file with *Loyola of Los Angeles Law Review*).

And in its ballot pamphlet argument: "3 Strikes keeps career criminals, who rape women, molest innocent children and commit murder, behind bars where they belong."¹²⁶

The reality is, over eighty percent of prosecutions under three strikes have been for nonviolent offenses.¹²⁷ In over one-third of three strikes cases, California taxpayers have been roped into footing the bill for the long-term housing, feeding, and medical care for drug users and petty thieves.¹²⁸

Moreover, as shown in the following sections, three strikes inexplicably allows for proportionately light sentences for the worst offenders, while mandating shockingly harsh sentences for minor offenses.

A. *Three Strikes Is Soft on Hard Crime*¹²⁹

1. Three strikes allows the worst offenders to receive light sentences

Three strikes, while claiming to be tough on violent criminals, is in fact considerably softer on violent felons than the rival Rainey Bill (Rainey),¹³⁰ which was before the California Assembly at the same time.¹³¹ Three strikes allows recidivists to be released in as little as

126. BALLOT PAMPHLET, *supra* note 97, at 36.

127. For example, a study by the California Legislative Analyst discovered that, of the 2912 people convicted of second-strike offenses in California as of November 1994, 944 were serving long prison terms for either drug possession or petty theft. The number of convictions for serious offenses and violent offenses combined reached only 17% of the total. Gary Webb, 'Three Strikes' Law Puts Squeeze on Courts, Jails: Nonviolent Offenders Swamp System, HOUSTON CHRON., Jan. 29, 1995, at A2, available in LEXIS, News Library, Majpap File.

As of October 23, 1994, Orange County prosecuted 94 defendants under three strikes. Lynch, *supra* note 90, at A41. Of the 94, only 18 were charged with felonies involving force or fear. The remaining 76 prosecutions concerned nonviolent crimes. *Id.* at A42. Of the 76 prosecutions for nonviolent crimes, 34 were for drug-related charges, 22 for burglaries, and the rest for such crimes as petty theft, receiving stolen property, firearms possession, and forgery. *Id.* The same holds true in Los Angeles County, where fewer than one in five three-strikes prosecutions have been for violent offenses. Colvin & Rohlich, *supra* note 8, at A1.

128. See Webb, *supra* note 127, at A2; Lynch, *supra* note 90, at A42.

129. This phraseology is owed to Marc Klaas. Brad Hayward, *Panel Rejects Alternate '3 Strikes' Proposal*, SACRAMENTO BEE, June 22, 1994, at A3.

130. JUDICIARY COMM. REP., *supra* note 53, at 9. Rainey, introduced as Assembly Bill 1568, required that the third conviction be for a violent or serious felony and, upon a third conviction for a violent felony, prescribed a sentence of life in prison without possibility of parole. *Id.* at 9-10.

131. See *supra* note 53 and accompanying text.

twenty-one years,¹³² while Rainey mandated that the incorrigibly violent spend the remainder of their lives in prison.¹³³

2. One victim is not enough for three strikes

Three strikes does not touch violent offenders who are caught for the first time—it applies only to those who previously have been caught and convicted.¹³⁴ Contrast this with Guaranteed Full Term (GFT), an alternative to three strikes which was analyzed by the RAND study.¹³⁵ GFT provides: (1) that each person convicted of a serious or violent felony serve a prison sentence; (2) that no credits for good time served be granted, effectively doubling time served;¹³⁶ and (3) that alternative sentencing be more frequently used for minor offenses.¹³⁷

GFT would reach those perpetrators of violent or serious felonies who are caught for the first time. Such cases constitute the majority of felony prosecutions.¹³⁸ By incarcerating offenders for the full term of their sentences upon their first conviction, GFT reaches offenders at a stage when they are most likely to repeat their offenses, and removes felons from society during the period of their lives when they are most active.¹³⁹ By so doing, GFT would prevent a greater number of violent and serious felonies than would three strikes.¹⁴⁰ And because it increases alternative sentencing for minor offenses, GFT achieves the

132. A violent felon sentenced to 25 years who earns good time credits—credits for good behavior—of one-fifth the sentence will spend less than 21 years in jail. See CAL. PENAL CODE § 1170.12(a)(5) (limiting good time credit to one-fifth of sentence); see also *infra* part VI (discussing how felons may earn good time credits of more than one-fifth of sentence).

133. JUDICIARY COMM. REP., *supra* note 53, at 9.

134. CAL. PENAL CODE § 1170.12(c).

135. GREENWOOD ET AL., *supra* note 33, at 9, 26.

136. See CAL. PENAL CODE § 2933 (West Supp. 1995) (providing sentence credits of up to one day for each day served).

137. GREENWOOD ET AL., *supra* note 33, at 9.

138. "First strike" cases constituted 5738 of the 9735 cases filed by the Los Angeles District Attorney's office between March 7 and October 20, 1994. B.J. Palermo, 'Three Strikes' Crush Looms in L.A. Courts, L.A. DAILY J., Oct. 20, 1994, at 1.

139. GREENWOOD ET AL., *supra* note 33, at 27-29.

140. *Id.* at 26. The RAND study projects that GFT would prevent 4000 more violent or serious crimes per year than would three strikes. *Id.*

GFT's advantage in the number of serious and violent felonies prevented is probably much greater than the RAND study indicates, considering that the RAND study analyzes three strikes as written. Three strikes has not been, and in all probability will *never* be, implemented as written. See *infra* part V. The advantage of GFT is even greater considering its marginal deterrence effect. See *infra* part IV.B.2.a.

decrease in felonies at about two-thirds the cost.¹⁴¹ The savings of GFT are even greater considering that GFT, by not providing a blanket imposition of life terms, will not require the people of California to provide sustained health care to nearly as many geriatric prisoners who are long past their crime-committing days. "Criminals really slow down in their mid-30s So these laws fill up (prison) space with people who are not going to be much of a crime threat and leave no room for younger guys who are more dangerous. It's like giving Joe Montana a 20-year contract to play football."¹⁴²

3. Three strikes *decreases* sentences in many second-strike cases

The Statute provides for the doubling of sentences upon a second strike.¹⁴³ While the doubling of sentences would appear to be a blanket increase in prison terms, it actually results in *decreased* terms in many cases.

Before the passage of three strikes, section 667(a) provided that persons convicted of a serious felony who had a prior conviction for a serious felony would have five years added to their sentences.¹⁴⁴ For those offenses that result in a sentence of less than five years, section 667(a) provides an enhancement which is more than twice what the sentence would have been. In such cases, because the court may not apply both section 667(a) and three strikes for the same offense,¹⁴⁵ and three strikes is to be applied "[n]otwithstanding any other provision of law,"¹⁴⁶ the Statute results in an enhancement which is less than the five years that would have been added absent three strikes.¹⁴⁷ And because so many of the prosecutions under three strikes are for offenses of the type that generally result in sentences of less than five years,¹⁴⁸ a considerable number of second-strike convictions will actually result in a *decreased* sentence.

141. GREENWOOD ET AL., *supra* note 33, at 26.

142. Reynolds Holding, *Behind the Nationwide Move to Keep Repeaters in Prison*, S.F. CHRON., Dec. 8, 1993, at A1, A12 (quoting James Austin). See *Boom in Elderly Inmates Feared: 300 Percent Increase Predicted Under 'Three Strikes' Law*, S.F. CHRON., Nov. 4, 1994, at A5, for a brief discussion of the impact of the mushrooming population of elderly prisoners that will result from three strikes.

143. CAL. PENAL CODE § 1170.12(c)(1).

144. *Id.* § 667(a).

145. *People v. Jones*, 5 Cal. 4th 1142, 1150, 857 P.2d 1163, 1166-67, 22 Cal. Rptr. 2d 753, 756-57 (1993); *People v. Coleman*, 48 Cal. 3d 112, 163-64, 768 P.2d 32, 62-63, 255 Cal. Rptr. 813, 843-44 (1989), *cert. denied*, 494 U.S. 1038 (1990).

146. CAL. PENAL CODE § 1170.12(d)(1).

147. See JUDICIARY COMM. REP., *supra* note 53, at 7.

148. See *supra* notes 127-28 and accompanying text.

4. Three strikes preempts the death penalty

Perhaps the most galling way in which three strikes is soft on hard crime is that it preempts the death penalty for recidivists. Three strikes's sentencing provisions are contained in subsection (c).¹⁴⁹ Paragraph (c)(1) provides that the sentence for a defendant with one prior will be "twice the *term* otherwise provided . . . for the current felony conviction."¹⁵⁰ Paragraph (c)(2)(A) provides that the sentence for a defendant with two or more priors shall be

an *indeterminate term of life imprisonment* with a minimum *term* of the indeterminate sentence calculated as the greater of

(i) three times the *term* otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five years or

(iii) the *term* determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any *period* prescribed by Section 190 or 3046.¹⁵¹

The death penalty, neither a "term"¹⁵² nor a "period,"¹⁵³ is conspicuously absent from the sentences enumerated in paragraphs (c)(1) or (c)(2). Subsection (d) provides: "(1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section."¹⁵⁴

Since the sentencing scheme contained in subsection (c) is to be applied in every case "notwithstanding any other provision of the law,"¹⁵⁵ and it does not include the death penalty in its enumerated sentences, the Statute clearly and unambiguously precludes the imposition of the death penalty on recidivist felons;¹⁵⁶ only those defendants with no prior felony convictions are eligible for the death penalty.

149. CAL. PENAL CODE § 1170.12(c)(1).

150. *Id.* (emphasis added).

151. *Id.* § 1170.12(c)(2)(A) (emphasis added).

152. A "term" is "[a] fixed and definite period of time; implying a period of time with some definite termination. Period of determined or prescribed duration. A specified period of time." BLACK'S LAW DICTIONARY 1470 (6th ed. 1990) (citations omitted).

153. A "period" is "[a]ny point, space, or division of time." *Id.* at 1138.

154. CAL. PENAL CODE § 1170.12(d)(1).

155. *Id.*

156. See JUDICIARY COMM. REP., *supra* note 53, at 8.

And, as the Statute requires prosecutors to plead and prove all pri-
ors,¹⁵⁷ the death penalty is effectively eliminated for recidivists.

Was this the intent of the legislature? We presume the legislature to mean what it says;¹⁵⁸ only when it is unclear what the legislature is saying do we consider legislative intent.¹⁵⁹ It is an elementary rule of statutory construction, expressed repeatedly and adamantly in case law, that “[i]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters).”¹⁶⁰

Even if this long-standing rule of statutory interpretation were tossed aside, and legislative intent were examined, the Statute’s prohibition of the death penalty for recidivists may still survive. The legislature declared that, in passing three strikes, it was its intent “to ensure longer prison sentences and greater punishment.”¹⁶¹ While the death penalty would qualify as “greater punishment,” it would be contrary to the desire for longer prison sentences—it *shortens* time of imprisonment.

In fact, there is evidence that the legislature affirmatively intended to eliminate the death penalty for recidivists. The Statute was passed overwhelmingly despite the warning from the Senate Committee on Judiciary, three months before the Statute’s passage, that, “[s]ince death is not a ‘term’, it apparently is not an option.”¹⁶²

The courts may be similarly disposed in interpreting the Statute. As the California Supreme Court recently stated, “[w]e recognize that in the construction of penal statutes, we must give the benefit of any doubt to the criminal defendant.”¹⁶³

To complete three strikes’s preemption of the death penalty, it is likely that, if three strikes is to be implemented as written, even first-

157. CAL. PENAL CODE § 1170.12(d)(1).

158. *People v. Jones*, 5 Cal. 4th 1142, 1146, 857 P.2d 1163, 1164, 22 Cal. Rptr. 2d 753, 754 (citing *Delaney v. Superior Court*, 50 Cal. 3d 785, 798, 789 P.2d 934, 940, 268 Cal. Rptr. 753, 759 (1990) (citing *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735, 755 P.2d 299, 303-04, 248 Cal. Rptr. 115, 120 (1988))). “If no ambiguity, uncertainty, or doubt about the meaning of a statute appears, the provision is to be applied according to its terms without further judicial construction.” *People v. Superior Court*, 150 Cal. App. 3d 486, 488, 198 Cal. Rptr. 61, 62-63 (1984).

159. *Jones*, 5 Cal. 4th at 1146, 857 P.2d at 1164, 22 Cal. Rptr. 2d at 754.

160. *Id.* (quoting *Delaney*, 50 Cal. 3d at 798, 789 P.2d at 940, 268 Cal. Rptr. at 759).

161. CAL. PENAL CODE § 1170.12 (Historical and Statutory Notes).

162. JUDICIARY COMM. REP., *supra* note 53, at 8.

163. *People v. Superior Court*, 150 Cal. App. 3d at 489, 198 Cal. Rptr. at 63 (citation omitted).

time offenders will be exempted from the imposition of the death penalty. The Statute creates two classes in its application of the death penalty: those who have priors, and those who have no priors. As the right to one's life is fundamental,¹⁶⁴ the discriminatory imposition of the death penalty would be subject to strict scrutiny: The state would have to demonstrate that the discrimination is necessary to advance a compelling state interest.¹⁶⁵ But the imposition of capital punishment on only the less culpable would certainly fail even a rational basis review.¹⁶⁶ It would fly in the face of rationality—not to mention all notions of fairness—to impose greater punishment on the less culpable, and lesser punishment on the more culpable.

There is, however, one way in which the death penalty theoretically may be imposed on those with prior convictions. To retain the possibility of imposing the death penalty on a recidivist, the prosecutor may move the court to strike the priors.¹⁶⁷ But requiring the prosecutor to first plead and prove the priors,¹⁶⁸ and then immediately move to strike those priors would not only force the prosecutor into a pointless charade, it would effectively negate prior convictions as an aggravating factor in considering whether to impose the death penalty. Further, the option of striking priors is available more in theory than in practice.¹⁶⁹

B. *Three Strikes Is Hard on Soft Crime*

Supporters of three strikes remind us that avoidance of three strikes sentencing is easy: To avoid harsh punishment, simply refrain from breaking the law.¹⁷⁰ The goal, says Bill Jones, quick at the ready with a mantra for the masses, is “zero tolerance” of crime.¹⁷¹

But when Jones and his fellow three strikes supporters proclaim “zero tolerance” of crime, how far are they willing to go to carry it out? For example, a sure and easy way to stop illegal parking would be to prescribe a sentence of life imprisonment for parking viola-

164. *People v. Olivas*, 17 Cal. 3d 236, 251, 551 P.2d 375, 384, 131 Cal. Rptr. 55, 64 (1976) (noting that life is most fundamental right).

165. *Id.* at 243, 551 P.2d at 379, 131 Cal. Rptr. at 59.

166. Rational basis review merely requires that a statute be rationally related to its purposes. See *In re Kapperman*, 11 Cal. 3d 542, 545, 522 P.2d 657, 659, 114 Cal. Rptr. 97, 99 (1974).

167. CAL. PENAL CODE § 1170.12(d)(2).

168. *Id.* § 1170.12(d)(1).

169. See *infra* part IV.C.

170. Bill Jones, '3 Strikes' Debate Is About Ideology, Not Public Finance, SACRAMENTO BEE, Mar. 29, 1994, at B9.

171. *Id.*

tions.¹⁷² What causes us to dismiss this proposal as absurd is our innate sense of proportionality between crime and punishment.

While it is clear that there are punishments that are proportionate, and punishments that are not, the line between the two has been difficult to ascertain with any precision.¹⁷³ This section provides indications that, wherever the line may lie, the Statute imposes punishments which fall well on the wrong side.

Three strikes's disproportionality stems from the fact that the Statute does not require the current conviction to be for a serious or violent felony—it may be for an act such as stealing a slice of pizza or picking a pocket.¹⁷⁴ The disproportionality is magnified by the fact that the prior convictions are not limited to violent felonies.¹⁷⁵ The California Senate Committee on Judiciary observed that “[a]ny third felony . . . would result in a life term under the provisions of this bill, regardless of whether or not [the defendant] had ever acted violently or dangerously.”¹⁷⁶ The result is possible imprisonment for life for mere petty offenses—a penalty grotesquely out of proportion to the axiomatic “eye for an eye.”

As demonstrated in the following, this possibility has become more than mere hypothetical.

1. Examples of disproportionality

a. *three strikes nails a pizza thief*

Jerry Williams has a history of petty crime and an almost comical propensity for getting caught.¹⁷⁷ His first conviction, for drug possession, came at age nineteen. He was sentenced to three years' probation.¹⁷⁸ Next, Williams was convicted for assaulting a man and taking the man's wallet during a dispute over a drug sale.¹⁷⁹ In 1989 he pled

172. This outlandish example is not original to me—the U.S. Supreme Court used it as an illustration of a sentence so disproportionate to the offense for which it is imposed that it may implicate Eighth Amendment protections. See *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980).

173. See *Harmelin v. Michigan*, 501 U.S. 957, 986-90 (1991) (“[T]he standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.”).

174. CAL. PENAL CODE § 1170.12(a).

175. See *id.*

176. JUDICIARY COMM. REP., *supra* note 53, at 4.

177. Gordon Dillow, *Pizza Case Unlikely Focus of '3 Strikes' Debate*, L.A. TIMES, Sept. 18, 1994, at B1.

178. *Id.* at B5.

179. *Id.*

guilty to joyriding.¹⁸⁰ His most recent prior came when he tried to snatch a gold chain off a man's neck—a robbery he attempted right in front of a police sergeant.¹⁸¹ On July 30, 1994, Williams took a slice of pizza from a group of four children.¹⁸² He has been convicted of felony petty theft¹⁸³ and now faces life in prison for stealing that single slice of pizza.¹⁸⁴

b. three strikes puts a wallet-grabber away—maybe forever

Steven Gordon grew up in a middle-class family, the son of an Air Force master sergeant.¹⁸⁵ He competed on the varsity football, basketball, and track teams while attending high school at Travis Air Force Base.¹⁸⁶ After graduation, Gordon went to work for the American Home Food Products cannery, where he was employed for six years.¹⁸⁷ While working there, he made regular contributions to his 401k retirement plan and a Christmas Club savings account.¹⁸⁸

Steve Gordon's middle-class world disintegrated in 1985 when he was fired from his job for drug use; he soon found himself not only jobless, but homeless as well.¹⁸⁹ Gordon's two priors resulted from stealing \$200 from the cash register of a Kentucky Fried Chicken and snatching a purse.¹⁹⁰ On March 8, 1994, less than twenty-four hours after Governor Wilson signed three strikes into law, Gordon made a grab for the wallet of Karl Alexander, a Sacramento room-service waiter.¹⁹¹ Alexander chased Gordon down and pinned him to the

180. *Id.*

181. *Id.*

182. *Id.* As it turns out, Williams had to throw the slice of pizza away, since it contained pork, to which Williams is allergic. *Id.*

183. Eric Slater, *Man Guilty in Potential '3 Strikes' Pizza Case*, L.A. TIMES, Jan. 21, 1995, at B1.

184. *Id.*

185. Peter Hecht, *'3 Strikes' Cases Draw Early Cries of Injustice*, S.F. EXAMINER, June 12, 1994, at B11.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

ground until police arrived.¹⁹² Gordon now faces the possibility of life in prison.¹⁹³

2. Indications of disproportionality

a. *an objective indication of disproportionality: three strikes defeats marginal deterrence*

Under prior law, an offender's sentence would be ratcheted upwards commensurate with the seriousness and number of offenses committed.¹⁹⁴ As such, offenders were given an incentive to limit their acts to the least harmful and the fewest violations by which they could achieve their ultimate aims. For recidivists, however, three strikes has lifted this scheme of marginal deterrence.¹⁹⁵

This deterrence-removing effect is present to some degree in all mandatory enhancements. But it is greatly magnified in the case of three strikes because, for purposes of the current conviction, it treats all felonies, serious and nonserious, violent and nonviolent, the same.¹⁹⁶ Three strikes, therefore, reduces the deterrence that would keep an offender from escalating a nonserious, nonviolent felony into a serious or violent one, or perhaps committing additional crimes.

192. *Id.*

193. For more examples of harsh sentences for minor offenses, see Nicholas Riccardi, *Proposition 184: Nonviolent 'Three-Strike' Crimes Detailed*, L.A. TIMES, Oct. 19, 1994, at A22.

Washington state, which passed its own three strikes law in November 1993, Thaa Walker, *Police Concerned About Effect of '3 Strikes' Law*, S.F. CHRON., Mar. 14, 1994, at A15, has seen similar cases. One example is Larry Fisher, who was convicted of stealing \$390 from his grandfather and robbing a pizza parlor of \$100 by sticking his finger in his coat pocket to simulate a gun. John Balzar, *The Target: Repeat Offenders*, L.A. TIMES, Mar. 24, 1994, at A5. He was arrested in April 1994 for taking \$151 from a sandwich shop, once again using the finger-in-the-pocket method. *Id.*

While it is true that cases of such gross disproportionality are among the minority of three strikes prosecutions, they are no less unjust for being so. In a nation built of individuals, injustice cannot be made just by saying it snares only the few—"[f]or one man ought never to be dealt with merely as a means subservient to the purpose of another." IMMANUEL KANT, *THE PHILOSOPHY OF LAW* (W. Hastie trans., 1887), quoted in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 137 (5th ed. 1989).

194. See JUDICIARY COMM. REP., *supra* note 53, at 4 ("Existing law differentiates between crimes. Thus, some felony offenses, such as rape or murder, have higher penalties than others, such as theft.").

195. See *id.* ("[T]his bill would make no distinction in severity between different felonies.").

196. If three strikes focused only on violent offenders, marginal deterrence would be a lesser issue: The target offender would already have a propensity for violence, despite the marginal deterrence under the old law.

Consider the following scenario. During a burglary, the burglar finds the occupant of the dwelling present. Without three strikes, the prospect of substantially increased prison time may deter the burglar from attacking the occupant. But under three strikes, the burglar who has two priors is already subject to a sentence of twenty-five years to life regardless of whether he commits a further crime. So long as triple the cumulative sentence for the combined crimes would not exceed twenty-five years, three strikes imposes *no penalty* on the burglar for attacking the occupant.

In fact, because the average murderer in California is sentenced to less than eight-and-a-half years in prison,¹⁹⁷ the burglar may simply decide to kill the occupant, and thereby eliminate a potential witness. If the burglar is caught and convicted, three strikes may ensure that the murder will cost him nothing.

Furthermore, the offender will have less to lose in evading or even attacking police who attempt to arrest him or her.¹⁹⁸ There already have been reports from San Francisco area police that, because of three strikes, felons are now resisting arrest more violently.¹⁹⁹

While it may be true that a potentially greater punishment will deter some offenders from committing any further crimes at all, reliance on the complete deterrence rationale fails to account for those who commit offenses in order to fuel drug addictions. Drug addicts who are compelled by their addictions to commit a crime are no longer deterred from turning their crimes of burglary or theft into assault, mayhem, or even murder.

Contrast this again with the effects of GFT.²⁰⁰ In its analysis—which considered only the incapacitative²⁰¹ effect, and not the deterrent effect of three strikes and of GFT—RAND determined that GFT would slightly exceed three strikes in the number of crimes pre-

197. The average murderer in California spends 4.2 years in prison. GREENWOOD ET AL., *supra* note 33, at 58. Felons serve at least half of their sentences. See CAL. PENAL CODE §§ 2930-2933.6 (West Supp. 1995). Therefore, the average sentence for murder is less than 8.4 years.

198. See Walker, *supra* note 193, at A15; Dan Walters, *While Politicians Run with "Three Strikes," Law Enforcement Frets*, L.A. DAILY J., June 14, 1994, at 6.

199. Walker, *supra* note 193, at A15. Seattle area police have also reported that, due to Washington state's three strikes law, suspects there are now resisting arrest with greater force. Balzar, *supra* note 193, at A5.

200. See *supra* notes 135-37 and accompanying text.

201. GREENWOOD ET AL., *supra* note 33, at 20. "Incapacitation" is used in this Comment to refer to the effect incarceration has of removing an offender from society at large, thereby denying that offender the capacity to perpetrate further offenses upon the public.

vented.²⁰² But if we consider deterrent effect, the advantages of GFT become all the more pronounced. Because GFT retains greater flexibility for the courts to impose increased prison time for additional or more serious crimes, it results in a stronger marginal deterrent effect. Finally, GFT arguably has a greater total deterrent effect because it reaches first-time offenders, deterring those who have not had a chance to become habitual offenders.

b. case law indications of disproportionality

Proportionality has been viewed as an implicit component of the protection against cruel and unusual punishments.²⁰³ Although the U.S. Supreme Court's affinity for the proposition that the Eighth Amendment encompasses a requirement of proportionality has waxed and waned in the past decade and a half,²⁰⁴ the California Supreme Court has consistently held that California's Constitution does require proportionality between sentence and offense.²⁰⁵

202. *Id.* at 26.

203. U.S. CONST. amend. VIII; CAL. CONST. art. I, § 17; *see also* *Solem v. Helm*, 463 U.S. 277, 290-92 (1983) (discussing Eighth Amendment's proportionality requirement).

204. In *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court, while recognizing the possibility of an Eighth Amendment violation in a case of extreme disproportionality, said that it would defer to legislatures in matters of sentencing. *Id.* at 274 n.11.

The concept of proportionality garnered a stronger endorsement in *Solem*, 463 U.S. at 290-92, with the Court not only reaffirming that the Eighth Amendment requires proportionality, but setting forth a three-factor test for its determination. *Id.* The three factors to be considered in determining Eighth Amendment proportionality were: (1) the gravity of the offense relative to the severity of punishment; (2) comparison to punishments in other jurisdictions for similar offenses; and (3) comparison to punishments for other offenses in the same jurisdiction. *Id.*

The pendulum swung once again, albeit not completely, in *Harmelin v. Michigan*, 501 U.S. 957 (1991). In *Harmelin*, a defendant brought an Eighth Amendment challenge to his sentence of life imprisonment for possession of 672 grams of cocaine. *Id.* at 961. Two Justices, Scalia and Rehnquist, held that the Eighth Amendment has not historically and therefore does not now require proportionality between sentence and offense. *Id.* at 965. The four dissenters, White, Stevens, Blackmun, and Marshall, applied a proportionality analysis to the case. *Id.* at 1009-28. The issue is controlled, therefore, by Justices Kennedy, O'Connor, and Souter, who concurred in *Harmelin*. The concurring Justices opined that proportionality analysis should be employed only in the most extreme cases, and *Harmelin's* case was not sufficiently extreme. *Id.* at 997-1004; *see also* *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1423 (1993) (discussing state of Eighth Amendment proportionality analysis after *Harmelin*); Kathleen Vandy, Casenote, 24 RUTGERS L.J. 883 (1993) (reviewing post-*Harmelin* Eighth Amendment proportionality analysis).

205. The California Constitution provides that "[c]ruel or unusual punishment may not be inflicted." CAL. CONST. art. I, § 17.

California's requirement of proportionality is spelled out in *People v. Dillon*,²⁰⁶ in which the California Supreme Court held that a sentence would violate Article I, Section 17 of the California Constitution if it was "grossly" disproportionate.²⁰⁷

The *Dillon* court gave some examples of sentences that had been rejected for disproportionality,²⁰⁸ including: an indeterminate life sentence for a second conviction for indecent exposure;²⁰⁹ a bar on recidivist narcotics offenders from being considered for parole for ten years;²¹⁰ twenty-two years for nonviolent child molestation,²¹¹ and the requirement that persons convicted of misdemeanor public lewdness register with the police as sex offenders.²¹²

All of these sentences have been adjudged unconstitutionally disproportionate. And yet, none seem nearly so harsh as a life sentence for stealing a slice of pizza, even considering priors of drug possession, stealing a wallet, joyriding, and attempting to steal a gold chain.²¹³ Nor do the court's examples approach the severity of a life sentence for stealing a wallet, despite priors of stealing \$200 and snatching a purse.²¹⁴

And since the Statute requires the prosecutor to plead and prove all priors, the Senate Committee on the Judiciary reported that "this [statute] appears to be constitutionally infirm in that it would require cruel and unusual punishment in some cases, with no option for a lesser sentence in the interest of justice."²¹⁵

Even so, Jerry Williams and Steven Gordon will face stiff uphill battles should they bring a proportionality challenge against the Stat-

206. 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).

207. *Id.* at 450, 668 P.2d at 700, 194 Cal. Rptr. at 393. The court prescribed two factors for the determination of proportionality: the nature of the offense and the nature of the offender. *Id.* at 479, 668 P.2d at 720, 194 Cal. Rptr. at 413. The analysis is to be conducted with particular regard to the degree of danger the offense and the offender present to society. *Id.*; see also CAL. PENAL CODE § 1170 (West Supp. 1994) ("The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense . . .").

208. *Dillon*, 34 Cal. 3d at 478-79, 668 P.2d at 719-20, 194 Cal. Rptr. at 412-13.

209. *In re Lynch*, 8 Cal. 3d 410, 429-32, 503 P.2d 921, 933-36, 105 Cal. Rptr. 217, 229-32 (1972).

210. *In re Grant*, 18 Cal. 3d 1, 5-18, 553 P.2d 590, 592-602, 132 Cal. Rptr. 430, 432-42 (1976); *In re Foss*, 10 Cal. 3d 910, 917-29, 519 P.2d 1073, 1076-85, 112 Cal. Rptr. 649, 652-61 (1974).

211. *In re Rodriguez*, 14 Cal. 3d 639, 653-56, 537 P.2d 384, 394-97, 122 Cal. Rptr. 552, 562-65 (1975).

212. *In re Reed*, 33 Cal. 3d 914, 663 P.2d 216, 191 Cal. Rptr. 658 (1983).

213. See *supra* notes 177-84 and accompanying text.

214. See *supra* notes 185-93 and accompanying text.

215. JUDICIARY COMM. REP., *supra* note 53, at 8.

ute as applied to them. Since the California Supreme Court handed down *Dillon* in 1983, there has been but one California case uncovered by research for this Comment, *People v. Beheler*,²¹⁶ in which a sentence may have been vacated under a *Dillon* analysis. In a decision the precise basis of which was unclear, a court of appeal reduced Beheler's conviction for first-degree felony murder to one for voluntary manslaughter.²¹⁷ The California Supreme Court declined to hear the case and ordered the opinion depublished.²¹⁸ *Dillon*, it seems, may have been the last hurrah for proportionality in California courts.²¹⁹ The concept of proportionality, however, exists independent of judicial inclinations.

216. 153 Cal. App. 3d 242, 200 Cal. Rptr. 195 (1984) (depublished upon denial of hearing (May 17, 1984)).

217. Beheler had been in the back seat of a car. *Id.*, 200 Cal. Rptr. at 197-98 (opinion has been deleted from official reporter). The robbery of a pedestrian was being committed from the front seat of the car, in the course of which the victim was killed. *Id.* at 196-98. Earlier that night, Beheler had discussed the robbery with the active participants, but when the plan was set to motion, Beheler was too drunk to take an active role. *Id.* Beheler's companions did not know whether he was awake at the time of the robbery. *Id.*

The court in *Dillon*, in addition to its proportionality analysis, had engaged in a discussion of the felony-murder law in California, noting that it created a loophole permitting prosecutors to obtain convictions for first-degree murder without having to prove intent or even malice. *Dillon*, 34 Cal. 3d at 472-76, 668 P.2d at 715-18, 194 Cal. Rptr. at 408-11. The court concluded that the existence of this loophole "leaves much to be desired." *id.* at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19, and urged the legislature to give the subject a thorough reconsideration. *Id.* The reasons for the *Dillon* court's dismay at the results produced by the felony-murder law are closely tied to notions of proportionality.

The *Beheler* court cited and discussed *Dillon* as authority for reducing Beheler's sentence but failed to state precisely which rationale it was borrowing from *Dillon*. See *Beheler*, 200 Cal. Rptr. at 206 ("[T]he rationale behind the *Dillon* opinion . . . is to stress the importance of individual accountability and proportionate punishment."). It is not clear whether the *Beheler* court based its ruling on the *Dillon* court's proportionality analysis or its statements on felony-murder.

218. The order to depublish was not published.

219. Moreover, art. I, § 24 of the California Constitution, adopted prior to *Dillon*, limits the protection provided by art. I, § 17 against cruel or unusual punishment to no more than those afforded by the federal Constitution. CAL. CONST. art. I, § 24. As discussed earlier, the federal Constitution presently affords little protection in terms of proportionality. See *supra* note 204 and accompanying text.

On its face, Article I, Section 17 of California's constitution forbids the infliction of punishment that is either cruel *or* unusual, as compared to the federal Constitution's prohibition on punishments that are both cruel *and* unusual. Compare CAL. CONST. art. I, § 17 with U.S. CONST. amend VIII. Whether the limit imposed by § 24 applies to the definitions of "cruel" and "unusual" as separate concepts or as one single concept is a constitutional curiosity brought into sharp focus by Justice Scalia's observation in *Harmelin* that harsh sentences may be cruel, but not unusual in a constitutional sense. *Harmelin*, 501 U.S. at 967.

c. *subjective indications of disproportionality*

Judges, juries, and victims each play an indispensable role in a criminal prosecution. As such, they are in a position to serve as the conscience of that prosecution.

i. judges

Given the often shocking results produced by the Statute, it is no surprise that many California judges—eighty-five percent of whom were appointed by conservative Republican governors²²⁰—are refusing to apply three strikes when it leads to disproportionate sentencing. One such individual is Superior Court Judge Lawrence Antolini of Sonoma County, who is known as a law-and-order conservative.²²¹ The defendant, Jeffrey Missamore, had incurred his second strike for possession of two marijuana cigarettes while in a county honor farm, where he was serving time for shoplifting twelve dollars' worth of food.²²² His first strike had come ten years earlier when he was convicted of residential burglary for taking his roommate's VCR.²²³ Absent the previous conviction, Missamore's sentence would have been two to four years; but with the prior, he faced up to eight years.²²⁴ Judge Antolini, in declaring his refusal to sentence Missamore by three strikes, said, "This man is not a threat to anyone, and to send him away like the law requires would be insane."²²⁵

Other judges have taken a less confrontational stance, withholding comment on three strikes's sanity but circumventing the Statute by

220. Reuben, *supra* note 270, at 17.

221. Jenifer Warren, *Judge Says He'll Defy '3 Strikes' Sentencing Law*, L.A. TIMES, July 22, 1994, at A1.

222. *Id.* at A23.

223. *Id.*

224. *Id.* Just what sentence three strikes provides for defendants like Jeffrey Missamore is unclear. Generally, there are three sentences available for each offense. JUDICIARY COMM. REP., *supra* note 53, at 6-7. In addition to the "midterm," or presumed sentence, the judge may apply a prespecified longer term or a prespecified shorter term. *Id.* at 7. The Statute is ambiguous as to which of these terms paragraph (c)(1) refers to as "the term otherwise provided." *Id.* at 6 (quoting CAL. PENAL CODE § 1170.12(c)(1)).

Furthermore, it is not known whether the doubling of the terms under paragraph (c)(1) should take place before applicable other enhancements are added, or after. *Id.* at 7.

"These ambiguities are repeated," *id.*, in paragraph (c)(2)(A)(i), which provides for the tripling of terms for defendants with two prior strikes, CAL. PENAL CODE § 1170.12(c)(2)(A)(i).

225. Warren, *supra* note 221, at A23. At the time of this writing, an appellate court had affirmed Judge Antolini's sentencing and the State had filed a petition with the California Supreme Court. William Claiborne, *Tough Sentencing Law Sparks Legal Debate*, WASH. POST, Dec. 31, 1994, at A3.

either striking prior convictions or reducing the current conviction from a felony to a misdemeanor.²²⁶ For example, in July 1994, Sacramento Superior Court Judge Peter Smith decided to treat a prior New York felony conviction as a misdemeanor in order to avoid sentencing a defendant under three strikes.²²⁷ Cases of judges ignoring priors, while not uncommon, are the subject of ongoing controversy: As of January 18, 1994, there were twenty-nine such cases on appeal in San Diego County alone.²²⁸

ii. juries

As three strikes's disproportionate effects become more publicized, and as jurors become more keenly aware of their role in imposing the harsh sentences, we may see cases of jury nullification of three strikes sentencing. As Los Angeles County district attorney Gil Garcetti put it, "[w]e're going to have a tremendous jury backlash. Jurors are going to require more proof than [the current standard of] 'beyond reasonable doubt.'" ²²⁹

Jury nullification for sentence disproportionality is particularly effective in three strikes cases. It relieves jurors of having to contemplate the release-or-punish-unfairly dilemma by giving them a choice as to degree of nullification. Since the existence of prior convictions involves questions of fact, the defendant has a right to a jury determination on the question.²³⁰ The jury may then nullify just that portion of the penalty it finds unfair. For example, if the prosecution presents evidence of two priors, the jury may find that the prosecution has proved only one, or none, to their satisfaction, depending on the sentence they feel is appropriate.

But as fortuitous as all this may be, three strikes still forces juries in such cases to make sham findings in order to achieve justice.

226. See Warren, *supra* note 221, at A1; *Judges Who Insist on True Justice*, L.A. TIMES, July 23, 1994, at B17.

227. *Another Judge Says No*, SACRAMENTO BEE, July 26, 1994, at B6.

228. Tony Perry, *Ruling a Victory for 'Three Strikes' Law's Advocates*, L.A. TIMES, Jan. 18, 1995, at A3. See *infra* part IV.C for a discussion of courts' limited discretion in striking priors.

229. Morain, *supra* note 7, at A3 (second alteration in original) (quoting Los Angeles County district attorney Gil Garcetti).

230. CAL. PENAL CODE § 1025 (West 1985); *People v. Calderon*, 9 Cal. 4th 69, 73, 885 P.2d 83, 87, 36 Cal. Rptr. 2d 333, 337 (1994).

iii. victims

Some victims have expressed ambivalence and even outright opposition to the shocking results the Statute has produced. For example, in the case of Steven Gordon,²³¹ his victim, Karl Alexander, wanted Gordon punished for the attempt on his wallet, but did not feel Gordon should spend the remainder of his life in prison.²³²

Another such victim was Joan Miller, a seventy-year-old Sacramento resident.²³³ Miller did not want to see a man who stole a box of old clothes from her car go to prison for the rest of his life; she refused to testify against him at the risk of being imprisoned herself for contempt of court.²³⁴ "Of course, he should [be] punished," Miller said, "but life in prison for stealing my boxes of old clothes is really ridiculous."²³⁵ The defendant ultimately pleaded to a lesser charge.²³⁶ Mike Reynolds's reaction to Miller's refusal to testify was that Miller was "just condemning another victim."²³⁷

While Miller may or may not have been willing to condemn another victim to the loss of a box of old clothes, Marc and Joe Klaas cannot shrug off their loss so easily. The father and grandfather of Polly Klaas, the murder victim whose death provided three strikes with the kind of publicity no amount of lobbying could, initially supported Reynolds's law.²³⁸ But they have since changed their minds.²³⁹ The Statute, they have said, is unaffordable, too harsh on petty criminals, and too lenient on the truly violent.²⁴⁰ The Klaas's instead gave their support to Assembly member Richard Rainey's alternative bill.²⁴¹

Dennis Lees, who, like Mike Reynolds and Marc Klaas, had a daughter who was murdered by a repeat offender, has also expressed his opposition to California's three strikes law. "Where is our com-

231. See *supra* notes 185-93 and accompanying text.

232. Hecht, *supra* note 185, at B11.

233. *Victim Prevents Felon from Taking 3rd Strike Under Law*, CHI. TRIB., May 1, 1994, at 12.

234. *Three-Strike Travesty*, S.F. CHRON., May 2, 1994, at A20.

235. Jim Herron Zamora, *City Burglary Victim Leads Fight Against '3 Strikes'*, S.F. EXAMINER, Aug. 14, 1994, at C1 (quoting Joan Miller).

236. *Three-Strike Travesty*, *supra* note 234.

237. Peter Hecht, *'3 Strikes' Fight Rages Inside, Outside Court*, SACRAMENTO BEE, Aug. 16, 1994, at B1 (quoting Mike Reynolds).

238. Ingram, *supra* note 68, at A29.

239. Vlae Kershner, *Klaases Like Substitute 3 Strikes Bill*, S.F. CHRON., Mar. 10, 1994, at A17.

240. *Id.*

241. *Id.*

mon sense?"²⁴² he asks. "[W]e can't afford scatter-gun solutions when more carefully crafted, affordable approaches will be much more effective[.]"²⁴³

Understandably, Reynolds takes a dim view of this opposition to his law from the individuals expected to support him most. The Klaas's, he conjectures, may have parted ways with him because they " 'felt that their daughter was so important that they should go out on their own.' "²⁴⁴ As for Miller, according to Rod Rimmer of the Three Strikes and You're Out Initiative, her reason for refusing to testify was born not of compassion, but from the fact that, at the time, her son was also awaiting trial in a three strikes case.²⁴⁵

C. Phantom Prosecutorial Discretion

Three strikes's supporters answer charges of disproportionality by pointing out that paragraph (d)(2) of the Statute²⁴⁶ gives prosecutors discretion to move to strike a prior in the furtherance of justice, and a just outcome may thus be achieved.²⁴⁷ However, any attempts by prosecutors to further justice through the striking of priors will be stymied by the language contained in the second sentence of paragraph (d)(2), which inexplicably provides that the court may only grant such motions upon its satisfaction "that there is insufficient evidence to prove the prior felony conviction."²⁴⁸ Thus, while the prosecutor may move to strike priors in order to achieve a just and proportionate sentence, the court is restricted to striking only those priors for which the prosecutor has insufficient evidence. But why would the prosecutor move to strike the priors if they could not be proven in the first place?

242. Dennis Lees, *The 'Three Strike' Fallacy*, USA TODAY, Apr. 13, 1994, at 9A.

243. *Id.*

244. Bill Ainsworth, *'Three Strikes' Spokesman Has Change of Heart*, LEGAL TIMES, Apr. 4, 1994, at 7.

245. Telephone Interview with Rod Rimmer, *supra* note 44. No independent support for this assertion has been found.

246. CAL. PENAL CODE § 1170.12(d)(2).

247. Morain, *supra* note 7, at A3. The three strikes bill passed by the legislature provided that the prosecutor may move to dismiss or strike a prior "pursuant to Section 1385." CAL. PENAL CODE § 667(f)(2) (West Supp. 1995). However, because § 1385 explicitly prohibits its use for the striking of priors for the purposes of sentencing under § 667, the judge would be unable to *grant* any such motion. *Id.* The three strikes initiative, the version now in effect, cures this problem by placing the Statute in newly created section 1170.12. *Id.* § 1170.12.

248. CAL. PENAL CODE § 1170.12(d)(2).

Further, prosecutorial discretion has proven to be a poor safeguard against disproportionate sentencing as it is against the prosecutor's interest to make motions to strike priors. Given the tougher-than-thou contest among legislators sparked by the three strikes bill,²⁴⁹ one wonders how willing district attorneys are to establish a record of failing to apply three strikes at every opportunity.²⁵⁰ Moreover, if a district attorney decides not to apply three strikes against a particular defendant, and that defendant were to commit a violent crime upon his or her release, an angry public would surely require a strong, perhaps impossible, justification for the district attorney's decision.

The pressure on district attorneys is heightened by the fact that the Statute appears to require them to plead and prove priors regardless of whether they intend to immediately turn around and move the court to strike them.²⁵¹ By requiring that the priors be pleaded and proved, the Statute forecloses any attempts by the prosecutor to obtain a proportionate sentence by ignoring the priors and hoping that no one will notice. Three strikes requires that the record reflect the defendant's priors, as well as the prosecutor's motion to strike.²⁵² The public is thus given a means by which to track prosecutors' implementation of the three strikes law, thereby turning the screws of public pressure once again.

Given these conflicting motivations of fairness versus political survival, district attorneys have been split into two camps: those who will prosecute each and every eligible case under three strikes, and those who will use three strikes only against defendants whom they deem deserving of the sentencing enhancement.²⁵³ The predictable effect has been that an offense that brings a sentence of a year or two in one county will result in a sentence of twenty-five years to life in another.²⁵⁴

249. See Bailey, *supra* note 55, at A3.

250. For a period of time after the three strikes bill's passage, Los Angeles County district attorney Gil Garcetti instructed all deputy district attorneys working under him to prosecute all "wobblers" as felonies. Martin Berg, *D.A.'s Office Softens Stance on '3 Strikes'*, L.A. DAILY J., May 6, 1994, at 1. Wobblers are offenses that may be prosecuted as either felonies or misdemeanors. *Id.*

251. CAL. PENAL CODE § 1170.12(d)(2).

252. *Id.*

253. See Chiang, *supra* note 3, at A1, A8; Peter Hecht, *How 'Three Strikes' Law Is Used Across the State*, S.F. EXAMINER, Aug. 8, 1994, at A7.

254. Chiang, *supra* note 3, at A1, A8. Such disparity in sentencing is in direct contravention of legislative intent as stated in California Penal Code § 1170(a)(1):

I earlier wrote that the Statute "appears" to require the prosecutor to plead and prove priors because, once again, the wording of the Statute is puzzling. Paragraph (d)(1) provides: "The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2)."²⁵⁵ This paragraph is a directive to prosecutors to plead and prove all priors, "except as provided in paragraph (2)." The use of the word "except" leads one to expect that paragraph (d)(2) will describe circumstances under which the prosecutor would not be required to plead and prove priors.

So what does paragraph (d)(2) provide as an exception to the requirement that the prosecutor plead and prove all priors? Does it name, as logic might otherwise dictate, Penal Code section 1025, which provides that, upon defendant's admission of the priors, they may be noted in the minutes without further proof?²⁵⁶ Or does it name, as unlikely and incorrect as it would be, Evidence Code section 452, providing that the court may take notice of court records?²⁵⁷

No, rather than either of these possibilities, paragraph (d)(2) offers an impossibility. It merely provides that the prosecutor may move the court to strike the priors.²⁵⁸ But this is an *exception* from the requirement that the prosecutor plead and prove all priors. If the prosecutor did not plead and prove the priors in the first place, how can the prosecutor move to strike priors which, as far as the court is concerned, do not exist? Paragraph (d)(2) would have made sense if it had either named section 1025, or provided an exception where the prosecutor *intended* to move to strike priors.

There is a further absurdity to paragraph (d)(2). Since three strikes is to be applied "[n]otwithstanding any other provision of law,"²⁵⁹ it overrides the provisions of Penal Code section 1025.²⁶⁰ Is the prosecutor now required to attempt to plead and prove priors

The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for *uniformity in the sentences of offenders committing the same offense under similar circumstances*. The Legislature further finds and declares that the *elimination of disparity and the provision of uniformity of sentences* can best be achieved by determinate sentences

CAL. PENAL CODE § 1170(a)(1) (West Supp. 1994) (emphasis added).

255. CAL. PENAL CODE § 1170.12(d)(1).

256. CAL. PENAL CODE § 1025 (West 1985).

257. CAL. EVID. CODE § 452(d) (West 1985). Since Penal Code § 1025 applies specifically to such situations, Evidence Code § 452 does not apply.

258. CAL. PENAL CODE § 1170.12(d)(2).

259. *Id.* § 1170.12(a).

260. CAL. PENAL CODE § 1025.

even when the defendant admits them? Read literally, that is exactly what paragraph (d)(2) requires.

V. THE CRIMINAL JUSTICE SYSTEM LACKS THE RESOURCES NECESSARY TO IMPLEMENT THREE STRIKES FULLY

Three strikes's enormously broad coverage²⁶¹ will make full implementation all but impossible since the courts and prosecutors simply do not have the necessary resources. Plea bargaining is a tool used to obtain convictions in routine cases quickly, thereby allowing prosecutors the time needed to prosecute serious or complex crimes.²⁶² But if the defendant knows that a third felony conviction will result in a life sentence, he will have nothing to lose and perhaps much to gain by going to trial. By removing the incentive to plea bargain, the Statute has resulted in a burgeoning increase in the number of criminal trials.²⁶³ Before three strikes, ninety-four percent of all felony cases in California were settled through plea bargaining.²⁶⁴ After three strikes, only six percent of third-strike cases and fourteen percent of second-strike cases have been settled by plea bargaining.²⁶⁵

In order to free staff to work on the additional trials resulting from three strikes, Los Angeles County district attorney Gil Garcetti has stopped filing worker safety, environmental, and major fraud

261. Between March 7, 1994, when three strikes went into effect, and October 20, 1994, the Los Angeles County District Attorney's Office filed 9735 cases. Palermo, *supra* note 138, at 1. Of those prosecutions, 2898 allege that the defendant committed a second felony, and 1099 were for third strikes. *Id.*

The Statute is so far-reaching, in fact, that even the legislators who voted overwhelmingly in its favor are having to resort to extraordinary measures in attempting to work around it. Eric Bailey, *Legislature Urged to Not Boost Felonies*, L.A. TIMES, Apr. 20, 1994, at A3. Many proposals to elevate particular misdemeanors to felonies have been altered or shot down entirely upon contemplation of sending people away for life for such crimes as abalone poaching, *id.*, or possession of a bear gall bladder, Hallye Jordan, *Senate Leader to Block Creation of New Felonies*, L.A. DAILY J., Apr. 20, 1994, at 3. State Senator Quentin Kopp, who introduced a bill to make assault with a vehicle a felony, was forced to amend it to provide that a conviction under his bill would not count as a conviction under three strikes. *Id.* Greg Totten of the California District Attorney's Association argued that any such provisions placed in bills passed before the passage of the three strikes initiative became void upon passage of the three strikes initiative. *Id.* The legislature would then be required to produce a two-thirds vote in order to amend or repeal the statute. *Id.* "[Y]ou can't write around laws in advance [of their passage]," said Bill Lockyer, Senate president pro tempore. *Id.* (second alteration in original) (quoting Bill Lockyer). Lockyer recommended that lawmakers forego their election-year ritual of introducing bills to elevate minor crimes to felonies. Bailey, *supra*, at A28.

262. Webb, *supra* note 127, at A2.

263. Morain, *supra* note 62, at A15.

264. Webb, *supra* note 127, at A2 (citing California Legislative Analyst).

265. *Id.* (citing California Legislative Analyst).

prosecutions.²⁶⁶ San Mateo County district attorney Jim Fox has said that he will require more than twice as many attorneys to handle the additional jury trials.²⁶⁷ Already, county jails have become so packed with three strikes defendants awaiting trial that some counties have had to release convicts early or refuse to accept new ones.²⁶⁸ San Bernardino County jail has stopped taking persons booked for misdemeanors.²⁶⁹ Los Angeles County sheriff Sherman Block has reported that he may have to release more dangerous inmates early to make room for three strikes defendants who are awaiting trial.²⁷⁰

The effect on the judiciary has been no less overwhelming. As criminal cases have priority over civil cases,²⁷¹ Garcetti has predicted that the Statute will crowd the courts with so many criminal cases that civil cases will eventually be squeezed out.²⁷² Said Fox, "the civil system as we know it will no longer exist."²⁷³ In October 1994, Judge Cecil Mills, supervising judge of the Los Angeles criminal courts, predicted that more than half of all downtown Los Angeles civil courts will have been closed down by December to make room for the additional criminal trials resulting from three strikes.²⁷⁴ By Christmas twenty-three of the forty civil courts had been closed.²⁷⁵ Long Beach Superior Court had stopped hearing civil trials altogether, with Torrance Superior Court not far behind.²⁷⁶ "This [unavailability of civil courts] could produce an environment in which consumer fraud and other illegal business practices cannot be restrained, and where criminal matters emanate from frustration over an inability to reach civil remedies, especially in domestic relations matters."²⁷⁷

There is no solution in sight for court overcrowding by three strikes trials. While additional sales tax revenues have been earmarked for district attorneys, public defenders, and sheriff's departments to help them cope with three strikes, no additional funds

266. *Crime Watch: Striking Out*, L.A. TIMES, Apr. 8, 1994, at B6.

267. Morain, *supra* note 7, at A21.

268. Webb, *supra* note 127, at A2 (citing California Legislative Analyst).

269. *Id.*

270. Richard C. Reuben, *Get-Tough Stance Draws Fiscal Criticism*, A.B.A. J., Jan. 1995, at 16, 16.

271. Morain, *supra* note 7, at A21.

272. *Large Load of '3 Strikes' Cases Filed by Prosecutors*, L.A. TIMES, Apr. 23, 1994, at B2.

273. Morain, *supra* note 7, at A21 (quoting Jim Fox).

274. Palermo, *supra* note 138, at 1.

275. Charles L. Lindner, *With the Courts Crowded, Private 'Justice' for the Rich and Famous*, L.A. TIMES, Dec. 25, 1994, at M6.

276. *Id.*

277. Webb, *supra* note 127, at A2 (quoting Center for Urban Analysis).

have been allocated to trial courts.²⁷⁸ The Judicial Council has estimated that each one-percent decrease in guilty pleas will result in 1000 additional jury trials, consuming at least twenty judge-years and \$16 million in court resources.²⁷⁹ The Los Angeles Superior Court has reported that, in the first ten months of 1994, of which three strikes was in effect for only the last seven, early case dispositions declined by *twenty-one* percent.²⁸⁰ “[W]hat good does a Constitution do,” asks Presiding Judge Robert Mallano of the Los Angeles Superior Court, “if we can’t give people a civil trial?”²⁸¹

Once again, court overcrowding is a problem which can be averted by GFT. In contrast to three strikes, GFT would retain the defendant’s incentive to plea bargain. The greater discretion allowed prosecutors by GFT would mean a much greater difference in the potential sentence if the defendant chooses to bargain. As such, the defendant would have much more to gain by bargaining, and thereby avoiding trial. Resources would thus be conserved.

VI. A BOTCHED ATTEMPT TO VIOLATE THE CALIFORNIA CONSTITUTION’S GUARANTEE OF EQUAL PROTECTION

Paragraph (a)(5) of the Statute provides that credits for good time served granted pursuant to section 2931 shall not exceed one-fifth of the total term of imprisonment, and *shall not accrue until the defendant is physically placed in the state prison.*²⁸² As will be shown in the following sections, the prevailing interpretation of this provision is a violation of the California Constitution’s guarantee of equal protection of the laws.²⁸³

A. Three Strikes Creates Two Distinct Classes

The only circumstance under which a person is placed in state prison is after conviction and sentencing for a felony.²⁸⁴ Before sen-

278. Palermo, *supra* note 138, at 5.

279. JUDICIARY COMM. REP., *supra* note 53, at 11.

280. Palermo, *supra* note 138, at 1.

281. *Id.* at 5 (quoting presiding judge of Los Angeles Superior Court Robert Mallano).

282. CAL. PENAL CODE § 1170.12(a)(5). Paragraph (a)(5) applies only to good time credits earned under Part 3, Title 1, Chapter 7, Article 2.5 of the Penal Code, commencing with § 2930. *Id.*

283. CAL. CONST. art. I, § 7, cl.(a) (“A person may not be . . . denied equal protection of the laws . . .”).

284. CAL. PENAL CODE § 17(a) (West Supp. 1995) (“A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.”); *id.* § 19.2

tencing, the defendant is either incarcerated in a municipal or county jail, or released on bail or on his or her own recognizance. The provisions of three strikes apply only to those convicted of a felony.²⁸⁵ So individuals falling under three strikes will first have been detained in jail or given presentence release, and then committed to state prison. Time served and credits earned in presentence detention will be credited towards the ultimate sentence,²⁸⁶ and thus deducted from the time to be served in state prison. Under the California Penal Code prior to three strikes, good time credits could be earned under section 4019,²⁸⁷ providing for credits of up to one day for every two served before sentencing,²⁸⁸ or under sections 2931 and 2933,²⁸⁹ providing for credits of up to one day per each day served after sentencing to state prison.²⁹⁰

There are two existing interpretations of how paragraph (a)(5) affects the grant of good time credits: the interpretation apparently held by its drafters, and the accurate interpretation.

1. The accurate interpretation of paragraph (a)(5)

The Statute purports to limit good time credits earned under sections 2931 and 2933 to one-fourth of time served,²⁹¹ and forbids the accrual of those credits until the inmate is physically placed in state prison.²⁹² It makes no mention of section 4019,²⁹³ and so defendants presumably continue to earn credits of one-half time served before sentencing.²⁹⁴ Under this scheme, a defendant will earn credit of *one-half* time served in presentence incarceration, but only *one-fourth* time served after sentencing. Those defendants who are incarcerated before sentencing will have an opportunity to earn more good time credits compared to those who are not incarcerated before sentencing. The more time spent in county jail, as opposed to prison, the more

("In no case shall any person sentenced to confinement in a county or city jail . . . be committed for a period in excess of one year . . .").

285. *Id.* § 1170.12(a) ("[I]f a defendant has been convicted of a felony . . . the court shall adhere to each of the following . . .").

286. *Id.* § 2900.5.

287. *Id.* § 4019.

288. *Id.*

289. *Id.* §§ 2931, 2933.

290. *Id.* § 2933.

291. One-fifth of the total sentence works out to be one-fourth of actual time served—four days of actual incarceration for one day of credit. *Id.* § 2931(b).

292. *Id.* § 1170.12(a)(5).

293. *Id.*

294. *Id.* § 4019.

credits the defendant can earn, and the shorter the time of overall incarceration. Thus, a felon who is incarcerated before sentencing may serve a significantly shorter sentence than one who is not.²⁹⁵

2. An erroneous, but widely held, interpretation of paragraph (a)(5)

The Three Strikes and You're Out Committee, among others, seems to believe that the Statute eliminates the granting of *any* good time credits before an inmate is physically placed in state prison. In a campaign circular²⁹⁶ the Committee describes the Statute as "requir[ing] that at least 80% of a sentence be served before repeat serious/violent felons are eligible for parole."²⁹⁷ Only if absolutely no credits are given outside state prison would this be true.

The Legislative Analyst agrees with this interpretation. In a description of three strikes published in the California Ballot Pamphlet, the Analyst concluded that the offender "may not receive any credits for any time spent in county jail before going to state prison."²⁹⁸ The Senate Committee on the Judiciary likewise seemed to interpret paragraph (a)(5) as limiting the sum of all good time credits to the twenty percent of the sentence served in state prison.²⁹⁹

Under this interpretation, good time credits awarded under section 4019 would be limited to misdemeanants;³⁰⁰ felons who fall under three strikes would not be able to earn good time credits during

295. Assume defendants *A* and *B* are arrested on the same day. Assume further that they both will be convicted. Defendant *A* is immediately released on her own recognition. Each day defendant *A* spends incarcerated, she will spend in state prison. Defendant *B*, on the other hand, is detained in custody in county jail pending his conviction and sentencing. While in county jail, *B* earns good time credits of one-half time served under § 4019.

Two hundred forty-four days later, both *A* and *B* are convicted of the same offense, and receive one-year sentences. *A* will serve her entire sentence in state prison, where she may earn good time credits totaling only 20% of her sentence. In other words, *A* will serve at least 80% of her sentence. Eighty percent of 365 days is 292 days, the number of days that *A* will spend in state prison. *B*, having served 244 days in county jail and earned 122 days of credits, will be deemed to have served his entire sentence and released. *B* served 48 days less than *A*.

296. *Yes on 184!: 3 Strikes and You're Out* (Three Strikes and You're Out Committee, Sacramento, Cal.) (on file with *Loyola of Los Angeles Law Review*).

297. *Id.*

298. *BALLOT PAMPHLET*, *supra* note 97, at 33.

299. *JUDICIARY COMM. REP.*, *supra* note 53, at 3 ("This bill would provide that a person sentenced under the provisions of this bill . . . may only receive sentence credits limited to a maximum of one-fifth the total sentence.").

300. The provisions of three strikes apply only to those convicted of felonies. *CAL. PENAL CODE* § 1170.12(a).

presentence detention. Those felons who are detained prior to sentencing, who serve part of their terms in county or municipal jail, will not be able to earn good time credits during the portion of their term they serve in county or municipal jail. They will thus earn fewer credits and serve longer periods of actual incarceration. Those who are able to gain presentence release, who spend their entire period of incarceration in state prison will have the opportunity to earn good time credits over the entire period of their incarceration. They will thus serve shorter periods of actual incarceration. The effect is that indigent felons, who are unable to afford bail, and are thus forced to serve presentence detentions, will be punished more severely than wealthy felons.³⁰¹

However, given the fact that the language of paragraph (a)(5) expressly limits its application to credits granted in state prison under sections 2930 to 2933.6,³⁰² and is silent as to credits granted in jail under section 4019, this interpretation is clearly erroneous.

B. The Prevailing (If Erroneous) Interpretation of Paragraph (a)(5) Violates the California Constitution's Guarantee of Equal Protection of the Laws

1. The discriminatory grant of good time credits is subject to strict scrutiny, as good time credits implicate a personal liberty interest, which is fundamental under the California Constitution

a. good time credits, even if state created, are a liberty interest

In *Wolff v. McDonnell*,³⁰³ the U.S. Supreme Court held that a prisoner's interest in good time credits was a liberty interest.³⁰⁴ The

301. In September 1994, the California legislature passed, and Governor Pete Wilson signed into law, Penal Code § 2933.1, limiting any and all good time credits earned by persons convicted of violent felonies to 15% of time served. *Id.* § 2933.1. This analysis therefore applies only to persons convicted of nonviolent felonies.

302. The reader may ask at this point why the drafters of the Statute took the trouble of expressly providing that the operation of §§ 2930-2933.6 would be limited to time served in state prison when those sections had always been so limited. I am equally perplexed but conjecture that the drafters intended to limit *all* good time credits to credits earned in state prison, but simply were not aware of the existence of § 4019. The fact that the Three Strikes and You're Out Committee, which presumably knew the true intentions of the drafters, ignores the existence of § 4019 in its interpretation of paragraph (a)(5) is entirely consistent with this explanation.

303. 418 U.S. 539 (1974).

304. *Id.* at 557; *see also* Superintendent v. Hill, 472 U.S. 445, 453 (1985) (holding good time credits are liberty interests deprivation of which requires due process); Ponte v. Real, 471 U.S. 491, 497 (1985) (holding good time credits are liberty interests deprivation of

State "may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior," the Court wrote, "[b]ut the State having created the right to good time[,] . . . the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty.'"³⁰⁵

b. liberty interests of the type embodied in good time credits are fundamental under the California Constitution

The discriminatory denial of a fundamental interest is subject to strict scrutiny, requiring that the discriminatory practice be necessary to further a compelling state interest.³⁰⁶ While personal liberty interests of the type embodied in good time credits do not appear to be fundamental under the federal Constitution,³⁰⁷ the California Supreme Court has held that personal liberty *is* fundamental under the California Constitution.

In *People v. Olivas*,³⁰⁸ a nineteen-year-old offender brought an equal protection challenge against his commitment to the California Youth Authority because it subjected him to a term of incarceration

which requires due process); *Preiser v. Rodriguez*, 411 U.S. 475, 487-89 (1973) (holding challenge to denial of good time credits is challenge to length of, or fact of, incarceration).

305. *Wolff*, 418 U.S. at 557. "We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State." *Id.* at 558; *see also* *Graham v. Richardson*, 403 U.S. 365, 374 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'").

Holding that good time credits constitute a liberty interest is undeniably logical; to find otherwise would encourage states to undertake semantic gamesmanship. For example, say Blackacre County has a policy of imposing relatively short sentences, but allows prison wardens to arbitrarily increase any prisoner's sentence. Whiteacre County, on the other hand, imposes long sentences, but is generous with good time credits so that, for those who earn the full allotment of good time credits, sentences are equal to what would have been received in Blackacre County. However, the warden of Whiteacre County Jail may arbitrarily deny good time credits. The effects of these two schemes are equal. *See also* *Preiser*, 411 U.S. at 489 (holding challenge to denial of good time credits is challenge to duration of, or fact of, incarceration).

306. *People v. Olivas*, 17 Cal. 3d 236, 243, 551 P.2d 375, 379, 131 Cal. Rptr. 55, 59 (1976).

307. *Chestnut v. Magnusson*, 942 F.2d 820, 823 (1st Cir. 1991) (interest in good time credits not fundamental); *see also* *McGinnis v. Royster*, 410 U.S. 263, 270 (1973) (employing rational basis test in upholding discriminatory grant of good time credits); *Johnson v. Louisiana*, 406 U.S. 356, 363 (1972) (applying rational basis test to deprivation of liberty); *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966) (applying rational basis test to deprivation of liberty). *But see* *Bolling v. Manson*, 345 F. Supp. 48, 51 (D. Conn. 1972) (grant of good time credits in certain prisons but not in others was denial of equal protection); *United States v. York*, 281 F. Supp. 8, 15-18 (D. Conn. 1968) (imposition of longer sentences on women than those imposed on men was denial of equal protection).

308. 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976).

longer than the longest jail term a similarly situated twenty-one-year-old offender would have received.³⁰⁹ After examining the sources and history of personal liberty interests, the court stated:

We believe that [the California Constitution is] no less vigilant in protecting against *continuing* deprivations of liberty than [it is] in protecting against the initial deprivation of that liberty. We conclude that personal liberty is a fundamental interest, second only to life itself, as an interest protected under . . . the California . . . Constitution[].³¹⁰

Four years later, in *People v. Sage*,³¹¹ the court reviewed a statute which, like the intent of three strikes, denied presentence good time credits to felons.³¹² "It is the distinction between the detainee/felon," the court wrote, "and the felon who serves no presentence time that raises equal protection problems."³¹³ The court, in invalidating the discriminatory practice, found good time credits to be an interest warranting the application of strict scrutiny.³¹⁴ In the absence of a suspect classification, the application of strict scrutiny indicates that a fundamental interest is at stake.³¹⁵

309. *Id.* at 242, 551 P.2d at 378, 131 Cal. Rptr. at 58.

310. *Id.* at 251, 551 P.2d at 384, 131 Cal. Rptr. at 64 (emphasis added). While acknowledging that federal courts have not treated personal liberty as a fundamental interest under the federal Constitution, the court "exercise[d its] inherent power as a court of last resort independent of fundamental interest determinations which may be reached by the United States Supreme Court solely on interpretations of the federal Constitution." *Id.* at 246, 551 P.2d at 381, 131 Cal. Rptr. at 61.

311. 26 Cal. 3d 498, 611 P.2d 874, 165 Cal. Rptr. 280 (1980).

312. *Id.* at 507, 611 P.2d at 878, 165 Cal. Rptr. at 284.

313. *Id.*

314. *Id.* at 508 n.6, 611 P.2d at 879 n.6, 165 Cal. Rptr. at 285 n.6 (distinguishing *McGinnis* on ground that federal court used rational basis, while California applies strict scrutiny).

315. *Olivas*, 17 Cal. 3d at 243, 551 P.2d at 379, 131 Cal. Rptr. at 52; *see also* *People v. Saffell*, 25 Cal. 3d 223, 233-35, 599 P.2d 92, 97-98, 157 Cal. Rptr. 897, 903-04 (1979) (denial of good time credits to mentally disordered sex offenders incarcerated for treatment upheld under strict scrutiny); *People v. Cook*, 14 Cal. App. 4th 1467, 1470, 18 Cal. Rptr. 2d 362, 363 (1993) (denial of good time credits to those under home detention program upheld under strict scrutiny); *People v. Poole*, 168 Cal. App. 3d 516, 525-26, 214 Cal. Rptr. 502, 507 (1985) (denial of work-credits program to presentence detainee upheld under strict scrutiny); *People v. Jobinger*, 153 Cal. App. 3d 689, 698, 200 Cal. Rptr. 546, 553 (1984) (denial of good time credits to mentally disordered sex offenders incarcerated for treatment invalidated under strict scrutiny).

But compare *In re Kapperman*, 11 Cal. 3d 542, 522 P.2d 657, 114 Cal. Rptr. 97 (1974), in which the court, without discussing the applicable standard of review, held that the State's failure to retroactively credit the time of presentence incarceration towards completion of the sentence lacked rational basis. *Id.* at 548, 522 P.2d at 660-61, 114 Cal. Rptr. at 100-01. The fact that the State's actions did not have a rational basis foreclosed any analysis under strict scrutiny. One can hardly argue that a law would fail under rational basis

and yet survive strict scrutiny. *Kapperman*, however, seems to have spawned a line of appellate court cases inimical to the U.S. Supreme Court's holding in *Wolff v. McDonnell*, 418 U.S. 539 (1974) (good time credits are liberty interest), and the California Supreme Court's decision in *Olivas*, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976) (liberty interests are fundamental under California Constitution).

For example, an appellate court, in *In re Stinnette*, 94 Cal. App. 3d 800, 155 Cal. Rptr. 912 (1979), reviewed the State's refusal to apply an increase in good time credits retroactively. The court maintained that good time credits were "wholly amelioratory," not implicating personal liberty interests. The denial of good time credits, the court therefore concluded, warranted only rational basis review. *Id.* at 805-06 n.4, 155 Cal. Rptr. at 914 n.4. In addition to *Kapperman*, the *Stinnette* court also cited *McGinnis v. Royster*, 410 U.S. 263 (1973) (applying rational basis to denial of good time credit). *Stinnette*, 94 Cal. App. 3d at 805-06 n.4, 155 Cal. Rptr. at 914 n.4. The *Stinnette* court, however, ignored both the U.S. Supreme Court's holding in *Wolff* that good time credits were a liberty interest, and the California Supreme Court's clear statement in *Olivas* that California would part ways with the federal courts in applying the higher level of scrutiny to impingements upon personal liberties. The refusal to grant good time credits retroactively may indeed have been constitutional, *see* *People v. Sage*, 26 Cal. 3d 498, 509-10 n.7, 611 P.2d 874, 880 n.7, 165 Cal. Rptr. 280, 286 n.7 (1980), but certainly not because the practice did not implicate a liberty interest.

In *People v. Hernandez*, 100 Cal. App. 3d 637, 160 Cal. Rptr. 607 (1979), the defendant challenged the enhancement of his sentence. His sentence had been enhanced for an in-state prior felony conviction, despite his having served less than a year for that conviction. *Id.* at 643, 160 Cal. Rptr. at 610. In order for out-of-state convictions to qualify as a prior felony conviction, the defendant would have had to serve a year or more. *Id.* at 644, 160 Cal. Rptr. at 610. This difference, according to defendant, was a denial of equal protection. *Id.* at 643-44, 160 Cal. Rptr. at 610. The court concluded that the differential treatment of prior felonies for enhancement purposes did not implicate fundamental interests, and was therefore subject only to rational basis review. *Id.* at 644 n.2, 160 Cal. Rptr. at 610 n.2. The court analogized it to the denial of good time credits (citing *Stinnette*) or credits for time served before sentencing (citing *Kapperman*). *Id.* "The *Kapperman* and *Stinnette* cases, as well as the instant situation, concern the effects of certain legislative enactments upon an individual's underlying sentence and actual time served and not whether that person is to be deprived of his liberty in the first place." *Id.* The U.S. Supreme Court, judging from its opinions in *Wolff* and *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973) (challenge to denial of good time credits was challenge to duration of, or fact of, incarceration), might disagree. So too would the California Supreme Court, which in *Olivas* held that the California Constitution's protections against continuing deprivations of liberty were equal to its protections against the initial deprivation of liberty. *Olivas*, 17 Cal. 3d at 251, 551 P.2d at 384, 131 Cal. Rptr. at 64.

The year after *Stinnette* and *Hernandez* were decided, the California Supreme Court handed down *Sage*, in which the high court treated good time credits as a fundamental interest. *Sage*, 26 Cal. 3d at 508 n.6, 611 P.2d at 879 n.6, 165 Cal. Rptr. at 285 n.6. The holding in *Sage* overruled, *sub silentio*, *Stinnette* and *Hernandez*, at least as to the nature of the interest embodied in good time credits, and the fundamentality of that interest.

Yet, in *In re Bender*, 149 Cal. App. 3d 380, 196 Cal. Rptr. 801 (1983), an appellate court cited *Stinnette* for the proposition that good time credits did not implicate a fundamental interest. In *Bender*, the defendant argued under equal protection for the retroactive application of increased work credits. *Id.* at 382, 385, 196 Cal. Rptr. at 802, 804. After determining that the defendant was not similarly situated with inmates convicted after the implementation of the new and increased work credit provisions, and that equal protection arguments were therefore inapposite, the court went on in dicta to advise us of the reasons

2. Three strikes's discriminatory grant of good time credits fails strict scrutiny

In *People v. Sage*,³¹⁶ the California Supreme Court held that the denial of good time credits based on presentence incarceration is a denial of the equal protection of the laws.

The State had raised three justifications for its discriminatory practice: First, good time credits were granted for rehabilitative purposes, and the State could not "presume to rehabilitate persons clothed in the presumption of innocence."³¹⁷ Second, presentence detainees were occupied in preparing for and attending hearings and trials, while convicts were perniciously idle of hand and mind.³¹⁸ Lastly, presentence detainees already had a motive to behave in that their good behavior would be considered by the court in sentencing.³¹⁹

In response to the State's proffered justifications, the court observed that,

[e]ach of the grounds advanced by the People . . . might also be given for denying such credit to detainee/misdemeanants as well. Yet detainee/misdemeanants are clearly entitled to such credit under section 4019. The inescapable conclusion is that the challenged distinction—between detainee/felons and felons who serve no presentence time—was not based on the grounds proposed.³²⁰

The State, the court concluded, "ha[s] not suggested, nor has our independent research revealed, a rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons."³²¹ As *Sage* is on all fours with the prevailing interpretation of paragraph (a)(5), the Statute represents an attempted denial of equal

why rational basis *would have been* applied to the already foreclosed equal protection challenge. *Id.* at 386-87, 196 Cal. Rptr. at 805-06. The *Bender* court acknowledged *Sage*, but the closest it came to distinguishing *Sage* was to say, "the [California Supreme] court indicated strict scrutiny was appropriate. Nevertheless, the court refused to apply the credits retroactively . . ." *Id.* at 388, 196 Cal. Rptr. at 806 (citation omitted). It is quite a leap from saying that a practice survived strict scrutiny to saying that rational basis should be applied.

316. 26 Cal. 3d 498, 611 P.2d 874, 165 Cal. Rptr. 280 (1980).

317. *Id.* at 507, 611 P.2d at 879, 165 Cal. Rptr. at 285 (quoting State's Petition for Hearing).

318. *Id.*

319. *Id.*

320. *Id.* at 507-08, 611 P.2d at 879, 165 Cal. Rptr. at 285.

321. *Id.* at 508, 611 P.2d at 879, 165 Cal. Rptr. at 285. While five Justices dissented on other grounds, this holding was unanimous. *Id.* at 510-14, 611 P.2d at 880-82, 165 Cal. Rptr. at 286-88.

protection of the laws.³²² This may be one instance in which faulty drafting may prove to be the Statute's saving grace.³²³

VII. THREE STRIKES'S PERPLEXING AND UNPRINCIPLED TREATMENT OF JUVENILE ADJUDICATIONS

Paragraph (b)(3) of the Statute provides that juvenile adjudications are to be considered a prior conviction of a felony if:

- (A) The juvenile was sixteen years of age or older . . .
- (B) The prior offense is
 - (i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or
 - (ii) listed in this subdivision as a felony, and
- (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and
- (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.³²⁴

This provision is neither logical nor principled.

322. May the legislature now raise or lower the amount of good time credits? Yes, of course—they need only do so in a manner that is necessary to advance a compelling interest. This is not terribly difficult, judging from the many times it has been accomplished in the past. See *supra* note 315.

323. Is the correct interpretation of paragraph (a)(5) also violative of the California Constitution's guarantee of equal protection? The State may argue that it has an interest in retaining defendants in custody before and during trial, and that the relatively greater good time credits for presentence detention provide an incentive for the defendant to stay in custody. But it would be hard to argue that the practice is *necessary* to advance the interest: The State already denies presentence release to defendants who pose a danger to the public or a danger of flight. Or, the State may argue that, because presentence incarceration has a punitive effect on defendants clothed with the presumption of innocence, the State may mitigate the punitive effect through the grant of additional good time credits. This argument, however, ultimately folds back on itself because the benefit of the credits cannot inure to the defendant until the defendant is convicted, and therefore no longer considered innocent.

On the other hand, it is hard to imagine that anyone would ever bring the challenge. The hypothetical defendant would be required to demand presentence incarceration. But, again, the benefit of presentence incarceration, i.e., the additional credits, do not attach unless the defendant is proven guilty. Demanding presentence incarceration in order to accrue benefits which do not attach unless the defendant is guilty seems to be a concession of guilt. It is hard to believe that any defendant, given the choice, would choose to be incarcerated before conviction, and would thus be injured by the grant of additional credits for that incarceration.

324. CAL. PENAL CODE § 1170.12(b)(3).

A. It Is Perplexing

In paragraph (B), the Statute's drafters go to the trouble of including as prior convictions not only those juvenile adjudications under Welfare and Institutions Code section 707,³²⁵ but also the felonies enumerated elsewhere in the Statute.³²⁶ By doing this, the drafters sought to reach those defendants who, as juveniles, committed adult crimes and were convicted in adult court.³²⁷ Two paragraphs later the drafters require that the subject juvenile have been adjudged a ward of the court "because the person committed an offense listed in subdivision (b) of section 707 of the Welfare and Institutions Code."³²⁸ But if, for certain acts, a juvenile was convicted in adult court, that juvenile could not also have been committed by a juvenile court under Welfare and Institutions Code section 707 for those same acts.³²⁹ By requiring that the defendant have been found to have committed an offense listed in Welfare and Institutions Code section 707, the drafters negate their inclusion of adult convictions two paragraphs earlier.

What could the drafters have meant by including adult offenses in paragraph (B), and then excluding them in paragraph (D)? Could the drafters simply have neglected to include those sections in paragraph (D)?³³⁰ Or did they not mean what they wrote in paragraph (B)? Once again, it seems the Statute could have benefitted from fewer drafters and more proofreaders.

325. California Welfare and Institutions Code § 707 enumerates offenses the commission of which would subject a juvenile to the possibility of trial in adult court. CAL. WELF. & INST. CODE § 707 (West Supp. 1995).

326. Paragraphs (b)(1) and (b)(2) of the Statute identify violent and serious offenses—namely, those enumerated in Penal Code §§ 1170.5 and 1192.7. CAL. PENAL CODE § 1170.12(b)(1), (2).

327. Convictions of juveniles in adult court were already covered by three strikes, as they are treated as convictions, and not juvenile adjudications. *See People v. West*, 154 Cal. App. 3d 100, 108-09, 201 Cal. Rptr. 63, 68-69 (1984).

328. CAL. PENAL CODE § 1170.12(b)(3)(D).

329. To be prosecuted for the same act in both adult court and juvenile court would violate the juvenile's protection against double jeopardy. *Breed v. Jones*, 421 U.S. 519, 541 (1975).

330. If the drafters of this subsection simply forgot in paragraph (D) that which they named in paragraph (B), they should not be too terribly embarrassed. The vast majority of legislators reviewed (presumably) and approved it, some more than once. *See supra* notes 75-76 and accompanying text.

B. It Is Unprincipled

Concerns have been raised that, because juveniles do not have the full panoply of procedural rights afforded adults, particularly the right to trial by jury,³³¹ the use of juvenile adjudications in sentencing enhancements would amount to a denial of due process. The California Senate Committee on the Judiciary noted that, "as juvenile court adjudications do not provide the same due process protections as adult court convictions, this provision may be unconstitutional."³³²

California courts have not addressed the issue. The California cases that do exist in this area were decided under old section 667, which provided for the use of juvenile *convictions*. California courts have interpreted "juvenile convictions" to mean convictions of juveniles who were tried as adults in superior court where they would have access to a jury.³³³ Three strikes, however, contains language to supersede these opinions, explicitly providing that juvenile adjudications pronounced in juvenile courts would also be considered prior convictions,³³⁴ and California courts will now be forced to address this issue head on.

Federal courts of appeals have held that, in view of the fact that even unadjudicated prior acts³³⁵ could be used to enhance sentencing, the use of prior juvenile adjudications is consistent with due process requirements.³³⁶ These federal court decisions, however, ignore a fundamental distinction between unadjudicated prior acts on the one hand, and juvenile adjudications without juries on the other: Those who committed unadjudicated acts were never brought before a court,

331. See *In re Javier A.*, 159 Cal. App. 3d 913, 919, 206 Cal. Rptr. 386, 388 (1984) ("reluctantly affirm[ing]" lower court's denial of jury trial to juvenile).

332. JUDICIARY COMM. REP., *supra* note 53, at 10.

333. *E.g.*, *People v. West*, 154 Cal. App. 3d 100, 108-09, 201 Cal. Rptr. 63, 68-69 (1984); see also *People v. Blankenship*, 167 Cal. App. 3d 840, 852, 213 Cal. Rptr. 666, 673 (1985) (holding conviction of 15-year-old juvenile in Wyoming adult court counted as prior conviction even though California does not permit persons under age of 16 to be tried as adults).

334. CAL. PENAL CODE § 1170.12(b)(3)(C), (D).

335. "Unadjudicated acts" is used in this Comment to refer to acts upon which no court has passed.

336. In *United States v. Williams*, 891 F.2d 212 (9th Cir. 1989), *cert. denied*, 494 U.S. 1037 (1990), the court noted that it was within the bounds of due process for sentencing judges, in enhancing the defendant's sentence, to consider factors which had not been fully adjudicated with due process guarantees. This being the case, the court concluded that it was not a denial of due process to use prior, nonjury, juvenile adjudications in sentence enhancement. *Id.* at 215; see also *United States v. Booten*, 914 F.2d 1352, 1355 (9th Cir. 1990) (citing *Williams*); *United States v. Mackbee*, 894 F.2d 1057, 1058 (9th Cir.), *cert. denied*, 495 U.S. 962 (1990) (citing *Williams*).

and therefore never required the protection of a jury. Conversely, all those who stand accused before our courts have a fundamental right to trial by an impartial jury.³³⁷

As a general rule, the government is not allowed to bargain with citizens for their fundamental rights: "[I]f the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'"³³⁸ Among the constitutional rights thus protected is the right to a jury trial in criminal prosecutions.³³⁹ For example, in *United States v. Jackson*, the Court struck down a statute that insulated the defendant from the death penalty in return for the defendant's surrender of his or her right to jury trial.³⁴⁰ Exceptions are made only when there is some compelling countervailing state interest. For example, plea bargaining is permitted because of its importance to the criminal justice system.³⁴¹ In the case of juvenile adjudications, the state's interest in protecting the juvenile from the stigmatizing aspects of a criminal conviction, and thereby facilitating his or her rehabilitation,³⁴² was found to outweigh the juvenile's right

337. U.S. CONST. amend. VI (guaranteeing right to trial "by an impartial jury" in "all criminal prosecutions"); CAL. CONST. art. I, § 16 ("Trial by jury is an inviolate right and shall be secured to all . . ."); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("[T]rial by jury in criminal cases is fundamental to the American scheme of justice."); *In re Javier A.*, 159 Cal. App. 3d 913, 928, 206 Cal. Rptr. 386, 395 (1984) (right to trial by jury was historically guaranteed to all, including juveniles).

338. *Chaffin v. Stynchcombe*, 412 U.S. 17, 33 n.20 (1973) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969)).

339. *United States v. Jackson*, 390 U.S. 570, 581-82 (1968).

340. *Id.*

341. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

342. One California appellate court noted,

"minors charged with violations of the Juvenile Court Law are not 'defendants.' They do not 'plead guilty,' but admit the allegations of a petition. Moreover, 'adjudications of juvenile wrongdoing are not 'criminal convictions.'" [Citation.] As section 203 [of the Welfare and Institutions Code] states, '[a]n order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding.'" [] A distinction is made between criminal convictions and juvenile adjudications because of the fundamentally different purposes the two bodies of law are designed to serve. "Juvenile court proceedings are designed for the *rehabilitation of minors and not punishment.*" (*In re Dennis J.* (1977) 72 Cal.App.3d 755, 762 [140 Cal.Rptr. 463].) (Italics added.) . . . There are numerous procedural differences between a juvenile proceeding and a criminal proceeding, most notably in the area of due process.

People v. West, 154 Cal. App. 3d 100, 107-08, 201 Cal. Rptr. 63, 68 (1984) (quoting *In re Joseph B.*, 34 Cal. 3d 952, 955, 671 P.2d 852, 854, 196 Cal. Rptr. 348, 350) (1983); see also *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1970) (describing ideal juvenile court as "an intimate, informal protective proceeding").

to trial by jury.³⁴³ And so states have been allowed to impose this "bargain" on juvenile offenders: protection against stigma will be provided in exchange for the juvenile's surrender of his or her right to a jury trial. Legal basis for the denial of so fundamental a right was found by labeling juvenile adjudications "civil" instead of criminal,³⁴⁴ despite the fact that a determination of the juvenile's guilt or innocence would be made, with the juvenile's liberty at stake.³⁴⁵

Whether or not this bargain, in hindsight, was wise, it was made. Having taken from the juvenile his or her right to the protections of a jury in exchange for promises that the juvenile would be shielded against stigma, the courts should now require the people to uphold their promise; otherwise, three strikes's use of juvenile adjudications for sentence enhancement will transform the categorization of juvenile adjudications as "civil" from legal sleight of hand into bald-faced falsehood.³⁴⁶

343. *McKeiver*, 403 U.S. at 545 ("[J]ury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.").

344. *In re Javier A.*, 159 Cal. App. 3d 913, 963, 206 Cal. Rptr. 386, 421 (1984); see also *In re Contreras*, 109 Cal. App. 2d 787, 789, 241 P.2d 631, 633 (1952) ("While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction . . .").

345. "[W]hile proceedings in the juvenile court are civil proceedings for the welfare of the minor, the proceedings still deprive the individual of liberty, as do criminal proceedings." *In re Bradley*, 258 Cal. App. 2d 253, 259, 65 Cal. Rptr. 570, 574-75 (1968); see also *McKeiver*, 403 U.S. at 541-43 for a description of the similarities between proceedings before juvenile court and those before criminal court.

The California Supreme Court, in addressing a juvenile's claim for due process protections, wrote, "[t]here was no trial for any crime here and the [Juvenile Courts] act is operative only when there is to be no trial. The very purpose of the act is to prevent a trial . . ." *In re Daedler*, 194 Cal. 320, 330, 228 P. 467, 471 (1924) (quoting *Commonwealth v. Fisher*, 62 A. 198, 200 (Pa. 1905)). This statement is a classic tautology: In denying trial we have not denied due process because no procedures were due since there was no trial. In this respect, the President's Commission on Law Enforcement and Administration of Justice made the following observation:

In theory the court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law . . .

McKeiver, 403 U.S. at 544 n.5 (quoting PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9 (1967)).

346. If juvenile adjudications to come are to be undertaken with the caveat that the results may be used against the minor in future adult criminal proceedings, perhaps the "civil" label should be abandoned in favor of a label more descriptive of the true nature of the proceedings: criminal. "If you are going to give adult consequences, you should ex-

VIII. CONCLUSION

Californians are justifiably outraged by the level of violence in this state. While the overall rate of crime has declined in the past decade, the rate of violent crime has risen.³⁴⁷ This increasing violence requires a response. But in grasping for an answer—*any answer*—we Californians, through our legislature, have saddled ourselves with the *wrong* answer in three strikes.

1. Three strikes does have the effect of preventing crime. But by elbowing out more effective and more efficient alternatives, three strikes does more harm than good. The sum of the Statute's shortcomings in effectiveness and efficiency is this: disproportionality. Offenders who are repeatedly and incorrigibly violent cause enormous harm, and should be put away until they are no longer able to destroy innocent lives. Twenty-five years may not be enough in some cases. Non-violent offenders should also be given sentences in proportion to their individual offenses; the imposition of a blanket twenty-five-year minimum only works to lift marginal deterrence. Each of these inefficiencies would have been eliminated by one of the alternatives to three strikes. For example, GFT would reach first-time offenders, impose sentences in proportion to the offense, and prevent more future crimes than three strikes, all for about two-thirds the cost.³⁴⁸ Rainey would focus on violent offenders and put them away for a longer time, again at a lower cost.³⁴⁹

2. Three strikes treads upon such fundamental beliefs and constitutionally guaranteed rights that it could justifiably be viewed as a repudiation of those protections against the state which Americans have guarded so jealously. Equal protection is the right to be treated with the same dignity as any other similarly situated person. Due process is the protection against the arbitrary imposition of governmental sanctions. The protection against cruel or unusual punishment allows our society to simultaneously maintain its order and its humanity.

Two centuries ago, at this nation's inception, Benjamin Franklin declared, "[t]hey that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."³⁵⁰ Surely we

tend adult rights.'" Charles Finnie, *'Three Strikes' Hits Hard in Juvenile Court*, L.A. DAILY J., Apr. 8, 1994, at 1, 4 (quoting Juvenile Court judge Leonard Sprinkles).

347. GREENWOOD ET AL., *supra* note 33, at 4-5.

348. *See supra* notes 135-270 and accompanying text.

349. GREENWOOD ET AL., *supra* note 33, at 26.

350. Vandy, *supra* note 204, at 883 (quoting Benjamin Franklin).

can accomplish our goals in criminal justice without surrendering our essential liberties.³⁵¹

3. Three strikes is, to be generous, sloppily drafted. The problem is not that three strikes is not perfect. The problem, rather, is the utter *pervasiveness* of its flaws. Shortly after its passage, the Judicial Council issued a memorandum concerning three strikes to all trial judges, identifying twenty-six points of inconsistency, ambiguity, error, and possible unconstitutionality, and advising the judges on how best to handle these problems as they arise in the courtroom.³⁵² If there were a three strikes law for poor statute drafting, this one would qualify many times over.³⁵³

While the voters who passed the three strikes initiative may not have expertise in the nuances of criminal law, legislators have no such excuse. Better considered, more effective, and more efficient alternatives were available at the time of three strikes's passage, but the legis-

351. It may be said that the people have spoken, and have passed three strikes by an overwhelming margin, so therefore let it be implemented. "Any judge who plays games with this law is thwarting the will of the people," says Sean Walsh, a spokesperson for Governor Wilson. Reuben, *supra* note 270, at 17 (quoting Sean Walsh). "Judges are supposed to enforce the law, not legislate from the bench." *Id.* (quoting Sean Walsh).

We live in a democracy where the majority rules. The majority, in donning the mantle of rulership, has entered a contract with the ruled. There are certain things the rulers may and may not do. We took these limitations, put them on paper, and called it the Constitution.

352. Judicial Council Memorandum, *supra* note 18.

353. In light of the drafting errors contained in the Statute, it was astounding to have revealed in early November 1994, nearly seven months after the passage of the Statute, that three judges were involved in its drafting. Dan Morain, *California Elections/Proposition 184*, L.A. TIMES, Oct. 19, 1994, at A3. Mike Reynolds told reporters that the judge-drafters had asked him to keep confidential their connection to the Statute in order to avoid questions on their impartiality should the Statute ever come before them. *Id.* It is not known how anonymity would have increased impartiality in this case.

Highest ranking among the three judges is James A. Ardaiz, presiding justice of the Fifth District of the California Court of Appeal, an acquaintance of Reynolds, and, coincidentally, brother-in-law to California Supreme Court Justice Marvin Baxter. Dan Morain, *Judge Admits Role in '3 Strikes' Law*, L.A. TIMES, Nov. 3, 1994, at A3. While keeping his role in drafting the Statute a secret for over a year, Ardaiz said he had always intended to recuse himself from cases involving "substantive" legal issues concerning three strikes. *Id.* This declaration was made despite the fact that Ardaiz had publicly argued in the Statute's favor while withholding disclosure of the fact that he had helped draft it. *Id.* Ardaiz's involvement in the drafting of three strikes was admitted only after Reynolds revealed that initial drafts of the Statute were penned by judges. *Id.* The revelation was made by Reynolds in order to assure voters that the Statute was well written. *Id.* at A29.

The two other judges involved in the drafting of the Statute, R.L. Putnam, presiding judge of the Fresno Municipal Court, and William Kent Levis, also a judge of the Fresno Municipal Court, have been the subject of controversy as to the propriety of their hearing three strikes cases. Tom Kertscher, *Fresno Judge Opts Not to Hear Three Strikes Case in Courtroom*, FRESNO BEE, Nov. 7, 1994, at B1.

lature simply opted for the one bill that could be invoked in a single prepackaged, two-word soundbite. The passage of three strikes is more a reflection of the rancorous, image-first mentality that pervades political discourse in this state than of any process of prudent deliberation that is presumed to take place in a legislative body.

It may be argued that our system of justice is flexible enough to work around the problems of three strikes—that we can find some legal way of ignoring the bad parts while implementing the good. But surrendering the determination of justice to individual judges and prosecutors not only defeats the purpose of mandatory sentence enhancement, it knocks our society several steps backwards towards the age of rule by fiat. Further, the accumulation of ignored or less than fully implemented laws and constitutional provisions could only speed the entropy of our already-bloated system.

The good news in this case is that nothing lasts forever. All that is needed to correct the course of our criminal justice system is a two-thirds vote of the California Assembly. To accomplish this in an age in which political discourse is dominated by in-your-face, bumper-sticker epithets, Californians must resolve to demand quality and reason.

*Victor S. Sze**

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