

**Strict, Stricter, and Strictest:**

**An Analysis of Prison Sentencing in California  
Before and After “Three Strikes”**

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McGeorge School of Law

By

**Vallerye Mosquera**

*J.D. University of the Pacific, McGeorge School of Law, to be conferred May 2015*  
*M.S., Community and Regional Development, University of California, Davis, 2012*  
*B.A., Biological Sciences, New College of Florida, 2004*

and

**Drew Wagner-Weir**

*J.D. University of the Pacific, McGeorge School of Law, to be conferred May 2015*  
*B.S., Marine Transportation, California State University Maritime, 2008*

## **I. INTRODUCTION**

This report examines California's repeat offender law, known as Three Strikes, by exploring the law's history, passage, legality, and effects.<sup>1</sup> The purpose of this report is to inform the reader on an aspect of criminal justice that has generated significant debate and discussion. Specifically, because Three Strikes was passed and amended by the initiative process, the report will examine the role that initiatives have played throughout the law's existence. In addition, this report analyzes the various legal challenges and constitutional issues raised by the different provisions of the law.

Section II provides a general overview of the history, passage, and structure of the original Three Strikes law passed in 1994. Three Strikes was the culmination of a trend moving towards increasing the punishments levied against repeat offenders. Section III analyzes the legality and effects of Three Strikes. The law has generated significant legal controversy and has been litigated all the way to the United States Supreme Court.

Section IV provides an analysis of the major effects of Three Strikes, specifically, the effects on crime reduction and prison operation costs. Finally, Section V discusses Proposition 36, which amended Three Strikes in 2012. Proposition 36 made some slight but notable changes to Three Strikes, such as ensuring that individuals cannot be sentenced to life imprisonment based on the commission of a non-serious and non-violent felony. Section V also discusses Proposition 47, which will appear on the November 4th, 2014 ballot. Proposition 47 is limited in scope and its primary purpose is to redefine many non-serious and non-violent crimes as misdemeanors, thereby avoiding the mandatory sentence that would come with a third strike felony.

## **II. HISTORICAL BACKGROUND AND THE PASSAGE OF THREE STRIKES**

The historical background is critical to a clear understanding of why Three Strikes was passed. Prior to 1994, California had gone through a number of sentencing reforms. Several key issues, such as lengthy sentences and prison conditions, emerged early in California's history.<sup>2</sup> Part A discusses California's sentencing structure prior to 1994 and the emergence of prison related issues. Part B provides a general overview of criminal justice initiatives that, starting in 1972, created a trend that Three Strikes followed. Finally, Part C discusses the drafting and passage of Three Strikes in both the California state legislature and through the initiative process.

### **A. Sentencing and Prisons Prior to 1994**

#### *1. Sentencing: Early Years, Indeterminate, and Determinate*

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<sup>1</sup> The term "Three Strikes" will be used throughout the report to refer to Assembly Bill 971 (March, 1994) and Proposition 184 (November, 1994), collectively.

<sup>2</sup> Kara Dansky, *Understanding California Sentencing*, 43 U.S.F. L. REV. 45, 51-52 (2008).

California has gone through several different sentencing variations.<sup>3</sup> Early in California's history the sentencing structure utilized total judicial discretion within statutory minimum and maximum terms limits.<sup>4</sup> Criticisms of this early structure focused on the fact that prisoners "were suffering imprisonment under unjust or unreasonably long sentences."<sup>5</sup> Furthermore, the legislature had not provided any real means of reducing a sentence once it was imposed, and the only remedy was the gubernatorial pardon or clemency, which governors were reluctant to use because of political ramifications.<sup>6</sup> The late 19th and early 20th centuries saw the development of probation and parole to combat prison overcrowding and lengthy sentences.<sup>7</sup>

Major sentencing reform came in 1917 with the passage of the Indeterminate Sentencing Act.<sup>8</sup> The law's goal was "to take from the trial judge the discretion of fixing definitely the term of imprisonment and to vest it in the prison authorities within prescribed limits."<sup>9</sup> Essentially, the law mandated that when a person was convicted of a crime, the judge either gave that person probation or sent that person to jail without making a decision on how long that person would be incarcerated. The length of incarceration was determined by the Board of Prison Directors, later known as the Adult Authority. The Board was constrained by the statutory limits.<sup>10</sup>

Finally in 1976, Governor Jerry Brown and the legislature enacted the Determinate Sentencing Law.<sup>11</sup> The Determinate Sentencing Law allows judges to use discretion in imposing one of three different prison terms provided by statute.<sup>12</sup> If the court finds an aggravating circumstance, then the court may sentence the person to the upper, or longer, prison term.<sup>13</sup> California continues to utilize the determinate sentencing system, subject to compliance with mandatory sentencing under Three Strikes.<sup>14</sup>

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<sup>3</sup> *Id.* at 45.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at n.48 (citing Governor Frederick F. Low, Governor's Message (Dec. 4, 1865)).

<sup>6</sup> *Id.* at 55.

<sup>7</sup> *Id.* at 56-57.

<sup>8</sup> Paula A. Johnson, *Senate Bill 42—The End of the Indeterminate Sentence*, 17 SANTA CLARA L. REV. 133, 135 (1977) available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2258&context=lawreview>; Act of May 18, 1917, ch. 527, § 1, 1917 Cal. Stat. 665 (current version at CAL. PENAL CODE § 1160 (West 2004)).

<sup>9</sup> *Sentencing Under Indeterminate Sentencing*, 22A Cal. Jur. 3d Criminal Law: Post-Trial Proceedings § 426, (Aug. 1, 2014).

<sup>10</sup> *Id.*

<sup>11</sup> Dansky, *supra* note 2, at 56-57. As clarification, the current Governor Jerry Brown was also governor in the 1970s before he became the California Attorney General and then Governor again.

<sup>12</sup> *Sentencing Under Determinate Sentencing Law*, 22A Cal. Jur. 3d Criminal Law: Post-Trial Proceedings § 386, (August 1, 2014).

<sup>13</sup> *Id.*

<sup>14</sup> *See, e.g., People v. Boyce*, 59 Cal. 4th 672 (2014) (providing a discussion of California's current sentencing procedure in a criminal case).

## 2. Prison Overcrowding: A Problem From the 19th Century

California prison conditions, prison costs, and prison overcrowding have been major problems since California became a state.<sup>15</sup> California's oldest prison, San Quentin State Prison, was constructed in 1852. By 1858 there were 600 prisoners in a facility built with only 68 cells.<sup>16</sup> In fact, it appears that most sentencing-related concepts, such as probation and parole, were implemented partially in response to prison overcrowding.<sup>17</sup> Prison overcrowding and prison costs have been major concerns since California became a state, and while Three Strikes plays a role in those two issues, they existed before Three Strikes came into being.

### B. Overview of Criminal Justice Initiatives from 1972 to 1994

Three Strikes was not the first time that California utilized the initiative process to affect sentencing as it relates to violent criminals and repeat offenders. In fact, Californians had used the initiative process at least once to address the issue prior to passage of Three Strikes.<sup>18</sup> Although the initiative process has existed in California since 1911, the most active use of the initiative process in the criminal justice context began in 1972, with the passage of Proposition 17.

In 1972, the California Supreme Court held that the death penalty in California violated the state constitution.<sup>19</sup> In response, the people passed Proposition 17, which amended the California Constitution to provide that statutes imposing the death penalty were not unconstitutional.<sup>20</sup> This appears to be the first time that California utilized the initiative process to directly address a criminal sentence. However, Proposition 17 appeared to lack force after the United States Supreme Court decided *Furman v. Georgia*,<sup>21</sup> which struck down every current state death penalty statute in the United States. *Furman* was not a categorical bar to the death penalty.<sup>22</sup> Instead, it was an attempt by the United States Supreme Court to regulate death penalty statutes to ensure that the

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<sup>15</sup> Dansky, *supra* note 2, at 53.

<sup>16</sup> *Id.* Interestingly, according to the San Quentin State Prison website, during construction of the facility, prisoners slept on a ship called the Waban at night and labored on the prison during the day. SAN QUENTIN STATE PRISON, [http://www.cdcr.ca.gov/Facilities\\_Locator/SQ.html](http://www.cdcr.ca.gov/Facilities_Locator/SQ.html) (last visited Sep. 12, 2014).

<sup>17</sup> Dansky, *supra* note 2, at 60.

<sup>18</sup> See Cal. Proposition 8 (1982).

<sup>19</sup> *People v. Anderson*, 6 Cal. 3d 628 (1972).

<sup>20</sup> CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 7, 1972, at 20, *available at* [http://librarysource.uchastings.edu/ballot\\_pdf/1972g.pdf](http://librarysource.uchastings.edu/ballot_pdf/1972g.pdf) ["NOVEMBER 1972 VOTER GUIDE"].

<sup>21</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>22</sup> Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1285 (1997).

death penalty was not imposed arbitrarily.<sup>23</sup> Nevertheless, after 1972, the initiative process began to play an ever-increasing role in prisons, sentencing, and punishment.

The initiative process reasserted itself once again in 1978 with the passage of Proposition 7.<sup>24</sup> In an attempt to create a constitutionally permissive death penalty law, California enacted a statute in 1977 that provided the death penalty in a murder case if a jury found that one of twelve special circumstances existed beyond a reasonable doubt.<sup>25</sup> Dissatisfied with what he considered a weak law, California State Senator John Briggs championed Proposition 7, which dramatically expanded the scope of California's new death penalty statute by "increasing the penalties for first and second degree murder" and "expanding the list of special circumstances requiring a sentence of death or life imprisonment without the possibility of parole."<sup>26</sup> What is striking about Proposition 7 is that it was a comprehensive law, which demonstrates the expanding role that initiatives began to have in sentencing and criminal justice.<sup>27</sup>

In 1982, Proposition 8 was passed, also known as The Victim's Bill of Rights.<sup>28</sup> The initiative was not passed without significant controversy in terms of its scope and legality.<sup>29</sup> Proposition 8 addressed a wide range of issues such as restrictions on bail, habitual criminals, use of prior convictions in criminal proceedings, and restrictions on sentencing those over the age of 18 to the Youth Authority.<sup>30</sup> In fact, Proposition 8 added a number of sections to the Penal Code, including sections 667 and 1192.7, which would be amended and modified in 1994 by passage of Three Strikes.<sup>31</sup> The habitual criminals section included enhancements for "any person convicted of a serious felony who previously has been convicted of a serious felony in this state."<sup>32</sup> Proposition 8 also flexed the muscles of the initiative process by placing restrictions on how the law could later be amended.<sup>33</sup> While attaining a simple majority of both legislative houses allowed the legislature to lengthen enhanced sentences, amending the law required the two-thirds

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

<sup>24</sup> *Id.* at 1310

<sup>25</sup> *Id.* at 1308.

<sup>26</sup> *Id.* at 1311.

<sup>27</sup> See NOVEMBER 1972 VOTER GUIDE, *supra* note 20, at 20, and CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 7, 1978, at 32, available at [http://librarysource.uchastings.edu/ballot\\_pdf/1978g.pdf](http://librarysource.uchastings.edu/ballot_pdf/1978g.pdf) ["NOVEMBER 1978 VOTER GUIDE"].

<sup>28</sup> George Nicholson, *Victims' Rights, Remedies, and Resources: A Maturing Presence in American Jurisprudence*, 23 PAC. L. J. 815, 821 (1992).

<sup>29</sup> *Brosnahan v. Brown*, 32 Cal. 3d 236 (1982).

<sup>30</sup> CAL SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, JUNE 8, 1982, at 33, 56 available at [http://librarysource.uchastings.edu/ballot\\_pdf/1982p.pdf](http://librarysource.uchastings.edu/ballot_pdf/1982p.pdf) ["JUNE 1982 VOTER GUIDE"].

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

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

vote of both houses or an initiative approved by the electors.<sup>34</sup>

There were predictions that the new bail restrictions, as well as the enhanced sentences, would have a direct impact on prison overcrowding and financial resources.<sup>35</sup> In fact, the California Attorney General at the time, who argued in favor of Proposition 8, highlighted that more convictions would result in more prisoners: “There is absolutely no question that the passage of this proposition will result in more criminal convictions [and] more criminals being sentenced to state prison.”<sup>36</sup> Opponents argued that Proposition 8 would require millions of dollars in new court procedures without money to pay for them.<sup>37</sup>

In short, it appears that Three Strikes was not the first time that the initiative process tackled the repeat offender issue. Propositions 7, 8, and 17 were not the only criminal justice propositions passed during the 1970s and 1980s, but they were the most significant in scope and purpose. Those propositions are significant because they represent a relatively sudden and controversial entrance of the initiative process into criminal procedure. They also demonstrate that Three Strikes was not the first time the state grappled with sentencing reform, prison overcrowding, and fiscal responsibility. Proposition 8 was a sweeping reform, and by adding numerous sections to the California Penal Code, it laid the foundation for the passage of Three Strikes in the next decade.

### **C. Three Strikes: Creation and Passage**

Three Strikes can be viewed as a high water mark in the campaign to punish repeat offenders and sentence them to state prison. While the actual drafting of the 1994 Three Strikes laws appears to have its genesis in the tragic murder of a young woman and a twelve year old girl, the 1982 Victim’s Bill of Rights had already taken a substantial step towards punishing repeat offenders.<sup>38</sup> However, it is helpful to view the passage of Three Strikes within the context of the times in which it was created. Therefore, this section provides a brief summary of events leading up to passage of the law.

The actual drafting of Three Strikes occurred because of the highly publicized murder of a young woman named Kimber Reynolds in 1992, who was shot in the head during an attempted robbery by a repeat offender.<sup>39</sup> Kimber’s father, Mike Reynolds, approached Justice James A. Ardaiz, presiding justice for the Fifth District Court of Appeal, to enlist his help in drafting a law to reduce serious and violent crime.<sup>40</sup> A

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 32.

<sup>36</sup> *Id.* at 34.

<sup>37</sup> *Id.* at 35.

<sup>38</sup> *Id.* at 33, 56.

<sup>39</sup> Michael Vitiello, *Three Strikes: Can We Return to Rationality*, 87 J. CRIM. L. & CRIMINOLOGY 395, 410 (1996).

<sup>40</sup> James A. Ardaiz, *California’s Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 1 (2000).

legislative committee rejected this first attempt, but Mike Reynolds shifted his focus and took the campaign to the people in the form of Proposition 184.<sup>41</sup>

Around the same time that Mike Reynolds was building support for Proposition 184 in 1993, tragedy struck again when another repeat offender kidnapped and murdered a twelve year old girl named Polly Klaas.<sup>42</sup> Polly's death spurred overwhelming support for Mike Reynolds' initiative, which made it onto the November ballot in 1994.<sup>43</sup>

The initiative process was not the only vehicle for a major law targeting repeat offenders. In fact, the text of Proposition 184 was virtually identical to the text of Assembly Bill 971, developed by the California legislature in the wake of Polly Klaas' murder.<sup>44</sup> Despite alternative bills and "an atmosphere of political distrust,"<sup>45</sup> Assembly Bill 971 passed and became law in March of 1994.<sup>46</sup> In November of 1994, Proposition 184 passed, and both laws became known collectively as "Three Strikes."

The deaths of Kimber Reynolds and Polly Klaas were not the only reasons that Three Strikes became law. Justice Ardaiz argued that Three Strikes was an attempt to prevent the commission of crime and deter the repetition of crime through reform in sentencing.<sup>47</sup> Basically, Three Strikes would serve as a powerful deterrent by sending the message that "further criminal behavior will result in severe consequences; disregard this message at your peril."<sup>48</sup> Furthermore, Justice Ardaiz argued that the rate of recidivism<sup>49</sup> in California was well over 50 percent, the second highest rate in the nation.<sup>50</sup> Indeed, proponents of Proposition 184 argued that Three Strikes "keeps career criminals, who rape women, molest innocent children and commit murder, behind bars where they belong."<sup>51</sup>

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<sup>41</sup> Vitiello, *supra* note 39, at 411.

<sup>42</sup> Marc Klass, *About the KlaasKids Foundation For Children*, KLAAS KIDS FOUNDATION (Sep. 11, 2014), <http://klaaskids.org/about/>.

<sup>43</sup> Vitiello, , *supra* note 39, at 418.

<sup>44</sup> David Esparza, *The "Three Strikes and You're Out" Law - A preliminary Assessment*, LEGISLATIVE ANALYST'S OFFICE (Sep. 11, 2014), *available at* [http://www.lao.ca.gov/1995/010695\\_three\\_strikes/sc010695.html](http://www.lao.ca.gov/1995/010695_three_strikes/sc010695.html).

<sup>45</sup> Vitiello, *supra* note 39, at 418. Professor Vitiello explains that "[f]ew in the legislature were willing to take on Reynolds or [Governor] Wilson who would have portrayed opponents as soft on crime, a tough label to wear in 1994." *Id.*

<sup>46</sup> *Id.* at 418.

<sup>47</sup> Ardaiz, *supra* note 40, at 3.

<sup>48</sup> *Id.*

<sup>49</sup> Recidivism occurs when criminals return to society after prior convictions and then commit more crimes.

<sup>50</sup> Ardaiz, *supra* note 40, at 5.

<sup>51</sup> Tony Miller, Acting Secretary of State, California Ballot Pamphlet, General Election, November 8, 1994, 36 (Sept. 11, 1994) [http://librarysource.uchastings.edu/ballot\\_pdf/1994g.pdf](http://librarysource.uchastings.edu/ballot_pdf/1994g.pdf) [hereinafter "1994 Ballot Pamphlet"].

Ultimately, political realities probably contributed significantly to the passage of Three Strikes both in the legislature and by the people. Governor Pete Wilson, up for reelection, was a major supporter of Three Strikes and spoke at Polly Klaas' funeral, advocating for the new law.<sup>52</sup> Additionally, the legal scholar Michael Vitiello argued that Mike Reynolds' ability to sway the public and use the press silenced those who may have opposed Three Strikes or attempted to modify it.<sup>53</sup> Looking at California history, Three Strikes appears to be exactly the type of situation that paralyzed sentencing reform in the early years of statehood: elected politicians are reluctant to be viewed as soft on crime.<sup>54</sup>

The 1994 debate surrounding Three Strikes was perhaps best described in the November 1994 Voter Guide. The analysis by the Legislative Analyst's Office (LAO) states that passage of Three Strikes would result in additional state operating costs, reaching an annual cost of \$6 billion by 2026.<sup>55</sup> Furthermore, the state would incur a one-time \$20 billion dollar expense to build and expand prison facilities to accommodate the anticipated increase in prison populations.<sup>56</sup> Proponents argued that Three Strikes would save lives and taxpayer dollars by keeping violent prisoners in jail, and would relieve Californians of having to "pay the outrageous costs of running career criminals through the judicial system's revolving door over and over again."<sup>57</sup> Opponents countered by stating that the prison system would be overwhelmed by non-violent offenders and the state would incur billions of dollars in increased expenses.<sup>58</sup>

### *1. Two Laws?*

As previously discussed, Three Strikes passed in both the legislature and through the initiative process. Why two laws? Functionally, there is not any textual difference between Assembly Bill 971 and Proposition 184.<sup>59</sup> The major difference is that Assembly Bill 971 amended Penal Code Section 667.5, whereas Proposition 184 created Penal Code Section 1170.12.<sup>60</sup> Importantly, both laws provided the same method for amendment: a two-thirds vote in both houses of the legislature or by a statute approved by the voters.<sup>61</sup> Then what would happen if the legislature tried to amend section 667 of

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<sup>52</sup> Vitiello, *supra* note 39, at 414.

<sup>53</sup> *Id.* at 418.

<sup>54</sup> Dansky, *supra* note 2, at 61.

<sup>55</sup> CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 8, 1994, at 34, *available at* [http://librarysource.uchastings.edu/ballot\\_pdf/1994g.pdf](http://librarysource.uchastings.edu/ballot_pdf/1994g.pdf) ["NOVEMBER 1994 VOTER GUIDE"].

<sup>56</sup> *Id.* at 36.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 37.

<sup>59</sup> *See id.* at 64-65; *see also* Official California Legislative Information Assembly Bill 971 (Sept. 11, 2014), *available at* [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab\\_0951-1000/ab\\_971\\_bill\\_940307\\_chaptered](http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_0951-1000/ab_971_bill_940307_chaptered).

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

<sup>61</sup> *See id.* There may be a constitutional issue with a law passed by a simple majority binding future legislatures with a supermajority provision. However, because Proposition 184 contains identical amendment restrictions, the question is probably moot.



the Penal Code and not section 1170.12? Which law has priority? The legal answer to that question is beyond the scope of this report, and it does not appear that the issue has presented itself. Furthermore, given the fact that both amendment clauses in each law are identical, the legislature or the people would presumably amend both at the same time, which is exactly what happened with the passage of Proposition 36 in 2012.<sup>62</sup>

## 2. *How Does Three Strikes Work?*

Three Strikes applies “strikes”—think baseball—to individuals who are convicted of serious or violent felonies.<sup>63</sup> Some well-known examples of serious or violent felonies are murder, robbery, and rape, but the total list is more expansive. If a person, who has one strike for having been previously convicted of a serious or violent felony, is subsequently convicted of *any* felony, whether or not it is serious or violent, that person receives double the required sentence for the new conviction, and receives a second strike.<sup>64</sup> If the same person, who now has two strikes, is convicted for *any* new felony, then that person receives a mandatory minimum term of 25 years, or three times the term otherwise required by law for the third conviction, whichever is longer—think “out.”<sup>65</sup> Keep in mind that a person can receive more than one strike arising out of a single criminal case. This occurs when a person is convicted of multiple felonies arising from the same set of facts.<sup>66</sup> Furthermore, those people with at least one strike must be sent to state prison and cannot be sentenced to probation or an alternative treatment program. Finally, a person serving time in state prison under the Three Strikes *must* serve out the minimum sentence without the possibility of early release.<sup>67</sup>

As will be discussed later in this report, the initiative process has been used to amend portions of the 1994 Three Strikes laws. However, the basic Three Strikes methodology persists today.

## III. THE LEGALITY OF THREE STRIKES

Despite the broad support received for Three Strikes, there were several attacks to its constitutionality. This section outlines the key court decisions that upheld the law and interpreted the extent of judicial control over sentencing after Three Strikes. Part A

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<sup>62</sup> CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 6, 2012, at 105, *available at* <http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf> [“NOVEMBER 2012 VOTER GUIDE”].

<sup>63</sup> NOVEMBER 1994 VOTER GUIDE, *supra* note 55, at 33, 36.

<sup>64</sup> *Id.*

<sup>65</sup> CAL. PENAL CODE § 667(e)(2)(A) (West 2012). Prior to the passage of Proposition 36 in 2012, a third strike could result in a life sentence.

<sup>66</sup> *See, e.g.,* People v. Benson, 18 Cal. 4th 24 (1998) (considering a case where the defendant was convicted of two felonies arising out of the same occurrence when defendant gained entry to the victims apartment and repeatedly stabbed her with a knife).

<sup>67</sup> NOVEMBER 1994 VOTER GUIDE, *supra* note 55, at 56.

discusses the U.S. Supreme Court cases that decided Three Strikes sentencing does not constitute cruel and unusual punishment. Part B outlines the California Supreme Court's interpretation of the judge's ability to reduce sentences even after a third strike felony conviction.

### **A. Constitutional Challenges: Cruel and Unusual Punishment**

Some opponents of Three Strikes believed that the law constituted cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution.<sup>68</sup> Based on the severity of the mandatory sentencing,<sup>69</sup> even for non-violent third strikes, these opponents argued that the punishment was “grossly disproportionate” to many of the crimes that constituted the “third strike.”<sup>70</sup> In 2003, the opponents got their chance to challenge the constitutionality of Three Strikes before the U.S. Supreme Court in *Ewing v. California*<sup>71</sup> and *Lockyer v. Andrade*.<sup>72</sup>

#### *1. Ewing v. Andrade: Non-Serious and Non-Violent Third Strikes*

In *Ewing*, the Supreme Court considered the case of Gary Ewing, who stole three golf clubs from a golf course pro shop in 2000.<sup>73</sup> Priced at \$399 each, the value of the golf clubs totaled less than \$1,200 dollars.<sup>74</sup> Mr. Ewing was convicted of felony grand theft, which would have resulted in a sentence of 10 years or less,<sup>75</sup> except that he had four prior serious felony convictions.<sup>76</sup> Those prior felony convictions subjected him to

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<sup>68</sup> See Michel Vitiello, “Three Strikes” and the Romero Case: The Supreme Court Restores Democracy, 30 LOY. L.A. L. REV. 1643, 1647 (1997).

<sup>69</sup> Section 667(e)(2)(A) of the California Penal Code states that upon receiving a third felony conviction, defendants are required to serve at least twenty-five years and up to a life sentence.

<sup>70</sup> *Ewing v. California*, 538 U.S. 11, 28 (2003).

<sup>71</sup> See *id.* The original trial court chose not to reduce the grand theft charge to a misdemeanor and also did not vacate Ewing's four prior felony convictions. As such, “Ewing was sentenced under the three strikes law to 25 years to life.” *Id.* at 21. The California Court of Appeal affirmed the decision, and the California Supreme Court denied review of the decision. *Id.*

<sup>72</sup> See *Lockyer v. Andrade*, 538 U.S. 63 (2003).

<sup>73</sup> *Ewing*, 538 U.S. at 17-18.

<sup>74</sup> *Id.* at 18.

<sup>75</sup> In his dissenting opinion, Justice Breyer notes that before the Three Strikes law, “no one like Ewing could have served more than 10 years in prison. We know that for certain because the maximum sentence for Ewing's crime of conviction, grand theft, was for most of that period 10 years . . . We also know that the time that any offender actually served was likely far less than 10 years. This is because statistical data show that the median time actually served for grand theft (other than auto theft) was about two years, and 90 percent of all those convicted of that crime served less than three or four years.” *Ewing v. California*, 538 U.S. 11, 44 (2003) (Breyer, J., dissenting) (emphasis in original).

<sup>76</sup> See *Ewing*, 538 U.S. at 18. Ewing had four prior serious and/or violent felony convictions: three burglaries and a robbery. *Id.* at 19.

the Three Strikes sentencing requirement of 25 years to life for this new, non-violent and non-serious felony conviction.<sup>77</sup>

The Court held that “recidivism” statutes like the Three Strikes law in California did not sentence violators out of proportion to their “third strike” crime, and, therefore, are not unconstitutional.<sup>78</sup> Rather, from the Court’s perspective, these laws are “nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State’s judgment as to whether to grant him parole.”<sup>79</sup> The Court further described how state legislatures needed discretion in making sentencing decisions, instead of being impeded by the federal courts.<sup>80</sup> Indeed, although the Court noted the criticism of the Three Strikes law,<sup>81</sup> it ultimately stated, “[t]his criticism is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme.”<sup>82</sup>

Finally, it is notable that the Court found that the rationale for the Three Strikes law was justifiable and that the outcomes of the law were impressive.<sup>83</sup> The Court stated that “[r]ecidivism is a serious public safety concern in California and throughout the Nation” and that after four years of the Three Strikes law in California, “the recidivism rate of parolees returned to prison for the commission of a new crime dropped by nearly 25 percent.”<sup>84</sup> Additionally, the Court seemed to consider evidence that parolees were leaving California because of the Three Strikes law to be a sign of its efficacy.<sup>85</sup>

In summary, the Court held that in determining whether a sentence was “unconstitutionally disproportionate” to a crime, the court must look to both the “offense of conviction, or the ‘triggering’ offense” along with the prior felony convictions.<sup>86</sup> As such, Ewing’s sentence of 25 years to life was held to not be “grossly disproportionate to his conviction for felony grand theft and his prior serious felony offenses.”<sup>87</sup> With its decision, the Court not only upheld the constitutionality of three strikes laws similar to California’s, but it also broadened the boundaries of what constituted proportional

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<sup>77</sup> *Id.* at 18, 20.

<sup>78</sup> *Id.* at 21.

<sup>79</sup> *Id.* (quoting *Rummel v. Estelle*, 445 U.S. 263, 278, (1980)).

<sup>80</sup> *Id.* at 25 (“Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.”).

<sup>81</sup> *Id.* at 27-28 (citing FRANKLIN E. ZIMRING ET. AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* (2001); Vitiello, *supra* note 39, at 423).

<sup>82</sup> *Id.* at 28 (“We do not sit as a ‘superlegislature’ to second-guess these policy choices.”).

<sup>83</sup> *See id.* at 26-27.

<sup>84</sup> *Id.* (citations omitted).

<sup>85</sup> *Id.* at 27 (referencing a report that found that “more than 1,000 net parolees left California” in the three years following the enactment of Three Strikes) (citing California Dept. of Justice, Office of the Attorney General, “Three Strikes and You’re Out”—Its Impact on the California Criminal Justice System After Four Years, p. 10 (1998)).

<sup>86</sup> *Id.* at 29.

<sup>87</sup> *Id.* at 30.

sentencing under the Eighth Amendment.<sup>88</sup> Instead of considering only the crime of conviction in relation to the imposed sentence, now courts could consider a defendant's "entire criminal history on the proportionality scales."<sup>89</sup>

## 2. *Lockyer v. Andrade: Habeas Corpus Context*

The same day that *Ewing* was decided, the Supreme Court issued a similar opinion in *Lockyer v. Andrade*.<sup>90</sup> In *Lockyer*, the respondent Mr. Andrade had been convicted of two counts of felony petty theft for stealing "approximately \$150 worth of videotapes from two different [Kmart] stores."<sup>91</sup> Mr. Andrade had at least three prior felony convictions that were either serious or violent, and, as such, these new felony convictions subjected him to the mandatory sentence of 25 years to life.<sup>92</sup> In a somewhat unexpected application of the Three Strikes law, he was sentenced to "two consecutive terms of 25 years to life" instead of merely one term "because each of his petty theft convictions [] triggered a separate application of the three strikes law."<sup>93</sup>

Although Mr. Andrade was successful with his habeas corpus petition<sup>94</sup> in the Ninth Circuit Court of Appeals, the Supreme Court held that the Ninth Circuit's decision was erroneous since Mr. Andrade's sentence was not cruel and unusual punishment and that the California appellate court's decision was not "contrary to, or an unreasonable application of, this Court's clearly established law."<sup>95</sup> In its decision, the Court gave little indication of what constitutes "clearly established Federal law" under the Eighth Amendment; it stated only that the grossly disproportionate test is applied in determining whether sentencing is unconstitutional.<sup>96</sup> The Court warned that this determination of "grossly disproportionate" sentencing would only be made in those cases that are "exceedingly rare and extreme."<sup>97</sup>

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<sup>88</sup> Sara J. Lewis, Comment, *The Cruel and Unusual Reality of California's Three Strikes Law: Ewing v. California and the Narrowing of the Eighth Amendment's Proportionality Principle*, 81 DENV. U. L. REV. 519, 532 (2003).

<sup>89</sup> *Id.* at 532.

<sup>90</sup> *Lockyer*, 538 U.S. at 63.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> A habeas corpus petition is brought by detained individuals who argue that their detention is unlawful. For example, in *Lockyer v. Andrade*, the prisoner petitioner argued that he was being unlawfully detained because his sentence violated the U.S. Constitution. *Lockyer*, 538 U.S. at 63.

<sup>95</sup> *Lockyer*, 538 U.S. at 63. Under section 2254(d)(1) of the United States Code, a federal court can issue a writ of habeas corpus (determining that the person is "in custody in violation of the Constitution or laws or treaties of the United States") in cases where the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

<sup>96</sup> *Id.* at 72-73.

<sup>97</sup> *Id.* (internal quotation marks and citations omitted).

## B. California Constitutional Challenge: Judicial Discretion

Judicial discretion in sentencing was a major issue that emerged after the passage of Three Strikes. While formally judges had broad power to reduce sentencing, the Three Strikes bill seemed to alter that power by allowing only prosecutors, and not judges, to “dismiss or strike” a prior felony conviction if it was “in the furtherance of justice.”<sup>98</sup> However, section 667(f) of the Penal Code—the provision that appeared to strip judicial discretion in sentencing—was worded in such a way as to make it unclear whether judges retained the ability to strike prior felony convictions on their own motion.<sup>99</sup>

As a result of the ambiguity in the statutory language, some judges continued to act on their own to strike prior felony convictions. The *Romero* case, described below, confirmed that trial court judges maintain some judicial control over sentencing in California in spite of the Three Strikes law.

### 1. Judicial Discretion: *People v. Superior Court (Romero)*

In *Romero*, the California Supreme Court considered the authority of a San Diego trial court judge to strike two prior felony convictions for a defendant who was charged with possession of a controlled substance (0.13 grams of cocaine base).<sup>100</sup> The defendant had two prior serious felonies (burglary and attempted burglary – both close to a decade old) that could have increased his punishment to a life sentence, rather than the one to six years for the current charge and prior drug convictions.<sup>101</sup> But the judge decided to strike the prior serious felonies, reasoning that judges retained the authority to do so without the prosecutor’s motion since it would otherwise be a violation of the state’s doctrine of separation of powers.<sup>102</sup>

The Court of Appeals disagreed with the trial court judge and held that judges do not have the authority to strike prior felony allegations on their own motion based on the Three Strikes law.<sup>103</sup> The California Supreme Court reversed the decision of the Court of Appeals, finding that the legislature could curtail the judiciary’s role in sentencing but that it would violate the state constitution to “subject to prosecutorial approval the court’s discretion to dispose of a criminal charge.”<sup>104</sup> The court’s decision addressed the interpretation of the Three Strikes bill, but it also affected the interpretation of the Three

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<sup>98</sup> CAL. PENAL CODE § 667(f)(2) (West 1995).

<sup>99</sup> *People v. Superior Court (Romero)*, 37 Cal. Rptr. 2d 364 (1995).

<sup>100</sup> *Id.* at 631.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 632. Under the California Constitution, the legislature reserves the “legislative power,” and the “people reserve to themselves the powers of initiative and referendum.” The judicial branch’s power, on the other hand, is “vested in the Supreme Court, courts of appeal, and superior courts.” CAL. CONST., art. IV, § 1; CAL. CONST., art. VI, § 1.

<sup>103</sup> *Romero*, 37 Cal. Rptr. 2d at 632.

<sup>104</sup> *Id.* at 640.

Strikes initiative since it held that restricting a judge's authority in striking prior felony convictions would be unconstitutional.<sup>105</sup>

## 2. Discretion in Sentencing After Three Strikes and Romero

After the affirmation of the *Romero* decision, there are two possible scenarios in which discretion can be exercised over sentencing in the case of a third strike felony charge.<sup>106</sup> First, the prosecution can decide to charge “wobbler” crimes—those crimes that could be considered either misdemeanors or felonies—as misdemeanors, thereby avoiding the “third strike felony” conviction.<sup>107</sup> Second, supported by the *Romero* decision, the prosecution or the judges themselves have the power to strike prior serious or violent felony convictions from consideration in the trial at issue.<sup>108</sup>

The courts are still required to take into account the defendant's “present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects” in determining if “the defendant may be deemed outside the scheme's spirit, in whole or in part.”<sup>109</sup> Thus, judges continue to retain some authority to decide if a particular defendant should be subject to the mandatory sentencing of Three Strikes. But that sentencing is still obligatory if a prior strike is not vacated or if the prosecution does not reduce a “wobbler” felony to a misdemeanor.

## IV. ERA OF STRICTER SENTENCING: OUTCOMES AND CRITICISM

The slogan of the Three Strikes campaign was to “keep[ ] career criminals, who rape women, molest innocent children and commit murder, behind bars where they belong.”<sup>110</sup> It further promised that it would “save[] lives and taxpayer dollars.”<sup>111</sup> The rationale for these last two outcomes was based on the idea that fewer crimes would be committed because “career criminals” would be locked-up and unable to commit crimes.<sup>112</sup> Additionally, proponents reasoned that stricter sentencing would cause would-be criminals to reconsider involvement in criminal activity.<sup>113</sup>

What have been the consequences of Three Strikes over the past two decades? This section provides some insight into that question. Yet, it is important to recognize that Three Strikes is a piece (albeit a large piece) of a larger criminal justice puzzle within California. In addition to Three Strikes, there have been other significant changes to how

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<sup>105</sup> See *id.* at 647.

<sup>106</sup> *Ewing*, 538 U.S. at 17.

<sup>107</sup> *Id.*

<sup>108</sup> *Romero*, 37 Cal. Rptr. 2d at 647-48.

<sup>109</sup> *People v. Williams*, 17 Cal. 4th 148, 161 (1998).

<sup>110</sup> NOVEMBER 1994 VOTER GUIDE, *supra* note 55.

<sup>111</sup> *Id.*

<sup>112</sup> See Vitiello, *supra* note 68, at 1678 (citation omitted).

<sup>113</sup> See *id.* at 1679 (citing Phil Wyman & John G. Schmidt, Jr., *Three Strikes You're Out (It's About Time)*, 26 U. WEST L.A. L. REV. 249, 257 (1995)).

criminals are prosecuted and sentenced in California: other sentencing enhancements, shifts in the parole system, and loosening of California evidence laws.<sup>114</sup> Therefore, it is difficult to determine an *exact* causal link between Three Strikes and crime reduction and/or rising costs of California's prison population.<sup>115</sup>

Part A of this section examines the relation between crime reduction and Three Strikes. Next, Part B looks at the fiscal effects of an increased and aging prisoner population. Finally, Part C outlines the criticism against Three Strikes based on the treatment of juveniles and criminals with non-serious and non-violent three strikes.

### **A. Safer Streets as a Result of Stricter Sentences?**

If the effectiveness of Three Strikes is judged based on the number of convicted criminals that were sentenced under the law, then it has been an overwhelming success.<sup>116</sup> The dilemma arises in attempting to evaluate the reduction in crime attributable to Three Strikes. In 2004, Mike Reynolds, the primary proponent of Three Strikes, co-wrote a report that applauded the results of Three Strikes and cited a decrease in violent and property crimes as an indication of the law's positive results.<sup>117</sup> Without a doubt, crime rates went down at a steady pace after Three Strikes went into effect; until 2011, when violent crime increased "slightly," and in 2012, when property crime increased "noticeably."<sup>118</sup> However, legal scholars highlight the fact that crime rates began to drop before Three Strikes was passed, and they reason that the crime reduction after Three Strikes is merely a coincidence.<sup>119</sup>

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<sup>114</sup> James Austin, *The Effect of "Three Strikes and You're Out" on Corrections*, in *THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY* 155, 170-71 (David Shichor & Dale K. Sechrest eds., 1997).

<sup>115</sup> See David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL'Y 557, 580 (2000).

<sup>116</sup> See CALIFORNIA STATE AUDITOR, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION: INMATES SENTENCED UNDER THE THREE STRIKES LAW AND A SMALL NUMBER OF INMATES RECEIVING SPECIALTY HEALTH CARE REPRESENT SIGNIFICANT COSTS 21 (2010), available at <http://www.bsa.ca.gov/pdfs/reports/2009-107.2.pdf> (stating that 25 percent of the California prison population is comprised of individuals sentenced under Three Strikes) [hereinafter "CAL. STATE AUDITOR 2009 REPORT"]. By 2000, "4,468 offenders ha[d] been sentenced under the third strike provision and over 36,043 for a second strike offense." Schultz, *supra* note 115, at 557 (citing CAMPAIGN FOR AN EFFECTIVE CRIME POLICY, "THREE STRIKES": FIVE YEARS LATER 6 (1999)).

<sup>117</sup> *3-Strikes 1994 to 2004, A Decade of Difference*, THREESTRIKES.ORG (Mar. 31, 2004), [http://www.threestrikes.org/tenyearstudy\\_pg3.html](http://www.threestrikes.org/tenyearstudy_pg3.html).

<sup>118</sup> Magnus Lofstrom & Brandon Martin, *Crime Trends in California*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (Dec., 2013), available at [http://www.ppic.org/main/publication\\_show.asp?i=1036](http://www.ppic.org/main/publication_show.asp?i=1036).

<sup>119</sup> See Schultz, *supra* note 115, at 573; Michael Vitiello, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 904-908, n.4 (citations omitted).

At least one legal scholar contends that Three Strikes not only deters individuals from committing crimes that would constitute a third strike, but it also deters people from committing crimes that count as a first or second strike (i.e., violent or serious felonies).<sup>120</sup> Critics, on the other hand, argue that people do not engage in a rational, cost-benefit analysis before committing crimes, but that they instead “make choices based on their own reference levels.”<sup>121</sup> The premise behind this argument is that people who commit criminal acts often have “less than perfect information” about the repercussions for those crimes, have a limited view of their own future, and make decisions based on “their present desires and needs.”<sup>122</sup>

## **B. Fiscal Effects: Cost of Incarceration**

A 2004 RAND Corporation study predicted that the Three Strikes law would reduce crime, but that the law would nevertheless increase the prison population and bring with it the increased cost of \$5.5 billion per year.<sup>123</sup> A similar study found that more funds would be needed to handle the additional “capacity, health care costs for geriatric prisoners, and prison construction.”<sup>124</sup> This sub-section describes the actual costs to California of Three Strikes, including the costs associated with more prisoners and higher healthcare costs.

### *1. Prisoner Population*

In 2009, the California State Auditor estimated that prisoners sentenced under Three Strikes will have increased costs to California by approximately \$19.2 billion by the end of their sentences, and that 25 percent of the prison population was made-up of individuals sentenced by the Three Strikes law (43,500 out of the total 171,500 prisoners).<sup>125</sup> Notably, \$7.5 billion of those increased costs will have been spent on prisoners who were convicted with a strike that was neither violent nor serious.<sup>126</sup>

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<sup>120</sup> Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159, 161-62 (2002).

<sup>121</sup> Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1090-92 (2004) (citations omitted).

<sup>122</sup> *Id.* at (citing Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55, 63 (2001)).

<sup>123</sup> See Linda S. Beres & Thomas D. Griffith, *Did “Three Strikes” Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report*, 32 LOY. L.A. L. REV. 101, 131 n.81 (1998) (citing PETER W. GREENWOOD ET AL., RAND CORP., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY SENTENCING LAW 25-30 (1994)); See Vitiello, *supra* note 68, at 1686 (citing PETER W. GREENWOOD ET AL., RAND CORP., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY- SENTENCING LAW, n.137, at xi (1994)).

<sup>124</sup> Schultz, *supra* note 115, at 579 (citing CAMPAIGN FOR AN EFFECTIVE CRIME POLICY, IMPACT OF “THREE STRIKES AND YOU'RE OUT” LAWS: WHAT HAVE WE LEARNED? 8 (1996)).

<sup>125</sup> CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 21.

<sup>126</sup> *Id.*



The issue with long mandatory sentencing is that even if fewer people end up committing crimes, there are still more people within the prison system over time.<sup>127</sup> As legal scholars have explained, the impact of sentencing one person to a minimum of 25 years is similar to sentencing five offenders to a 5-year sentence, which creates large-scale impacts overtime.<sup>128</sup> However, an alternative argument is that the “three striker” recidivists would be in and out of the prison system regardless of whether the Three Strikes law was in effect.<sup>129</sup> The logic of this argument is that any additional costs or increases in the prisoner population are not necessarily tied to Three Strikes, since many of these individuals would still have contributed to prison costs without Three Strikes.<sup>130</sup> Yet, the California State Auditor estimates that the individuals convicted under Three Strikes receive an average of nine years more to their sentence than they would otherwise, indicating that the overall time spent in prison by these individuals is longer under Three Strikes.<sup>131</sup>

In 2011, the U.S. Supreme Court upheld a decision by a Three-Judge Court that California prisons were so overcrowded that it constituted cruel and unusual punishment under the Eighth Amendment.<sup>132</sup> The decision mandated that California reduce its inmate population to 137.5 percent of design capacity by June 27, 2013.<sup>133</sup> The California legislature has since passed several laws as part of a comprehensive “realignment” effort to meet the judicial mandate.<sup>134</sup> Yet, the state has not been able to sufficiently reduce its prisoner population, and, as a result, the deadline has been extended several times with the most recent extension giving the state until the beginning of 2016.<sup>135</sup> California officials will need to continue to make reforms to the state prison system in order to comply with the mandate, but any changes to Three Strikes would be extremely difficult. The Three Strikes initiative and legislation both imposed amendment restrictions on the

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<sup>127</sup> FRANKLIN E. ZIMRING ET. AL., *THREE STRIKES AND YOU’RE OUT IN CALIFORNIA: PUNISHMENT AND DEMOCRACY* 18 (2001).

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

<sup>129</sup> *A Primer: Three Strikes After More Than a Decade*, LEGISLATIVE ANALYST’S OFFICE (Oct. 2005), [http://www.lao.ca.gov/2005/3\\_strikes/3\\_strikes\\_102005.htm](http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm).

<sup>130</sup> *Id.*

<sup>131</sup> See CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 1; see also Michael Vitiello, *Reforming Three Strikes’ Excesses*, 82 WASH. U. L.Q. 1, 16 (2004) (“[T]he impact of third-strike offenders began when, but for Three Strikes, the offenders would have been released, and the impact of prisoners sentenced under the Three-Strikes Law will culminate between 2009 and 2014 when the system will contain 20 years’ worth of sentenced offenders.”).

<sup>132</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011).

<sup>133</sup> *Id.*

<sup>134</sup> CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, <http://www.cdcr.ca.gov/realignment/>, (last visited on Sep. 12, 2014).

<sup>135</sup> Bob Egelko, *Court Gives California 2 Years to Lower Prison Population*, SF GATE, Feb. 11, 2014, <http://www.sfgate.com/crime/article/Court-gives-California-2-years-to-lower-prison-5221828.php>. By February 28, 2016, California must reduce its population from the current 117,500 individuals to 112,100. *Id.*

law, and, therefore, it is impossible to touch Three Strikes without a voter-approved initiative or by a statute passed by two-thirds of both houses of the legislature.<sup>136</sup>

## 2. Aging Prisoner Population

Not surprisingly, older prisoners require more medical care, which increases the cost per year spent on these “aging” prisoners.<sup>137</sup> The annual medical care of older prisoners ranges from approximately \$14,000 to \$44,000 more than their younger incarcerated counterparts.<sup>138</sup> The largest age group of individuals serving sentences under Three Strikes is in the age-range of 45 to 49 years old,<sup>139</sup> compared to the remaining prison population whose largest age group is in the range between 25 to 29 years old.<sup>140</sup> Indeed, 53 percent of the prisoner population convicted under Three Strikes is over the age of 40 years old.<sup>141</sup> Still, as of 2011, less than 4 percent of prisoners in the Three Strikes category are over the age of 60 years old (the time at which medical care costs, on average, are greatest).<sup>142</sup> But, some data predicts that by 2025 California will have to spend more than \$4 billion on prisoners who are over 60 years old.<sup>143</sup>

Critics of Three Strikes also argue that aging prisoners should not be subject to the mandatory sentencing because they pose “a low risk of violence” to the community.<sup>144</sup> However, the California Supreme Court has held that Three Strikes prisoners are prohibited from being released early, even with “good-time credits,” meaning they must serve their entire sentence despite their potential old age or frailty.<sup>145</sup>

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<sup>136</sup> See CAL. CONST. article II, § 10(c) (“The Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.”).

<sup>137</sup> Vitiello, *supra* note 131, at 16-17 (citing California's Aging Prison Population, Hearing Before the Senate Select Comm. on the California Correctional System of the California Senate Comm. on Public Safety 12 (written statement of professor Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University Law School)).

<sup>138</sup> *Id.*

<sup>139</sup> Department of Corrections and Rehabilitation, Data Analysis Unit, Table 6: Second and Third Strikers in the Adult Institution Population, Apr. 6, 2011, *available at* [http://www.cdcr.ca.gov/reports\\_research/offender\\_information\\_services\\_branch/Quarterly/Strike1/STRIKE1d1103.pdf](http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Quarterly/Strike1/STRIKE1d1103.pdf) [hereinafter “Dep’t of Corrections and Rehabilitation Data”].

<sup>140</sup> CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 39.

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

<sup>142</sup> Dep’t of Corrections and Rehabilitation Data, *supra* note 139; see CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 39 (showing that specialty medical care is the most expensive for those “striker” inmates over the age of 60 years old).

<sup>143</sup> See Vitiello, *supra* note 131, at n.116 (2004) (citing California's Aging Prison Population, Hearing Before the Senate Select Comm. on the California Correctional System of the California Senate Comm. on Public Safety 11,13 (written statement of professor Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University Law School)).

<sup>144</sup> *Id.* (citations omitted).

<sup>145</sup> *In re Cervera*, 16 P. 3d 176, 179-81 (Cal. 2001) (holding that 25-year sentences under Three Strikes cannot be reduced based on the 20 percent good time credits rule in California). Proposition 36 in 2012 made slight changes to the law, and now judges are allowed to provide

### C. Punishment for Low-Level Crime and Juvenile Convictions

Three Strikes has been criticized for its impact on individuals whose third strike is a non-violent and non-serious crime,<sup>146</sup> and for those individuals whose prior strikes were committed when they were juveniles.<sup>147</sup> Under Three Strikes, certain serious or violent felonies committed as juveniles are considered first or second strikes.<sup>148</sup> Additionally, although felonies that are non-serious or non-violent do not count as first strikes, they do constitute a second or third strike and subject a third strike offender to mandatory sentencing.<sup>149</sup>

A 2009 report found that 53 percent of all prisoners serving time under Three Strikes had been convicted for non-serious and non-violent felonies.<sup>150</sup> As described above, third strike crimes include crimes like grand theft where the total value of stolen items is \$1,200 or less.<sup>151</sup> The original proponents of Three Strikes claimed that the law would put murderers and rapists behind bars.<sup>152</sup> But the fact that the majority of prisoners sentenced under the law have been convicted for non-violent crimes raises skepticism of the actual scope and efficacy of the law in deterring and incarcerating *violent* criminals.

Another five percent of all the “striker” prisoners were subject to Three Strikes because they had one or more juvenile offenses that counted as a felony strike.<sup>153</sup> Part of the concern in counting juvenile crimes as strikes is due to the fact that minors in California do not always have the benefit of jury trials and bail, and, therefore, they are not protected by the same procedural safeguards available to adults.<sup>154</sup> Additionally, the juvenile system tends to focus more on rehabilitation rather than punishment, which critics have found to be contradictory to the rigid punitive nature of Three Strikes.<sup>155</sup> In response to these concerns, Three Strikes proponents would likely point to the fact that juvenile crimes only count against an offender if they were committed when the juvenile

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early release to third strike offenders serving life sentences, as long as their third strike was non-violent and non-serious and they do not pose a threat to society.

<sup>146</sup> See e.g. Lisa E. Cowart, Comment, Legislative Prerogative vs. Judicial Discretion: California’s Three Strikes Law Takes a Hit, 47 DEPAUL L. REV. 615, 638-29 (1998).

<sup>147</sup> Schultz, *supra* note 115, at 579.

<sup>148</sup> CAL. PENAL CODE § 667(d)(3) (West 1998).

<sup>149</sup> *Id.* § 667(e)(2)(A).

<sup>150</sup> CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 23.

<sup>151</sup> See *Ewing*, 538 U.S. at 18 (grand theft of \$1,200 in golf clubs); *Lockyer v. Andrade*, 538 U.S. 63, 63 (2003) (petty theft of \$150 in videotapes).

<sup>152</sup> NOVEMBER 1994 VOTER GUIDE, *supra* note 57.

<sup>153</sup> CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 23.

<sup>154</sup> Schultz, *supra* note 115, at 579; Amanda K. Packel, *Juvenile Justice and the Punishment of Recidivists Under California’s Three Strikes Law*, 90 CAL. L. REV. 1157, 1179 (“[T]he California Supreme Court [has] upheld the use of juvenile adjudications as strikes without any acknowledgement that it was attaching permanent criminal consequences to a nonjury proceeding.”).

<sup>155</sup> Packel, *supra* note 154, at 1179.

was 16 years or older, and that at such an age the juveniles should be more responsible for their crimes.<sup>156</sup>

## **V. INITIATIVE RESPONSE TO THREE STRIKES**

After Three Strikes passed in 1994, the initiative process attempted to address a wide range of criminal justice issues. Between 1994 and 2004, the initiative process addressed issues relating to sentencing, the definition of murder, and non-violent drug possession offenses.

### **A. Limited Reform and a Failed Attempt at Reform**

Proposition 36, passed in the year 2000 (not to be confused with a different and distinct Proposition 36 passed in 2012), actively discussed reducing the prison population by removing non-violent drug possession offenders and placing them in treatment programs.<sup>157</sup> However, the text of Proposition 36 clearly indicated that the law did not apply to people sentenced under Three Strikes, except in a limited number of circumstances.<sup>158</sup> Furthermore, the law restricted its treatment provisions to those who had remained out of custody for a number of years and were basically convicted only of simple non-violent drug possession.<sup>159</sup> One of the justifications of taking non-violent drug offenders out of prison was to make room for serious or violent criminals.<sup>160</sup>

Proposition 66, which was on the ballot in 2004, would have made major changes to Three Strikes by requiring a second and third strike felony to be serious or violent in order to make Three Strikes applicable to the person convicted.<sup>161</sup> However, Proposition 66 failed to pass, and a similar initiative was not presented until 2012.

### **B. Amending Three Strikes and Reducing Prison Populations**

Three Strikes underwent modest reform in 2012. Proposition 36, the Three Strikes Reform Act of 2012, amended numerous sections of the Penal Code, including sections 667 and 1170.12.<sup>162</sup> Under Proposition 36, the indeterminate life sentence for a

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<sup>156</sup> See CAL. PENAL CODE § 667(d)(3) (West 2012) (requiring that a juvenile be at least 16 years or older for their crimes to count as a strike).

<sup>157</sup> CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 7, 2000, *available at* <http://vote2000.sos.ca.gov/VoterGuide/pdf/ballotpamphlet.pdf> ["NOVEMBER 2000 VOTER GUIDE"].

<sup>158</sup> *Id.* at 23-24.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 26.

<sup>161</sup> CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 2, 2004, *available at* [http://librarysource.uchastings.edu/ballot\\_pdf/2004g.pdf](http://librarysource.uchastings.edu/ballot_pdf/2004g.pdf) ["November 2004 Voter Guide"].

<sup>162</sup> CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 6, 2012, at 105-110, *available at*

non-violent and non-serious third strike is now only imposed on those who committed certain crimes with firearms and/or those with a prior conviction for a sexually violent offense, child molestation, homicide, solicitation to commit homicide, specific murder of a police officer, or possession of a weapon of mass destruction.<sup>163</sup> Further changes give judges discretion to release prisoners serving a life sentence for non-violent and non-serious third strikes, as long as the judge determines they are not a threat to society.<sup>164</sup>

Thus, Proposition 36, while making significant changes to the imposition of a life sentence, does not alter the basic structure of Three Strikes, and 25-year sentences are still imposed for a wide range of non-violent and non-serious felony third strikes. The findings and declarations of Proposition 36 state that murderers, rapists, and child molesters will still serve their full sentences, but certain offenders with a third strike for crimes like shoplifting or simple drug possession will not receive mandatory life sentences.<sup>165</sup>

The arguments put forth by proponents and opponents of Proposition 36 echoed the issues raised in 1994. The LAO portion of the voter guide claimed that Proposition 36 would save the state money by reducing prison populations and reducing parole expenses, totaling up to \$90 million annually.<sup>166</sup> Proponents argued several main points: make the punishment fit the crime; save California millions of dollars each year; and make room in prison for dangerous felons.<sup>167</sup> Opponents stated that dangerous felons would be summarily released from prison and that law enforcement overwhelmingly rejects Three Strikes reform.<sup>168</sup>

It may take a number of years for the positive or negative effects of Proposition 36 to fully develop. One concrete change that has taken place is demonstrated by the Stanford Three Strikes Project, which claims that over 1,000 persons have been resentenced and released under Proposition 36 since its implementation.<sup>169</sup>

### **C. Proposition 47: Reduced Penalties for Some Crimes Initiative**

Proposition 47, on the 2014 ballot, is not an attempt to comprehensively reform Three Strikes, but rather to prevent low-level criminals from being subject to a mandatory

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<http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig- v2.pdf>. [“NOVEMBER 2012 VOTER GUIDE”].

<sup>163</sup> CAL. PENAL CODE § 667 (West 2012).

<sup>164</sup> Russell Cooper & Erica Scott, *Proposition 36: Three Strikes law. Repeat Felony Offenders. Penalties.*, 11 CAL. INIT. REV. 11, 103 (Fall 2012).

<sup>165</sup> NOVEMBER 2012 VOTER GUIDE, *supra* note 162, at 50.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 52.

<sup>168</sup> *Id.* at 53.

<sup>169</sup> STANFORD THREE STRIKES PROJECT, STANFORD LAW SCHOOL, <https://www.law.stanford.edu/organizations/programs-and-centers/stanford-three-strikes-project>, (last visited Sept. 11, 2014).

25-year sentence. In keeping with Three Strikes and Proposition 36, those individuals who have been convicted for murder, rape, some sex offenses, or some gun crimes will not be eligible for a reduced sentence under Proposition 47.<sup>170</sup>

Proposition 47's main aim is to redefine many non-serious and non-violent crimes as misdemeanors, thereby avoiding the mandatory sentence that would come with a third strike felony.<sup>171</sup> Indeed, in a 2009 report, it was found that 53 percent of all prisoners serving time under Three Strikes had been convicted for non-serious and non-violent felonies.<sup>172</sup> For critics, these statistics confirm that Three Strikes disproportionately punishes low-level criminals, rather than targeting the reduction of violent crime. For supporters, these numbers only show that the law is working by imprisoning repeat offenders that cannot control their criminal urges.

If Proposition 47 passes, low-level crimes—such as the theft of \$150 in videotapes at issue in *Lockyer*<sup>173</sup>—would be considered misdemeanors and no longer carry the 25-year mandatory penalty required if they were third strike felonies.<sup>174</sup> However, the initiative places a \$950 cap on the amount of money that can be involved if the crime is to be classified as a misdemeanor instead of a felony.<sup>175</sup> Therefore, the theft of \$1,200 in golf clubs at issue in *Ewing*<sup>176</sup> would still constitute a felony under the law proposed by Proposition 47. According to the LAO, there would be “several thousand” current inmates whose sentences would be reduced by Proposition 47, but they do not provide an estimate of the exact number of inmates who would be effected by the new law.<sup>177</sup>

Although Proposition 47 is not proposing comprehensive reform, it is notable that Proposition 47 appears to be part of a growing trend to reshape and reduce the current prison population. Proposition 47 is discussed in detail under that section of this volume of the California Initiative Review.<sup>178</sup>

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<sup>170</sup> CAL SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 4, 2014, at 34, *available at* <http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf#page=70> [“NOVEMBER 2014 VOTER GUIDE”].

<sup>171</sup> *Id.*

<sup>172</sup> CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 23.

<sup>173</sup> *Lockyer*, 538 U.S. at 63.

<sup>174</sup> CALIFORNIANS FOR SAFE NEIGHBORHOODS AND SCHOOLS, <http://safetyandschools.com/> (last visited Sept. 12, 2014).

<sup>175</sup> *Id.*

<sup>176</sup> *Ewing*, 538 U.S. at 18.

<sup>177</sup> *Proposition 47, Criminal Sentences. Misdemeanor Penalties. Initiative Statute*, LEGISLATIVE ANALYST'S OFFICE (Nov. 4, 2014), <http://www.lao.ca.gov/ballot/2014/prop-47-110414.aspx>.

<sup>178</sup> Emily Reynolds & Selena Farnesi, Safe Neighborhoods and Schools Act, CAL. INIT. REV., (Fall 2014).

## VI. CONCLUSION

In the last two decades, Three Strikes has made a significant impact on California's criminal justice system.<sup>179</sup> The enhanced sentencing structure is the culmination of a series of laws aimed at punishing repeat offenders.<sup>180</sup> In 1994, the passage of Three Strikes was secured by the political realities and public support for harsher punishments after the tragic murders of a young woman and a twelve-year old girl.<sup>181</sup> While Three Strikes' supporters claim credit for the general trend of crime reduction in California,<sup>182</sup> critics remain skeptical that Three Strikes has actually deterred criminals or reduced crime.<sup>183</sup> Additionally, the fiscal impact of Three Strikes has been substantial, with an estimated \$19.2 billion additional funds needed to operate California prisons.<sup>184</sup>

Despite attempts to reform or overturn the law through legal challenges and the initiative process, Three Strikes weathered the storm for eighteen years until 2012 with the approval of Proposition 36.<sup>185</sup> However, Proposition 36 did not provide wholesale reform or invalidation of Three Strikes, and the law is still very much alive and well in the California criminal justice system today.<sup>186</sup>

Now, Proposition 47 seeks to address the issue of long-term, mandatory sentencing under Three Strikes for non-serious and non-violent third strike felonies. If Proposition 47 passes, many low-level crimes would be considered misdemeanors and no longer carry the 25-year mandatory penalty required if they were third strike felonies.<sup>187</sup> However, there is a \$950 maximum crime amount that delineates a "felony" from a "misdemeanor."

For the time being, the future of Three Strikes appears secure. Three Strikes supporters dislike the recent changes under Proposition 36 and reject the premise that any further modifications are needed through Proposition 47. But the fundamental nature of Three Strikes—lengthy, mandatory sentences for repeat offenders—remains intact.

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<sup>179</sup> See CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 21 (2010) (stating that 25 percent of the California prison population is comprised of individuals sentenced under Three Strikes).

<sup>180</sup> *Infra* Section III.

<sup>181</sup> *Infra* Section III.

<sup>182</sup> *3-Strikes 1994 to 2004, A Decade of Difference*, THREESTRIKES.ORG (Mar. 31, 2004), [http://www.threestrikes.org/tenyearstudy\\_pg3.html](http://www.threestrikes.org/tenyearstudy_pg3.html).

<sup>183</sup> See Schultz, *supra* note 117, at 573; Vitiello, *supra* note 121, at 904-908, n.4 (citations omitted).

<sup>184</sup> CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 21.

<sup>185</sup> *Infra* Section V.

<sup>186</sup> *Infra* Section V.

<sup>187</sup> CALIFORNIANS FOR SAFE NEIGHBORHOODS AND SCHOOLS, <http://safetyandschools.com/> (last visited Sept. 12, 2014).