

"THREE STRIKES" LAWS: FIVE YEARS LATER

Executive Summary

Beginning in 1993, twenty three states and the federal government adopted some form of “three strikes and you’re out” law intending to target repeat violent offenders. Washington state was the first to do so; California soon followed with a considerably broader version of the law. Although subsequently adopted versions of three strikes law vary among the states, the laws generally reduce judicial discretion by mandating severe prison sentences for third (and in some instances first and second) felony convictions.

The “three strikes” bandwagon was set in motion at a time when public fear of crime was at its height and extravagant promises were made for the new laws. However, since their passage there has been no national assessment of their use. In 1996, the Campaign for an Effective Crime Policy published a report, *The Impact of Three Strikes Laws: What Have We Learned?*, documenting the law’s uneven application yet significant impact on costs, prison admissions and the overall functioning of the justice system in California during its first two years in operation. Now that there are several years of data available on the implementation of three strikes laws, the Campaign has produced the first national assessment of their impact five years after the first of these laws were passed.

These are the key findings of the report:

❑ **Substantial Impact in California and Georgia**

Despite the wide availability of three-strikes laws, their impact has been minimal in most states. California continues to have the most offenders (more than 40,000) sentenced under two and three strikes. Georgia lies in second place with almost 2,000 persons sentenced under its law – 57 of them serving life without parole for a second strike and the others serving between ten years and life for a first strike.

❑ **Limited Impact in Most States and the Federal System**

While political rhetoric dominated much of the debate preceding the adoption of these laws – with claims that three-strikes laws were an essential tool for crime

control and the only way to ensure that violent felons were kept off the street – the laws that resulted have had only minimal impact. Most states and the federal government drafted laws that were narrowly tailored and so their use has been limited and their disruptive impact minimized. Fifteen states have between none and six people sentenced under provision of their three-strikes laws. Only 35 people had been convicted under Federal three-strikes law as of September 30, 1996.

□ **Cost Implications**

The California law has been implemented at great economic cost:

- Substantially increased costs for pre-conviction jail time, case processing and trials are already evident as defendants facing three-strikes terms opt to go to trial rather than plead guilty.
- Substantial increase in prison building costs will be required. By the end of 1997, almost a quarter of California's prison population was incarcerated for second- or third-strike convictions. Based on the most recent projections, there will be a shortage of more than 70,000 beds to house the projected prison population by 2006.
- The long-term costs of increased sentence length, including the cost of care for geriatric prisoners, have yet to be faced. The cost of incarceration for older prisoners is two to three times that for younger, healthier ones.

□ **Effect on Crime**

Crime rates began to drop in California before passage of three strikes and have dropped as much or more in some states without a three strikes law. Serious repeat felons in California already faced life-without-parole sentences before three strikes. The chief impact of the law has been to imprison less serious offenders to longer prison terms just as they are aging out of their crime prone years. Research shows that the money spent on the additional prisons required to house them would prevent far more crimes if it were invested in prevention programs. Nonetheless, many politicians still credit three strikes as a major contributor to the decline of crime rates in California.

□ **Unintended and Uneven Impacts**

- The wide scope of the provisions of California's three-strikes law has resulted in long prison terms for many less serious crimes. Among the 36,000 second-strikers, less than one-fourth were admitted to prison for a violent offense.
- Prosecutorial discretion over charging and plea bargaining has resulted in very uneven application of the law between different jurisdictions within the state.
- African-Americans comprise 31% of inmates in the state's prisons, but 37% of offenders convicted under two strikes and 44% of three strikes offenders.

□ **Political Concerns**

The California law is still strongly supported by politicians despite the problems that have been identified with it, and the law remained a cornerstone of criminal justice policy even in the 1998 elections. Continuing political support, and the refusal of the Governor to undertake any analysis of the law's costs and impacts, illustrates the necessity for rational and honest debate and careful study when such laws are being formulated. Once politicians have committed to the rhetoric, it requires extraordinary political courage to retreat from it.

I. THE USE OF STRIKES LAWS NATIONALLY

Washington was the first state to adopt a “Three Strikes and You’re Out” law in 1993; thirteen states and a federal version of three strikes followed in 1994; nine more states adopted similar laws in 1995. The laws were passed at a time when public concern about crime was at its peak, although crime rates were falling. The political push for three strikes built on the public’s perception that offenders were receiving shorter sentences than they had in the past and that prisons had revolving doors. In fact incarceration rates were at an all-time high and offenders were serving longer average terms. The new laws were sold to the public as an essential crime fighting tool and the only means of keeping repeat offenders off the street. In fact most states already had statutes providing for long prison sentences for violent career criminals.

The new laws that were passed under the three strikes rubric were intended to target violent career criminals but they were written with significant variations in sentencing and parole eligibility, the number of strikes required to invoke a mandatory sentence, the nature of crimes that qualify as a strike, the time elapsed between strikes, the type of felony that triggers the sentencing enhancement, and the degree of discretion permitted in invoking and applying the law. Evaluating the effect of any law is challenging because of the complex functioning of the criminal justice system and the difficulty in isolating the impact of one law from other factors. Assessing three strikes laws nationwide is particularly problematic because of these differences within each state law. However, now that more time has elapsed since passage of the laws and more data has been collected, some very striking differences in the impact of these laws have become apparent.

Impact of the California Law The most dramatic impact on the criminal justice system has been seen in California. As of July 1998, there were 36,043 “second strike” and 4,468 “third strike” convictions in California.¹ While some states limit the triggering offense to one of statutorily enumerated violent felonies, under California’s statute the third strike triggering a term of 25 years to life imprisonment may be *any* felony.² The length of time between the prior and current felony convictions does not affect sentencing,³ “good time” credit is limited⁴ as is discretion for judges and prosecutors.⁵ The California law’s other key elements include a two strike provision that doubles the prison sentence for offenders with a prior “serious” or “violent” felony conviction.⁶ (See Section II of this report for a fuller discussion of California’s experience.)

Increased Use of the Law in Georgia While no other state comes close to California in terms of the number of people convicted under three strikes provisions, Georgia has substantially increased the use of its One Strike and Two Strikes laws. The laws, passed in 1994, cover “seven deadly sins” for which a first strike earns a minimum of 10 years without parole, and a second strike earns life without parole. At the time of our 1996 report, a Georgia corrections statistician

stated that with only a handful of convictions under the law, it was “too early to tell” its impact. As of April 1998, however, in just over three years since the law was passed, there have been nearly 2,000 persons sentenced under the laws’ provisions.

The convictions under the law were for murder (15%), rape (7%), armed robbery (54%), kidnaping (12%), aggravated sodomy (5%), aggravated sexual battery (1%) and aggravated child molestation (9%). Most of those convicted (1,833) are serving time on a first strike for which they will have received a sentence from 10 years without parole up to a possible life sentence with parole eligibility after 14 years. The average time to be served by first strikers is 16 years, and 21% of those convicted will serve 20 years or more. The 57 persons who have been convicted a second time (and not being tried for capital murder) will serve life without parole.

Georgia’s first strikers are predominantly young black men. Seven in every ten sentenced under the first strike provisions are black and more than two thirds are under age 30. Second strikers show the same racial imbalance – 68% of those convicted are black – but are a little older with less than one third under age 30.⁷

Those sentenced under the law now account for almost 5% of Georgia’s 42,000 state prisoners. They have not yet had a significant impact on the size of the prison population because persons convicted of these specific crimes would be serving prison sentences regardless of Two Strikes. However, Georgia’s prisons are already very overcrowded with facilities filled beyond capacity and 3,600 convicted felons being held in county jails awaiting space in the state system. The governor’s budget office estimates that the state will need to spend more than \$1.1 billion by July 2003 to provide an additional 15,000 beds.⁸ As the prisoners sentenced under the strikes law remain in prison beyond the time when they would otherwise have been released, the demand for prison beds will increase and so will the cost of operating the prisons, especially when an aging population puts extra demands on medical care.

Application of Three Strikes Laws in Other States As seen in Table 1, in contrast to California and Georgia, fifteen states report six or fewer convictions under their versions of three strikes, and of these, three states report no convictions: Alaska (1), Colorado (2), Connecticut (1 known), Maryland (5), Montana (0), New Jersey (6), New Mexico (1), North Carolina (5 in 96-97), Pennsylvania (3), South Carolina (1 on a 3rd strike, 13 on a 2nd strike), Tennessee (5), Utah (0), Vermont (4), Virginia (0), and Wisconsin (3). Of the remaining states, only three, Florida, Nevada and Washington, report more than 100 convictions. Washington was the first state to adopt a three-strikes law so there is now more data available on how the law has been used.

TABLE 1
Data on Use of “Three Strikes” Type Laws

Jurisdiction	Year Law Enacted	Data Current as of:	Number of Convictions	Comments:
Alaska	1996	8/98	1	Although adopted following the wave of get-tough-on-crime legislation, Alaska faces prison overcrowding issues and the law was narrowly tailored—all strikes must be for serious felonies, and a 3 rd strike earns a 40 to 99 year sentence.
Arkansas	1995	8/98	12	2 strike provision allows 40 year sentence without parole; 3 strikes allows life sentence without parole. More frequently used is a habitual offender law which permits both graduated increases in length of sentences and reductions in parole eligibility.
California	1994	7/30/98	40,511	2 nd strike convictions: 36,043 3 rd strike convictions: 4,468
Colorado	1994	8/98	2	Used more often are Colorado’s “big” and “little” habitual offender laws, under which 36 persons were sentenced in 1997.
Connecticut	1994	8/98	1	Connecticut does not have a mandatory-life type of law; instead its law permits enhanced sentences for persistent offenders by upgrading the felony one higher grade, e.g., a class B felony (10-20 years) becomes a class A (life sentence). There is one known person sentenced but may be others; an exact number is not extractable from the DOC database.
Florida	1995	6/98	116	In contrast, under Florida’s 1988 habitual offender law, 23,000 persons have been sentenced (about 20% of the state prison population). The 1988 law allows for a imposition of a sentence double the statutory minimum for crimes committed.

Georgia	1994 One Strike and Two Strikes	3/31/98	57 serving life without parole for 2 nd strike; 885 serving 20 years or more for a first strike.	Georgia's law covers "seven deadly sins" for which a first strike earns a minimum of 10 years without parole, and a second strike earns life without parole. Of the 1,833 person serving various terms for a first strike; 617 were sentenced to life (with parole eligibility after 14 years); 7 were sentenced to 50 years or more, and 261 were sentenced to 20 years or more.
Indiana	1994 Life without parole	7/1/98	38	Indiana's habitual offender law is used more often: estimated at least 1000 times over 20 years. It allows a sentencing enhancement for a person with two prior felonies, increasing the sentence up to three times the presumptive sentence for the underlying offense, not to exceed 30 years.
Louisiana	1994			DOC officials did not respond to request for information.
Maryland	1994 Four Strikes	12/97	1995: 3 1996: 1 1997: 1	Before 1994, about 250 people were sentenced under Maryland's 1975 law which provided for 25 years without parole for a third felony conviction. Amended in 1994, the law now provides for life without parole for a fourth strike when prison terms have been served for the first three strikes.
Montana	1995	8/98	0	Montana has a persistent offender statute that allows a sentence enhancement of 5-100 years to be served consecutively for certain repeat felons.
Nevada	1995	8/98	164 greater 140 lesser, with parole options - see comment	Nevada has several life-sentence options under its "greater" and "lesser" habitual offender statutes which, depending on the nature of the crime, include life with no parole, life with parole possible after 10 years served, and 25 years with parole possible after serving 10.

New Jersey	1995	8/17/98	6	Another statute provides for a life sentence with parole eligibility after serving 30 years; as of 1-1-98, 1,029 persons were serving such sentences (this number may also include some persons sentenced before 1980 who may have been eligible for parole after 14 years under a prior version of the law).
New Mexico	1994	8/98	1	The offense and conditions that qualify for life with parole eligibility after 30 years are very restrictive. Pre-existing law provided for sentencing enhancements of 1, 4 and 8 years on 2 nd 3 rd and 4 th convictions.
North Carolina	1994	12/97	5 in Fiscal Year 96-97	During this time, although only 5 persons were sentenced to life without parole as violent habitual felons under Three Strikes and You're In , 15 death sentences and 47 life without parole sentences were imposed. In addition, 248 were sentenced as habitual felons on a fourth felony conviction. Of these, the most frequently occurring serious crimes are Felony Breaking and/or Entering (48); Possession of Stole Goods (18) and Felony Possession of Cocaine (19). It is believed that the law is used as a bargaining chip to elicit guilty pleas, and that there may be others who qualify for a three strikes conviction.
Pennsylvania	1995	8/98	3 through 1996	Data set is currently being compiled; numbers not yet available for 1997 or 1998.
South Carolina	1995	10/97	2 Strikes-13 3 Strikes-1 "No Parole" offenses- 811	South Carolina's 1995 Crime Bill contained 3 provisions relevant to "Non-Parolable" Inmates: Life without parole for repeat violent offenders under the two/three strikes provisions, and a new category of "no parole" offense for crimes committed after 1/1/96 which includes felonies punishable by 20 years or more, irrespective of criminal history, a group that includes proportionally more younger offenders. (205 or 15% of the 1,349 currently serving non-parolable offenses are 21 or younger; 396 or 30% of this group show no prior criminal history.)

Tennessee	1994	7/13/98	5	Tennessee has both a 2nd and 3rd strike provision, both of which can mandate life without parole depending on the offense. The state also has a 1989 habitual offender statute under which 156 persons have been sentenced.
Utah	1995	8/98	0	Utah's flexible sentencing structure allows for 3 possible sentences: 1-5 years, 1-15 years, and 5 years to life, and most serious crimes earn a lengthy indeterminate sentence. The Board of Pardons and Parole determines the release date and virtually never grants pardons. Because of this scheme, there has also been little use of a sentencing enhancement law for repeat offenders which ratchets a second degree felony (1-15) up to a first degree felony (5-life); under which just 16 persons have been sentenced since 1990. Prosecutors know that they can bargain away a three strike enhancement in exchange for a guilty plea because a dangerous person is unlikely to be released early.
Vermont	1995	8/98	4	Considered a "habitual offender law," it provides for up to life for certain third strikes and for any fourth felony conviction.
Virginia	1994	8/98	0	Shortly after the law was passed Virginia eliminated parole for all sentences, effectively negating the need for a three strikes law.
Washington	1993	8/21/98	121	Washington has also sentenced 3 persons under its 2 Strike Sex Offender law.
Wisconsin	1994	8/98	3	Reported by DOC analyst though could not be confirmed by DOC databases. In contrast, Wisconsin's habitual offender statute which permits increased penalties for persistent repeaters was applied to over 300 offenders per year in the past 3 years.
Federal Law	1994	10/97	35	By September 30, 1996 (the end of FY 1996), there were a total of 35 convictions under three strikes. Figures for FY 1997 are not yet available.

Washington State Analysis of three strikes in Washington shows some similar effects to those seen in California. Washington State's three strikes promoter John Carlson claims the leading cause of crime is letting criminals out of prison. Carlson asserts that Washington's law (which is tailored more narrowly than California's law) has worked exactly as intended, citing statistics that show rapes, robberies, and aggravated assaults have declined and non-strike crimes such as burglary, larceny and auto theft have increased.⁹ In mid-1997, he contended that the law has not been directed at petty criminals but at slightly fewer than 100 criminals with very long or very violent criminal histories, whose average age is 33.¹⁰

A Department of Corrections report produced five years after the law was enacted shows that three strikes offenders now account for 44% (121 out of 275) of offenders serving life without parole in Washington. The average age of the three strikes offenders is 38; two are women; 10% have been convicted of rape, 20% of murder, and 50% of robbery.¹¹

As in California, the results are subject to interpretation, with advocates crediting the law for safer streets and critics claiming that the law is too broad in scope and disproportionately affecting African-Americans. Nearly five years after the law was enacted, although African-Americans make up 4% of the state general population, they comprise 23% of the prison population and 36% of three strike convictions.¹² According to public defenders, African-Americans historically have been less likely to be able or allowed to make bail and therefore are more willing to plead guilty in return for lower sentences. As a result, they have more strike convictions on record which makes them susceptible to the three strikes law.¹³

Federal Three Strikes Law Although the federal three strikes law received much attention during passage of the 1994 crime bill, application of the federal version of three strikes law has resulted in only 35 convictions as of September 30, 1996.¹⁴ It is not surprising that its impact has been limited because most violent felonies are resolved in state courts and less than 2% in federal courts. Passage of the law thus appears to have been a largely symbolic act.

Constitutional challenges to various aspects of the federal three strikes law have produced mixed results. In 1997, the U.S. Supreme Court upheld a prosecutor's discretion under the law and noted that prosecutorial discretion in charging is an "integral feature of the criminal justice system."¹⁵

However, in August 1998, the 9th U.S. Circuit Court of Appeals in San Francisco struck down a provision of the federal three strikes law, finding it unconstitutional to require defendants to prove they were unarmed and did not cause injury in certain prior convictions (robberies and certain types of assaults) that qualify as strikes.¹⁶ (In 1997 a 7th Circuit decision found that the defendant's

burden did not violate due process.¹⁷⁾ The San Francisco federal court found it an unconstitutional burden to require defendants to disprove an element of a crime that may have been committed years earlier. The prosecutor has the burden of proving all elements of a crime, including whether a robbery involved use of a weapon or resulted in injury, which would make it a more serious crime that qualifies as a strike. The ruling does not apply to state three strike laws and is expected to be appealed.

II. THE IMPACT OF THREE STRIKES IN CALIFORNIA

A. On the Commission of Crime

The Falling Crime Rate Crime has been declining in California in recent years, as it has for the nation as a whole. The cause of the falling crime rate remains a matter in dispute. California's Governor Pete Wilson, Secretary of State Bill Jones, and Attorney General Dan Lungren steadfastly maintain that three strikes is substantially responsible for the drop in the California Crime Index for the past four years.¹⁸ But a 1997 comprehensive statistical analysis of the effects of California's three strikes law by criminologists Lisa Stolzenberg and Steward D'Alessio found that in nine of the state's ten largest cities, there was no indication that the law had reduced either the serious crime or petty theft rates below the level that would be expected, based on preexisting downward trends.

Stolzenberg and D'Alessio suggest several factors that may help account for the findings, including pre-existing laws and sentencing practices in California which provided for enhanced penalties under a 1981 determinate sentencing law that targeted serious repeat felons. Convicted felons who had served two previous prison terms could receive a term of 20 years to life for a third felony, and those with three prior prison terms could get a life sentence without possibility of parole. Since the three strikes law does not raise the severity of potential punishment for violent repeat felons significantly, it is unlikely that it will have any greater deterrent effect than the old law.

Another potential factor relates to the age of offenders who are sentenced under three strikes. The peak age for violent offending is 18, and repeat offenders' criminal careers generally decline rapidly after age 30. However, the average age of all offenders admitted to prison is 31, suggesting that any incapacitation effects on crime rates may be small. Stolzenberg and D'Alessio conclude that, if three strikes laws are failing to reduce crime through deterrence or incapacitation, the state should shift attention to more cost-effective measures.¹⁹

Criminologists point to a range of factors that contribute to falling crime rates, including the significant drop in unemployment in California and nationwide, and demographic trends that reveal a smaller number of young males in the crime-prone age group. Community policing, public intolerance of violence, and a drop in alcohol consumption which is often linked with violent acts are also cited. A national survey conducted by the Justice Policy Institute concluded in March 1997 that the law has had little impact on violent crime, finding that California and other states with three strikes laws showed less of a decline in violent crime than states without the law (e.g., Massachusetts and New York), and that crime in California was already going down before

implementation of three strikes.²⁰

Deterrence Most experts agree that the threat of punishment has little impact on criminal behavior because most criminals correctly believe they will not be caught, they have little knowledge of what sentencing laws would apply to them, or they commit crimes while intoxicated, angry or high and thus are not rationally analyzing the consequences of their behavior. Proponents of the California three strikes law cite anecdotal evidence that prisoners inquire about their strike status and thus conclude that the law has a deterrent effect.

Incapacitation An analysis by the RAND Corporation in 1994 assumed that the law would have no deterrent impact on potential felons, but its incapacitative effects would reduce felonies committed by adults in California between 22 and 34 percent. Based on these assumptions, RAND estimated that 340,000 serious crimes would be prevented per year at a cost of \$16,000 per crime prevented.²¹ However, the analysis also pointed out that many of those imprisoned under the law would soon have been aging out of their criminal careers anyway, so there would be no crime-reduction benefit from their *extended* incarceration. A RAND study in 1996 acknowledged that incarcerating people *does* prevent them from committing some crimes, but went on to explore how the same amount of prevention could be purchased at a much lower price. This study analyzed the of California's three strikes law compared with investment in specific prevention programs in reducing crime and concluded that, while a million dollars invested in prisons prevents 60 crimes per year, the same amount invested in parent training would avert 157 crimes, and if invested in graduation incentives would prevent 258 crimes per year.²²

B. On Fairness, Drugs and Race

Because the California law was drafted to qualify *any* felony as the triggering third strike, the law which was apparently intended to target dangerous repeat felons has in practice led to the incarceration of a different group of offenders. Based on California Department of Corrections data, by March 1996 more people were sentenced for second and third strike marijuana possession (192) than the total combined numbers of those sentenced for murder (40), rape (25) and kidnaping (24).²³ As of June 1998, the triggering offenses for sentencing under strikes laws continued to be predominantly property and drug crimes. In second-strike cases, the offenses were 19% crimes against persons, 37% property crimes and 31% drug crimes, and for third-strike cases, 39% crimes against persons, 32% property crimes and 19% drug crimes.²⁴ As was predicted by the 1994 RAND study, a third strike more often arises from a non-violent felony rather than from a more serious violent crime such as murder or rape.

Uneven Application Prosecutors play an influential role in determining whether the three strikes law will be used when they exercise discretion at charging and in plea negotiation. We noted in 1996 that practice and policy differences among district attorneys' offices resulted in uneven application of the law throughout California. For example, in charging a "wobbler" offense as either a misdemeanor or a felony, an auto thief could receive an eight-month sentence in one county and 25-to-life in another. As prosecutors gained experience with the law, the more populated counties tended to reduce prior strikes more often than when the law first passed.²⁵ Two thirds of state three- strike cases were filed in Los Angeles County where District Attorney Gil Garcetti zealously used it,²⁶ while San Francisco District Attorney Terence Hallinan refused to do so against nonviolent drug offenders.²⁷

These jurisdictional differences in prosecuting drug cases were held not to be violative of equal protection in a July 1998 California case, where a San Diego defendant argued that possession of a small quantity of drugs would not be charged under three strikes in San Francisco. However, the judge acknowledged that differences in enforcement patterns is a source of concern, adding that when "a person faces either probation or 25 years to life based only on geography should trouble any thinking person."²⁸

Racial Disparity As noted in Washington state, the impact of three strikes in California includes racial disparity in sentencing. Persons sentenced for third strike convictions are disproportionately African-American. According to a 1997 report, in California, blacks make up 7% of the state's population but account for 20% of felony arrests, 31% of state prisoners, and 43% of those imprisoned for a third strike.²⁹ According to 1998 California DOC data, African-Americans comprise 36.8% of offenders convicted on a second strike and 44% of those convicted on a third.³⁰

C. On Prison Crowding and Costs

Geriatric Costs By sending offenders to prison for longer terms and reducing available good time credits, three strikes laws contribute to the problems of prison crowding and eventually will contribute to the high cost of incarcerating geriatric inmates. According to the Bureau of Justice Statistics, since 1980 the number of prisoners over 55 years old has jumped from 9,500 to 30,000, a growth paralleling the nationwide increase in the elderly population.³¹ Because their health care needs are greater, often arising from unhealthy lifestyles and substance abuse, experts estimate that the cost of imprisoning older inmates runs 2 to 3 times the average of \$20,000 per year for a younger, healthy offender.

This issue is of particular concern in Florida which passed its habitual offender law in 1988 and added a “three-strikes” law in 1995. It is now the southern state with highest number of prisoners who are 50 or older. As of 1997, 4,176 prisoners are over 50, and 500 are over 65, with the oldest prisoner age 89, and more than 300 in wheelchairs.³² Because the elderly are far less likely to commit more crimes (with the exception of certain sex offences), one demographer and economics expert describes this as wasting taxpayer time and money, noting that eventually the state legislature may have to revise the policy of imposing long sentences and requiring 85 percent of a sentence to be served.³³

With longer prison sentences, truth-in-sentencing, the abolition of parole, and three strikes laws, the number of elderly prisoners is expected to explode in the next few decades. In response to this expected demand, Alabama, Pennsylvania and North Carolina have taken steps to lower costs by consolidating geriatric prisoners in one location, such as converted state mental institutions.³⁴ Even with such measures, there may be budget pressure to reduce the sentences of older offenders in the coming years. This may appear in pressure on governors to pardon offenders, on lower courts to modify sentences, and on the legislature to recreate parole.

Concern for the growing population of geriatric inmates is also evident in Washington State, where the Department of Corrections opened a minimum-security facility for aged and disabled offenders in Yakima as a test to see if costs can be controlled.³⁵ However, even if confinement in less secure facilities helps to reduce some operations costs, health care costs will still be exorbitant.

Mental Health Concerns A survey in late 1997 showed unusual patterns of behavior among jail inmates, including some evidence of increased suicide attempts among third strike inmates awaiting trial. When county health directors in California were asked if they had experienced an increase in suicides since the three strikes law was passed, of the 35 who responded, 12 responded affirmatively.³⁶ Although the survey was informal, it raised sufficient concern that a seminar was organized to focus attention on suicide-prevention programs. Experts noted that depression is common among inmates, and several counties cited examples of inmates who committed suicide when they believed they were facing life sentences.

Projections on Prison Crowding Projections for prison crowding in California after the adoption of three strikes have been revised downward,³⁷ but even to meet the revised estimates, prison space will have to be vastly expanded. Based on recent projections, the prison system will exhaust all available space by late 2000 and there will be a shortage of more than 70,000 beds by 2006.³⁸ Proponents of the law have cited the prison population growth slowdown as evidence that objections to the law were alarmist, and that the law is working by deterring others. However, the

main effect of the three strikes law is to increase sentence length and its impact on prison overcrowding is therefore not immediate. The process of adjudicating three strikes cases is slow, so the crowding in California initially occurred at the county jail level and has been deferred in state prisons. But the Department of Corrections predicts that by 2002, one in four prisoners will be a second or third-striker.³⁹ An earlier RAND study noted the law will eventually require huge prison expenditures when those inmates normally released must remain incarcerated at greater cost; thus the real cost of three strikes will fall on subsequent taxpayers and administrations.

A Santa Clara criminal justice consultant who has written about California's law points out the significance of this phenomenon: when the effects of enactment of any law are delayed so long that voters no longer make the connection between cause and effect, lawmakers escape responsibility for any negative consequences.⁴⁰ The effects of three strikes laws will not be faced by current policymakers but by their successors, and greater accountability would be desirable.

Although three strikes is only a contributing factor to the rising cost of building prisons, it has been pointed out that the number of jobs created in the prison system during Governor Pete Wilson's tenure corresponds to the number of jobs cut in higher education. The Justice Policy Institute reports that state bond expenditures in prison construction surpassed that for higher education in 1995, noting that from 1984-1992 spending per \$1000 of personal income increased less than 1% for higher education while the increase for prisons was 47%.⁴¹ It may come as no surprise that the California prison workers union contributed to the passage of three strikes law.

D. On Plea Bargaining, Costs, and Processing Cases

California's law, by providing significantly greater sentences, appears to have motivated felony offenders to go to trial rather than plead guilty. Plea bargaining is criticized for a number of reasons, including that it is the result of "backroom deals" as part of an "invisible justice system."⁴² However, it remains a common practice substantially controlled by prosecutors that is justified to preserve time and resources. In June, 1997 the State Judicial Council reported that in the first fiscal year following passage of three strikes, statewide jury trials increased by 13%, and in the second full year the number of trials increased again by 4%.⁴³ Since most strike defendants are represented at public expense, and a criminal trial can cost up to \$50,000 compared to a plea bargain at \$600, the law is having significant cost implications at this level.⁴⁴

The reduction in plea bargains also places a significant financial burden on local jurisdictions which must house defendants in jail and provide additional security for those facing long sentences. For example, after the 1994 enactment, the proportion of Los Angeles County's jail population classified as high-security increased from 35% to 62% of the inmates.⁴⁵

Three strikes laws and other rigid sentencing schemes also affect the nature of plea bargaining, such as when the laws forbid leniency for someone who committed two previous crimes in the distant past. In the interests of justice, prosecutors may compensate for a mandatory scheme by accepting a lesser plea to avoid a third felony conviction, or by striking a previous strike to avoid invoking the mandatory long sentence. Many factors come into play, including the policy of that district attorney's office, public perceptions, and the individual agendas of both the prosecutor and defense attorney. The plea bargain decision-making process is not out in the open, reflecting another facet in the complex functioning of the criminal justice process that is difficult to evaluate. The result is a shift of discretion, with multiple functions — charging, fact-finding and sentencing — left in the hands of one party, the prosecutor.⁴⁶

However, after the California Supreme Court in *People v. Romero* granted judges the authority to ignore a prior conviction when a 25 year sentence would be too high, the law became a better tool, according to some judges, but the treatment is uneven between counties. For example, according to an October 1997 report, in Orange County about 70% of three strike defendants are *not* sentenced to 25 years, but instead are given shorter sentences.⁴⁷ One explanation for the high percentage is that Orange County District Attorney encourages his deputies to file every eligible case and only rarely to seek lesser punishments.

The increase in criminal trials not only costs more but also creates backlogs in processing cases. In March, 1997 Fresno County attempted to deal with its backlog of three strike cases by shifting cases requiring less security to a mock courtroom at the San Joaquin College of Law in Clovis.⁴⁸ Facing similar problems in March, 1997 Ventura County experienced a 50% increase in felony trials due in part to three strikes legislation; the offices of the district attorney and public defender are nearly \$1 million over budget from the heavy caseloads.⁴⁹

The cost problems continue in 1998. In March 1998, Los Angeles County requested reimbursement from the Commission on State Mandates to pay for the mounting costs for trial expenses and jail costs related to handling three strikes cases. In the first year, county officials estimated the added cost to be \$64 million, while one official said the cost is now \$200 million.⁵⁰ According to a *Los Angeles Times* report, the County claimed that the law unintentionally had a severe impact on local law enforcement such that it constitutes a state-mandated program requiring reimbursement.

E. On Early Release

When the numbers of three strike defendants mushroomed in the first year of the California law and occupied limited jail space while awaiting trial, Los Angeles County was forced to release lower-level offenders.⁵¹ Violators who usually would serve 200 days of a one-year sentence were being released after serving only 71 days of their sentence.⁵² In 1998, Orange County acknowledged that jail crowding led to reduced sentences, with a person sentenced to a year getting out in 185 days. Although crowding has long been a problem, three strikes has contributed significantly because defendants spend more time in jail while they are awaiting trial. In January 1995 inmates awaiting trial spent 78 days in jail, but the average stay has now increased to 115 days for pretrial prisoners.⁵³ These unplanned sentence reductions did not arise from conscious policy choices but as a "back end" response to the new law. Because jail space is a finite resource, the decision to increase its use for one person (perhaps awaiting trial) may require the release of one or two others. There may be a public safety tradeoff in this transaction, particularly if the person released is in need of supervision which is not adequately provided in the community.

F. On Trials, Civil Proceedings and Personnel

More Trials, Delays and Safety Concerns A 1996 survey reported serious caseload increases in California Superior Courts as a result of the three strikes law, accompanied by the need for increased jury pools to accommodate the trials.⁵⁴ The same survey revealed that civil cases were being delayed because three strikes cases impinged on limited courthouse space, and some counties were at least temporarily forced to stop hearing civil lawsuits. Because civil courtrooms are not equipped with metal detectors and lack stringent security measures, concern for safety became an issue when these courts were used for criminal cases.⁵⁵

Safety concerns also arise when jails and prisons become more crowded. In a survey conducted by the California State Board of Corrections, inmate assaults on staff increased 27% in the year after enactment of three strikes.⁵⁶ It is often asserted that inmates with long terms in prison with no chance of parole have little incentive to behave, and thus pose a greater risk to staff and to other inmates. This risk is thought to be greatest early in the sentence. As third strike inmates age, the danger they pose to others may decline, while the likelihood of their being victimized by younger, aggressive inmates may increase.

Safety concerns may also arise at the time of arrest, when an offender facing a long prison term realizes he has nothing to lose by resisting arrest. A Fullerton police lieutenant conducting research for a management course found evidence linking the law to violence against police officers, noting that six officers killed since 1994 were tied at least partially to the law.⁵⁷ Although

the study is inconclusive, it suggests more research should be conducted. A Los Angeles police spokesman commented that it is not unusual for potential third strikers to act more aggressively, noting that, "They resist or commit suicide."⁵⁸

Another trend advanced by three strikes law is the use of private courts to resolve civil disputes. Private courts may avoid delays and cost far less than a conventional courtroom resolution of many disputes. One attorney who is advocating use of Private Court in Sacramento noted that "Resolution of civil cases has taken a backseat to three strikes cases in the regular court system."⁵⁹

Pressure on Personnel Burnout can be high when prosecutors and public defenders are faced with larger caseloads and the additional work required for criminal trials involving a possible life sentence. The extra work generated and additional attorneys hired to represent two and three strike defendants, of whom 85% are indigent,⁶⁰ is paid by taxpayers. There is no data available to accurately assess the additional personnel costs.

G. Legal Issues

Questions of Legality Lack of clarity in drafting three strikes laws raises issues that may profoundly affect the law's use and application. For example, whether juvenile convictions for which there was not a right to a jury trial can properly be considered strikes; whether courts have the authority to dismiss third strike cases; whether felonies in other states may qualify as strikes; whether juries may be informed that a defendant is subject to three strikes law; and whether sentences must be consecutive or may be concurrent, are all important and difficult issues which are not always clearly addressed in state legislation. California courts have since resolved several of these issues, as well as other issues that have arisen.

Constitutionality Two years after three strikes went into effect in California, 9% of three strikes sentences had been imposed for theft — an unacceptable result for some judges who refused to sentence under the law.⁶¹ This refusal led to a challenge to judicial discretion in striking prior offenses at sentencing. The June, 1996 decision of the California Supreme Court in *People v. Romero* interpreted the law to permit a trial court on its own motion to strike prior convictions in the interest of justice.⁶² Judicial power at sentencing then more closely resembled prosecutorial discretion at the charging and plea stages. This decision was expected to lead to a review of some strike sentences, and possibly to changes in the law. Reports vary as to the exact numbers, but sentence reductions were granted in very few cases. Other challenges to the California law based on vagueness,⁶³ double jeopardy,⁶⁴ equal protection,⁶⁵ and proportionality⁶⁶ have not been successful, with the double jeopardy challenge resolved by the U.S. Supreme Court in mid-1998.

Counting Juvenile Crimes as Strikes In *People v. Daniels* the California Court of Appeals held that a youthful offender's prior serious or violent felony may be treated as a strike, even though it is expunged from the record.⁶⁷ In a decision released July 3, 1997 the California Supreme Court limited this rule by holding that *most* serious or violent felonies tried in juvenile court can be treated as a strike, but did not decide if crimes such as residential burglary and unarmed robbery can be considered strikes.⁶⁸ A *Sacramento Bee* editorial raised important issues about this decision. It noted that this decision has implications for cost and for justice, and reflects a disturbing shift in juvenile justice philosophy. In California, juveniles are not entitled to jury trials or to bail, the usual rules of evidence do not always apply, and they are adjudicated rather than prosecuted in what is more like a civil proceeding. If a 16-year-old knocks down another kid and steals his skateboard, his public defender may be ethically compelled to go to trial rather than admit guilt and have a strikable robbery conviction following the defendant for the rest of his life.⁶⁹ The likely result: increased costs for public defenders, district attorneys and the courts because of the demand for more trials, more hearings, more processing time, and more juvenile bed space.⁷⁰ Mike Reynolds, who spearheaded three strikes legislation, agrees with the court's decision but believes the real issue is that older teens know right from wrong and should be held accountable for their decisions, in particular the choice to engage in criminal behavior as an adult.⁷¹

Out-of-State Felonies In *People v. Hazelton* the California Supreme Court ruled that out-of-state felony convictions may be counted as a strike because the voters did not intend to limit the strikes to a defendant's California criminal record, though this was not explicit in Proposition 184.⁷²

Informing Juries In July, 1997 the California Supreme Court also denied review of an appellate court decision which prohibited jurors from considering punishment in deciding a case, thus barring defense attorneys from raising the defendant's status as a third striker to the jury.⁷³

Leniency Limited A January 1998 ruling by the California Supreme Court appeared to narrow the 1996 *Romero* decision by limiting judges' power to disregard previous convictions when the defendant's past conduct falls within "the spirit of the three-strikes law."⁷⁴ Although a trial court has discretion to vacate a prior strike "in furtherance of justice," as it had done in the case at issue, it must state the reasons for doing so, and the decision is reviewable. Given this defendant's lengthy criminal record and other considerations, he could not be deemed "outside the spirit of the Three Strikes law."

Strengthening the Law The California three strikes law was further strengthened in a 4-3 decision in May 1998 by the California Supreme Court holding that when a court has stayed a sentence on an otherwise qualifying conviction under the law, the stayed conviction may be treated

as a strike.⁷⁵ In this case the defendant had two felonies from a single knife attack in 1979 and incurred a third strike 15 years later when he stole a carton of cigarettes in 1994. A single act can count as more than one felony, amplifying the discretion of prosecutors. If the knife attack had been counted as one felony, the theft charge would have yielded a maximum six year sentence. Politicians backed the ruling, while critics labeled it “disgusting” and “a travesty of the intent of the law.”⁷⁶

Double Jeopardy In June 1998, the U.S. Supreme Court ruled 5-4 that California prosecutors can retry defendants on whether they used dangerous weapons in previous crimes in order to apply the three strikes law. The close decision held that the prohibition against double jeopardy does not apply to sentencing proceedings in noncapital cases. However, in separate dissents, Justice Scalia contended that state lawmakers had used the “gimmick” of sentencing enhancements “that look exactly like separate crimes and that expose the defendant to additional maximum punishment,” while Justice Stevens noted that until this case the court had never ruled that a retrial or resentencing was permissible when the evidence in the first proceeding was insufficient.⁷⁷

Discretion in How Sentences are Served The California Supreme Court preserved a measure of judicial latitude in sentencing and ruled in favor of a criminal who received four consecutive 25-year terms for robbing four people on the same occasion plus 11 years for the underlying crime. In a July 1998 decision the court clarified that when sentencing offenders on multiple three strike convictions, judges may decide whether to make the sentences consecutive or concurrent.⁷⁸ In a separate opinion, Justice Mosk noted that a 111-year prison sentence amounted to cruel and unusual punishment.

Changing the Law Attempts in California to strengthen the law by reducing judicial discretion, and efforts to weaken the law by limiting the triggering felony to violent or serious crimes, have both been unsuccessful. Expressing concern for budget-draining prison spending and early release of other inmates, State Senator Barbara Lee introduced a bill to allow only a serious or violent strike such as murder or rape to trigger the sentence enhancements. The proposal failed to pass in the California Senate in June, 1997 by a vote of 13-25.⁷⁹

In 1998, State Senator John Vasconcellos also proposed to limit enhanced punishment to violent felonies. Failing to find sufficient support for his bill to limit the law, he opted to propose legislation mandating an in-depth study of the impact of three strikes, to be conducted jointly by the legislative analyst, the state Department of Justice, and the University of California.⁸⁰ Vasconcellos’ bill received initial approval in the state Senate. Developing reliable data on how much it costs taxpayers, whether the law has reduced crime, and whether it is incarcerating the right

people would be important to any meaningful public discussion about reforming the law. However, concern for political fallout in an election year led to defections among supporters of the bill, and it failed to pass the Assembly. The fear, according to one commentator, was that a yes vote would be pitched to voters as an attempt to undermine the popular law.⁸¹ “Lock-em-up” still resonates with the public, the Harvard Law Review recently noted, while concerns for cost-effectiveness “do not translate into effective campaign speeches.”⁸² An amended version of the bill to fund a costs/benefit study of the bill was eventually passed but vetoed by Governor Wilson who wrote, “There are many mysteries in life. The efficiency of ‘Three Strikes’ however, is not one of them.”⁸³

III. CONCLUSION

The implementation, costs and consequences of three strikes legislation deserve careful ongoing evaluation of the law's opportunity costs as well as its effects on crime, racial disparity, legal process, fairness in application, prosecution practices, judicial discretion and impact on jail and prison populations. Of concern is whether the law is reducing public safety rather than enhancing it because of the burdens placed on crowded jails and because increased prison costs divert funds from education and social programs that may be more effective in preventing crime in the long run. It is unfortunate that Governor Wilson refused to allow the state of California to make such an investigation but perhaps not surprising, given the political capital which three strikes' supporters invested in the law.

Protecting communities from repeat violent offenders may be the most emotionally and politically charged challenge to the justice system today. It is properly among the highest priorities of government. Proposed solutions to the problem of violent crime must take into account the efficient use of public resources and take care to avoid creating harmful distortions in the justice system. No single law will be a panacea for violent crime. An overriding problem with three strikes is that catchy slogans divert attention from a serious discussion of how reducing crime and violence must involve a comprehensive range of social, educational, health and justice system interventions.

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