Douglas W.
Kieso

UNJUST SENTENCING AND THE CALIFORNIA THREE STRIKES LAW

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Recent Scholarship

Edited by
Marilyn McShane and Frank P. Williams III

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Introduction

On March 7, 1994, at 2:45 p.m. a piece of paper was delivered to the Secretary of the State of California that would directly affect thousands of Californians in the following years.[1] Assembly Bill 971, after having passed the California legislature a few days earlier, had been signed by Governor Pete Wilson and would officially be placed in the California statutes under Penal Code § 667(b).[2] Then, as an added exclamation point, on November 8, 1994, after receiving almost 72 percent of the vote, a public initiative known as Proposition 184 would also be placed in the California statutes--under Penal Code § 1170.12.[3]

Penal Code § 667(b) and § 1170.12 are almost identical except for a few minor word differences, and in practice they are treated as the same law. Even though neither statute mentions the phrase "Three Strikes," combined they are known in the singular as the "California Three Strikes law."[4] It is a law that has become well-known nationally because of its extreme harshness, and its ability to be triggered after the commission for ANY felony--including misdemeanor crimes such as shoplifting that can be elevated to "felony status" if the offender had been convicted of specific prior crimes. While many other jurisdictions have passed "strikes" laws or recidivist sentencing enhancement statutes, California's is the most draconian.[5]

But for two deaths, the California Three Strikes law probably would not have passed with such harsh penalties. Had either of these deaths not occurred, the odds of the California Three Strikes law being passed with such harsh provisions seem very slim. It took the timing of a public initiative already in place with a stubborn crusading father and the publicity of the second death to propel the Three Strikes law into force.

THE DEATH OF KIMBER REYNOLDS

On June 29, 1992, 18-year-old Kimber Reynolds was visiting her hometown and had just finished a late dinner with a friend at a popular restaurant in the city of Fresno.[6] She and her friend were approaching her car which was parked on the street in front of the restaurant when

two individuals on a motorcycle sped up to them and attempted to rob Kimber of her purse. A struggle ensued, and then Kimber was shot in the head with a .357 magnum handgun. She died two days later. The assailants in the robbery were later located; the one that witnesses said did the shooting, Joseph Michael Davis, was killed after a gun battle with the police; the other, Douglas David Walker, pled guilty to robbery and was sentenced to 9 years in prison, with the possibility of release through "good time credits" after only serving 50 percent of the term.[7]

Kimber's father, Mike Reynolds, 49-years-old, was enraged at her death and the short sentence of the living assailant, and called a meeting with various local representatives of the criminal justice system. Included at the July gathering were a superior court judge, an appellate judge, a municipal court judge, a well-known local defense attorney, a representative of the Fresno Police Department, an expert in juvenile justice issues, and a radio talk show host.[8] The major focus of the group was on how to craft a law that would have the most impact on the greatest number of criminal offenders. Reynolds believed that a habitual offender statute that would include only serious or violent felonies, would affect only an insignificant number of people. The group decided that using "any felonies" as the criteria for the last strike would impact a significant number of people.

Reynolds contacted his local assemblymen, Republican Bill Jones and Democrat Jim Costa, and on March 1, 1993 they put forward Assembly Bill 971 which in its original version mandated a tripling of the usual sentence upon the commission of any third felony.[9] Reynolds later stated: "So what we originally decided to ask for was more than what we really wanted. We asked for AB971 to apply to all felonies when, in fact, we were willing to negotiate that down to just serious and violent felonies for the first two convictions."[10] On April 20, 1993, Reynolds brought four busloads of people to Sacramento, but AB971 failed to get out of the Assembly Public Safety Committee that was controlled by Democrats.[11]

Believing he would not be able to get his bill passed in a Democrat-controlled legislature, Reynolds turned to the California public initiative process. To get on the ballot, he would need to gather over 385,000 valid signatures during a 150-day period.[12] Reynolds was told that the first step in putting forward an initiative is that a public opinion poll on the issue needs to be conducted by an independent organization. If the results are favorable, the proponents of the initiative can use them to shop around to seek funding for the initiative. It would cost $15,000 for a cheap poll or $35,000 for an in-depth one. Instead, Reynolds was able to piggyback a question on a survey being conducted by the Gun Owners of California Inc., a pro-gun lobbying

group. The response to Reynolds' question about the Three Strikes law was 73 percent in favor.[13]

With his poll results, Reynolds was able to receive a start-up fund of $40,000 from the National Rifle Association (NRA) and $50,000 from the California Correctional Police Officer's Association (CCPOA)(also known as the prison guard union). A direct mailing effort was conducted by Pat Robertson's Christian Coalition.[14] In addition, Reynolds put up $60,000 of his own money.[15]

THE DEATH OF POLLY KLAAS

On October 1, 1993, 12-year-old Polly Klaas was kidnapped from her Petaluma home as she and two friends were preparing to go to bed during a slumber party. The Klaas family immediately took the case to the media, where grandfather Joe Klaas (a former DJ at KGO--a radio station in San Francisco) and father, Marc Klaas, were articulate speakers. Joe Klaas's experience with the media was put to good use, and the family sent videos of the photogenic Polly with a cute smile to all the media outlets. Within a very short time Polly Klaas became known worldwide.[16]

About the same time as the Klaas kidnapping, Reynolds had filed his petition with the Secretary of State's office and had begun the process of collecting signatures. After the first three weeks, Reynolds noted his disappointment: "After all that work, all that money, all the time we put into this effort, we only got 15,000 signatures back. It was barely enough to fill one box. I can still remember bringing that box home and watching Sharon [his wife] break into tears just looking into it. . . . We started thinking that we would never get there."[17]

Soon, Republican Party U.S. Senate candidate Michael Huffington agreed to donate $200,000 to Reynolds' campaign. He was also endorsed by U.S. Representative Dan Lungren, who was going to be running for California Attorney General.[18] As a condition for Huffington's contribution, Reynolds secretly agreed that he would seek to push his initiative through, even if AB971 eventually were to pass. This agreement was kept from Assemblyman Bill Jones who was the principle author of AB971.[19]

Also at this time, during the November elections in the state of Washington, voters passed a "three strikes" law by means of a public initiative with a 76 percent favorable vote, to become the first of what would be many "strikes" laws.[20] The "three strikes" movement in Washington had attracted national interest, including support from such notable people as William J. Bennett, the former U.S. Education Secretary and drug czar.[21] But, unlike Reynolds' law, the Washington statute would be limited to only violent and serious offenses, as would be the case in the vast majority of other states that enacted "strikes" laws in the 1990s.

In California, a poll showed that "crime" had become the number one public concern.[22] The U.S. Senate had voted 91 to 1 in favor of its federal "three strikes" legislation.[23] On November 10, 1993, California Democrat Assemblyman Tom Umberg of Santa Ana proposed to put forward state legislation the following year similar to the state of Washington's "three strikes" law.[24]

Then on December 4, news bulletins would change the face of Reynolds' efforts dramatically. That day, Reynolds' petition drive received an enormous (but horrible) boost. The body of Polly Klaas was found in a field near an abandoned sawmill near Cloverdale, California. Richard Allen Davis, the alleged kidnapper and killer, had a long history of violent crime. Reynolds has said: "When Polly's body was found, KGO radio gave out our telephone number, told people about Three Strikes, and asked them to call for petitions. The resulting volume of calls blew out our phone system that night. We had four lines with a sixty-call backup. It was overloading and recycling every two minutes. It was unbelievable. The phone company brought in a special team and rerouted our lines through a company in Sacramento that could handle the volume."[25]

The death of Polly left the public, in small towns and big cities alike, feeling insecure and vulnerable. Children in many communities were afraid that "some monster" would come and "snatch them from their homes." [26] Parents tried to talk to their children about the abduction of Polly. "This is the one thing that's shaken me. There is no place to go. There is no place that's safe," said Molly McVay, who had already moved with her 10-year-old daughter to the small town of Sonora to escape the "violent" atmosphere of the big city.[27] A child resource center in the city of Orange, California, reported it received phone calls throughout the day from parents asking about ways to protect their children.[28] Mike Reynolds and Marc Klaas were becoming well-known names in California and around the nation.[29] Klaas, who already had the national spotlight, was initially a very strong supporter of Reynolds' initiative--and, although he later would oppose it, his original support for the initiative in December and January definitely helped keep the Three Strikes issue in the forefront of the public mind and caused more and more people to endorse the initiative.[30] News articles and TV programs were giving daily updates on Richard Allen Davis, the circumstances of the Klaas kidnapping and murder that usually also included announcements about Reynolds' Three Strikes initiative. Reynolds used conservative radio shows effectively to help influence many of their listeners.[31] The idea that the Three Strikes law would have prevented the Polly Klaas tragedy was becoming deeply engrained in the minds of Californians.

The 1994 elections were looming. Democrat Kathleen Brown, the early frontrunner and the strongest challenger to Republican Governor

Pete Wilson, appeared to be extremely vulnerable on the issue of crime because she was the sister of former Governor Edmund G. (Jerry) Brown, Jr. Jerry Brown was the governor who had appointed the controversial Chief Justice Rose Bird to the California Supreme Court. Bird had become notorious because of her judicial efforts to keep death penalty sentences from being enforced.[32] Kathleen Brown knew that crime was going to be a hot issue in the upcoming election and she announced her full support for the death penalty and the Three Strikes law.[33] Another Democratic candidate for governor, John Geramendi, pushed things further, not only endorsing the Three Strikes law, but also proposing to repeal the "inmate bill of rights" and calling for the housing of convicted criminals in "boot camps."[34] U.S. Representative Lynn Woolsey, who represented Petaluma and was known as a liberal Democrat, felt it necessary to call for stricter criminal penalties and tougher parole standards.[35] The picture of Richard Allen Davis was featured on pamphlets issued by a Republican state assembly candidate in the San Diego area, who declared that the incumbent was soft on crime and a supporter of bills such as those that allowed Davis to receive short sentences for his previous crimes.[36]

NOTES FOR INTRODUCTION

[1] *People v. Cargill*, 38 Cal. App. 4th 1551, 45 Cal. Rptr. 2d 480 (1995).

[2] The text and history of AB971 and all other bills were found at the California State Senate and Assembly Bill web site at: http://info.sen.ca.gov/cgi-bin/pagequery?type=sen_bilinfo&site=sen&title=Bill+Information (accessed October 21, 2003). The California Penal Code was found on the internet at the state of California government web site at: http://www.leginfo.ca.gov/calaw.html (accessed October 21, 2003). All further references to statutes by "§" are to the California Penal Code unless otherwise noted.

[3] Propositions and their results can be found at: http://www.uchastings.edu/library/Research%20Databases/research_databases_main.htm (accessed October 21, 2003). See also *Statement of Vote: November 8, 1994,* California Secretary of State, 107.

[4] There are two parts to the law. Part one is like a "two strike" law and states that if someone has one prior serious or violent felony conviction on their record and then commits a current felony, then he or she can receive double the sentence for the current felony. Part two is the "three strike" part of the law and states that if someone has two or more prior serious or violent felony convictions, then he or she will receive at least a minimum of 25 years-to-life before being eligible for parole.

[5] Vitiello, "Three Strikes: Rationality," 397.

[6] Kimber was the third and youngest child of the Reynolds' and was a student at the Fashion Institute of Design and Merchandising in Los Angeles. She was

back home in Fresno to be the bridesmaid in a friend's wedding. St. George, "Daughter's Slaying."

[7] Morain, "A Father's Bittersweet Crusade." Walker was paroled on November 14, 1998. "Parolee in Reynolds Killing Jailed," *Fresno Bee*, November 25, 1998.

[8] Reynolds, Jones and Evans, *Three Strikes*. There was some controversy about whether it was appropriate for judges to be involved in writing a law on which they might someday have to make decisions. James A. Ardaiz, the presiding justice of the Fresno-based 5th District Court of Appeal, admitted his role, along with two other Fresno Municipal Court judges, in drafting a core document. Morain, "Judge Admits His Role." After Reynolds indicated the residence of one of the other judges, reporters from the *Los Angeles Times* did a search of the property records and found the house belonged to Municipal Judge William Kent Levis of Fresno (who declined to talk with the *Times* about his involvement). Morain, "California Elections/Proposition 184."

[9] The original AB971 was found on the internet at: http://info.sen.ca.gov/pub/93-94/bill/asm/ab_0951-1000/ab_971_bill_930301_introduced (accessed October 21, 2003). Ironically, Assemblyman Jim Costa was not entirely unacquainted with the criminal legal process. He had been arrested in 1986: "[W]hile driving a state-leased automobile, Costa had picked up a prostitute and then offered money to an undercover police woman to join them in a threesome. Arrested on a misdemeanor charge of soliciting, and released on his own recognizance, Costa initially would say only that 'a mistake has been made.' He was "fined one dollar and sentenced to three years probation." Reynolds, Jones and Evans, *Three Strikes*, 153. Arax, "A New Political Fire." And, then in 1994, in the heat of the Three Strikes debate, police found marijuana in his apartment while they were investigating a burglary there. Costa claimed the burglars were using drugs during the burglary or he was being framed by the burglars. The police said Costa's claims were "possible but unusual." They decided not to press charges because the amount of marijuana was too small and the question of possession too hazy. Arax, "A New Political Fire"; Reynolds, Jones and Evans, *Three Strikes*, 153.

[10] Reynolds, Jones and Evans, *Three Strikes*, 39. Reynolds also admitted he was willing to negotiate the good time credits down to 50 percent, but never had to, and therefore the law eventually passed at the original 80 percent for second strikes and 100 percent for third strikes, because the third strike is an indeterminate sentence (see chapter 5 for more details).

[11] The roll call of votes can be found at: http://info.sen.ca.gov/pub/93-94/bill/asm/ab_0951-0000/ab_971_vote_930420_000001_asm_comm (accessed October 21, 2003).

[12] The number of valid signatures needed to pass a general law by public initiative in California is established as five percent of all the votes for governor in the prior gubernatorial election. CAL. CONST. art. II, § 8(b), http://www.leginfo.ca.gov/.const/.article_2, (accessed October 21, 2003).

[13] Reynolds, Jones and Evans, *Three Strikes*, 56.
[14] Morain, "'Three-Time Loser' Bid Supported"; Reynolds, Jones and Evans, *Three Strikes*, 57.
[15] Kershner and Lucas, "'3 Strikes' Leader Warns Assembly."
[16] Bortnick, *Polly Klaas*. Also Joe Klaas, speech given at Furama Hotel, Los Angeles on October 6, 2001.
[17] Reynolds, Jones and Evans, *Three Strikes*, 65.
[18] Eventually Huffington would give at least $350,000 to Reynolds' campaign. Morain, "'Three Strikes': A Steamroller."
[19] Reynolds, Jones and Evans, *Three Strikes*, 67.
[20] See Lewis, "'Three Strikes You're Out'"; "1993 Election Results," *Seattle Times*, November 3, 1993, C6.
[21] Bennett, "Yes on 593"; Serrano and Lewis, "Other States."
[22] Seventy-eight percent of the California public identified "crime and law enforcement" as an "extreme concern." Kershner, "Crime is Now No. 1."
[23] Alpert, "'3 Strikes You're Out' Law"; Dewar, "Senate Approves Life Sentences." The Three Strikes legislation was added to President Clinton's Crime Bill which would eventually be passed in its entirety in 1994. 18 U.S.C.S. § 3559.
[24] "Wilson Calls for War on Crime in State," *San Francisco Chronicle*, November 11, 1993, C4. The Umberg bill was probably also politically motivated by the fact that Umberg was anticipating a run at the attorney general position in the 1994 election. Bailey, "Umberg Launches Race."
[25] Reynolds, Jones and Evans, *Three Strikes*, 70.
[26] Paddock and Warren, "Fear, Anger, Calls for Action."
[27] Ibid.
[28] Ibid.
[29] There was an in-depth story discussing the death of Kimber and the initiative in the *New York Times*. Gross, "Drive to Keep Repeat Felons in Prison." Marc Klaas appeared on the "CBS This Morning Show" and was invited to the White House. "Marc Klaas, Father of Murdered Daughter Polly, Discusses His Upcoming Meeting with President Clinton Regarding Child Safety," *CBS This Morning: CBS News Transcripts*, December 20, 1993. Klaas also appeared on the talk-show "Geraldo." Rivera, "Polly Klaas." The Reynolds family was featured prominently in a "20/20" episode. Jarriel, "Three Strikes and You're Out." Polly Klaas was mentioned in President Clinton's 1994 State of the Union address. Clinton, "CNN Specials: State of the Union Address." See also St. George, "Daughter's Slaying."
[30] "And what we're going to do in California is pass a one, two, three strikes you're out initiative which will put dangerous felons away for good after their third--after their third felony," said Klaas on CBS' *Good Morning America*. "Marc Klaas."
[31] Bailey, "News Analysis."
[32] Stall, "Crime Issue."

[33] Stall, "Kathleen Brown."
[34] Stall, "Garamendi Urges Repeal." Commenting on the Governor's race, Speaker of the Assembly Willie Brown said, "They're each going to be candidate for hangman." Hamilton, "California Rivals."
[35] Paddock and Warren, "Fear, Anger, Calls for Action."
[36] "Polly Suspect Being Used in Willie Horton Role," *San Francisco Chronicle*, December 24, 1993, A3.

CHAPTER 1

The Passage of AB971

Politicians beat the "tough on crime" drum and began using Three Strikes more and more as a platform issue.[1] After speaking at Polly Klaas's funeral on December 29, 1993, Governor Pete Wilson--despite the fact the state's crime rates were actually decreasing--called for a special legislative emergency session that would provide for first priority for the passage of crime bills in 1994.[2] Wilson also called for a "crime summit" for January.[3] On January 3rd, Bill Jones accused fellow assemblyman Democrat John Burton of being soft on crime--to which Burton, a recovering drug addict and known to be one of the more liberal legislators, replied, "Jones is a liar. I've been trying to strengthen the bill."[4]

The state assembly began its January session with special tribute to the memory of Polly Klaas.[5] Along with Jones' (AB971) and Umberg's bills (AB167), three more "three strike" measures were proposed, one by Assemblymen Richard Rainey, a former sheriff, (AB1568) and two by Ross Johnson (AB2429 and AB9X).[6] In 1994, on January 6th, Jones' AB971 sailed through the Assembly Public Safety Committee with a 7 to 1 vote (only Tom Bates, Democrat from Oakland, opposed the bill) and was altered into a measure to be put on the June primary ballot.[7] Assembly Speaker Willie Brown openly acknowledged that he was hoping that by passing the Three Strikes law in the spring, it would be a non-issue in the November election.[8] Reynolds, worried that Brown was going to try to pull a fast one on him, said he was going to continue collecting signatures for his initiative.[9] Benefiting from the Three Strikes spotlight, on January 11th, Bill Jones announced that he was running for Secretary of State.[10]

On January 25th, President Clinton gave his State of the Union address and received his strongest applause after announcing his support for the federal "three strikes" law.[11] And--probably most significant--also on January 25th, it was announced that a field poll showed Reynolds' initiative had 84 percent of the public's support.[12]

On January 31, AB971 and the companion bills went before the whole Assembly. Bill Jones said, "Before the session that day I went to see Willie Brown to find out if he was going to, as we say, 'Speakerize' the bill. He made it clear to me he was going to get out of the way."[13] Later Willie Brown said, "I got out of the way of this train. I tell you, I looked like Harrison Ford in 'The Fugitive.' I got out of the way because I'm a realist. We're talking about a group of people who have zero courage. They all like their jobs and they want to be reelected."[14]

On the other hand, there were some signs of hesitancy for Reynolds' AB971: all the "new" alternative bills required the last strike to be "serious" or "violent." Most criminologists and experts had spoken out against all the "strike" laws being proposed, not only in California, but across the nation.[15] Los Angeles County Sheriff Sherman Block said the Three Strikes law was flawed because it would cost the state and its counties billions of dollars; and other law enforcement officials and some district attorneys also questioned details of the measure.[16] The Legislative Analyst's office estimated that Reynolds' Three Strikes law could add $2 billion a year to the state's $2.7 billion prison system budget.[17] Conservative newspaper columnists were questioning the broadness of the application of Reynolds' law or noticeably not endorsing it.[18] Even Governor Wilson had told Marc Klaas that the Rainey bill was more reasonable and the one Marc should support.[19] Besides limiting its provisions to only "violent" and "serious" convictions, the Rainey bill also required a prior prison term in order for a prior serious or violent felony to count as a strike, and juvenile adjudications could not be tabulated as strikes. The California District Attorneys Association (CDAA) also supported the Rainey bill. Reynolds, however, skeptically believed that the real reason the CDAA did not like AB971 was because prosecutors would forfeit "plea bargaining power" because AB971 disallowed the use of strikes for such bargaining.[20]

In public, almost all politicians were very hesitant to speak out against AB971. Reynolds was in a very strong position since he had already gathered over 300,000 signatures for the initiative. Paul Sutton, Professor of Criminal Justice Administration at San Diego State University, said to a reporter that: "[T]o argue against a policy position offered by [Reynolds] is somehow taken to be a denial of the legitimacy of [his] pain."[21] Reynolds, who maintained constant relations with the media, also possessed the power to accuse a politician of being "soft" on crime--a label considered highly undesirable in the election year of 1994. As Assemblyman Phil Izenberg said on the floor of the assembly during debate on the Three Strike bills: ". . . we so fear the voters that we are hesitant to talk honestly and publicly about the questions of crime and punishment."[22]

Because 1994 was an election year, both parties found themselves in a political quandary. As Reynolds later observed: "Republicans wanted the initiative on the November ballot to help their reelection campaigns. Democrats didn't want the initiative on the ballot because they felt it would hurt their reelection campaigns. Republicans who might have liked to see AB971 fail in order to guarantee that the initiative would be on the November ballot couldn't vote against the bill because they intended to make support for Three Strikes a campaign issue. Democrats who philosophically disagreed with AB971 couldn't vote against it because such a vote would be used against them by their Republican opponents in the election."[23]

On January 31st, after the proposal had not even made it out of the Public Safety Committee the previous year, five Three Strike bills were passed by overwhelming margins in the state assembly. The Jones bill (AB971) passed by a 59 to 10 vote, the Rainey bill (AB1568) by a 62 to 2 vote, the Umberg bill (AB167) by a 66 to 2 vote, and Johnson's two bills (AB2429 and AB9X) by 64 to 1 and 63 to 1 votes, respectively.[24] In addition, giving the NRA an additional plum, the assembly voted 40 to 34 against a gun control bill (AB1105) that had gained support from many law enforcement experts and had been earlier considered a "no-brainer" for passage.[25]

During this time the signature gathering for Reynolds' initiative continued and demonstrated massive public support. Due to an error when printing the petitions, Reynolds feared that he might not meet state requirements and therefore started a new drive with a new set of corrected petitions. This proved to be no problem as Reynolds' drive eventually netted a total of more than 800,000 signatures--well over the 385,000 that were needed.[26]

By now, Joe Klaas, the grandfather of Polly, began having doubts about Reynolds' petition and AB971. He expressed his reservation to his son Marc, but Marc still was hesitant to turn against Reynolds' initiative efforts. Then, when Governor Wilson finally conveyed his crime summit on February 7th and 8th (it had originally been scheduled for January but had to be postponed because of the Northridge earthquake), Marc Klaas traveled with Reynolds and was disturbed by some of the comments Reynolds made as they went from the Los Angeles airport to the crime summit in Hollywood. According to Klaas, Reynolds pointed out the window--as they were passing a neighborhood populated by many people of color--and said "This is how we are going to take care of these people." Marc Klaas was embarrassed at the racial implications of the statement and decided that it was time to distance himself from Reynolds' campaign and put his support behind the Rainey bill.[27]

On February 17th, AB971 and the other Three Strike bills came before the Senate Judicial Committee.[28] Reynolds made the following

statement: "A felony is a serious crime." Looking around the room, he asked, "How many people in here have committed a felony recently? Anybody in here commit a felony last week? A felony isn't a parking ticket! A felony is a serious crime! I say that if a person commits two serious or violent felonies and then commits another felony, we should get the dirtbag off the street!"[29] The Jones-Costa bill (AB971) passed the Senate Committee by an 8 to 3 vote, the Rainey bill (AB15680) by a 9 to 0 vote, the Umberg bill (AB1670) by an 8 to 2 vote, and Johnson's two bills by 9 to 0 and 10 to 0 votes.[30]

When Reynolds announced that he had gathered over 600,000 signatures for his initiative, it became obvious that he was in a very strong position to get his way.[31] On March 2nd, Governor Wilson announced that he wanted to have the toughest (and most expensive) Three Strikes bills sent to him to sign--and, thus, the Rainey bill and the other Three Strike measures fell to the wayside, with only AB971 going forward.[32] Democrats let AB971 pass without much of a fight, in line with Assembly Speaker Brown's attitude that the Reynolds' law would be passed in any event and it would be better to try to neutralize the matter as a campaign issue in the upcoming November election. On March 3rd, AB971 passed the state senate by a 29 to 7 vote; and on March 7th, on a public platform in Hollywood, Governor Pete Wilson signed AB971.[33] At 2:45 p.m., when the law was delivered to the Secretary of State by a Wilson aide, it became official that thereafter anybody who committed any felony and had a prior "serious" or "violent" felony on their record could be subject to the harsh provisions of the Three Strikes law.[34] The new law also required a two-thirds vote of the legislature or a majority vote by the public to alter it.[35]

REYNOLDS' INITIATIVE AND THE NOVEMBER ELECTION

For all practical purposes, the damage was done. The Three Strikes law was on the statute books and it would be virtually impossible to obtain a two-thirds vote by the legislature to change matters. The passage of Reynolds' initiative in November would be only symbolic. The turn against Reynolds' initiative by Marc Klaas was too little and too late to stop the Three Strikes momentum. Reynolds fulfilled his promise to Michael Huffington by keeping the Three Strikes initiative alive. On the same day AB971 became the law, Reynolds submitted more than 800,000 signatures to qualify his initiative for the November ballot.

News reports began trickling in regarding the first Three Strike arrests. In Los Angeles, less than seven hours after the Three Strikes measure took effect, Donnell Albert Dorsey, 37, was arrested for receiving stolen property (he was driving a stolen pickup truck).[36] With seven prior felony convictions--including one assault with a deadly weapon and two robberies--Dorsey faced a minimum sentence

under the new law of 25 years-to-life. Earlier in the day, he would have faced a minimum sentence of six years with the chance to reduce the sentence by 50 percent with conduct credits. "He just kept asking me over and over again how this could be. He just didn't understand. He didn't know anything about the law," Deputy Public Defender Nanci Gast said. "I had to go back and tell this man that he is potentially facing 25 years-to-life . . . when he gets caught sitting in a stolen car."[37]

On March 7th, five hours after enactment of the Three Strikes law, Ventura County police arrested Preston A. Sheldon, 36, for cultivating seven marijuana plants. "It's the law and we're going to do our best to make it work in Ventura County," said Chief Deputy District Attorney Kevin J. McGee about the prospect of Sheldon receiving a 25 years-to-life sentence. "There's no doubt we need a habitual offender statute."[38] Similarly, shortly thereafter, John Kennedy Freeman was arrested for carrying a loaded revolver, Jed Harlan Miller was accused of stealing a truck and two bicycles, and Jose Jesus Ramirez was arrested for stealing a car battery in cases that arose in Alameda and Santa Clara counties--none of the accused would have received more than about four years in state prison if they had committed their alleged crimes before Governor Wilson signed the Three Strikes law, but now all could potentially be sentenced to at least a minimum of 25 years-to-life.[39]

During the first six weeks of the new law's existence, Los Angeles County filed 152 third strike cases and 489 second strike cases. District Attorney Gil Garcetti, judges, and attorneys complained that the number of Three Strikes cases going to trial would create a huge bottleneck in the court system and cause court resources to be transferred from the civil court system to the criminal court system.[40] Orange County officials were complaining that the influx of Three Strike cases burdened their jail system and would cause an earlier release of inmates who had non-Three Strike sentences.[41]

While California politicians abdicated from any effort to stop a Three Strikes law that most really did not like, in Washington, D.C., less than two weeks after the California Three Strikes law became effective, federal legislators were able to limit the national Three Strikes law to only violent and serious offenses and to allow an automatic parole hearing for third strikers who turned 70 and had served at least a 30-year prison sentence.[42] Of course, senators and representatives in Washington, D.C. did not have a very popular initiative pushing them into action.

From March 26th to March 29th, the Los Angeles Times conducted a poll of 1,608 California adults, asking about the Three Strikes law: 65 percent were in favor of the law, but only 47 percent supported a tax increase to help pay for the increase in the number of

prisoners--and only 22 percent were willing to support cuts in higher education to help pay for the increased incarceration rate.[43]

In the June 7th primary election, the Republicans had strongly pro-Three Strikes candidates Pete Wilson running for governor, Dan Lungren for Attorney General, Bill Jones for Secretary of State, and Michael Huffington for U.S. Senate. All were vocal supporters of Reynolds' Three Strikes law, and continued to advertise the initiative whenever they spoke publicly. Democrats running for office also felt they had to show public support for it or perhaps be defeated.[44] Democrats carried things to an absurd extreme when they tried to accuse Republicans of being "soft" on crime.[45] Not only did this help legitimize in the public's mind Republican efforts to enact harsher sentences, but it also probably made the Democrats look disingenuous and desperate to try to reverse the Republicans' image of being "tough on crime."

Opponents of the Three Strikes law had hoped that the legislature would vote to put another version of the measure on the November ballot.[46] The plan was to give voters a choice between the Reynolds and a Rainey-type initiative. Knowing, however, they would need the signature of Governor Wilson to get such a measure on the ballot, the effort eventually died.[47] The killings of Nicole Brown Simpson and Ronald Goldman started occupying the headlines after June 13th and became the "hot crime" topic when O.J. Simpson emerged as the prime suspect. Marc and Joe Klaas and a few other critics spoke out against the Three Strikes law, but their voices were muted by the overwhelming support for the measure.[48] All told, it is estimated that supporters of the Three Strikes law spent 58 times as much as their opponents.[49]

On July 30th, Jerry Dewayne Williams, 27, was arrested at the Redondo Beach Pier for taking a slice of pizza from some children ages 7 to 14. He faced 25 years-to-life under the Three Strikes law.[50] The case would become one of the best known Three Strikes episodes and thereafter be referred to as the "pizza slice" crime.[51] Media coverage of the Three Strikes law slowed down as the November election approached and Proposition 187 (the proposed initiative to deny state resources such as education and welfare to illegal immigrants) grabbed more and more of the headlines. And, perhaps Proposition 187, with its racial overtones, helped bring even more votes supporting the Three Strikes campaign. On November 8, 1994, Proposition 184 passed by a 71.84 percent margin.[52]

NOTES FOR CHAPTER 1

[1] By the end of January, news reports said that at least 30 states had legislation or initiative drives in place that would enact a "strikes" law. "GOP Is No Longer Bastion of Tough Talk on Crime," *Christian Science Monitor*, February 1, 1994, 2. See Clark, Austin and Henry, *Three Strikes and You're Out;* Vitiello, "Three Strikes: Rationality."

[2] "Urgency statutes are those necessary for immediate preservation of the public peace, health, or safety. A statement of facts constituting the necessity shall be set forth in one section of the bill. In each house the section and the bill shall be passed separately, each by rollcall vote entered in the journal, two thirds of the membership concurring." CAL. CONST. art. 4 § 8(d). The law was held as a valid urgency statute by several California appellate courts. See, for example, *People v. Cartwright*, 39 Cal. App. 4th 1123, 46 Cal. Rptr. 351 (1995).

[3] Gunnison and Lucas, "Legislators Plan Tough Bill." The Speaker of the Assembly, Willie Brown, also went along with the special session and said: "The public generally believes they are in danger and more so than they have ever been." Gilliam, "Lawmakers Take Quick Aim."

[4] Reynolds, Jones and Evans, *Three Strikes*, 93.

[5] Gilliam, "Lawmakers Take Quick Aim."

[6] Ross Johnson's second bill was nearly identical to AB2429, but the "X" designation allowed it to be considered during the special session--potentially allowing it to become effective sooner than if the normal legislative process took place. Kershner, "Governor Wants '3-Strikes' Plan"; Morain, "'Three-Time Loser' Bid Supported."

[7] Said Bates: "Right now it's like everyone is just piling on, trying to dream up the most Draconian proposal they can." Bailey, "Politically Perilous Times."

[8] Lucas, "'3 Strikes' Proposals OKd."

[9] Skelton, "Capitol Journal: When You're Up."

[10] "Fresno Assemblyman Enters State Race," *San Francisco Chronicle*, January 13, 1994, C4.

[11] Devroy, "President Insists Congress Enact Reforms." "Most violent crimes are committed by a small percentage of criminals, who too often break the laws even on parole," Clinton said. "Those who commit repeated violent crimes should be told: commit a third violent crime and you'll be put away, and put away for good. Three strikes and you are out." Philips, "Crime Hardball: 'Three strikes'." *USA Today* reported that Clinton was spurred on to support the Three Strikes law because of the death of Polly Klaas. Davis, "California Girl's Slaying." All were not happy with Clinton's statements. Congressional Black Caucus members sat noticeably silently as Clinton discussed the Three Strikes law while white colleagues stood and applauded. Philips, "Clinton Pitch."

[12] The poll found 92 percent of Republicans and 78 percent of Democrats in favor of the initiative. Kershner, "Poll Shows Commanding Lead."
[13] Reynolds, Jones and Evans, *Three Strikes*.
[14] "Lawmakers Sure to Pass 'Strikes' Bill, Brown Says," *Fairfield Republic*, March 2, 1994.
[15] See, for example, Henderson, "'Three Strikes' Laws Strike Out." "[M]ost criminal justice experts reject the sweeping get-tough approach, saying it has a minimal effect on crime. They point out that the prison population has nearly tripled since 1980, but crime hasn't dropped." Cauchon, "Critics: Life Terms."
[16] Reich, "'Three Strikes' Plan Flawed." "It would lead to absolute gridlock of the criminal justice system," said James Fox, the District Attorney of San Mateo County. Gunnison and Lucas, "Legislators Plan Tough Bill."
[17] Gunnison and Lucas, "Legislators Plan Tough Bill." Reynolds, however, was responding to estimates that he declared that the Three Strikes legislation would add only about 8,000 more prisoners to the system that already housed 119,000. Kershner and Lucas, "'3 Strikes' Leader Warns Assembly."
[18] See, for example, Saunders, "They're Draconian Or I've Gone Lib."
[19] Moore, *The Legacy*. Reynolds' views of Governor Wilson's actions at this time were: "There is no doubt that Wilson privately attempted to build support for the Rainey bill while publicly maintaining his neutrality." Reynolds, Jones and Evans, *Three Strikes*, at 164.
[20] Reynolds, Jones and Evans, *Three Strikes*. The CDAA, however, changed their position on the Three Strikes law. Later they spoke against proposed legislation that would make the Three Strikes law inapplicable to nonviolent and non-serious offenses. Interestingly, supporting Reynolds' theory, this change in their position occurred after the provisions prohibiting plea bargaining became virtually meaningless and prosecutors gained a distinct advantage in the plea bargaining process because of the threat of a Three Strikes enhancement.
[21] Weintraub, "Lone Justice," quoting L. Paul Sutton, Professor of Criminal Justice Administration, San Diego State University.
[22] Reynolds, Jones and Evans, *Three Strikes*, 139.
[23] Ibid., at 145-146.
[24] See State Senate and Assembly Bills at: http://info.sen.ca.gov/cgi-bin/pagequery?type=sen_bilinfo&site=sen&title=Bill+Information.
[25] "Legislature Knifes Gun Control in the Back," *Los Angeles Times*, February 2, 1994, B6.
[26] See CAL. CONST. art. II, § 8(b), http://www.leginfo.ca.gov/.const/.article_2 (accessed October 21, 2003).
[27] Personal interview with Marc Klaas, April 26, 2001 and also from an opinion piece written by Klaas in the *San Jose Mercury News*, November 14, 1999. "Marc Klaas Prefers Rainey Bill to 'Three Strikes' Initiative," *San Francisco Chronicle*, February 18, 1994, D3.

[28] See State Senate and Assembly Bills at: http://info.sen.ca.gov/cgi-bin/pagequery?type=sen_bilinfo&site=sen&title=Bill+Information (accessed October 21, 2003).

[29] Reynolds, Jones and Evans, *Three Strikes*, 179. I had an interesting experience a few years later at a meeting of about 10 to 15 people at a Republican Assemblyman's office. The meeting was being held because the assemblyman was exploring the possibility of putting forward a bill to amend the Three Strikes law to violent and serious felonies. The assemblyman, who was known to have had his own difficulties with the law, asked those in the room very loudly: "Who in here hasn't committed a felony?" Nobody in the room raised their hand and everybody broke out laughing.

[30] Morain, "5 '3-Strikes' Bills."

[31] See Ibid.; "Marc Klaas Prefers Rainey Bill."

[32] Kershner, "Governor Wants '3-Strikes' Plan." Wilson, although he originally considered the Rainey bill, became an ardent supporter of Reynolds' Three Strikes law and even said to Marc Klaas when Klaas was trying to get his support for the Rainey bill that Klaas ". . . didn't know how the crime victims felt." Klaas responded, "I don't think you remember who you are talking to." Hecht, "Two Grieving Fathers."

[33] Kershner, "State Senate"; Kershner and Lucas, "'Three Strikes' Signed."

[34] Weintraub, "'3 Strikes' Law Goes Into Effect."

[35] It is questionable whether the legislature could impose a two-thirds voting requirement on itself; which may also have been an additional incentive for Reynolds' to pass his initiative because there was no question that the public could impose the two-third voting requirement on the legislature.

[36] Murphy and Morain, "50-Cent Caper."

[37] Ibid.

[38] Bray and Fields, "D.A. Considers Using '3-Strikes' Law."

[39] Holding, "'3 Strikes' Law Goes Into Action."

[40] "Large Load of '3 Strikes' Cases Filed by Prosecutors," *Los Angeles Times*, April 23, 1994, B2.

[41] Miller, "Orange in Bind."

[42] Eaton, "House Panel OKs Anti-Crime Package."

[43] Weintraub, "The Times Poll."

[44] Martinez, "Candidates for Attorney General."

[45] In March, Kathleen Brown blamed Governor Wilson for the release of serial rapist Marvin Carter even though by law his term was up and there was nothing Wilson could have done legally to stop his release. Weintraub, "Rapist's Release." And, in another television ad, Umberg depicted Attorney General Dan Lungren as being partly to blame for the death of Polly Klaas because "Lungren slashed staffing for a statewide computer database that could have helped officers apprehend Richard Allen Davis, the repeat felon charged with the girl's murder." Bailey, "Attorney General."

[46] "The Smart '3 Strikes'; Give California Voters a Choice in November," *Los Angeles Times*, June 9, 1994, B6.
[47] "Tough, and Good Policy to Boot," *Los Angeles Times*, June 21, 1994, B6; "A Last Chance to Fix Three-Strikes Law," *San Francisco Chronicle*, June 9, 1994, A24; "Wilson Says He Will Block Try to Weaken '3 Strikes'," *San Francisco Chronicle*, June 10, 1994, D3.
[48] Cannon, "A Dark Side to 3-Strikes Laws"; Ingram, "Support Sought for '3 Strikes' Alternative." The "No on 184" campaign was led by political consultant Leo McElroy, a former Los Angeles television news reporter. Morain, "'Three Strikes': A Steamroller."
[49] Moore, *The Legacy*. Through September of 1994, the "No on 184" campaign had raised only $13,850, with the largest donation of $10,000 coming from the California Teachers Association. Morain, "'Three Strikes': A Steamroller."
[50] Dillow, "Stealing Pizza Could Be Third Strike."
[51] Dillow, "Pizza Case Unlikely Focus."
[52] See Statement of Vote: November 8, 1994.

CHAPTER 2

The Social Construction of Common Criminals in the U.S.

THE STIGMATIZATION OF CRIMINALS AND ATTRIBUTION ERROR

Some political scientists view the process of implementing public policy as a battlefield in which different interests battle against one another, and the interests with the most political power and who receive the most sympathy from the public are able to win against those with little political power or little sympathy from the public.[1] Special interest groups, such as small business owners, the middle class, scientists, and senior citizens are considered to possess a lot of political clout, and are socially constructed as "deserving" assistance from society. Big business, the rich, and gun owners are viewed as groups that have a great deal of political power, but less public support. Mothers and children are considered to have little political power, but receive a lot of public sympathy. And, the groups that have the least political power and receive the least sympathy (and are thought of as "undeserving" of help) are gangs and street criminals.[2]

Convicted common criminals and their families and friends are perceived as part of communities that are least likely to vote. Felons and ex-felons typically forfeit their right to vote; it is estimated that 13 percent of black men in the United States are ineligible to vote because of criminal convictions.[3] Most political power is tied to giving campaign contributions, and common criminals are particularly unlikely to donate to political campaigns.

Social psychologists refer to the ideas we have about others' behavior as part of attribution theory.[4] An internal attribution generally refers to the inference we give to another's particular actions as attributable to internal causes such as the person's attitudes, character, motive or personality--and the assumption is that the action is attributable as unique to that person (for example, "that person is bad").

An external attribution generally refers to our inference that particular actions are attributable to external causes such as the environment or the situation the person is in--and the assumption is that most people would act in a similar manner if in the same situation (for example, "I would have done the same thing if I had been in their shoes"). Combined with theories on self-esteem (the extent to which people believe themselves good, competent, and decent), most social psychologists have found that we generally attribute our own successes to internal rather than external attributes, but our failures to external attributes (these are also known as self-serving attributions). On the other hand, we generally attribute the successes and failures of others mostly on internal attributes--and this has become so pervasive that it has been termed "the fundamental attribution error."[5]

SCHEMAS

People develop theories about the world that social psychologists refer to as "schemas." These schemas contain basic knowledge and impressions that are about matters such as people, places, social roles, and specific events. In many ways, the schemas that people develop are helpful, and they can be used as shortcuts when making decisions. Schemas, however, can also have negative consequences. Schemas are often incomplete or incorrect.

Social psychologists have examined how people develop schemas and use new information. They have discovered that often new information will be ignored or not remembered if it is contrary to the schema already developed.[6] On the other hand, information that is consistent with a schema will be more easily remembered and used to reinforce a schema already developed. Studies also have even shown that sometimes ambiguous information will be interpreted in a way to fit within already developed schemas and new information can be misperceived or distorted in order to fit within the working schemas.[7]

The schema that the general public holds about crime and criminals is that most crime is committed by people who have "bad" or "evil" dispositions. They exclude the belief that external attributes have played a part in the choices people made when committing crime. Not only does fundamental attribution error play a part, but this schema is learned early in life. Most children stories contain lessons that try to turn children away from choosing to commit crime. The schema is constantly developed throughout life from the moral lessons of novels, television, and movies and reinforced in discussions with people who generally refer to crime as committed by "others." Although there are a few novels, television shows, and movies that show external attributes as part of the cause of crime, the general schema that crime is caused by internal attributes is so pervasive and ingrained that people tend to ignore examples stressing external attributes.

Social psychologists have also studied schemas in conjunction with a concept known as the "self-fulfilling prophesy." They have demonstrated that teachers who have developed a schema that particular students are better than others will generally act (even unconsciously) in a manner that gives more confidence to such students and they also will devote more time to such students.[8] Because the result then reinforces the teacher's schema, the schema is held even stronger. This concept of reinforcement through a self-fulfilling prophesy has been referred to as the "reign of error," and it has been discussed at length under labeling and social construction theories developed by Howard Becker and Edwin Lemert.[9] Its application within jails and prisons seems a logical extension. When employees in corrections or the criminal justice system believe that prisoners cannot be rehabilitated or educated interact with the prisoners, rehabilitation or education is only done grudgingly. When the rehabilitation or education fails, the belief that such approaches do not work is reinforced.

HEURISTICS

"Heuristics" are similar to schemas except "heuristics" are considered cognitive shortcuts that people use for making smaller, quicker decisions. One heuristic posited by social psychologists is the "availability heuristic" which says that we make judgments based on the ease with which we can bring examples to mind.[10] Some examples include studies that have shown that more of the public believes people die from shark attacks than from falling airplane parts or that more people die in fires than die from drowning--even though the opposite is true in both examples. The reason people have such counterfactual ideas is believed to be because they are able to more readily recall news stories or movies about such events--even though in reality they are not statistically representative.[11]

Crime--and in particular violent crime--sells. Novels, television shows, movies, plays, and even CD-ROM games often use criminal activity as their major plot or subplot. The news industry has become more involved in "entertaining" and therefore increasingly has made crime stories a major part of its coverage. When people calculate the different risks of being harmed, the "availability" of crime events overwhelms more mundane risks such as accidents--thus, it is no surprise that the public is overly fearful of crime. Research demonstrates that people who watch a great deal of television--with its heavy servings of violence--significantly overestimate the amount of real crime that occurs.[12]

Another heuristic, called "base-rate fallacy," causes us to focus on specific incidents or examples and ignore relevant background information about the population or total number of such

circumstances.[13] When the media focuses on children being kidnapped or murdered by strangers, for instance, people can easily forget that when children are harmed, kidnapped, and murdered, the act most often is committed by acquaintances.[14] Misperceptions about criminal statistics are quite common since the media tends to focus on crimes that are unusual or where the public is perceived to likely be very sympathetic toward the victims. The public would probably be surprised to learn that young black men have the highest risk of being murdered, probably because they are murdered so often in big cities that the media does not consider their deaths to be "newsworthy."[15]

RACISM, PREJUDICES, AND STEREOTYPES

Historically, racism has been a major shame of the United States criminal justice system. During the 1980s and 1990s, the most feared person was the young black male, with the young Latino male probably a close second. Even other blacks acknowledged being apprehensive when walking down the street and said that they would cross the street to avoid walking past a young black male.[16] There are two major views about what causes racial prejudice: (1) prejudice is a learned behavior from family, peers, and society, and (2) prejudice is the result of psychological processes that are formed when people create social categorizations. The first reason is straightforward; it simply involves people learning racial prejudice from others and may be encouraged because people feel pressured to act as others do in order to fit within their social circles. The second reason, however, requires some further explanation.

It is generally believed that people make sense out of the world by creating categories. The categories are used to help make decisions: people analyze present stimuli with past data and constantly create and update categories of information so they can determine how to react to different situations. The ability to make categories is said to be a great help in making efficient decisions. In addition, it is said that people categorize things to help simplify how they look at the world. Gordon Allport described such categorizing as the "the law of least effort," a process that comes into being because the world is too complicated for people to possess a highly differentiated attitude about everything. "Instead, we maximize our cognitive time and energy by developing elegant, accurate attitudes about some topics, while relying on simple, sketchy beliefs for others" stated Allport.[17] The downfall of such categorizing is that it can also lead to prejudice or stereotyping that results in unreasonable negative attitudes about others.

One of the major ways people create categories is by establishing groups that they are in--the "in-groups"--versus groups they are not in--the "out-groups." People tend to have especially positive feelings and give favorable treatment to those defined as being part of their in-

group, and negative feelings and unfavorable treatment to those in the out-group. The major underlying motive for this is said to be self-esteem: people seek to enhance their self-esteem by identifying with specific social groups, and such self-esteem will be enhanced only if they see their "in-groups" as superior to the "out-groups."[18] Another psychological process common with "in-group" versus "out-group" categorizing is the concept of "out-group homogeneity." It involves the perception that people within the out-group are more homogenous than they really are--thus, enhancing the belief that "others" seem to act alike.[19]

Like schemas, prejudices and stereotypes are reinforced by the way people process new information. We tend to ignore or filter out information inconsistent with a prejudice or stereotype, but become more cognitively conscious and better remember information that is consistent with a prejudice or stereotype, thus reinforcing the prejudice or stereotype.[20] Thus, stereotypes are difficult to change because with the filters in place it always seems as if there is proof that the prejudices and stereotypes are correct.

Combining stereotypes with the fundamental attribution error (that people generally attribute behavior of others based on internal attributes) and the factors that make up a stereotype of an ethnic or racial category are seen as being internally attributed to the group--a concept that has been called the "ultimate attribution error."[21]

The category of "criminals," as discussed, is often overly or incorrectly stigmatized. In addition, most people think of criminals as being "others" and therefore all the problems associated with cognitive processing of "out-groups" are compounded in people's perceptions of "criminals." Crime--especially street crime--is associated with people of color or the poor. Social psychologists recognize that many people in the United States have a stereotype about people of color that involves their aggressiveness and the potential for violence. In mock trial research involving college students, students playing jurors were more likely to find the defendant guilty of a crime if his name was Carlos Ramirez rather than Robert Johnson.[22]

At the end of 2001, 43 percent of the people on death row in the U.S. were black though blacks made up only about 12 percent of the general population.[23] Based on current rates of first incarceration, about 28 percent of black males will enter state or federal prison during their lifetime, compared to 16 percent of Hispanic males and 4.4 percent of white males.[24] In 2001, black males accounted for about 31 percent of the California prison population while they only constituted about 3.5 percent of the general population.[25]

Officially more and more public officials say that racial profiling should not exist, but unofficially there still appears to be a strong undercurrent that permits it to occur. Demonstrating inconsistency

(and perhaps self-interest) are those who maintain that we should have a color-blind system that disallows affirmative action, but then argue that racial profiling is necessary for public safety.[26]

Another controversy involves the racial composition of juries. Many believe the jury system is biased and that people of color are too often judged by people who are not their racial "peers." Racial profiling by law enforcement, biased white juries, and prejudiced judges and prosecutors are all believed to cause some of the disparity that has large numbers of people of color incarcerated in U.S. prisons and jails.

In 1990, California's Superior Court judges were 89 percent white and Municipal Court judges were 84 percent white--at a time when the white adult population was 61 percent. During Governor Pete Wilson's administration, 84 percent of judicial appointments were white.[27]

As Harvard Professor Randall Kennedy points out, the disparity of people of color arrested, convicted, and incarcerated by the criminal justice system is probably not attributable wholly to discrimination. Crime victim reports corroborate the patterns. Kennedy continues: "Given the deprivations blacks have faced, it should come as no surprise that, relative to their proportion of the population, blacks are more likely than whites to commit street crimes. The legacy of legal racism, modern discrimination, and the failures of government to provide opportunities to the disadvantaged have combined to create criminogenic conditions in which too many black Americans are forced by circumstances to live."[28]

SOCIAL LEARNING AND NORMATIVE CONFORMITY

Much of the previous discussion focuses on the cognitive psychological processing that we perform when we create mental schemas, categories, stereotypes, and similar ways of looking at things. The other major way we create our schemas, categories, and stereotypes is through social learning processes and by our general conformity to the norms prevalent in our society and our social circles.[29] When society has a strong prevailing attitude or view concerning specific schemas, categories, or stereotypes, such an attitude is said to be institutionalized. Institutionalized racism and sexism are widespread in the United States, but they have become more subtle over the past decades. Rather than prejudicial or stereotypical statements being made in public, such views are maintained but kept private. One could make a strong argument that the public's attitudes about criminals have also become institutionalized--which is why it is so difficult for politicians to promote any legislation that might appear to "help" criminals in any manner.

NOTES FOR CHAPTER 2

[1] Schneider and Ingram, Policy Design for Democracy.
[2] Ibid., 109.
[3] Fletcher, "States Working Hard."
[4] Fritz Heider is widely regarded as the originator of attribution theory. Heider, *The Psychology of Interpersonal Relations*.
[5] Ross, "The Intuitive Psychologist."
[6] Fiske, "Social Cognition and Social Perception" cited in Aronson, Wilson and Akert, *Social Psychology*, 68.
[7] Kelley, "The Warm-Cold Variable."
[8] Rosenthal and Jacobson, *Pygmalion in the Classroom*.
[9] Merton, "The Self-Fulfilling Prophesy" cited in Aronson, Wilson and Akert, *Social Psychology*, 78. Becker, *Outsiders;* Lemert, *Human Deviance* cited in Henry and Einstadter, *The Criminology Theory Reader*, 291.
[10] Manis, et al., "Availability Heuristic"; Schwarz, et al., "Ease of Retrieval"; Tversky and Kahneman, "Availability" cited in Aronson, Wilson and Akert, *Social Psychology*, 81.
[11] Plous, *The Psychology of Judgment and Decision Making;* Slovic, Fischhoff and Lichtenstein, "Cognitive Processes."
[12] Gerbner, et al., "The "Mainstreaming"."
[13] Nisbett, et al., "Popular Induction."
[14] Of all children under age five murdered from 1976 to 2000, only three percent were by strangers. *Percent of Homicides of Children,* Bureau of Justice Statistics.
[15] Blacks were six times more likely to be murdered than whites in 2000. *Homicide Trends in the U.S.,* Bureau of Justice Statistics. See also *Homicide Victimization Rates per 100,000 Population by Age,* Bureau of Justice Statistics.
[16] See Kennedy, *Race, Crime, and the Law*, 15-16. On November 27, 1993, Reverend Jesse Jackson said "There is nothing more painful for me at this stage in my life than to walk down the street and hear footsteps and start to think about robbery and then look around and see it's somebody white and feel relieved. How humiliating." Glastris, "A New Civil Rights Frontier," 38.
[17] Allport, *The Nature of Prejudice*.
[18] Tajfel, *Social Identity*.
[19] Linville, Fischer and Salovey, "Perceived Distributions"; Quattrone, "On the Perception of a Group's Variability."
[20] Bodenhausen, "Stereotypic Biases."
[21] Pettigrew, "The Ultimate Attribution Error."
[22] Bodenhausen, "Stereotypic Biases."
[23] Snell, *Number of Prisoners Under Sentence of Death, 1968-2001*.

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[24] *Criminal Offender Statistics: Summary Findings*, Bureau of Justice Statistics.

[25] *California Prisoners and Parolees: 2001*, California Department of Corrections; *Population by Race and Hispanic or Latino Origin, for the United States, 2000*, U.S. Census Bureau.

[26] See Kennedy, *Race, Crime, and the Law*, 6-7.

[27] Bell, "Many Fear Bias."

[28] Kennedy, *Race, Crime, and the Law*, 23-24.

[29] Asch, "Opinions and Social Pressure." See also Crutchfield, "Conformity and Character"; Sherif, "An Experimental Approach"; Sherif, "A Study of Some Social Factors." For a general discussion on conformity to group norms, see Aronson, Wilson and Akert, *Social Psychology*, 509-513; Myers, *Social Psychology*, 209-248.

CHAPTER 3

U.S. Crime in the 1980s and 1990s

Since the beginning of the existence of the United States, a continuing argument has surrounded the question of the extent that federal powers should override state rights. Originally the southern states that had slave-based economies were against federal interference with slavery; then, after the Civil War, the same states objected to federal interference with their implementation of Jim Crow laws. Today, conservatives desire states to be free to regulate abortion, civil rights, and affirmative action as they want. With regard to criminal justice issues, conservatives have generally disliked the broad mandates of the civil rights era and have believed they handcuffed the police and gave too many breaks to criminals. They maintain that the federal government has become too powerful, and that the U.S. Supreme Court of the 1950s and 1960s acted too much like legislators: since the justices on the court were not democratically elected, conservatives argued that democracy was being thwarted by elites who had become too politically active.

During the 1980s, after President Ronald Reagan made the extreme conservative William H. Rehnquist the Chief Justice (1986 to present), and a few of the moderate swing justices were succeeded by more conservative justices, the Court was able to reach many more decisions that eroded the individual rights that had been granted earlier. In addition to the U.S. Supreme Court, federal and state legislatures have been creating new criminal laws and new and harsher punishments from the mid-1970s to the present.

The "war on drugs" and imprisonment of people for non-violent crimes are mostly responsible for the dramatic rise in incarceration rates. With police units focusing on drug crimes and the increasing length in sentences for drug offenses, prison populations have become saturated with drug offenders. In 1999, it was estimated that the United States had over 1.8 million people imprisoned in prisons and jails. One million of these were there for non-violent crimes.[1] In 1986, the federal government significantly altered sentencing policies for drugs

by tying a mandatory minimum penalty to the weight of drugs involved.[2] In 1988, the mandatory minimum laws were broadened to include "conspiracies" to commit certain drug offenses and to impose a minimum of five years' imprisonment for simple possession of "crack" cocaine. Caught in the "tough on crime" wave, most state governments also raised sentences for drug offenses. Thus, between 1980 and 1993 the percentage of drug offenders among state and federal prisoners went from 8 percent to 26 percent.[3]

Today, with the prison population estimated to have an 80 percent substance abuse rate, "rehabilitation" focuses more on trying to lessen or end the use of alcohol or drugs.[4] Recent studies demonstrate that resources spent on treating heavy drug users would be far more successful at reducing crime than longer sentences to drug dealers or the expenditure of resources on conventional law enforcement.[5] The dogma that "rehabilitation doesn't work" has been difficult to overcome, however, and combined with the fact that increasing sentences can promote immediate deterrence, politicians still find it much easier to favor prisons for punishment and incapacitation purposes rather than for rehabilitation which will probably have beneficial effects only in the long-run. In addition to decreasing rehabilitation programs, in 1994 politicians were able to revoke educational opportunities for prisoners by disallowing Pell Grants for them--despite the fact that research shows that inmates who take educational programs while incarcerated are the least likely to recidivate.[6]

VICTIM RIGHTS AND THE INFLICTION OF MORE PAIN FOR REVENGE

Throughout most of U.S. history, victims of crime generally have not played a part in the criminal justice system except when needed to testify as witnesses. This situation can be compared to the civil justice system which requires a plaintiff to file the case, hire an attorney or represent themselves, and even file papers and pay for a government agency to receive the compensation awarded from an uncooperative defendant. The criminal justice system operates on the principle that when someone commits a crime, the crime is against the "state" and therefore the "state" can proceed against the person even if the victim of the crime is dead, unavailable, or even if the victim desires that the suspect not be arrested. The criminal process is seen not as protecting the victim as much as it is seen as protecting "society." The state's rather than the victim's resources have been used to prosecute criminals for another reason: the state has been seen as stepping into the shoes of the victim and helping prevent victims from seeking revenge by taking justice into their own hands against the alleged criminal. The

government proceeds against accused criminals to prevent vigilantism and the proceedings are supposed to be based more on rational reasoning than on the emotional anger of the victims.

Perhaps this system based on non-emotions was bound to change with the advent of television. As media crime coverage showed more of the faces of the victims of crime on television (often in an emotional state), the more the public became very sympathetic to them--and also came to further vilify the criminals. In the 1980s a number of crime-victim organizations were formed and grew significantly in membership. Ronald Reagan's presidency gave crime-victim groups political momentum.[7] In 1982, the President's Task Force on Victims of Crime proposed a constitutional amendment for crime victims and launched the Office for Victims of Crime in the Justice Department.

Crime-victim organizations started by promoting crime-victim compensation, preventing the re-victimization of sexually abused women by the police and the courts, and giving support to victims so they could learn about the criminal justice process and learn about ways to cope with being a victim. Then, as some of the organizations became more powerful, they pushed for changes in laws to increase punishments.

There were three main things victims demanded from the system: (1) greater respect, (2) a greater voice in the process, and (3) harsher punishments for criminals. With the victims as their shields, "tough on crime" politicians had little problem addressing the third issue and pushed legislation that increased penalties for convicted criminals.

As Bruce Shapiro reported after investigating crime-victim groups: "Today one significant slice of the victims' rights movement explicitly remains a vengeance-rights lobby, demanding faster executions and longer prison sentences and practicing a particularly vindictive brand of electoral politics."[8] Shapiro goes on to note that the "vengeance-rights lobby is . . . integrally tied to right-wing funders and politicians."[9]

THE "RED SCARE" ENDS AND "DOMESTIC CRIME" RECEIVES THE FOCUS AS THE ENEMY

A cynical view of history suggests that politicians with little creative ability to come up with ideas to help society will instead focus on attacking and eliminating public enemies, thus setting up the politician as a public hero. If there are no clear enemies readily available, the politician will either exaggerate the fear of lesser enemies or try to create new enemies. Playing on the "red scare" of communism after World War II, whether exaggerated or not, was a favorite means by many politicians to gain a reputation.

At the close of this millennium the Berlin wall came down and the Soviet Union dissolved, the notion of two superpowers--the Soviet Union and the United States--in opposition to each other began to

dwindle. Thus, two things resulted: (1) politicians needed to find other enemies to attack so they could still take on the "hero" role, and (2) news and entertainment coverage needed to fill the vacuum created where there once was extensive coverage on the "red scare." Conveniently there were a couple of "wars" that had already been declared, so it wasn't too hard to shift the nation's attention to them: thus, the "war on crime" and the "war on drugs" shifted to the forefront and "criminals" and "drug dealers," already highly stigmatized, became further vilified by the politicians and the media.

SENSATIONALISTIC NEWS AND THE "SOUNDBITE"

The media plays an important role in shaping how people see the world. Not only do journalists have great power of forming how viewers or readers see issues, but they also determine which issues will be presented to the public. In general, there has always been a tension between the media's role as a provider of entertainment and its social responsibility to inform the public on important issues so the public can make informed decisions. Many people critical of today's mainstream media believe that corporate interests and bottom-line profits have increasingly pushed the media to become more of an entertainment industry.

During the 1980s, many national news agencies were bought by big corporations. To curtail costs and increase profits the news became more streamlined, marked by a decrease in coverage of world events. U.S. news bureaus around the world were closed to cut costs. Local news stations also made cost-cutting changes. Major undercover and in-depth coverage was curtailed in favor of stories on domestic crime, especially "street or common crime."[10] Not only did stories of common crime generally lead the newscasts, but the amount of coverage started to overwhelmingly dominate other stories. Common crime is preferable as entertainment as opposed to "white-collar crime" because common crime generally involves overt violence and is easier for an audience to understand. The statement, "If it bleeds, it leads," is used facetiously--but somewhat accurately--to describe the nature of how stories increasingly are chosen for newscasts.[11]

Large metropolitan areas generally have at least one or two violent crimes occur on a daily basis and therefore the local news media find it very cheap to have mobile units race to the "crime scene" and cover the story--usually interviewing witnesses or even getting to talk with the victims or suspects. Stories that are particularly bizarre, heinous, or involve a celebrity can be dragged out for many months or even years as the news media cover the investigation, arrests, new twists in the developments of the case, and then the trial of the suspect. "Live coverage" has become especially entertaining as viewers are held in suspense wondering how the story will develop and how it will end.

Motion pictures focus heavily on character and generally portray the "bad guys" as particularly "evil" so the audience will fear and hate them, and the "good guys" as particularly nice, so the audience will sympathize with and like them. Likewise, as newscasts became more focused on "entertaining," criminals have been typically shown as more sinister or evil and heroes as more innocent and likable. One example of this was the darkening of the cover picture of O.J. Simpson on the cover of *Time* magazine after Simpson was arrested as a suspect in the murders of Nicole Brown and Ron Goldman.[12] Another feature of entertainment and news coverage has been that they both primarily focus on the solution to crime as simply to catch the "bad guys" (with the general implication that they will then be put away in prison). This inadvertently appeals to our focus on the internal attributes of the causes of crime and makes it easier for us to ignore the external attributes.

With increasing news coverage on street crime and the greater vilification of those who commit such crime, many have argued that the public's perceptions of the world's social problems have become seriously skewed, leading to a counterfactual analysis of the risks of street crime as opposed to other dangers and problems in society. White-collar crime such as environmental pollution, employer safety violations, product malfunctions, and similar business crimes are generally not perceived by the public as "violent" even though these can result in billions of dollars of physical harm. False financial statement reporting, insider trading, anti-trust violations and other types of business crimes are often too complicated for the public to understand--and are also considered too boring.

Issues such as education, poverty, and healthcare take second place to crime in the public's risk-analysis because these issues do not get the daily news coverage they demand if actual coverage of news events corresponded to society's real problems. Like white-collar crime, these issues are not as entertaining, and some have speculated that because of the politically controversial nature of such issues, the public would rather see the non-political nature of street crime.[13]

The context and extent of coverage by the news media during political campaigns has also changed dramatically over the years. Whereas a few decades ago news coverage tended to focus more on policy issues, and those running for election were expected to provide details on their policy stands, the focus shifted in the 1980s and 1990s toward how a politician was doing in the polls and his or her campaign strategy. In addition, the amount of coverage has changed as the "sound bite" and paid advertising are now used to present issues. It was shown that in 1968 the average "sound bite"--a block of uninterrupted speech by a candidate on television news--was 42 seconds; and in 1988 it had shrunk to less than 10 seconds.[14]

With the growing emphasis on "street crime" it became politically easier to give the sound bite answers of being "tough on crime" and "locking them up and throwing away the key." Programs of alternative sentencing and explaining that some punishments might be too extreme are difficult to put into a single sound bite and those who tried became labeled as "soft on crime." Explaining risk analysis associated with the real problems and dangers of the world is considered far too complicated.

The use of the "Willie Horton" advertisement by George Bush against opponent Michael Dukakis in the 1988 presidential election is believed by many to have been the most important cause for Bush coming from behind in the polls to defeat Dukakis. The "Willie Horton" ad painted Dukakis as soft on crime because Horton had been on a work release program in Massachusetts where Dukakis was governor at the time. While on work release Horton raped a woman and assaulted her husband. To try to defend the work release program and describe the benefits for the hundreds of others who used it--at less cost to the state--was too complicated.[15] A socially responsible news media might have been able to counter the Bush advertisement, but the media focused instead on poll results.

Just as Mike Reynolds was in the process of gathering signatures for his Three Strikes initiative in 1993, the national news media had an extraordinary increase in the coverage of crime. The evening newscasts of the three major networks--ABC, CBS and NBC--had doubled their coverage of crime from 785 stories in 1992 to 1,632 stories in 1993 (104 about murder in 1992 and 320 about murder in 1993). In 1993 alone, the increase was dramatic from just the first half to the second half of the year. In the second half of 1993, the news shows aired a monthly average of 111 stories about murder and assault as opposed to 66 stories per month in the first half of the year.[16] The result of such coverage was immediate: fear of crime became the number one concern for Americans as Gallup Polls showed 52 percent naming crime as the "most important problem" in 1994. Eighteen months earlier only 9 percent had stated the same thing.[17]

The *Los Angeles Times* has noted that the reason that the fear of crime has overwhelmed reality is because "police stoke fear in part because they take crime seriously, but also to prime their budgets; politicians feel deeply about the issue, but also manipulate it to win votes. News organizations amplify fear by ratcheting up their crime coverage, even as crime declines, because it helps ratings.[18]

THE POOR BECOME AN ENEMY

In June of 1978, California voters overwhelmingly voted for Proposition 13, a constitutional amendment that limited property taxes to one percent of a property's assessed value, and any subsequent

increase in assessed values was limited to 2 percent. In addition, the proposition required a two-thirds vote by the state legislature for any future increases in tax revenues.[19]

The "tax revolt" made news across the country and politicians from every state began jumping on the bandwagon to decrease taxes--not just property taxes, but every tax. In 1980, Ronald Reagan was elected as President, and one of his primary objectives was to lower taxes. The thought was that lower tax rates would stimulate the economy and actually increase total tax revenues. In fact, the increase in tax revenues did not take place and the government deficit grew.

The political rhetoric of the 1980s and 1990s was that taxes were too high, and the primary reason was welfare and programs that benefited the poor. Comments were made by President Reagan and others about "welfare queens," who were sitting around at home watching television and collecting unemployment rather than working at a job.[20] Teenagers were accused of getting pregnant and bearing children so they could collect support from the taxpayers. Those on welfare were said to be just lazy and taking advantage of the system. The poor were seen increasingly as parasites and it was claimed that the only reason they were poor was their own fault.

Crime committed by the poor also took on a new meaning. If the poor were poor through their own fault, then committing crimes to support themselves became less forgivable; in fact, crime not punished might be another form of "enabling." Throughout the 1980s and 1990s many Republicans talked about decreasing taxes--and used the poor as the reason taxes were so high--and were very successful at winning elections. Democrats, such as President Bill Clinton, also had to change and go along with the "decrease in taxes" theme and help pass legislation to curtail welfare.[21] In addition, the decline in economic conditions has been correlated with a general climate of resentment that, as shown by Svend Ranulf, is often associated with calls for increasing punishments.[22]

Another trend has been the increasing segregation of the poor and people of color within inner cities. Middle-class people have moved from the cities to the suburbs, leaving the inner cities with an increasing concentration of people in poverty.[23] Concentrated poverty appears to lead to more serious crime and makes the people in such areas greater targets of policing efforts, thus leading to a greater proportion of people from the inner cities ending up in the prisons.[24]

THE INCREASING NUMBERS: POPULATION, IMMIGRANTS, AND RACISM

A concern for humanity and the human rights of others has been confronted with that fact that the world is becoming overpopulated. As populations have grown, the quality of life for everybody is being

questioned. A person is not only seen as being a part of this increase, but also as having the reproductive potential to increase the population by multiples of his or herself. Thus, concern for the abstract person is lessened.

Measuring such a social psychological phenomenon would be difficult, but one could logically see how many millions of people might have less concern for the rights of "others" when the "others" are contributing to the overpopulation of the world. This could result in two unfortunate aspects in regard to crime: (1) as more people have less empathy for others, the less likely they will be inhibited from committing crimes against others, and (2) as people are caught committing criminal acts, there will be less sympathy for their rights.

The population growth in the United States has been extreme over the previous two centuries and the country has changed from a predominantly rural population to an urban population: In the United States, there were approximately 3.9 million citizens in 1790 (5.1 percent in urban areas), 63 million in 1890 (35.1 percent in urban areas), and 249 million in 1990 (75.2 percent in urban areas).[25] The increased urbanization has a way of exaggerating the feeling that the world is becoming overpopulated because people feel more crowded in cities than in rural areas.

The vast majority of people in the United States are the products of immigration or had ancestors who were immigrants. Until the last few decades most immigrants came from Europe. The recent change, however, in foreign-born immigrants has been dramatic as Latin-American and Asian born now account for a greater percentage of foreign-born immigrants than European. White, non-Hispanics are projected to lose their majority status in the United States somewhere between 2055 and 2060.

As discussed in the previous chapter, racism can be inculcated by social learning and by other social psychological processes. It is not a surprise that European-Americans are feeling threatened by the large increase of immigrants from Latin America and Asia.[26] Not only is there a decrease in empathy for "others" because of the concern about overpopulation, but the vast majority of voters who are of European decent consider themselves an "in-group" and therefore have concerns and fears of the people of color in the "out-group." As the European-Americans watch the abundance of common crime portrayed in the news media, they perceive that crime is committed disproportionately by people of color and they fear the increasing population explosion of people of color and, thus, more criminals.

As discussed in chapter 2, we are psychologically disposed to over-stigmatize the poor, people of other ethnicities, and especially criminals because of our cognitive processes that create schemas,

heuristics, categories, stereotypes and prejudices--all of which are basically shortcuts employed to process information.

NOTES FOR CHAPTER 3

[1] Gearan, "Nation's Population of Nonviolent Prisoners."
[2] For more details on federal mandatory minimums, see Caulkins and RAND Drug Policy Research Center, *Mandatory Minimum Drug Sentences*.
[3] Melossi and Lettiere, "Punishment in the American Democracy," 42.
[4] Falkin, Prendergast and Anglin, "Drug Treatment."
[5] Caulkins and RAND Drug Policy Research Center, *Mandatory Minimum Drug Sentences*.
[6] Henry, "Pell's Prison Pullout."
[7] Shapiro, "Victims & Vengeance," 13.
[8] Ibid.
[9] Ibid.
[10] See Graber, *Mass Media*, 10.
[11] In a comparison of newspaper versus actual crime reports in 1994, of all the total crime reported by the *Chicago Tribune*, 69.9% of the stories were for murder (when murder actually accounted for only 0.3% of total Chicago crime and 15.4% of the stories involved sexual assault (when sexual assault only accounted for 1.1% of total Chicago crime). Ibid., 107.
[12] Kurtz, "*Time's* Sinister' Simpson."
[13] Doris Graber states: "[T]he bulk of television fare is geared to simple, emotion-laden programming that attracts large, diverse audiences. [This] also means shying away from controversial or troublesome issues that may antagonize and deplete audiences and diminish advertising revenues." Graber, *Mass Media*, 35.
[14] Adatto, *Sound Bite Democracy* cited in Patterson, *Out of Order*, 74.
[15] See Patterson, *Out of Order*, 163-164.
[16] Freeman, "Networks Doubled Crime Coverage" cited in Barkan, *Criminology: A Sociological Understanding*, 26.
[17] Gallup, *The Gallup Poll, Public Opinion, 1995*, 13. In June 1993, 5 percent of respondents in a Washington Post/ABC poll named crime as the country's top problem and then the response increased to 31 percent by February 1994. Jackson and Naureckas, "Crime Contradictions."
[18] Shuster, "Living in Fear."
[19] Rawls and Bean, *California: An Interpretive History*.
[20] Lewis, "Welfare Reform."
[21] Diebel, "Bill Clinton's War on America's Poor."
[22] Ranulf, *Moral Indignation and Middle Class Psychology* cited in Melossi and Lettiere, "Punishment in the American Democracy," 45.
[23] Klofas, "Outside In."

[24] Hagan, *Crime and Disrepute;* Miller, *Search and Destroy* cited in Klofas, "Outside In."

[25] *United States Population: 1790 to 1990, Urban and Rural*, U.S. Census Bureau.

[26] The foreign-born Latin Americans and Asians were 1,803,970 and 824,887 in 1970, 4,372,487 and 2,539,777 in 1980, and 8,407,837 and 4,979,037 in 1990. *Region of Birth of the Foreign-Born Population,* U.S. Census Bureau.

CHAPTER 4

California Voters

Throughout its history, the vast majority of Californians could be likened to people living on an island. Being so far from the eastern centers such as New York, Boston, Philadelphia, Washington and Chicago, California cities developed independent from eastern influence. From the first gold rush, to the picturesque orange groves that lured the "Okies" during the Great Depression, to the glamour of Hollywood, to the high-flying technology of Silicon Valley, California has been the place where millions have pursued their dreams of fame and fortune. In addition, because of California's agriculture, tourist business, and its ever-ending need for labor to work at farming, house-keeping, and other low paying jobs, the state has been a magnet for millions who seek a better livelihood. By 1993, if it had been a separate country, California would have been the seventh largest national economy in the world.[1] California's population grew so fast during the last century, by 1990 it had a population that was greater than 10 percent of the total U.S. population, while the next closest state, New York, was only about 60 percent of its size.[2]

With its reputation as a place where people could pursue their dreams, it is not surprising that California has attracted a lot of people who think of new ideas and try to put them into action. In politics, it has been a vanguard in movements that have then spread throughout the country. During the 1960s, the University of California at Berkeley and San Francisco's Haight-Ashbury district were considered the hotbeds of the free speech, civil rights, and anti-Vietnam War movements. In 1978, a citizen group headed by Howard Jarvis pushed forward and passed Proposition 13 which started the national tax revolt of the 1980s.

Politically, California is often shaped by the North versus the South, with the North more liberal and the South more conservative or disinterested in politics. These characterizations still hold somewhat today, but the political alignment has shifted somewhat so now the coastal areas are seen as being the more reliable liberal vote, with the

Central Valley areas being strongly conservative. Californians have a reputation for splitting their votes between political parties: in elections where the Democratic or Republican governor candidates won by large margins the opposite party candidate has won the U.S. Senate or other major state offices.[3]

Just like the rest of the nation, Californians have been showing less interest in politics, are less inclined to vote as compared to a couple of decades ago, and more people are classifying themselves as "independent." All told, Californians statistically demonstrate slightly higher negative political interest and independence than the rest of the nation.[4] They are said to fit the profile of the "New Political Culture"--with the "New Political Culture" being defined as liberal on social and privacy issues and conservative on fiscal issues, especially spending on the poor.[5] In recent years, the legislature has been dominated more by the Democratic Party, while politicians from either party can win state-elected official positions--so long as they take a moderate stance.

While Americans in general are known to distrust politicians, California voters are believed to have greater distrust.[6] This growing mistrust has been reflected in the increased use by Californians of the public initiative process: In the two decades prior to 1976, Californians voted on only 29 public initiatives; between 1976 and 1996, they voted on 106.[7]

This chapter builds on the previous two chapters and demonstrates how the national trends and national social psychology overlapped with California thinking. In some cases--perhaps because of California's trend-setting culture, the huge population growth in non-whites, or the anxiety created from natural and man-made disasters--such trends were pushed to even more of an extreme than in the rest of the nation.

CALIFORNIA CRIME

Statistically there were two general times in recent California history when crime rates reportedly peaked. The first was an increase in all crime to the year 1980, then a short period of some decline and stability, and then another slight gradual increase from 1983 to 1992 in violent crimes such as murder, aggravated assault, and robbery.[8]

The same crime rate patterns occurred across the nation. California's rate for violent crime was high compared to the national averages in 1992, but it was similar to the rate for the next three most populated states--New York, Texas, and Florida.[9] The national increase in homicides in the late 1980's and early 1990's has been attributed to a rise in gun violence by juveniles and young adults.[10]

In California, violent crime was considered to have increased in the 1980s because the apex of the illegal drug market had shifted from Miami to Los Angeles, perhaps, with the encouragement, or, at least, the "turn-of-the-head" attitude of the Central Intelligence Agency.[11]

Cocaine, in particular, was now the more popular drug, and many young people had become enamored with this new, cheaper "party" drug that initially was believed (incorrectly) not to have an addictive quality or bad side effects. South Central Los Angeles became a major gateway for cocaine, and the gangs that sold it battled each other and extended their reach throughout California--and even started moving eastward to other states in the nation. Everybody in the U.S. now had heard about the "Bloods" and "Crips." Movies about gangs in Los Angeles, such as "*Colors*" (1988--starring Sean Penn and Robert Duvall), "*Boyz N The Hood*" (1991--starring Laurence Fishburne, Cuba Gooding, Jr., and Ice Cube), "*Menace II Society*" (1992--starring Samuel L. Jackson), "*South Central*" (1992), "*American Me*" (1992--starring Edward James Olmos), and "*Bound by Honor*" (1993) were shown in theaters and rented from video stores across the nation.

CALIFORNIA CRIME CONTROL

In the early 1980s, crime was one of the top issues in California as statistics reported that the rate was increasing. Polls showed that 85 percent of Californians believed authorities were too lenient with criminals.[12] The judiciary committee of the state Senate was overwhelmed with "tough on crime" legislation put forward by legislators who were more than willing to play into their constituents' fears. At the 1982 ballot box, Californians approved of a Victim's Bill of Rights (Proposition 8) that amended the Constitution and pushed many rules to the federal constitutional limits, including the judicial interpretation of "cruel and unusual" punishment. The bill involved restitution to victims, allowable evidence at trials, bail, plea bargaining, and proof of insanity. And, though taxes were despised, the voters approved the issuance of $495 million in bonds to build state prisons (Proposition 1).[13] The 1982 election for governor included Los Angeles Mayor and former police officer, Democrat Tom Bradley, running against the State Attorney General, Republican George Deukmejian. Deukmejian won the election by only .06 percentage points.[14] His top campaign strategy had been to be "tough on crime," and he pushed California into an unprecedented period of building prisons. From 1984 through 1997, 21 new prisons were erected; and--to demonstrate California's priorities--only two new universities were created.[15] During this same period, it has been estimated that there were 400 new California laws that "expanded the types of crimes that resulted in state prison sentences, increased prison sentences, and restricted the ability of correctional agencies to reduce the actual time served by granting good conduct or work credits."[16]

A major defining moment in California politics involved the voters' failure to re-elect the Chief Justice of the California Supreme Court, Rose Elizabeth Bird, in 1986. Justice Bird had opposed the

death penalty; despite the fact that Californians were strongly in favor of executions.[17] Along with Bird two other associate justices who had been nominated by Democratic Governor Jerry Brown also were not reconfirmed--the first time in California history that any justice was not approved since the reconfirmation process had begun over 50 years earlier.[18] Governor Deukmejian, having now won a comfortable 1986 re-election over Democratic candidate Bradley, was able to appoint three new Supreme Court justices and swing the court to the conservative side.[19] Not only did the non-reconfirmation have a direct effect on Supreme Court voting, but for many years it exerted a large chilling affect on all politicians, judges, prosecutors, and others who might have further political ambitions.

The California prison population soared as the legislature increased penalties and intensified police enforcement. California had a prison population growth rate twice as high as the rest of the nation. From 1977 to 1998, the number of California's prisoners grew 713 percent while the rest of the nation, less California, increased only 310 percent.[20] In 1978, the California prison population was 20,629 (at 84.9% of design capacity). By 1990 it had grown to 93,810 (at 177.2% of design capacity). When the Three Strikes law was passed in 1994, the prison population was about 124,000 (at 179.8% of design capacity).[21]

CALIFORNIA'S RADICAL PRISON MOVEMENT AND CHANGES IN REHABILITATION

During the mid- to late 1940s, California prisons embraced the rehabilitative "treatment" medical model in which criminal behavior was to be diagnosed and then cured through education, reading, and control of the inmates' thoughts.[22] The rehabilitative model in California began with group counseling in 1944, and "bibliotherapy" in 1947 (the prisoner was to learn "good morals" by reading "good books").[23] In addition, instead of isolation, prisoners were encouraged to meet with family and have contact with others from the outside world. Whether such rehabilitative programs actually received sufficient resources to be successful can be argued, but prisoners saw "rehabilitation" as a "game" in which they knew they had to play along in order to get an early release date. Inmates were the first to realize that the "treatment" programs they were receiving were not as successful as envisioned. Then, as the prisoners repeatedly kept coming back because of further convictions, the staff and prison authorities began having their doubts too.

As the 1960s youth movement developed, prisoners were defined as being a product of a corrupt economic system. In addition,

"outlaws" gained a special "reverence" from the radical youths of the 1960s, and prisoners were seen as potential intelligent leaders.[24]

Blacks, led by the Muslims, became increasingly powerful within prisons and created a re-education plan that emphasized that the reason they were in prison was because of the inequities and racism that existed in society. The rehabilitation "treatment" model came under attack as passive and demeaning and no longer were prisoners willing to play "the game."

The Black Panther Movement began to build, and with many members cycling in and out of prison, blacks became more radical and militant in their resistance to both the perceived unfair society and the prison system. White prisoners and Hispanics also became more organized and radical and often--through the manipulations of the California Department of Corrections (CDC)--became more segregated and confrontational along racial and ethnic lines against each other and against blacks.

As the Haight-Ashbury district and Berkeley became more radical and the youth movement fought for underclass, racial, sexual, and gender liberations and freedoms during the 1960s, many on the outside began to look at all inmates as "political prisoners" and gave them a special reverence.[25] The belief was common that their leaders would emerge from prison to help build a revolution that would overthrow society's inequitable economic system. Many prisoners began to believe in the rhetoric and hype, and since they heard most of the news about the outside from friends, family, and sensationalized media stories, they obtained an exaggerated view of the strength of the radical movement.

At the time that society was experiencing violence and riots on the streets, the violence and riots increased in the prisons. The prison guards and prisoners became more confrontational, and there was an enormous increase in prison guard injuries and deaths. The guards retaliated with more violence, and this was only more proof to the outside radicals that the whole system was corrupt.

In early 1970, a white guard was beaten and thrown to his death from the third tier in Soledad prison. Noted prison writer and black activist George Jackson was accused, and his cause became swept up by outsiders because now the young black who entered prison for a $70 robbery was facing possible execution. Jackson and the Soledad Brothers became instant heroes to the radical left. The radical days of protest continued with an increased focus on protesting about prisons.

In August of 1970, the radicals were inflamed when Jonathan Jackson, George's brother, took a sawed-off shotgun into the trial of some prisoners accused of assaulting a guard. Jonathan and three of the prisoners took the judge, prosecutor, and some jurors hostage, and Jackson was heard demanding for the release of the "Soledad Brothers"

or "all political prisoners" (depending on which witness was to be believed) as he left the courthouse and entered an awaiting van. The police and San Quentin guards had a "no hostage" policy and caught the van and let loose with a barrage of bullets. The result was the death of Jonathan Jackson, two of the prisoners, and the judge. [26]

By 1972 the public was deserting the left. Some of the more radical left responded by going underground, hoping to encourage greater resistance through bombings and other criminal activities. They formed groups such as the Weather Underground and Symbionese Liberation Army (SLA) and built connections with many prisoners. Law enforcement began to target such groups and violent battles between the police and the radicals were featured in the news. The public became fearful of the radicals and revolutionaries, especially after the SLA had kidnapped newspaper heiress Patricia Hearst, and many politicians escalated their rhetoric about the necessity for "law and order."

After the death of Jackson, the California Correctional Officers Association (CCOA) called for sweeping changes--including special maximum security prisons, a tightening of information to and from the prisons, searching all visitors, complete censorship of mail, and other controls. At the time, however, the courts were still granting freedoms brought by the 1960s and they disallowed many of the CCOA's requests. The CCOA waited, and when more conservatives were placed on the California appellate bench in the next couple of decades, the CCOA was able to get what it wanted.

As the 1970s proceeded, the public turned against the SLA and the prison liberation movements and many SLA members were killed or went into hiding. The FBI and other enforcement agencies infiltrated the Black Panthers and used infiltrators as provocateurs. In addition, leaders who became opportunistic caused the organizations to implode in chaos and dissolve. Prison administrators seeking to take back control began gutting education programs and severely cut back on the ability of outsiders to be a part of prison rehabilitation programs. The prison library changed drastically as shown by the San Quentin library which possessed 36,000 volumes in 1974 and only 8,900 by 1990.[27]

The indeterminate sentencing law was abolished in 1976 and prisoners who were not convicted for kidnapping or murder were given a date when they would get their release. [28] The rehabilitation model was officially discarded, and prison was seen as a means to punish. At first prisoners liked this new system because they did not want their fate left to psychologists and other "experts." Eventually, however, the powers in control would use the new system against the prisoners. Without rehabilitation as a model, prisoners who suffered from substance abuse were denied much needed treatment for their addictions. Once back on the streets, they would support their

addictions by any means necessary, which generally meant more criminal activity and more convictions.[29] Along with predetermined release dates came much longer sentences. Then--much to the horror of all the prisoners who hated the indeterminate sentencing system--in 1994 it came back in a much uglier form as the Three Strikes law: the new law not only brought back an indeterminate sentence, but if sentenced as a third striker, the prisoner would have to wait until at least 25 years to see the parole board.[30]

THE CALIFORNIA PRISON GUARD UNION BECOMES POLITICALLY POWERFUL

As the movement to extend prisoners' rights faded in the 1960s and early 1970s, a new power began to slowly rise that would eventually become one of the most politically powerful organizations in California: the California prison guard union. One of its primary goals has been to not only stop prisoners from gaining any more rights, but to take away many of the rights they had gained. In particular, they have focused on preventing any more "celebrity" convicts. Moreover, the prison guards have used their new power to enrich themselves by getting pay raises and more job security because of an ever-increasing prison population.

In 1982, collective bargaining for state employees was first allowed and the California Correctional Officers Association (CCOA) won the power to bargain on behalf of the prison guards.[31] In the same year, they also changed their name to the California Correctional Peace Officers Association (CCPOA). Led by Don Novey, a second-generation prison guard (and known for always wearing a fedora), the CCPOA became a political juggernaut that most California politicians feared. With the huge growth of prisons in the 1980s, the CCPOA grew in power because of the growing number of prison guards that needed to be employed.[32] Combined with the huge increase in salaries its members were receiving, the prison guard union has been able to obtain an annual budget of over $20 million and became the largest California political campaign contributor in 2001, passing even the California Teachers Association and Phillip Morris Company. Wages and benefits have increased tremendously for prison guards. By 2002 guards were earning $50,700; and with overtime their annual salary was boosted greatly.[33] The *Los Angeles Times* reported that through overtime pay at least 110 prison guards made more than $100,000 in 2002.[34]

In 1991, Don Novey pushed the union to align itself with and give major funding to two victim rights groups: The Crime Victims United of California, led by the parents of murdered Catina Rose Salarno, and the Doris Tate Crime Victims Bureau, led by the mother of Sharon Tate--who was murdered by the "Charles Manson family." Crime

Victims United and the Doris Tate Crime Victims Bureau have reportedly received 84 and 78 percent of their funding, respectively, from the CCPOA, along with free office space and lobbying staff.[35] Michael Salarno, the father of Catina Salarno, is quoted as saying "Don Novey was the godfather of the victims' rights movement. . . . Without his financial and emotional support, we could have never done this."[36] And, as an example of political money circling back, Harriet Salarno gave $80,000 to Governor Wilson's 1992 campaign.[37]

With their increasing power in the 1990s, California prison guards must have felt more emboldened to demonstrate their hatred of prisoners: reports of abuse against prisoners began to rise at alarming rates. "Gladiator fights" were reportedly staged by prison guards between known prisoners who hated each other, and then--as if this wasn't bad enough--the guards would break up the fights by shooting the prisoners. From 1989 to 1994, California prison guards shot and killed 27 prisoners and wounded 175 when trying to break up prisoner fights. After much attention was brought to the matter in 1994, guards still shot and killed 12 prisoners and wounded 32 from 1994 to 1998.[38] In contrast, during the same period, in all the federal and state prisons combined, only 6 prisoners were shot and killed by prison guards and all 6 were shot while attempting to escape.[39]

At legislative committee hearings in 1998, whistle-blower guards and other correctional staff testified to guard abuse of prisoners at Corcoran prison and spoke about threats of intimidation against them for becoming whistle-blowers. The hearings clearly demonstrated a strong "code of silence" among the prison guards. Anybody who broke the "code" would be the subject to illegal and border-line legal reprisals.[40] The abusive prison guards had developed a "gang mentality" and called themselves "sharks"; they even had a large shark painted on one of the walls at Corcoran prison.[41]

When cases about guard abuse came to trial, the CCPOA stood strongly behind the guards and paid for their legal services. In regard to "gladiator fights," the federal government indicted eight prison guards.[42] Prior to the trial, the CCPOA paid for broadcasts on television stations in places from which the jury would be selected. The broadcasts showed the "prison guards as neighbors, and prisoners as the scum of the earth." The selection of jurors allowed was highly suspect--one was a former prison guard--and, with the code of silence strongly at work, it was not much of a surprise that all eight of the guards were acquitted. Indeed, immediately afterward, some of the jurors joined the defendants at a party.[43]

The results have been the same in other prison guard abuse cases. Thus, many district attorneys have become hesitant to bring forward claims against prison guards because they fear they do not have strong enough evidence. As an added fear, district attorneys who indicted

prison guards have seen the CCPOA give record-breaking campaign contributions to opposing candidates in successful efforts to get the DA removed from office. The CCPOA has boldly promoted district attorneys who are aggressive in prosecuting prisoners, but hands off in regard to prison guards. The CCPOA's philosophy to back district attorneys of their choice is based on the expressed view: "Today's DA is tomorrow's state senator. We get our name out there."[44] The prison guard union is also feared because of its ability to get its members to vote and get their families and friends to the polls.

The influence of the CCPOA on the state legislature and in the governor's office is legendary.[45] Many legislators will offer only laudatory comments about the prison guard union or provide no comment at all. Only legislators who hale from districts where they have won by large margins will be bold enough to come out against the CCPOA--and even they do so with some hesitancy. As an example of their ability to target politicians they dislike, in the late 1990s the CCPOA published an enemies list that said "Felons Aren't the Only Bad Guys You're Up Against." It then named state Senators Richard Polanco (D-Los Angeles) and John Vasconcellos (D-Santa Clara) who both were critical of the CCPOA.[46]

Moreover, the CCPOA has openly bragged about its support and financial assistance to put the governor of their choice in office. In the last few weeks of the 1990 election, an aide to Governor Wilson told Novey that if Wilson did not win by eight to ten percent in the Central Valley, he would not be able to defeat Democrat Diane Feinstein. Novey put $1 million into television and radio ads that ran in the Central Valley on Wilson's behalf. Wilson won the Central Valley by 16 percent and defeated Feinstein statewide by 3.5 percent to remain governor.[47] Afterwards, Novey bragged that the CCPOA "put him over the top." In 1998, rather than put their money in the governor's race toward "tough on crime" Republican Attorney General Dan Lungren, they gave "$2.3 million to Gray Davis's campaign, placed television spots for Davis in the conservative Central Valley, and helped fund a bank of telephone callers before the election."[48] After winning the election Governor Davis became a fervent supporter of the CCPOA.

With the help of victim rights groups, the CCPOA has consistently pushed forward legislative bills, ballot initiatives, and prison regulations to decrease prisoner rights, increase the number of prisons in the state, and dramatically increase the sentences of prisoners. As previously stated, they gave $101,000 to Reynolds' Three Strikes campaign and their web site states that they "strongly backed the initiative."[49]

THE POPULATION EXPLOSION IN CALIFORNIA AND INCREASING NUMBERS OF LATIN AND ASIAN IMMIGRANTS

California experienced rapid growth after it became a state in 1848 as demonstrated by estimated populations of 224,000 in 1852, 1.2 million in 1890, and 29.7 million in 1990.[50]

California's population was growing at a much faster rate than the rest of the nation during the last century, and population of the West grew faster than the population in each of the other three regions in the nation in every decade of the 20th century.[51] When analyzing cities with a population of 100,000 or more from 1980 to 1990, California cities had 21 of the highest 41--percentage increases in city size in the nation.[52] Much of the growth was a result of an increase in the number of immigrants who moved to California from Latin American and Asian countries.[53]

California has joined Hawaii and New Mexico as the only states where whites are less than 50 percent of the population. Projections for the future show that California will increase to a population of 49,285,000 by the year 2025 and that a large part of the increase will be caused by an international in-migration of over 8 million people.[54] By 2025 it is estimated that whites will constitute less than 34 percent of the population in California.[55]

One of the first modern signs that whites in California were reacting against the influx of "others" may have been the passage of Proposition 13 in 1978. The purpose was to control taxes, especially property taxes, which were growing at astronomical rates. The other side of the coin was that the measure decreased spending for schools, parks, and other public services that primarily benefited people of color.[56] In 1986, white California voters again demonstrated a backlash against the influx of people from south of the border when they passed a ballot measure that declared English the official state language.[57] In 1994, on the same ballot as the California Three Strikes law, there was Proposition 187 which made illegal aliens ineligible for public social services, public health care services unless emergency as defined by federal law, and public school education at elementary, secondary, and post-secondary levels.[58] The advertisement that seemed to stick in the white public mind was that of people running across a border in the dark with the accompanying verbal warning: "They keep coming. They keep coming."

In *The Coming White Minority: California, Multiculturalism, and America's Future*, Dale Maharidge wrote the following about the attitudes of California whites in the 1990s:

> First, whites are scared. The depth of white fear is underestimated and misunderstood by progressive thinkers and the media. . . . They fear the change that seems to be transforming their state into something different from the rest of the United States. They fear losing not only their jobs but also their culture. Some feel that California will become a version of South Africa, in which whites will lose power when minorities are the majority. It is an ill-founded fear because most nonwhites have the same economic and social interests as whites, but in interviews across the state I found this fear permeating the thinking of many whites.

Perhaps it is no coincidence that Proposition 184 and 187 both passed at the same time--in a way, they fed off of each other. With fear and despair in the air, the white voters probably felt they needed to build fences--border fences to keep out their unwanted neighbors to the south, and jail and prison fences to house the unwanted people who were within their territory.

EARTHQUAKES, MUDSLIDES, FIRES, A RIOT, AND A RECESSION ALL INCREASE TENSIONS AND ANXIETY IN CALIFORNIA

A little after 5:00 p.m. on Tuesday, October 17, 1989 the San Andreas Fault made a large movement.[59] The result was a 6.9 earthquake centered about 10 miles north of Santa Cruz that ripped through northern California, killing over 200 and injuring over 1,400 people. The earthquake was felt from Lake Tahoe to Los Angeles. It set buildings ablaze and damaged the Bay Bridge, causing cars to topple into the bay and killing some motorists. Most casualties occurred when an upper deck of a 10-mile section of Interstate 880 collapsed onto a lower deck just as commuters were heading home from work. The quake was the strongest in the area since the famous 1906 San Francisco tremors. Damages were estimated at around $3 billion. The third game of the World Series in San Francisco where the San Francisco Giants were hosting the Oakland Athletics was to start in 30 minutes and had to be cancelled as a nationwide audience went from viewing the pre-game interviews to scenes of San Francisco buildings on fire. Up to one million people were without power in the Bay Area and gas leaks were reported throughout the region. There were reports of lootings, muggings and beatings. In the following day there were 1,400 aftershocks. And it still wasn't considered the "Big One": experts said that a bigger one was probably going to occur in the region within the next 30 years. Californians were told that it would be on the

order of 8.0 and probably result in the deaths of between 3,000 to 23,000 people and cause $60 billion in damages.[60]

Beginning in 1987 Californians experienced a drought that lasted the next six years. As the drought extended, it caused anxiety as people wondered if their paradise was really just a mirage in a desert. Lawns turned brown and farmers had to let their fields lie fallow.[61] By 1991 and 1992, reservoirs and lakes had gotten drastically low and state politicians were seriously looking at alternatives such as desalination.[62] Beyond the problems of the drought itself were additional expected difficulties caused by it: fires--and when the rains came back--floods. Because the drought caused the brush and trees to dry out, fires were easier to start and they spread faster, causing great damage to people who lived near open wilderness areas. Then, when the rains did come, without the roots of living brush the ground had a tendency to give way and form mudslides which would cause homes to slide from their foundations and crumble down hills.[63]

When there are mudslides and fires they tend to make the front page news and lead the television news coverage because of the spectacular visual destruction. In 1990, it was estimated that about 7 million Californians lived in areas prone to fires and flooding--most of these were probably white residents--and most watched on television or read the news about their neighbors and worried about their own possible situation.[64] In 1990, over 500 homes were destroyed in the Santa Barbara area by fires and floods.[65] On October 20 of 1991, the eastern San Francisco Bay area was hit by fires that killed 26 people and destroyed 3,354 residential units. The estimated total dollar damage was over $1.5 billion.[66] In the spring of 1992, losses from torrential rains in southern California caused $23 million in damage and four people died in storm-related traffic accidents.[67]

On April 29th, 1992, a Simi Valley jury (ten members white, one Asian, and one Hispanic) acquitted four white Los Angeles police officers in a highly publicized case in which the officers had allegedly illegally assaulted a black man, Rodney King, on March 3, 1991. The news of the acquittals was a shock to the public: millions of people had watched on television in the year preceding the trial a videotaped recording of the March 3rd events in which the officers were seen clubbing and kicking a handcuffed King who was crawling around on the ground. For black and brown Los Angelinos the case was an outrage. They were fed up with Los Angeles Police Department officers who were notorious for beating people--especially people of color--while the people were in police custody. The Rodney King videotape case was supposed to be an open and shut matter where finally some LAPD officers would receive their just deserts. When the acquittals occurred, shock turned to anger, and then to action.

The riots lasted five days and the National Guard and federal troops had to be brought in to quell the disturbances. Property losses exceeded $900 million--the most ever in a U.S. riot. Over 850 buildings had been destroyed--four times more than in the Watts Riots of 1965. Thousands of stores were damaged or looted and the riots had wrecked the infrastructure of many neighborhoods--generally areas where people of color predominated.[68]

On June 28, 1992 two big earthquakes shook southern California, killing one and injuring 300 in mostly rural areas. The first quake had a magnitude of 7.4 and was located near the small rural San Bernardino County community of Landers, and the second measured 6.5 and was located near Big Bear Lake, 30 miles north of Palm Springs. The 7.4 quake was the state's largest in 40 years and residents in Los Angeles, who felt much of the rumbling, were left wondering what would have happened had such a quake happened in their metropolis.[69]

The six-year drought in California was said to be ended in the spring of 1993 as torrents of rain came down causing floods: Los Angeles received 11 inches of rain in a 14 day period, homes slid from mudslides, and four people were killed in Los Angeles County as Governor Wilson declared a state of emergency.[70] In October and November of 1993--right at the time Polly Klaas was kidnapped--severe fires and then mudslides were experienced in areas like Malibu, Laguna Beach, and suburbs of Los Angeles, where over 200,000 acres were burned by the fires, 1,000 buildings were destroyed, and three people were killed.[71]

Then--as if the Gods were really wanting to show their wrath--at 4:31 a.m. on January 17, 1994--during the days when legislators in Sacramento were having emotional debates about the pros and cons of the Three Strikes law--in Northridge, California, deep in the ground, the earth moved and caused a 6.6 earthquake 20 miles from downtown Los Angeles.[72] Federal and state emergencies were declared, 72 people were killed, and thousands of buildings were damaged. Buildings shook in San Diego (125 miles to the south) and in Las Vegas (275 miles to the northeast); and brief power failures were reported as far away as British Columbia. Aftershocks continued during the day, with one having a 5.5 magnitude. Major sections of freeways were destroyed, 90 percent of the residents in Los Angeles lost electricity, a dusk-to-dawn curfew was called, and residents of San Fernando Valley were told to boil their water before using it for drinking purposes. In Anaheim, 40 miles from the epicenter, Anaheim Stadium, a big league baseball park, was littered with debris and the "Big A" sign and replay screen leaned precariously over the upper deck. When all the damage was totaled it came to an estimated $40 billion.[73]

As if all the droughts, earthquakes, fires, floods, and riots didn't induce enough anxiety in Californians, they also were going through

one of the most severe recessions in the state's history. The whole nation was experiencing a recession, but California was especially hard hit. California's economy was based heavily on military contracts. As federal government spending on the military decreased in the early 1990s, many bases were closed and spending on aircraft and other military equipment was severely decreased.[74] From 1990 through 1992, California lost over 600,000 jobs. The length of the recession--three years--was said to make "other recessions pale in comparison."[75] Business failures soared 33 percent in California in 1992 compared with 1991 (in the nation they increased only 9 percent), while lenders in the state foreclosed on more than twice as many homeowners.[76] While the rest of the nation started to pull out of its recession in late 1992, California remained in its recession throughout 1993. A Field poll in February of 1993 showed that 88 percent of Californians thought the state was "in bad economic times."[77] The unemployment rate in California was 9.8 percent in September of 1993--the second highest state was New York with a rate of 7.9 percent.[78]

A poll asking Californians if their state was the "best place to live" had 85% of those polled in 1985 say "yes," 51% in 1991, and only 41% in early 1994.[79] In the ensuing years, one can see that the dream of California was coming to an end. Books were appearing with titles such as *The Coming White Minority: California, Multiculturalism, and America's Future* by Dale Maharidge; *Ecology of Fear: Los Angeles and the Imagination of Disaster* by Mike Davis; and *Paradise Lost: California's Experience, America's Future* by Peter Schrag.[80]

For decades, social psychologists have recognized a correlation between increased acts of discrimination by members of the in-group against those of an out-group at times when economic competition or hardship increase. In a classic study, Carl Hovland and Robert Sears looked at the changes in the price of cotton and the number of lynchings of blacks in the southern U.S. In general, the economy of the South was highly dependent on the price of cotton: When cotton prices increased, the economy was good; when cotton prices decreased, the economy went sour. Their study showed a very high inverse correlation between the price of cotton and the number of lynchings of blacks from 1882 and 1930 (an r statistic equal to -72).[81] Other historical studies and laboratory experiments have demonstrated similar results.[82]

Social psychologists have developed a concept known as the scapegoat theory. The classic example they give is the German people turning against the Jews and blaming them for the economic and chaotic problems they were experiencing in the 1930s.[83]

Lynchings and pogroms are socially unacceptable by today's standards, but one has to question whether the same discriminatory actions may have been replaced by more socially-acceptable harsh

prison punishments. In 1993 white Californians were extremely frustrated by destructive forces that seemed to be unleashed against their state, the economy was in a downturn, and commercials were advertising that Hispanics were coming across the borders to take away their jobs and crowd their lands. Crime rates were considered high and the state recently had experienced one of the worst riots in the history of the United States--riots where black and brown faces were televised coming out of stores with their arms full of electronic appliances, groceries, and other goods.

NOTES FOR CHAPTER 4

[1] Armstrong and Wood, "Northrop's ATF Contract." Hyink and Provost, *Politics and Government in California*, 11.

[2] The populations of the state of New York and California in 1990 were 17,990,445 and 29,760,021, respectively. Forstall, *Population of Counties by Decennial Census*.

[3] See Hyink and Provost, Politics and Government in California, 17-51.

[4] See Baldassare, *California in the New Millennium*, 26-59. A survey conducted one month after the 1998 gubernatorial elections demonstrated that only about half of California adults could name the recently elected governor. Baldassare, *California in the New Millennium*, 33.

[5] Baldassare, *California in the New Millennium*, 49. In a 1998 survey, although there are more registered Democrats than Republicans in California, about 60 percent "fit into categories of middle-of-the-road and somewhat conservative." In the same 1998 survey, 61 percent of Californians believed the choice of abortion should be left up to a woman and her doctor, 55 percent said homosexuality is a way of life that should be accepted by society, but 77 percent agreed that poor people have become too dependent on government assistance programs. Baldassare, *California in the New Millennium*, 49-52.

[6] See Baldassare, *California in the New Millennium*, 26-59.

[7] Ibid., 61.

[8] From 1965 to 1993 the violent crime rates in California increased from 275.5 per 100,000 persons to 1,058.8 per 100,000 persons (the peak year was 1992 with a 1,119.7 rate). During the same time period, property crime rates also increased from 1,597.5 per 100,000 persons in 1965 to 2,400.3 per 100,000 persons in 1993 (the peak, however, was in 1980 at 3,035.3 per 100,000). *Second and Third Strikers in the Institution Population, June 30, 2002,* California Department of Corrections.

[9] The U.S. violent crime index was 757.5 per 100,000 persons in 1992 as opposed to the California violent crime index of 1,119.7 (1,045.2 for the next three largest states). In 1992, the U.S. murder rate was 9.3 per 100,000 and California's was 12.7 (11.63 for the next three largest states). Also in 1992, the U.S. aggravated assault rate was 441.8 as opposed to the California rate of

641.6 (582.8 for the next three largest states); and the U.S. robbery rate was 263.6 as opposed to the California rate of 424.1 (405.4 for the next three largest states). *Uniform Crime Reports: Index of Violent Offense Rates,* Federal Bureau of Investigation.

[10] "Homicide victimization and offending rates for younger groups – teenagers and young adults – rose sharply in the late 1980's and early 1990's . . . ." Fox, *Homicide Trends in the United States*.

[11] Webb, Dark Alliance.

[12] Turner, "Crime is Top Issue."

[13] California propositions can be found at: http://www.uchastings.edu/ library/ Research%20Databases/research_databases_main.htm (accessed October 21, 2003).

[14] Lindsey, "Bradley Loses."

[15] California Correctional Facilities, California Department of Corrections; Second and Third Strikers in the Institution Population, June 30, 2002; University of California: It Starts Here, University of California.

[16] *Beyond Bars,* Little Hoover Commission, 30.

[17] Since joining the California Supreme Court in 1977, Bird voted to overturn all of the 61 death penalty cases that had come before her. Lindsey, "The Elections."

[18] The other justices not reconfirmed were Associate Justices Joseph Grodin and Cruz Reynoso. Ibid.

[19] Deukmejian won in 1986 with 60.5 percent of the vote to Bradley's 37.5 percent. Ibid.

[20] *Prisoners Under State or Federal Jurisdiction, 1977-1998,* Bureau of Justice Statistics. California's general population also grew faster than the rest of the nation from 1977 to 1998, so when re-calculating the numbers based on per 100,000 of population, the relative California prisoner growth rate was (480/80) or 600 percent, and the rest of the nation's growth rate was (457/135) or 338 percent. *Incarceration Rates for Prisoners Under State or Federal Jurisdiction, per 100,000 Residents, 1977-1998,* Bureau of Justice Statistics.

[21] *California Prisoners and Parolees 2000,* California Department of Corrections. At June 30th of 1999 the prison population had peaked at 162,064 (at 193.4% of design capacity).

[22] Much of this section was taken from the book Cummins, *The Rise and Fall*.

[23] Ibid.

[24] Ibid.

[25] Davis, "Political Prisoners," 47.

[26] Louis E. Tackwood, paid by the Los Angeles Police Department (Criminal Conspiracy Section) to infiltrate the Black Panther Party, has written that the FBI and LAPD had known beforehand about a courtroom hostage attempt, but they had thought such an event had been cancelled. Tackwood said that the FBI was planning to use the hostage episode as a sting operation to kill and capture many Black Panthers and also to try to discredit their organization.

Jackson--not knowing that the event had indeed been cancelled--proceeded by himself in a half-bungled job. Churchill and Vander Wall, *Agents of Repression*, 95.

[27] Cummins, *The Rise and Fall*.

[28] § 1170.2. Richard Allen Davis, the convicted killer of Polly Klaas, benefited greatly from this change in the system. When serving a sentence for serious crimes, he had received an indeterminate sentence and might not have been released until determined to be "not dangerous" by authorities. Once the system changed to a determinate sentence, however, he had to be released once his term was up. Because he had been sentenced before the harsh punishments of the 1980s were implemented, he was able to get out after a relatively short imprisonment. The short length of his incarceration was then used by the promoters of the California Three Strikes law who argued that California sentences were too short and needed to be remedied by the Three Strikes law.

[29] See *Beyond Bars*.

[30] Going from an indeterminate sentencing model where discretion in sentencing was shared by a parole board, the judge, and prosecutor to a determinate sentencing model was seen as changing the discretion to the judge and prosecutor. Then with the passage of the Three Strikes law, the judge's discretion was further decreased, giving prosecutors most of the discretionary authority over three strikers. See Zimring, Hawkins and Kamin, *Punishment and Democracy*, 27.

[31] *History of the CCPOA,* California Correctional Peace Officers Association.

[32] From 1985 to 1995 the number of prison guards increased from 7,570 to about 25,000. MacLean, "The Strong Arm," 26.

[33] Current benefits for prison guards also include health, vision and dental plans, physical fitness pay of $65 per month, "more vacation time than any other state employee," uniform allowance of $520, and many other benefits. *History of the CCPOA*.

[34] Morain, "Overtime Pays."

[35] Shapiro, "Victims & Vengeance," 13-14.

[36] MacLean, "The Strong Arm," 27.

[37] See for example, Arax, "8 Prison Officials Fired"; Arax, "FBI Probes Deaths."

[38] In 1998, the CDC appointed a panel of law enforcement experts to review 31 shootings of prisoners by guards at Corcoran prison from 1989 to 1995. The experts judged 24 of the 31 to be unjustified. Arax and Gladstone, "Prison Inquiry Calls Shootings Unjustified."

[39] Arax and Gladstone, "Only California Uses Deadly Force." All other states were reported to break up prisoner fights by using only pepper spray, tactical teams, or warning shots. "Shooting to break up a fight is something you never see outside of California. It just doesn't occur," said Lanson Newsome, a former deputy commissioner of Georgia state corrections. Arax and Gladstone, "Only California Uses Deadly Force."

[40] Attorneys for the prison guards appear to encourage such silence by using their right to talk with any prison guard suspects or witnesses before police detectives. Arax and Gladstone, "Guards Union Slowed Probe."
[41] The comments about the legislative hearings are based on personal observations of the author.
[42] Arax, "Tales of Brutality."
[43] MacLean, "The Strong Arm," 27.
[44] Ibid.
[45] In August of 1998, the Wilson administration agreed to grant a raise of up to 12 percent to the prison guards--one day after the governor used his line item veto to delete $400 million from the state budget in pay raises for most other state workers. Morain and Vanzi, "Wilson Agrees."
[46] MacLean, "The Strong Arm," 27.
[47] Jacobs, "Lungren's Bad Omens."
[48] MacLean, "The Strong Arm," 27.
[49] Ibid., 26; *History of the CCPOA*.
[50] Rawls and Bean, *California: An Interpretive History*, 155; *United States Population: 1790 to 1990*, U.S. Census Bureau.
[51] Hobbs and Stoops, *Demographic Trends*.
[52] *1990 and 1980 Census Counts for Cities*, U.S. Census Bureau.
[53] *California - Race and Hispanic Origin*, U.S. Census Bureau; *Nativity of the Population*, U.S. Census Bureau; *Population by Race and Hispanic or Latino Origin, for the United States, 2000*.
[54] Campbell, *Population Projections for States*.
[55] Ibid.
[56] Proposition 13 passed by a 64.5% vote.
[57] Proposition 63 passed by a 73.2% vote.
[58] Proposition 187 passed by a 58.8% vote.
[59] Shilts, "Hundreds Dead in Huge Quake."
[60] Petit, "It Hit"; Saltus, "The 'Big One' Hasn't Hit Yet."
[61] Reinhold, "What Price Swimming Pools?'
[62] Wood, "Long Drought Heightens Struggle."
[63] Reinhold, "In California, Nature Refuses to Remain Mastered."
[64] Ibid.
[65] Ibid.
[66] Lynch, "Bracing Against Mudslides."
[67] McCabe, "Soggy Battle in Southern California."
[68] In 1992, at the time of the South Los Angeles riots, the poverty rate was 30.3%. This was even higher than at the time of the Watts riots of 1965, when it was 27%. Hubler and Ramos, "South L.A.'s Poverty Rate."
[69] Asimov, "2 Big Quakes Rattle L.A."
[70] Leavitt, "Western Storms"; Reinhold, "West's Drought Ends."
[71] Leavitt, "California Fires"; Mydans, "Water, Not Fire, Now Threatens Weary Malibu"; Reinhold, "What's Doing In; Los Angeles."

[72] Mydans, "Severe Earthquake Hits Los Angeles."
[73] "Quake Damage Now Estimated at $40 Billion," *Atlanta Journal and Constitution*, March 14, 1997, 10A.
[74] See for example, Armstrong and Wood, "Northrop's ATF Contract"; "Losing More Defense Jobs," *San Francisco Chronicle*, March 30, 1993, C2; "Pentagon's New Base-Closings Plan Targets Bay Area Facilities," *San Francisco Chronicle*, March 13, 1993, A16.
[75] Marshall, "Gloomy Outlook for Economy."
[76] Howe, "California Had Worst Failure Rate."
[77] Gunnison, "Californians Gloomy About Economy."
[78] Marshall, "More U.S. Jobs But More Jobless."
[79] Skelton, "Voters May Be Giving Wilson Another Look."
[80] Daunt and Lait, "Inmate Freed"; Maharidge, *The Coming White Minority;* Schrag, *Paradise Lost*.
[81] Hovland and Sears, "Minor Studies of Aggression."
[82] Jacobs and Landau, *To Serve the Devil;* Sherif, et al., *Intergroup Conflict and Cooperation;* Simpson and Yinger, *Racial and Cultural Minorities;* Vanneman and Pettigrew, "Race and Relative Deprivation" cited in Aronson, Wilson and Akert, *Social Psychology*, 504-506.
[83] Berkowitz, *Aggression: A Social Psychological Analysis*.

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CHAPTER 5

California Initiatives and the Three Strikes Law

THE INITIATIVE PROCESS

California first used direct democracy on the local level in 1903 when Los Angeles passed a city charter including a public initiative. Some enterprising Californians saw this as a way to break the corruption and political influence of corporations--in particular, the Southern Pacific Railroad which had a strangle-hold on California politics. They formed the Progressive Party and, led by gubernatorial candidate Hiram Johnson, were elected on the platform that they would significantly move California toward greater direct democracy. Thus in 1911 the Progressives created the California initiative, referendum, and the recall.

Today the Progressives might be surprised if they saw what has happened to the initiative process in California. Instead of elevating the average voter, special interests have dominated the initiative process and rarely can ordinary people use initiatives to make changes in California laws. According to a survey conducted in 1998, eight in ten California residents believed that initiatives "usually represent the concerns of organized special interests rather than the concerns of average California residents."[1] Yet the initiative process in California remains popular and considered a sacred cow. In the same 1998 survey, Californians by a three-to-one margin favored initiatives over reliance on the governor and state legislature.[2] Of course, the influence of special interests is an overpowering argument to condemn the initiative process though its only alternative, representative democracy, is also greatly criticized because of the influence special interests have on government officials.[3] The initiative process was used frequently in California from 1912 through 1950, sparingly in the 1950s and 1960s, and has dramatically increased in usage since the mid-1970s.[4] Since

the initiative process began, Californians have approved about one-third of such measures.[5]

There are those who are cheerleaders of the initiative process as a means to allow for greater democracy--as if greater democracy is always a better alternative--and others who criticize the process because it takes away many of the checks and balances of a representative democracy. Two major criticisms of the initiative process are (1) fear of "tyranny of the majority" and (2) failure to resort to the deliberative process that legislators experience when passing laws. At a quick glance, the Three Strikes law appears to have bypassed these criticisms because it was passed by both the legislature and the public. But a review of chapter 1 demonstrates that the statute probably would not have passed with such harsh punishments without the initiative process that had been put in place by Reynolds.

The cynical view of why the Framers of the United States Constitution feared tyranny of the majority is that they did not trust the poor populace. A representative democracy was designed to have representatives who would come from the elite class and thus would be able to protect the interests of rich property owners.[6] In more modern times, "tyranny of the majority" is based more on fears that the majority of white voters will pass laws particularly designed to harm nonwhites.[7] Whether such fears of racial tyranny have materialized through the initiative process is debatable: As discussed in the previous chapters, California's passage of Proposition 13 (limiting property taxes), Proposition 63 (making English the official state language), Proposition 187 (making illegal immigrants ineligible for state services), and the Three Strikes law had racial overtones to them--but otherwise, racial tyranny through the initiative process has been somewhat limited throughout the nation's history.[8]

Representative democracy is thought to allow for greater protections for minority interests because of the give and take through negotiations that result from representative democracy. Minority interests are able to trade their votes on some issues in return for votes on other issues that might more directly affect them. In addition, to the extent there are checks and balances such as the separation of powers, a bicameral legislative system, and an executive veto, the representative system purposely insulates important issues from the popular passions of the people.

The major complaint about initiatives (by eight of ten Californians) is that they are too complicated and "do not provide an understanding of what will happen if an initiative passes."[9] A similar complaint is that the number of initiatives on a ballot has overwhelmed California voters. It is not unusual for them to receive a 100- to 150-page, small-print, single-spaced voter packet or packets in the mail a couple of weeks prior to a primary or general state election--and also to receive

separate packets for municipal and county measures.[10] For the November 1994 general election, California citizens received two voter pamphlets from the Secretary of State--one was 96 pages and the supplemental pamphlet was 24 pages--these included the arguments and language for ten propositions (five by legislative referendum and five by public initiative). Understanding the language in a ballot proposition is difficult enough, but many references to other statutory sections require the reader to have the legal code available if they want to know all the changes proposed.[11] The California Three Strikes proposition had many references to external sections of the legal code including references for the definitions of what crimes counted as "serious" or "violent."[12] Arguments about misrepresentations in voter pamphlets often spill over into threats of litigation as was the case with the Three Strikes initiative. Opponents of Three Strikes claimed that the representations by supporters of cost savings were grossly exaggerated, and Mike Reynolds responded that opponents' estimated costs of Three Strikes imprisonment were also exaggerated.[13]

California initiatives may be amended only by another initiative or referendum--unless the initiative provides that the legislature can make amendments without voter approval.[14] In the Three Strikes law, Reynolds allowed a two-thirds vote by the legislature to make amendments--but this is almost an impossibility to obtain, given the controversial nature of the law and the ease with which politicians can successfully accuse others of being "soft on crime."[15]

A common complaint is that people did not know the Three Strikes law would be applicable to non-violent felonies or that the last strike could be any felony. Sue Reams, the mother of Shane Reams, said she voted for the Three Strikes law because she thought it would target only violent offenders.[16] She said she had no idea that her son, who had two residential burglary convictions on his record at the time the law passed, was only one felony conviction away from a 25 years-to-life sentence--which he received later after being convicted for being the look-out in a $30 drug sale.

THE BASIC SENTENCING SCHEMES

The purpose of the California Three Strikes law is "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."[17] There are two separate statutes that contain the California Three Strikes law: the legislatively enacted law was added to § 667, and the public initiative created § 1170.12. There are a few word differences between the two, and there was some speculation that the application of the law might differ depending on which section was applied, but the differences have proven to be of little or no significance.[18]

The Three Strikes law has two significant sentencing enhancement schemes. One is the "two strike" part of the law and those sentenced under it are often referred to as "two strikers" or "second strikers." The other is the "three strike" part of the law and those sentenced under it are often referred to as "three strikers" or "third strikers."

The "two strike" part of the law states that if someone is currently convicted of a felony and has one prior "serious" or "violent" conviction, then the sentence for the current conviction shall be doubled. The "three strike" part of the law states that if someone is currently convicted of a felony and has two or more prior "serious" or "violent" convictions, then the sentence shall be for an indeterminate term of life with a minimum term the greater of:

(1) three times the sentence for the current conviction;
(2) 25 years; or
(3) the usual sentencing schemes plus enhancements.[19]

Because the passage of the entire law was advertised as the "Three Strikes and You're Out" law, semantically it has led to a lot of confusion with the public. Most have thought of the law as affecting only criminals who have "three strikes." They fail to realize that there is a "two-strike" part to the law, and many think that what can count as a "strike" is the same for all prior and current convictions. The mistake has cut both ways: some have mistakenly believed that all three strikes must be "violent" or "serious," and others have thought that "any felony" can count for all three strikes. Prior to the passage of the new law, the former mistake appears to have been made more often. After the law went into effect and news reporters focused their attention on its application to nonviolent and non-serious offenders, the latter mistake seems to be growing.[20]

People are also confused with the standing of a "two striker." Many think that because someone was sentenced as a "two striker" these persons automatically will be subject to the "three strike" part of the law the next time they commit any felony. The law does not work that way.[21] If the convicted person in a "two strike" case had a prior record of only one "violent" or "serious" felony and the second strike was a "nonviolent" and "non-serious" felony, the person will still have only one "prior strike" and can be subject to the "two strike" part of the law only for the next felony conviction.

"SERIOUS" AND "VIOLENT" PRIORS

A major element in the Three Strikes law is what can be counted as "serious" or "violent" prior strikes. The Three Strikes law refers to these as "[a]ny offense defined in subdivision (c) of § 667.5 as a violent felony or [a]ny offense defined in subdivision (c) of § 1192.7 as a

serious felony."[22] The supporters of the law have often publicly emphasized the most "violent" aspects of the law--brushing aside the fact that some of the "serious" crimes also include property offenses--such as arson or burglary. Joe Klaas, the grandfather of Polly Klaas, recognized this difference and in the documentary "The Legacy" he discussed his reasons for opposing the Three Strikes law: "There's a difference between a person who goes into an unoccupied house to steal the stereo system and somebody who goes with ropes and gags and a knife to steal a child. There's quite a bit of difference. I've had a grandchild stolen and a stereo stolen and there's no comparison. I think it is obscene to equate stealing a stereo with stealing a child--giving the same penalty for both."[23] By broadening "serious" felonies to include "residential burglaries," the target group of people subject to the strikes law increased significantly. The proposed alternative, the Rainey Bill (AB1568) in 1994, excluded residential burglary as a strike. Michael Vitiello of the McGeorge School of Law stated, "Inclusion of burglary as a 'strike,' and making the third strike any felony, guaranteed that most offenders within the provisions of 'three strikes' would not be murderers, rapists, or child molesters."[24]

BROADENING THE LIST OF "SERIOUS" AND "VIOLENT" STRIKES

The year 2000 was going to be Pete Wilson's big push for a run at the U.S. presidency. In anticipation, he wanted to support a crime bill during the election as he had done with "Three Strikes" in 1994. His supporters, therefore, helped put together a bill that would target the hot issue of juvenile crime--and in the process also broadened the Three Strikes law. As the year 2000 went by, Wilson's run for the presidency failed to get off the ground, but his "Juvenile Crime" initiative moved forward anyway and was approved by a 62 percent electoral vote.[25]

Included within the small-print, single-spaced 148-page voter pamphlet on "juvenile crime" were the detailed changes to be made to the Penal Code by Proposition 21.[26] Within the summary was the statement, "Adds crimes to the serious and violent felony lists, thereby making offenders subject to longer prison sentences." In addition, Proposition 21 specifically stated:

> SEC. 16. Section 1170.125 is added to the Penal Code, to read: 1170.125. Notwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994 General Election, for all offenses committed on or after the effective date of this act, all references to existing statutes in Section 1170.12 are to those statutes as they existed on the effective date of this act, including amendments made to those statutes by this act.

A similarly worded provision was added about § 667 of the Penal Code. There was no mention that these changes were to the "Three Strikes" law, and no mention that within the "Juvenile Crime" initiative that these changes would be effective to not just juveniles--but also adults.

The changes in the "violent" felony list did little to alter how the Three Strikes law was applied since most of the changes incorporated additional "serious" crimes into the "violent" list--including residential burglary when it could be proven that someone other than an accomplice was in the residence. The "serious" list was broadened in many areas by slight word changes and the inclusion of a list of new crimes. An example of a change through merely inserting a few extra words was item (16) which read "exploding a destructive device or any explosive causing *bodily injury,* great bodily injury, or mayhem"--with the words in italics indicating the additional language added by Proposition 21.

Amongst the list of new "serious felonies" was "(28) any felony offense, which would also constitute a felony violation of Section 186.22." Further investigation of the Penal Code and a detailed reading of the changes to § 186.22 by Proposition 21 would lead the reader--if diligent enough--to discover that any felony committed by a gang member during the commission of gang activity would also now be included as a "serious felony." Since other parts of Proposition 21 decreased the amount of damages necessary for graffiti to be classified as a felony from $5,000 to $400, it was now possible that three graffiti convictions by a gang member causing damage of over $400 each could subject him or her to a 25 years-to-life penalty. And what about a gang member with a prior theft record that shoplifts on behalf of a gang? Proposition 21 now made it possible that three shoplifting convictions could result in a 25 years-to-life punishment--if the "gang" criteria were met.

Also included in the list of new "serious felonies" were "(38) terrorist threats, in violation of Section 422"--which meant threats "to commit a crime which will result in death or bodily injury . . . even if there is no intent of actually carrying [them] out . . .," and, "(41) any conspiracy to commit an offense described in this subdivision."[27] The last item made it possible that gang members making only plans to commit over $400 of damage in graffiti, shoplifting, or possessing a small quantity of a controlled substance could be in jeopardy of obtaining a "serious" strike under the Three Strikes law.

PRIOR STRIKES

The courts have made it almost impossible to attack a prior strike--especially if the prior strike was the result of a guilty plea.[28] One problem of fairness is that most people committed prior strikes long

before there was any thought of a Three Strikes law; thus they did not have any knowledge of the full consequences of accepting a "higher charge" rather than going to trial and fighting for a "lesser charge."

Luciano Orozco's prior strike of "residential burglary" in 1988--six years prior to the enactment of the Three Strikes law--is an example where this may have occurred. Orozco had entered an apartment that his mother rented to others because he needed to make a telephone call. He was caught, charged with "burglary," and given a deal for short jail time if he pleaded guilty. Orozco had wanted to finish his jail time as soon as possible; and his public defender told him to take the deal. Later, in 1996, when Orozco was convicted and received a third strike for possession of .05 grams of heroin he realized the mistake he had made in 1988. He recognized that had he fought the "burglary" charge he would have had a good chance that it would have been reduced to the lesser offense of "trespassing" because the prosecutor had no proof that Orozco entered the apartment with the intent to commit a felony or theft--a required element of the crime of burglary.[29] The difference for Orozco after being found guilty of the heroin possession charge was enormous. If the 1988 conviction had been only "trespassing," Orozco would have been treated as a second striker and received a maximum of a five-year sentence, with an additional possibility of 20 percent less time to be served due to the availability of good conduct credits. Because of the "burglary" charge, Orozco was classified as a third striker and received a 28 years-to-life sentence, with no allowable conduct credits.

A full trial takes place in fewer than ten percent of all criminal cases; therefore, many who face the Three Strikes law have prior pled strikes. [30] During the plea bargaining process, many defendants feel that they are entering into a "contract" with the state when they take the punishment offered by the prosecutor in return for surrendering the many constitutional rights afforded them in a trial. Because the Three Strikes law came into effect after they believed they had "contracted" with the state, they especially felt cheated and that the state had broken their "contract" by subjecting them to harsh punishment on the basis of the previously pled prior strike--especially if that strike was only for a crime like shoplifting, and the prosecutor now insists the defendant deserves the harsh punishment not because of the shoplifting, but because of a "history" of crimes.

LIMITATIONS ON GOOD TIME CREDITS

One of the commonly misunderstood parts of the Three Strikes law is the assumption that those convicted under it will not have to serve their full sentence. This mistake is probably due to the fact that most sentences allow for a reduction for "conduct credits" and people hear of such procedures in the media. In addition, the law grants second

strikers a reduction in sentence, but does not give a reduction to third strikers. In general, second strikers have to serve at least 80 percent of their sentence, and third strikers have to serve 100 percent of their term until they are allowed the possibility of parole. Prior to the Three Strikes law, most people convicted in California served only 50 percent of their sentence if they followed prison regulations and worked or attended the appropriate educational programs. Thus, the 80 percent limitation had some significant results; instead of merely doubling the sentence, second strikers were effectively getting triple their sentence under the Three Strikes law.[31]

During some of the initial debates about the Three Strikes law and in the first few years after its passage, it was believed that third strikers were eligible for good time credits and would also be eligible for parole after serving 80 percent of their sentence. Third strikers were even given official paperwork from the California Department of Corrections showing their term calculated at 80 percent.[32] In 1996 the first appellate court of California addressed this issue in *People v. Stofle* and stated that because third strikers had an indeterminate sentence, the indeterminate sentencing rules apply--and that such rules strictly declare that indeterminate lifers are not eligible for parole until 100 percent of their term has expired.[33] The California Department of Corrections quickly sent a memo out to the third strikers informing them of the clarification.[34]

EXCLUDING DRUG USE AND POSSESSION AS A STRIKE

In November of 2000, California voters demonstrated that the "tough on crime" movement might have reached its peak and was turning the other way when they passed Proposition 36. That public initiative, funded by billionaire George Soros and a couple of other multi-millionaires, required that certain adults convicted for use and possession of illegal drugs "receive drug treatment and supervision in the community" rather than "being sent to prison or jail." The new law would be applicable to the first and second convictions after the passage of the initiative, and any convictions beyond the first and second could be subject to a 30-day jail sentence.[35] With regards to the Three Strikes law, Proposition 36 said that its provisions would be applicable if defendants have a prior "serious" or "violent" strike on their record--but only if offenders within the previous five years "(1) had not been in prison, (2) had not been convicted of a felony (other than a nonviolent drug possession), and (3) had not been convicted of any misdemeanor involving injury or threat of injury to another person."[36] In addition, Proposition 36 was not available if during the same proceedings the defendant was guilty of a misdemeanor (other than the drug offense), refused the drug treatment, or used a firearm while under the influence of specifically identified drugs.[37]

The new proposition would have a minimal direct effect on the application of the Three Strikes law, but indirectly it was very symbolic.[38] People within the criminal justice system began to see that the public was concerned about minor offenders receiving too harsh a sentence--and it, therefore, may have allowed more politicians to speak against the Three Strikes law, more prosecutors to not apply it fully, and more judges to use their discretion.

THE THREE STRIKES SENTENCE IS IN ADDITION TO OTHER SENTENCING STATUTES

As stated previously, prior to the Three Strikes Law, California already had sentencing enhancement statutes. The Three Strikes law did not replace them, but rather was added on top of the other legislation.[39] With regard to serious felonies, California had imposed a mandatory sentencing enhancement of five additional years for every prior serious felony on somebody's record. For instance, if someone was convicted of a residential burglary and they had two prior residential burglary convictions, they were typically sentenced to five years for the current burglary conviction and another five years for each of the prior burglary convictions for a total sentence of fifteen years. This enhancement is mandatory since the judge is not allowed discretion to waive such a prior strike.[40] Therefore, with the passage of the Three Strikes law, the third burglary conviction could result in a sentence of 25 years-to-life with the additional five year enhancements for each prior serious felony conviction for a total sentence of 35 years-to-life.

SINGLE ACTION CAN COUNT AS MULTIPLE PRIOR STRIKES

If a person is convicted of multiple "serious" or "violent" counts, each of the counts--even though committed within a short-period of time or during one action--can count as multiple strikes under the Three Strikes law (for instance, a robbery of two victims at the same time can count as two counts of robbery).[41] There has been a concern with the fairness of allowing one event to count as possible multiple strikes. If the enhanced Three Strikes penalty is supposed to be a result of a "history" of crimes by the defendant, the "history" of the criminal does not appear to be as extensive if all or many of the serious strikes occurred during one action.[42]

JUVENILE COURT ADJUDICATIONS OF YOUTHS OF 16 YEARS AND OLDER CAN COUNT AS PRIOR STRIKES

Another controversial area of the Three Strikes law concerns the counting of juvenile adjudications of 16- and 17-year-olds as prior

strikes.[43] One of the obvious problems with using juvenile adjudications is that the process for juveniles is not the same as for adults--for instance, juveniles are not allowed a jury. An argument could be made that using such offenses as prior strikes should be unconstitutional since it violates the right to a jury trial.

In addition, the use of juvenile adjudications as prior strikes appears to conflict with the general purpose to incapacitate individuals who are believed to demonstrate a high risk of continuous future criminal behavior. Is juvenile behavior a good predictor of future adult criminal behavior? Or are juvenile activities more likely to be youthful mistakes that a more mature person would not repeat? Many prosecutors apparently agree that there might be something wrong with using juvenile adjudications as prior strikes and therefore do not use them.[44]

PRIOR STRIKES EXPUNGED FROM RECORDS CAN COUNT AS STRIKES

If a person is "honorably discharged" from control of the Youthful Offender Parole Board, the trial court can set aside the guilty verdict and dismiss the accusation against the person--which is known as getting the crime "expunged" from one's record.[45] The Court of Appeals, Fifth District, however, has said that expunged felonies can still count as prior strikes because "The Three Strikes law is not a rehabilitative statute, . . . [and] the rehabilitative goals of the Youth Authority Act are not furthered by relieving defendant of the consequences occasioned by commission of another offense."[46] The Court of Appeals, Fifth District, has also said that felonies which were reduced to misdemeanors upon discharge from Youth Authorities pursuant to § 17 can also be counted as prior strikes.[47]

PRIOR STRIKES ARE RETROACTIVE, THE PROCEEDINGS ARE NOT PROTECTED BY DOUBLE JEOPARDY, AND THERE IS NO WASH-OUT PERIOD

The Three Strikes law became effective on March 7, 1994, and based on the constitutional prohibition against *ex post facto* laws, it cannot be applied to someone unless the last strike was committed on or after this date. Also, the California Supreme Court has held that the proceedings for sentencing enhancements in non-capital cases are not protected by the state and federal double jeopardy proceedings.[48]

In addition, while some states recognize that prior strikes can become old or stale, the California Three Strikes law specifically states that "[t]he length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence."[49]

It is difficult to ascertain how the Three Strikes law meets the normal goals of punishment when someone has committed crimes a long time ago, prior to any knowledge that there would be a Three Strikes law, and then is convicted of a felony many years later, and could be subject to a life sentence. Are they really a "danger" to society because they shoplift or possess illegal drugs? It could be argued that the Three Strikes law provides an extra deterrent from committing such minor actions; but if such harsh punishments act as a deterrent and are beneficial to society, then one might argue they should equally be applied to everybody regardless of their prior record.

THE THREE STRIKES SENTENCE SHALL BE IN ADDITION TO ANY OTHER SENTENCE

In general, if a person has multiple felony convictions that are not committed on the same occasion and that do not arise from the same set of operative facts, consecutive sentencing on the multiple counts is mandatory.[50] This was the case of Leandro Andrade who received a 50 years-to-life sentence for two separate shoplifting incidents.[51] If the felonies are committed on the same occasion or arise from the same set of operative facts (but both conditions were not simultaneously present), then consecutive sentencing on the multiple felonies is discretionary. Also, any sentence imposed under the Three Strikes law is to be added to any other sentence that the defendant is already serving.[52]

PLEA BARGAINING

The Three Strikes law states that the prosecutor must plead and prove all prior felony convictions and they cannot be waived as part of a plea bargain--which seems to imply that prosecutors cannot negotiate a guilty plea with the expectation that strikes will be waived.[53] This, however, is not the case. The practical reality is that plea bargaining goes on as usual but under a legal fiction that the prosecutor is acting in the "interests of justice" and such a deal therefore cannot be enforced but only "indicates" what the prosecutor will recommend. In addition, the judge will be able to give only an "indicated sentence" during the plea bargaining process.[54] Just like any bargaining, however, if somebody were to get a reputation of backing out of deals (or an "indicated sentence"), they would find it harder to be taken seriously in the future, thus the deals are rarely taken back. Also, if such a deal were taken back, the guilty plea by the defendant can also be retracted and cannot be used against him or her.[55]

TREATING A FELONY AS A PAROLE VIOLATION, MISDEMEANOR, OR DISMISSING A CASE ARE ALSO OPTIONS AVAILABLE FOR PROSECUTORS

The Three Strikes law is only triggered when an indictment is filed by the prosecutor and then can only be used when a "conviction" occurs. This leaves the prosecutor with a great deal of leeway. Instead of prosecuting a crime, prosecutors can refer the matter to parole officials to be processed as an administrative parole violation if the alleged criminal was on parole at the time of the arrest. If this occurs, the most the parole violator can receive is a maximum of one year in prison. Even "serious" and "violent" felonies can be referred by prosecutors to parole officials instead of prosecuting the offense in a criminal trial. This happens often when prosecutors believe they lack evidence to gain a conviction under the "reasonable doubt" standard, whereas a parole violation needs to meet only the "preponderance of evidence" standard and is determined by a parole official.[56] In a study performed by Franklin E. Zimring, Sam Kamin and Gordon Hawkins, they found that there was a slight decline in their samples of eligible third strikers from before and after the passage of the Three Strikes law as a result of the increase in the use of parole violations that sent third strike eligible defendants to shorter prison sentences.[57]

And finally, the prosecutor has the option to decide whether to charge a current offense as a misdemeanor or dismiss the case altogether. In some instances, the prosecutor and the judge both have the option to classify the current offense as a misdemeanor if the provisions of the Penal Code allow the particular criminal act to be treated as such--these cases are referred to as "wobblers."[58] But more often, it is the prosecutor who has sole discretion about how to classify the charge. An example of a "wobbler" is "petty theft with a prior," while an example of the option available solely to the prosecutor would be whether to charge someone with the felony of "first degree burglary" or the misdemeanor of "trespassing."[59]

STRIKERS MUST SERVE SENTENCE IN PRISON

The court may not grant probation, suspend execution or imposition of sentence, divert the defendant, or commit the defendant to any facility other than state prison in sentencing someone under the Three Strikes law.[60] This ensures that the Three Strikes defendant will have to serve his or her time in state prison. In addition, because one of the criteria for placement in different level security prisons is the length of sentence, all third strikers who receive a 25 years-to-life sentence are expected to serve the first portion of their sentence in a maximum security prison--thus making "shoplifters" and other nonviolent and

non-serious offenders subject to more expensive and dangerous confinements than would normally be expected.

JUDICIAL DISCRETION "IN THE INTERESTS OF JUSTICE"

One of the major questions about the Three Strikes law involved the role of judges. Was the law similar to the federal "mandatory" laws whereby judges were required to sentence the convicted based on the dictates of the statute or did the judges have discretion to ignore the law? The question was decided by the California Supreme Court in June of 1996 in the case of *People v. Superior Court (Romero)*. The court said that judges could not ignore the law, but that they should be allowed discretion "in the interests of justice" to waive prior strikes--in other words, they could treat third strikers as only second strikers, or perhaps as having no prior strikes; and second strikers as having no prior strikes.[61] Republicans immediately expressed their outrage and called for legislation that would remove such judicial discretion. They pushed such a bill through the Republican-controlled Assembly, but Democrats, sensing that the public momentum that helped push the passage of the Three Strikes law in 1994 had dwindled by 1996, were able to kill the bill in the Senate Public Safety Committee.[62]

The result of *Romero* was that anybody who earlier had been sentenced under the Three Strikes law would be allowed a new sentencing hearing after filing a writ of habeas corpus. The court clarified the procedures for a judge to use his or her discretion in *People v. Williams,* stating a judge could use his or her discretion only to waive a prior strike if "in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had presently not committed one or more felonies and/or had not previously been convicted of one or more serious and/or violent felonies."[63] In addition, the supreme court ruled in *Romero* that a trial court abuses its discretion if it dismisses a prior conviction to accommodate judicial convenience, because of court congestion, because a defendant pleads guilty, or is guided solely by a personal antipathy for the effect that the three strikes law would have on a defendant, "while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.'"[64]

The case of Robert G. Saldana is an example of how a trial court used the new discretion defined by *Romero*.[65] On January 11, 1995, Saldana was sentenced to 25 years-to-life for possession of a controlled substance (heroin weighing about .88 grams) and the court stated on the record that it did not believe it had the authority to waive a prior strike. Saldana's prior record included two strikes; he had a residential

burglary conviction in 1977 and robbery conviction in 1981. After the *Romero* decision in 1996, Saldana filed a petition for a writ of habeas corpus to the original trial court, which was granted. At a new resentencing hearing, the trial court judge decided to waive a prior strike and resentenced Saldana to only four years.

The discretion allowed judges, however, is still far less than the unlimited discretion available to prosecutors. Prosecutors, as noted, can refer criminal acts to parole officials to have them treated as parole violations--judges cannot. Prosecutors also can charge a current offense as a misdemeanor or a felony, while judges can do so only where the law has provided the alternative sentence for that particular charge.[66] Prosecutors are responsible for searching for the prior record of an arrestee and listing the possible strikes, but the amount of effort or diligence used is solely at the prosecutor's discretion. In addition, if a prosecutor waives a prior strike or dismisses a case, the matter is not going to be appealed, which gives a prosecutor a great deal of power over a judge. And the prosecutor can appeal a trial judge's decision he or she does not like when the judge waives a prior strike or dismisses a case. Thus, even with the *Romero* decision, it is the district attorneys of each county who have the greatest ability to decide how the Three Strikes law will be applied in their jurisdiction.

CONCLUSION

With regards to almost every consideration, California has generally taken the position that results in the highest sentence to the person convicted in comparison with other states that passed recidivist or strike-type sentencing statutes during the 1990s.[67] At least 22 states limit prior strikes to "violent" felonies, the vast majority of states require the last strike to be for "violent" felonies, and some states, like Louisiana, include a wash-out period.[68]

As this chapter demonstrates, the Three Strikes law is not easy to understand. It conflicts with many provisions of the California and federal Constitutions and notions of fairness. For the vast majority of offenders who have been convicted of burglary, assault, and other borderline strike-type crimes, the law is not clear and--as the next chapters will indicate--it does not provide an accurate indication as to how it will be applied by the various prosecutors and judges across the state. Whether the fact that the Three Strikes law was applicable to nonviolent and non-serious offenders was known by voters when they passed the law is debatable. Certainly many were probably caught up in the tide of social-psychological movements and concerns expressed in the previous chapters and voted for the law out of the fear they had for another Richard Allen Davis--and even with the knowledge that the Three Strikes law would give nonviolent and non-serious offenders a life sentence. On the other hand, there were probably many who also

voted for the law not knowing all of its consequences. Either way, in discussions concerning public initiatives, the California Three Strikes law is generally not regarded as a good example of the positive virtues of "democracy."

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[1] Baldassare, *California in the New Millennium*, 86.

[2] Ibid., 84-85.

[3] Representative democracy is also considered problematic because of the influence that political parties have on their members. A representative might have to vote against the best interests of constituents because his or her party has put pressure to vote a certain way.

[4] The number of state propositions passed in the 1990s accounted for about one-third of the total passed since the first initiative in 1911.

[5] Hyink and Provost, *Politics and Government in California*, 90.

[6] Zinn, *A People's History of the United States*, 76-101.

[7] See Bell, "The Referendum"; Charlow, "Judicial Review"; Eule, "Judicial Review of Direct Democracy," 1548-1586.

[8] Arkansas voters also passed a public initiative that required the legislature to use any constitutional means to block school integration in 1956. *Arkansas,* Initiative and Referendum Institute.

[9] Baldassare, *California in the New Millennium*, 86.

[10] California voter pamphlets for elections from 1911 to the present can be found at the Hastings College of Law Library web site at: http://holmes .uchastings.edu/ballot_pdf/index.html (accessed October 21, 2003).

[11] It is estimated that one needs a reading level equivalent to that of a third-year college student to comprehend such pamphlets. See Eule, "Judicial Review of Direct Democracy," 1509.

[12] See Penal Code Section 1170.12(b)(1) making reference to violent felonies at Section 667.5 and serious felonies at Section 1192.7.

[13] Zamora, "'Three Strikes' Faces California Challenge." See "1994 General Election Voter Pamphlet" at http://holmes.uchastings.edu/ballot_pdf/index.html (October 21, 2003). The opening summary of Proposition 184 in the voting pamphlet stated twice that the person's vote would not change existing law as the law had already been passed by the legislature in March of 1994. While true, these statements may have given voters the impression that the legislature had deliberated on the Three Strikes law, reasonably evaluated its pros and cons, and decided the law to be fair and cost effective--ignoring the fact that the law was really passed based on the emotional circumstances of Polly Klaas's death and driven by public opinion polls.

[14] CAL. CONST. art. II, Section 10(c).

[15] See Section 667(j) and Propostion 184, Section 4 at "1994 General Election Voter Pamphlet" at http://holmes.uchastings.edu/ballot_pdf/index.html (accessed October 21, 2003), page 65.

[16] Interviewed at various times by the author during 2002 and 2003.

[17] § 667(b).

[18] See *People v. Hazelton*, 14 Cal. 4th 101, 926 P.2d 423 (1996) (resolving potential conflict between initiative and legislative versions of the Three Strikes law with regard to out-of-state prior convictions). No court has expressly stated which statute has greater authority. Couzens and Bigelow, *California Three Strikes Sentencing*, 1.3.

[19] See §§ 667(e)(1) and (2) and 1170.12(c)(1) and (2).

[20] These mistakes are based on personal observations and discussions by the author with many people about the Three Strikes law.

[21] The law never mentions the word "strike"; it only refers to "prior convictions" and "current conviction(s)."

[22] See §§ 667(d)(1) and 1170.12(b)(1). "Serious" and "violent" strikes also include any out-of-state prior convictions that contain the same elements as corresponding crimes listed in §§ 667.5(c) or 1192.7(c). *People v. Hazelton*, 14 Cal. 4th 101, 926 P.2d 423 (1996).

[23] Moore, *The Legacy*.

[24] Vitiello, "'Three Strikes' and the *Romero* Case," 1683.

[25] Results of Proposition 21 for year 2000 were found at http://www .uchastings.edu/library/Research%20Databases/research_databases_main.htm (accessed October 21, 2003).

[26] Voters also received an additional 16-page "correctional supplement" voter pamphlet that included three additional legislative referendums. Both pamphlets can be found at the Hastings College of Law Library Web site at http://holmes.uchastings.edu/ballot_pdf/index.html (accessed October 21, 2003).

[27] "Terrorist threats" are perhaps not as sinister as might be suggested. An angry threat left on a message machine saying "I'm going to kill you" has qualified as a "terrorist threat."

[28] To attack a prior conviction a defendant generally must try to use whatever appellate procedures are available on the prior conviction itself in the hopes that there was some prejudicial trial error for grounds to reverse. In most cases such appellate procedures have been exhausted because of time deadlines. See also *Garcia v. Superior Court*, 14 Cal. 4th 953, 928 P.2d 572 (1997) (not allowing a defendant to use current proceedings to attack prior conviction on grounds of inadequate legal counsel in a non-capital case). As for attacking prior plea bargains, the process is even harder, and generally the defendant can only attack on the grounds that the plea bargain process was somehow done incorrectly--a very difficult exercise since most plea bargain proceedings entail a formal declaration of statements by all the parties involved in the courtroom process and the judge usually has a checklist to make sure all the proper statements are made by everyone. See *People v. Sumstine*, 36 Cal. 3d 909, 687 P.2d 904 (1984).

[29] § 459. Orozco's probation report from January 27, 1997 states: "Two brothers told police that they had returned to their apartment on 40th Street, after an absence of two days. As they entered the residence, they saw a man

they recognized as their landlady's son, standing inside the apartment. This man, the defendant, said to them in Spanish, 'I'm sorry brother. I won't do it anymore.' The defendant then ran past them and out the front door. As he did so, they could see that he had their telephone tucked into his waistband." Orozco's other strike was from a burglary conviction in 1981 where his wife has said Luciano "simply went along with an acquaintance." Conversations with Chana Orozco, Orozco's wife, at various times from 2002 through 2003.

[30] Cox and Wade, *The Criminal Justice Network.*

[31] In addition, according to § 2933.1, if the underlying current strike is "violent" then the amount of credit is further limited so that the person has to serve a sentence of at least 85 percent.

[32] See *In re Cervera*, 24 Cal. 4th 1073.

[33] *People v. Stofle*, 45 Cal. App. 4th 417, 52 Cal. Rptr. 829 (1996). *Stofle* was upheld by the California Supreme Court in *In re Cervera*, 24 Cal. 4th 1073.

[34] Information on the official paperwork by the California Department of Corrections and the subsequent memo was obtained through personal interviews with many family members of third strikers.

[35] Thus the beneficial application of the law became available to defendants even if they already had multiple convictions for drug offenses prior to when the law went into effect.

[36] See Legislative Analysis of Proposition 36 in the 84-page "2000 General Election Ballot" at Hastings College of Law Library found on the internet at: http://holmes.uchastings.edu/ballot_pdf/index.html (accessed October 21, 2003). See also § 1210.1. Thus, a person with a prior strike does not wipe out the prior strike for possession of a controlled substance by staying clean for the five-year period. If they commit another felony or a misdemeanor involving injury or threat of injury, the five-year period must start again. *People v. Superior Court (Martinez)*, 104 Cal. App. 4th 692, 128 Cal. Rptr. 2d 372 (2002).

[37] See § 1210.1(b).

[38] The minimal impact for three strikers is because most are drug addicts, with the result that most have probably been in trouble with the law or served time within the prior five years.

[39] See §§ 667(e) and 1170.12(c).

[40] See § 667(a)(1) and *People v. McDaniel*, 44 Cal. App. 4th 1590, 52 Cal. Rptr. 2d 595 (1996) interpreting § 1385(b) with § 667(c)(2); *People v. Turner*, 67 Cal. App. 4th 1258, 79 Cal. Rptr. 2d 740 (1998).

[41] The court held that even though two prior strikes from one action may have not been allowed to be used during the original sentencing phase--because § 654 precluded double punishment, the two counts could still be used to count as two prior strikes. *People v. Fuhrman*, 16 Cal. 4th 930, 941 p.2d 1189 (1997).

[42] See also *People v. Benson*, 18 Cal. 4th 24, 954 P.2d 557 (1998) (court said a residential burglary and then a stabbing even though in same action can count

as two prior strikes; then defendant received a third strike and a 25 years-to-life sentence for shoplifting a carton of cigarettes in 1994).

[43] See §§ 667(d)(3) and 1170.12(b)(3). *People v. Garcia*, 21 Cal. 4th 1, 980 P.2d 829 (1999). In *Garcia* the California Supreme Court decided that prior juvenile adjudications that can count as strikes include all of the same offenses that can be used to count as strikes for adults.

[44] This is based on interviews with many attorneys and reviewing many probation reports of prisoners.

[45] This section is based on the comments found at: Fox, *Use of Expunged Felonies*. See Welfare and Institutions Code § 1772.

[46] *People v. Daniels*, 51 Cal. App. 4th 520, 59 Cal. Rptr. 2d 395 (1996).

[47] *People v. Franklin*, 57 Cal. App. 4th 68, 66 Cal. Rptr. 2d 742 (1997).

[48] Angel Jaime Monge was found guilty and then sentenced under the Three Strikes law, but later the sentence enhancement was reversed by an appellate court for "lack of evidence" in proving the prior strikes. *People v. Monge*, 16 Cal. 4th 826, 941 P.2d 1121 (1997).

[49] See §§ 667(c)(3) and 1170.12(a)(3)

[50] §§ 667(c)(6) and (7); and §§ 1170.12(a)(6) and (7). However, if a person is sentenced as a second striker and they have been convicted of multiple current felonies not committed on the same occasion and not arising from the same set of operative facts, the greatest determinate term is selected as the principal term; any other consecutive term is a subordinate term. For nonviolent felonies, the subordinate term is one-third the midterm. For violent felonies, the subordinate term is one-third the midterm plus one-third the mid-term of any applicable enhancements. See §§ 1170.1(a) , 667(c)(6)-(8), 1170.12(a)(6)-(8), *People v. Nguyen*, 21 Cal. 4th 197, 980 P.2d 905 (1999).

[51] On November 4, 1995, Andrade stole five video tapes worth $84.70 from a Kmart store in Ontario and on November 18, 1995 he stole four additional video tapes worth $68.84 from a Kmart store in Montclair. See *Lockyer v. Andrade*, 538 U.S. 63 (2003).

[52] See §§ 667(c)(8) and 1170.12(a)(8). In addition, the Three Strikes law specifically states that there can be no aggregate term limitation. §§ 667(c)(1) and 1170.12(a)(1).

[53] See §§ 667(g) and 1170.12(e).

[54] See *People v. Trausch*, 36 Cal. App. 4th 1239, 1249, 42 Cal. Rptr. 2d 836 (1995).

[55] *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 532, 917 P.2d 628 (1996).

[56] Spiegel, "'3 Strikes' Loophole."

[57] Zimring, Kamin and Hawkins, *Crime and Punishment in California*, 3.

[58] See § 17(b).

[59] A "felony" in California is defined as "a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as

infractions." § 17. Petty theft with a prior is "punishable by imprisonment in the county jail not exceeding one year, or in the state prison." § 666. First degree burglary is punishable "by imprisonment in the state prison for two, four, or six years." § 461. The Penal Code specifically states that "every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor." § 602.

[60] See §§ 667(c)(2) and (4); and §§ 1170.12(a)(2) and (4).

[61] *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 532, 917 P.2d 628 (1996).

[62] See SB331 authored by Senator Hurtt (R) in 1996. AB1370, similar to SB331, in 1997 authored by Assemblyman Prenter (R), also died in the Democratic controlled Assembly Public Safety Committee.

[63] *People v. Williams*, 17 Cal. 4th 148, 161, 948 P.2d 429 (1998).

[64] *People v. Superior Court (Romero)*, 13 Cal. 4th at 531.

[65] *In re Saldana*, 57 Cal. App. 4th 620, 67 Cal. Rptr. 2d 183 (1997).

[66] When judges use discretion to classify a "wobbler" to a "misdemeanor," they must follow similar guidelines established by the California Supreme Court in the *Williams* case. See *People v. Alvarez*, 14 Cal. 4th 968, 928 P.2d 1171 (1997).

[67] See Vitiello, "Three Strikes: Rationality," 402.

[68] See Ibid., 400.

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CHAPTER 6

The Three Strikers and the Counties That Created Them

A THIRD STRIKERS STORY: RICKY FONTENOT

The deputy district attorney continued his closing arguments:

> Now, Mr. Fontenot's obvious claim is the following: Two sworn deputy sheriffs came to court and they are not telling you the truth. That's the obvious claim. He didn't say it explicitly, but that is the obvious claim. But what about that? If these--if these peace officers are going to do that, there's got to be some reason. There's got to be some reason for that. Nobody has yet advanced a reason why two, not one, but two deputy sheriffs would come to the court and basically tell you the same false story. Good heavens.[1]

It was Fontenot's testimony against two deputy sheriffs' testimony. They claimed to have seen Fontenot, who was a passenger in a parked pickup truck, place a handgun under the seat below him. Fontenot says he had never seen the gun before. The car was not Fontenot's and it wasn't even the driver's car--it was the driver's brother's car.

Fontenot had turned down a deal from the prosecutor that would have given him a prison sentence of only four years. With good time credits, it was possible that Fontenot would have had to serve only a little over three years. But Fontenot refused the deal. Fontenot was getting an income from a security agency he had helped to create and had regretted taking "deals" in the past. Plus he thought he had the evidence on his side.

It was midnight when the episode unfolded, and the street was illuminated only by the city lights and the headlights of the sheriffs' car. Fontenot was sitting in a large pickup that would have made it

virtually impossible for the deputy sheriffs while seated in their car to have seen anything going on in the pickup truck below the occupants' chests. They would have only been able to see Fontenot's hands placing a gun under his seat had they been standing right next to the windows of the pickup. Certainly a jury would see the logic that if somebody had a gun in their hands, he or she wouldn't wait until after a marked police car pulled up, parked, the doors opened, and two deputy sheriffs walked toward the car, and the sheriffs were right next to the car to then put the gun under the seat. Fontenot was sure the jury would be able to see that the police had to have been lying about seeing a gun in Fontenot's hands.

Fontenot, however, had guessed incorrectly. The officers' testimony was enough for the jury--and Fontenot was found guilty. Instead of the four-year sentence that he turned down, Fontenot received a 27 years-to-life sentence. This would mean that he would not be able to go in front of a parole board until the passage of 27 years--when Fontenot would be 51-years-old.

Ricky Fontenot's story brings to mind the old adage of "being in the wrong place at the wrong time." Had Fontenot been convicted of possession of a gun in another country, another state, many other California counties, even other parts of Los Angeles, he would not have received a sentence as a third striker. If Fontenot had been convicted of possession of a gun prior to March 7, 1994 he would not have had to worry about the Three Strikes law. If the conviction occurred after the newly-elected Los Angeles County District Attorney Steve Cooley took office in 2000, Fontenot also might not have been sentenced as a third striker. The majority of people Fontenot sees in prison have been convicted of much more serious offenses than he, and most of those have a much shorter sentence than he.

Fontenot's story is not unique; there may be hundreds or even thousands of men and women who are currently in California prisons wondering about the fairness of our so-called "justice" system.

THE STATISTICS OF THE THREE STRIKERS

As of December 31, 2002 the California Department of Corrections (CDC) reported that it had 39,349 strikers within its prison population (31,723 were second strikers and 7,626 third strikers).[2] Since the total prison population on the same date was 159,654, approximately 25 percent of the prison population was subjected to sentencing enhancements from the Three Strikes law.[3] Women made up only about 3.7 percent of second strikers and 1.0 percent of third strikers (as compared to 6.1 percent of the total prison population).

Table 6.1: Percentage of 2nd and 3rd Strikers Based on Race/Ethnicity about December 31, 2002

	Blacks	Hispanics	Whites	Others
Cal. Prison Population	30%	36%	29%	6%
Second Strikers	37%	33%	26%	4%
Third Strikers	45%	26%	25%	4%
Violent Third Strikers	48%	23%	25%	5%
Nonviolent Third Strikers	42%	28%	26%	4%
California Population	6%	32%	47%	14%

Sources: *California 1990, 2000 Census Comparison Tables*, California Department of Finance; *Facts and Figures, Second Quarter 2003*, California Department of Corrections; *Third Strikers in the Institution Population by County of Commitment, July 31, 2002*, California Department of Corrections.

As Table 6.1 indicates, compared to other race/ethnicities blacks have received a greater number of second strikes and third strikes relative to their population in California. In comparison to whites, blacks were 12 to 13 times more likely to acquire a third strike (and Hispanics were about 50% more likely than whites) based solely on their population in California.[4]

Table 6.2: Number of Second and Third Strike Commitments by Case Delivery Date to Prison, April 1994 Through December 2001

	Strike Case Delivery Date								
	1994	1995	1996	1997	1998	1999	2000	2001	Total
2nd Strikers	3,613	10,117	9,727	9,161	9,427	8,892	8,216	8,419	67,572
3rd Strikers	134	866	1,333	1,248	1,174	1,022	813	635	7,225

Source: *Number of 2nd and 3rd Strike Commitments by the Type of Admission, County of Commitment and the Striker Commitment Case Delivery Date: April 1994 Through December 2001*, California Department of Corrections.

The average age of third strikers when admitted to prison from the beginning of the law through December 31, 1999 was 36.3.[5] Table 6.2 presents the delivery date that the CDC received second and third strikers. As the table shows, the number of second strikers and third strikers admitted to prison peaked in 1995 and 1996, respectively. The number of second strikers admitted to prison has dropped off slightly since its peak in 1995 and has had a much more dramatic drop in 2000 and 2001 for third strike cases.

Table 6.3 shows the second and third strikers in prison by category of offense through 2002. Because many second strikers completed their sentence, and the most likely to complete their sentence first were nonviolent and non-serious second strikers, the percentage of second strikers who were convicted of nonviolent crimes was higher than the 65 percent in prison at December 31, 2002.

Table 6.3: Second and Third Strikers in Prison by Major Category of Criminal Offenses as of December 31, 2002

	Second Strikers	Percent	Third Strikers	Percent	Total	Percent
Violent Crimes	10,988	35%	3,467	45%	14,455	37%
Property Crimes	9,540	30%	2,254	30%	11,794	30%
Drug Crimes	8,418	27%	1,276	17%	9,694	25%
Other	2,777	9%	629	8%	3,406	9%
Total	31,723	100%	7,626	100%	39,349	100%

Source: *Second and Third Strikers: December 31, 2002*, California Department of Corrections.

The prison population statistics show that only about 45 percent of the third strikers are identified as having committed "crimes against persons," thus indicating that there were 4,159 prisoners serving at least 25 years-to-life for nonviolent crimes as of December 31, 2002.[6] Table 6.6 shows the number of second and third strikers in the prison population as of December 31, 2002.

Included within the list of third strikers were 353 persons sentenced for petty theft with a prior and 673 for simple possession of a controlled substance--two offenses that most likely would be treated with no or minimal jail time if they were a first offense for somebody. Research by Gilbert Geis and myself, using the same project concluded:

> . . . that there are a significant number of people sentenced under the Three Strikes law who are not "professional" thieves in terms of making a living from crime, but rather can be characterized as committing small-time property offenses to support their drug addiction. In addition, contrary to being "violent" episodes, a significant number of cases we reviewed show an offender who has never been convicted of a crime that has physically harmed another person.[7]

Table 6.4: Second and Third Strikers in the Prison Population by Offense Group as of December 31, 2002

	2nd Strikers	Percent	3rd Strikers	Percent	Total	Percent
Murder 1	0	0.0%	181	2.4%	181	0.5%
Murder 2	263	0.8%	138	1.8%	401	1.0%
Manslaughter	234	0.7%	40	0.5%	274	0.7%
Veh. Manslaughter	59	0.2%	7	0.1%	66	0.2%
Robbery	4,380	13.8%	1,547	20.3%	5,927	15.1%
Assault DW	2,128	6.7%	375	4.9%	2,503	6.4%
Other Assault	2,004	6.3%	453	5.9%	2,457	6.2%
Rape	219	0.7%	140	1.8%	359	0.9%
Lewd Act w/ Child	658	2.1%	262	3.4%	920	2.3%
Oral Copulation	55	0.2%	51	0.7%	106	0.3%
Sodomy	17	0.1%	16	0.2%	33	0.1%
Penet w/ Object	38	0.1%	22	0.3%	60	0.2%
Other Sex Off.	781	2.5%	145	1.9%	926	2.4%
Kidnapping	152	0.5%	90	1.2%	242	0.6%
Crimes-Violent	10,988	34.6%	3,467	45.5%	14,455	36.7%
Burglary 1st	2,525	8.0%	825	10.8%	3,350	8.5%
Burglary 2nd	1,792	5.6%	466	6.1%	2,258	5.7%
Grand Theft	697	2.2%	120	1.6%	817	2.1%
Petty Theft	1,974	6.2%	353	4.6%	2,327	5.9%
Rec. Stolen Prop.	714	2.3%	168	2.2%	882	2.2%
Vehicle Theft	1,121	3.5%	222	2.9%	1,343	3.4%
Forgery/Fraud	584	1.8%	64	0.8%	648	1.6%
Other Property	133	0.4%	36	0.5%	169	0.4%
Crimes-Property	9,540	30.1%	2,254	29.6%	11,794	30.0%

Table 6.4: Continued.

	2nd Strikers	Percent	3rd Strikers	Percent	Total	Percent
CS Possession	4,365	13.8%	673	8.8%	5,038	12.8%
CS Possess-Sale	2,102	6.6%	296	3.9%	2,398	6.1%
CS Sub.-Sales	1,221	3.8%	200	2.6%	1,421	3.6%
CS-Manufacting	223	0.7%	27	0.4%	250	0.6%
CS-Other	168	0.5%	45	0.6%	213	0.5%
Hashish Possession	4	0.0%	0	0.0%	4	0.0%
Marij. Poss-Sale	196	0.6%	4	0.1%	200	0.5%
Marij. Sales	115	0.4%	29	0.4%	144	0.4%
Other Marij. Off.	24	0.1%	2	0.0%	26	0.1%
Crimes-Drugs	8,418	26.5%	1,276	16.7%	9,694	24.6%
Escape	53	0.2%	14	0.2%	67	0.2%
DUI	333	1.0%	42	0.6%	375	1.0%
Arson	104	0.3%	28	0.4%	132	0.3%
Poss. Weap.	1,436	4.5%	393	5.2%	1,829	4.6%
Other Off.	851	2.7%	152	2.0%	1,003	2.5%
Crimes-Other	2,777	8.8%	629	8.2%	3,406	8.7%
Crimes-Nonviolent	20,735	65.4%	4,159	54.5%	24,894	63.3%
Total	31,723	100.0%	7,626	100.0%	39,349	100.0%

Source: *Second and Third Strikers: December 31, 2002*, California Department of Corrections.

THE CALIFORNIA COUNTIES AND HOW THEY USED THE THREE STRIKES LAW

California's counties are extremely diverse in their size and the number of people sent to prison under the Three Strikes law. Los Angeles County has been responsible for sending the most people to prison under the Three Strikes law. As of December 31, 2001, the county had 13,413 second strikers (42% of the state) and 3,046 third strikers (40% of the state) in the prison population. These numbers are so large that when comparing counties against each other, one has to be careful that the numbers from Los Angeles do not skew the results. At the opposite extreme, there are 23 counties with a population of less than 100,000; and 23 counties with less than 10 third strikers--including five counties--Alpine, Calaveras, Inyo, Plumas and Sierra--which did not have any third strikers in the prison population.[8]

Table 6.5: 2001 Second and Third Strikers and 2000 Population by County

County	2000 Population	Nonv. 2nd Strikers	Nonv. 3rd Strikers	Total Nonv. Strikers	Total 2nd Strikers	Total 3rd Strikers	Total Strikers
Los Angeles	9,519,338	8,819	1,701	10,520	13,413	3,046	16,459
Orange	2,846,289	1,195	232	1,427	1,597	366	1,963
San Diego	2,813,833	2,322	360	2,682	3,315	639	3,954
San Bern.	1,709,434	993	305	1,298	1,531	473	2,004
Santa Clara	1,682,585	740	203	943	1,190	399	1,589
Riverside	1,545,387	1,144	180	1,324	1,708	311	2,019
Alameda	1,443,741	184	24	208	480	122	602
Sacramento	1,223,499	840	212	1,052	1,360	465	1,825
Cont. Cost.	948,816	147	35	182	278	89	367
Fresno	799,407	458	98	556	746	191	937
San Fran.	776,733	56	9	65	177	36	213
Ventura	753,197	237	30	267	373	72	445
San Mateo	707,161	164	34	198	279	79	358
Kern	661,645	848	253	1,101	1,150	390	1,540
San Joaquin	563,598	435	38	473	662	98	760
Sonoma	458,614	57	7	64	123	18	141
Stanislaus	446,997	304	62	366	432	103	535
Monterey	401,762	118	12	130	203	28	231
Santa Barb.	399,347	126	32	158	186	64	250
Solano	394,542	78	6	84	180	25	205
Tulare	368,021	296	70	366	413	104	517
Santa Cruz	255,602	55	4	59	101	9	110
Placer	248,399	129	22	151	178	33	211
Marin	247,289	40	33	73	62	44	106
San Lu. Ob.	246,681	49	15	64	108	43	151
Merced	210,554	149	26	175	221	44	265
Butte	203,171	47	14	61	76	38	114
Yolo	168,660	86	6	92	143	9	152
Shasta	163,256	117	17	134	205	41	246
El Dorado	156,299	40	10	50	63	17	80
Imperial	142,361	12	4	16	21	11	32
Kings	129,461	93	38	131	131	76	207
Humboldt	126,518	22	1	23	49	5	54
Napa	124,279	35	7	42	56	16	72
Madera	123,109	52	13	65	81	24	105
Nevada	92,033	19	4	23	28	6	34

Table 6.5: Continued.

County	2000 Population	Nonv. 2nd Strikers	Nonv. 3rd Strikers	Total Nonv. Strikers	Total 2nd Strikers	Total 3rd Strikers	Total Strikers
Mendocino	86,265	17	2	19	31	3	34
Sutter	78,930	14	3	17	22	7	29
Yuba	60,219	19	8	27	37	11	48
Lake	58,309	43	2	45	72	7	79
Tehema	56,039	31	7	38	47	12	59
Tuolumne	54,501	28	1	29	46	2	48
San Benito	53,234	2	2	4	6	5	11
Siskiyou	44,301	17	2	19	26	6	32
Calveras	40,554	1	0	1	6	0	6
Amador	35,100	15	0	15	18	3	21
Lassen	33,828	16	5	21	26	13	39
Del Norte	27,507	3	1	4	14	7	21
Glenn	26,453	3	2	5	9	2	11
Plumas	20,824	1	0	1	2	0	2
Colusa	18,804	2	1	3	3	3	6
Inyo	17,945	2	0	2	5	0	5
Mariposa	17,130	3	1	4	6	2	8
Trinity	13,022	6	3	9	16	5	21
Mono	12,853	1	0	1	2	1	3
Modoc	9,449	5	2	7	10	3	13
Sierra	3,555	0	0	0	0	0	0
Alpine	1,208	0	0	0	0	0	0
Total	33,871,648	20,735	4,159	24,894	31,723	7,626	39,349

Source: *Second and Third Strikers: December 31, 2002*, California Department of Corrections.

Table 6.6: County Use of the 3 Strikes Law for Nonviolent 3rd Strikers in Comparison to the Rest of the State as of December 31, 2002							
		2002 Based on Four Factors					
Rank	County	Pop-ulation	Violent Crime	Total Arrests	Total Con-victions	Ave. of Four Factors	Non-Violent 3rd Strikers
1	Kings	240%	535%	435%	197%	352%	38
2	Kern	325%	414%	234%	169%	285%	253
3	Lassen	120%	408%	350%	175%	263%	5
4	Trinity	188%	636%	96%	114%	258%	3
5	Modoc	172%	387%	219%	173%	238%	2
6	Marin	109%	295%	232%	219%	214%	33
7	Tulare	156%	206%	161%	161%	171%	70
8	Los Angeles	177%	86%	163%	187%	153%	1,701
9	San Bernardino	149%	154%	105%	175%	146%	305
10	Sacramento	143%	163%	126%	112%	136%	212
11	Santa Clara	98%	170%	127%	94%	122%	203
12	Placer	72%	220%	93%	80%	116%	22
13	San Diego	105%	128%	112%	95%	110%	360
14	Merced	101%	137%	95%	96%	107%	26
15	Stanislaus	113%	118%	93%	93%	104%	62
16	Madera	86%	126%	118%	72%	100%	13
17	Shasta	85%	138%	70%	106%	100%	17
18	Fresno	100%	88%	100%	109%	99%	98
19	Tehema	102%	128%	78%	84%	98%	7
20	Yuba	108%	103%	75%	103%	97%	8
21	Riverside	95%	99%	106%	88%	97%	180
22	Orange	64%	141%	83%	77%	91%	232
23	Santa Barbara	65%	126%	97%	67%	89%	32
24	Butte	56%	126%	92%	70%	86%	14
25	Glenn	62%	156%	56%	53%	82%	2
26	El Dorado	52%	122%	75%	66%	79%	10
27	San Luis Obispo	49%	106%	75%	56%	72%	15
28	Napa	46%	99%	80%	55%	70%	7
29	Nevada	35%	105%	64%	48%	63%	4

Table 6.6: Continued.							
30	San Mateo	39%	79%	74%	51%	61%	34
31	Ventura	32%	72%	55%	80%	60%	30
32	Siskiyou	37%	110%	54%	33%	58%	2
33	Colusa	43%	73%	44%	43%	51%	1
34	San Benito	31%	53%	74%	42%	50%	2
35	Mariposa	48%	47%	51%	44%	47%	1
36	San Joaquin	54%	47%	48%	36%	46%	38
37	Contra Costa	29%	40%	30%	36%	34%	35
38	Yolo	29%	54%	25%	26%	33%	6
39	Sutter	31%	51%	25%	22%	32%	3
40	Del Norte	30%	55%	20%	18%	31%	1
41	Lake	28%	41%	26%	26%	30%	2
42	Monterey	24%	31%	33%	22%	28%	12
43	Imperial	23%	34%	18%	25%	25%	4
44	Tuolumne	15%	44%	21%	15%	24%	1
45	Mendocino	19%	27%	15%	16%	19%	2
46	Sonoma	12%	27%	17%	12%	17%	7
47	Santa Cruz	13%	18%	16%	11%	14%	4
48	Solano	12%	14%	12%	13%	13%	6
49	Alameda	13%	11%	11%	12%	12%	24
50	Humboldt	6%	11%	6%	5%	7%	1
51	San Francisco	9%	6%	5%	7%	7%	9
52	Amador	0%	0%	0%	0%	0%	0
52	Mono	0%	0%	0%	0%	0%	0
52	Alpine	0%	0%	0%	0%	0%	0
52	Calveras	0%	0%	0%	0%	0%	0
52	Inyo	0%	0%	0%	0%	0%	0
52	Plumas	0%	0%	0%	0%	0%	0
52	Sierra	0%	0%	0%	0%	0%	0

Sources: For this table and the remaining tables in this chapter see notes 9 and 10.

The best indicators of how the law is being used would be county by county statistics of eligible second and third strike arrests by offense, the number of people then charged under the Three Strikes law by prosecutors, and finally the breakdown of the disposition of these cases and the sentence for those who pled guilty, those who went to trial and were found guilty, and those who went to trial and were acquitted. The state does not require such statistics, so the population, violent crime, arrest, and conviction statistics are used here as the best proxies available. The results of the initial analysis can be found in Tables 6.6, and 6.7.[9]

Not shown but also calculated were tables demonstrating the use of the law by counties for second strikers and violent strikers. Those tables should that the counties use the law in a somewhat consistent pattern: if they use it heavily for second strikers, they also use it heavily for third strikers; and if they use it heavily for violent third strikers, they also use it heavily for nonviolent third strikers. Kern, Kings, and Los Angeles counties are consistently ranked high in all tables. The same consistency is somewhat true regarding counties that use the law the least. Alameda and San Francisco counties are ranked in the bottom half or near the lower end in all tables. The correlation between the use by each county (based on the four factors averaged together) for second strikers and third strikers was 69; and the correlation between the use by each county for violent and nonviolent third strikers was 71.

The results demonstrate some inconsistencies when the different factors are used to set a relative base among all the counties. For instance, Trinity County shows a dramatically high use of the Three Strikes law for the amount of violent crime committed within its jurisdiction, but average to below average use when compared to the rest of the state based on the number of arrests and convictions made in the county. Los Angeles County is the opposite. It demonstrates a below average use of the statute when compared on the variable of violent crime, but an above average use when compared with its population, arrests, and convictions.

Table 6.7 demonstrates the large disparity in the number of third strikers from each county based solely on drug offenses. While Kings County and Kern County have 250 to 650 percent of the third strikers in prison as relative to the rest of the state, there are 20 counties that have no third strikers for drug offenses. Kern County with 119 third strikers for drug offenses appears to especially stand-out in its use of the law, while San Francisco is at the opposite extreme without any. Alameda County also appears to use the law at a very low rate with a total of only 2 third strikers who received a third strike for a drug offense.

Table 6.7: County Use of the 3 Strikes Law for Drug Offender 3rd Strikers in Comparison to the Rest of the State as of December 31, 2002 Based on Four Factors.							
Rank	County	Pop-ulation	Violent Crime	Total Arrests	Total Con-victions	Ave. of Four Factors	Drug Offender 3rd Strikers
1	Kings	289%	643%	657%	237%	457%	14
2	Kern	516%	657%	342%	269%	446%	119
3	Trinity	204%	691%	95%	123%	278%	1
4	Marin	129%	350%	326%	260%	266%	12
5	Lassen	78%	266%	263%	114%	180%	1
6	Placer	107%	327%	136%	119%	172%	10
7	San Bernardino	163%	169%	117%	192%	160%	102
8	Madera	130%	190%	201%	108%	157%	6
9	Santa Clara	126%	219%	151%	120%	154%	79
10	Sacramento	153%	173%	143%	119%	147%	69
11	Butte	91%	206%	167%	114%	145%	7
12	Los Angeles	161%	78%	154%	170%	140%	492
13	Tehema	142%	179%	104%	118%	136%	3
14	Stanislaus	143%	150%	128%	118%	135%	24
15	Glenn	100%	255%	94%	86%	134%	1
16	San Diego	110%	136%	115%	101%	115%	116
17	Tulare	101%	133%	110%	104%	112%	14
18	Merced	101%	137%	102%	97%	109%	8
19	Siskiyou	60%	179%	111%	54%	101%	1
20	Santa Barbara	73%	141%	113%	75%	100%	11
21	Shasta	81%	133%	62%	102%	94%	5
22	Orange	64%	140%	83%	77%	91%	71
23	Riverside	87%	91%	101%	81%	90%	51
24	Yuba	88%	84%	68%	84%	81%	2
25	El Dorado	51%	120%	81%	64%	79%	3
26	Tuolumne	49%	145%	63%	48%	76%	1
27	Fresno	66%	58%	70%	72%	67%	20
28	Lake	45%	68%	37%	42%	48%	1
29	San Mateo	26%	53%	50%	34%	41%	7

30	San Joaquin	47%	40%	43%	30%	40%	10
31	Ventura	17%	39%	31%	43%	33%	5
32	San Luis Obispo	21%	46%	36%	24%	32%	2
33	Mendocino	31%	44%	23%	27%	31%	1
34	Imperial	19%	27%	15%	20%	20%	1
35	Yolo	16%	29%	13%	14%	18%	1
36	Solano	7%	8%	7%	7%	7%	1
37	Contra Costa	5%	7%	6%	7%	6%	2
38	Alameda	4%	3%	3%	3%	3%	2
39	Modoc	0%	0%	0%	0%	0%	0
39	Napa	0%	0%	0%	0%	0%	0
39	Nevada	0%	0%	0%	0%	0%	0
39	Colusa	0%	0%	0%	0%	0%	0
39	San Benito	0%	0%	0%	0%	0%	0
39	Mariposa	0%	0%	0%	0%	0%	0
39	Sutter	0%	0%	0%	0%	0%	0
39	Del Norte	0%	0%	0%	0%	0%	0
39	Monterey	0%	0%	0%	0%	0%	0
39	Sonoma	0%	0%	0%	0%	0%	0
39	Santa Cruz	0%	0%	0%	0%	0%	0
39	Humboldt	0%	0%	0%	0%	0%	0
39	San Francisco	0%	0%	0%	0%	0%	0
39	Amador	0%	0%	0%	0%	0%	0
39	Mono	0%	0%	0%	0%	0%	0
39	Alpine	0%	0%	0%	0%	0%	0
39	Calveras	0%	0%	0%	0%	0%	0
39	Inyo	0%	0%	0%	0%	0%	0
39	Plumas	0%	0%	0%	0%	0%	0
39	Sierra	0%	0%	0%	0%	0%	0

ANALYSIS OF COUNTY PATTERNS

Combining the county data together by the geographic regions, Table 6.8 shows how the region that makes up the Sierra area used the Three Strikes law much less than the rest of the state for both violent and nonviolent third strikers, and the North and Bay areas also used it less than average for nonviolent third strikers. The Central and Inland areas, on the other hand, demonstrated above average use of the statute for nonviolent third strikers. The results are shown both with and without Alameda, Kern, Los Angeles and San Francisco counties because of the large populations of these counties and the extreme manner in which these counties use the Three Strikes law. A broader analysis of the northern, central, and southern counties demonstrated that the northern counties use the Three Strike part of the law less than the rest of the state, although when based on violent crime rates for

comparison purposes, they appear to have a little more than average violent third strikers.[10]

Table 6.8: Third Strikers in the Prison Population from Counties of Different Geographical Areas as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

	North	Sierra	Coast	Bay	Central	Inland
All Counties:						
Number of Counties	14	12	8	12	8	4
Violent	112%	55%	114%	90%	116%	87%
Drug Crimes	76%	74%	119%	49%	176%	122%
Property Crimes	58%	55%	137%	52%	129%	122%
Nonviolent	65%	69%	131%	52%	145%	118%
*All Counties Less 4:						
Number of Counties	14	12	7	10	7	4
Violent	115%	56%	88%	126%	106%	93%
Drug Crimes	80%	77%	94%	89%	104%	139%
Property Crimes	62%	57%	100%	84%	114%	140%
Nonviolent	68%	71%	97%	86%	115%	134%

*Excludes Alameda, Kern, Los Angeles and San Francisco

Based on a county-by-county basis within each geographic area there were large disparities of use of the law. For example, in the Bay area, Marin, Santa Clara, and Sacramento Counties used the law significantly above average even though some of their neighboring counties used it significantly less than average. The same can be said in almost every geographic area (see Tables 6.6 and 6.7). The northern counties of Lassen and Modoc used the law in an above average manner as compared to the below average use by northern counties. Imperial County used the law significantly below average for nonviolent offenders as compared to the rest of the Inland counties which used the law in an above average manner. The table also demonstrates the significance that Alameda, Kern, Los Angeles, and San Francisco Counties have on the data. When the Bay area counties include Alameda and San Francisco Counties, use of the Three Strikes law for violent and nonviolent offenders is 90 percent and 52 percent, respectively. However, when calculating the rate of use for the Bay area counties without Alameda and San Francisco Counties, the violent and nonviolent rates increase to 126 percent and 86 percent. The inclusion of Los Angeles and Kern Counties have the opposite affect increasing significantly the use of the law for their areas.

Table 6.9: Third Strikers in the Prison Population from Counties of Different Dominant Political Parties as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

	Democrat	Republican	Neither Dominant
All Counties:			
Number of Counties	24	23	11
Violent	108%	96%	102%
Drug Crimes	72%	138%	136%
Property Crimes	86%	117%	120%
Nonviolent	83%	120%	126%
*All Counties Less 4:			
Number of Counties	21	22	11
Violent	107%	91%	109%
Drug Crimes	72%	110%	155%
Property Crimes	72%	119%	135%
Nonviolent	75%	112%	142%

*Excludes Alameda, Kern, Los Angeles and San Francisco

Table 6.10: Third Strikers in the Prison Population from Counties of Different Populations as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

	Less Than 50,000	50,000 to 100,000	100,000 to 300,000	300000 to 800,000	Greater Than 800,000
All Counties:					
Number of Counties	15	8	14	12	9
Violent	112%	48%	97%	78%	133%
Drug Crimes	46%	45%	94%	82%	132%
Property Crimes	52%	36%	79%	75%	149%
Nonviolent	59%	50%	87%	77%	140%
*All Counties Less 4:					
Number of Counties	15	8	14	10	7
Violent	113%	49%	100%	78%	129%
Drug Crimes	48%	47%	100%	51%	178%
Property Crimes	54%	38%	84%	73%	151%
Nonviolent	61%	53%	92%	68%	150%

*Excludes Alameda, Kern, Los Angeles and San Francisco Counties

Table 6.9 demonstrates the breakdown of third strikers in the prison population based on the dominant political party of the county.

As one would expect, counties defined as Republican tended to use the law for third strikers more than counties defined as Democrat, except for violent third strikers, in which case the Democratic counties used the law more than Republican counties. Once again, there were exceptions: Los Angeles, Marin, and Sacramento Counties are considered to have large numbers of registered Democrats as compared to Republicans, but also appear to use the law more than the average.

Table 6.10 shows the number of third strikers based on the populations of each of the counties. The counties with populations greater than 800,000 people used the law on an above average basis, while counties with a population of less than 100,000 tended to have a below average number of third strikers.

Tables 6.11 and 6.12 demonstrate that as the percentage of the black and Hispanic populations increase--and likewise the white population decreases--the counties have a greater percentage of third strikers in the prison population. Once again, however, there were significant exceptions. Alameda and Solono counties have the largest percentage black populations (above 14 percent), but are among the counties that have the least number of third strikers--especially for nonviolent crimes. Imperial County has the highest percentage of Hispanics (above 72 percent), but is also among the counties that have used the Three Strikes law the least.

Table 6.11: Third Strikers in the Prison Population from Counties of Different Black Population Percentages as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

	Less Than 1 Percent	1 Percent to 5 Percent	Over 5 Percent
All Counties:			
Number of Counties	20	24	14
Violent	58%	85%	137%
Drug Crimes	56%	86%	137%
Property Crimes	54%	82%	143%
Nonviolent	56%	84%	139%
*All Counties Less 4:			
Number of Counties	20	24	10
Violent	59%	86%	132%
Drug Crimes	59%	91%	126%
Property Crimes	56%	86%	133%
Nonviolent	58%	89%	128%

*Excludes Alameda, Kern, Los Angeles and San Francisco

Table 6.12: Third Strikers in the Prison Population from Counties of Different Hispanic Population Percentages as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

	Less Than 10%	10% to 25%	25% to 40%	Over 40%
All Counties:				
Number of Counties	14	22	12	10
Violent	77%	96%	87%	129%
Drug Crimes	76%	52%	134%	130%
Property Crimes	60%	53%	109%	154%
Nonviolent	68%	54%	113%	148%
*All Counties Less 4:				
Number of Counties	14	20	11	9
Violent	78%	137%	80%	100%
Drug Crimes	80%	92%	118%	87%
Property Crimes	63%	84%	116%	116%
Nonviolent	70%	89%	112%	113%

*Excludes Alameda, Kern, Los Angeles and San Francisco

Table 6.13 shows the number of third strikers in prison from counties based on the county unemployment rates for the year 2000. In general, counties with less than a four percent rate of unemployment tended to have below average three strikers--but there does not seem to be any pattern when counties had a greater than four percent unemployment rate. The data also shows a significant difference when Alameda, Kern, Los Angeles, and San Francisco Counties are not included. For instance counties with 8 percent to 12 percent unemployment have a 179 percent use of the law when the four counties are used in the analysis, but only 70 percent when they are excluded.

Table 6.13: Third Strikers in the Prison Population from Counties of Different Year 2000 Unemployment Rates as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

	Less Than 4%	4% to 8%	8% to 12%	Over 12%
All Counties:				
Number of Counties	15	23	12	8
Violent	77%	132%	103%	106%
Drug Crimes	61%	132%	179%	91%
Property Crimes	65%	147%	102%	119%
Nonviolent	63%	141%	127%	118%
*All Counties Less 4:				
Number of Counties	13	22	11	8
Violent	95%	115%	76%	113%
Drug Crimes	101%	114%	70%	100%
Property Crimes	98%	110%	59%	132%
Nonviolent	96%	109%	67%	130%

*Excludes Alameda, Kern, Los Angeles and San Francisco

Table 6.14 demonstrates the number of third strikers from counties based on per capita income from 1999. Counties with a per capita income greater than $30,000 tended to use the law on a below average basis, and counties with a per capita income less than $20,000 on an above average basis. Once again, however, there were some significant exceptions: Imperial County with an unemployment rate of over 26 percent and per capita income of only about $17,500 was among the counties to use the law the least, while Marin County with an unemployment rate of only about two percent and per capita income of greater than $57,000 was among the counties that used the law for third strikers the most.

Table 6.14: Third Strikers in the Prison Population from Counties of Different Year 1999 Per Capita Income as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

	Less Than $20,000	$20,000 to $25,000	$25,000 to $30,000	Over $30,000
All Counties:				
Number of Counties	12	22	12	12
Violent	140%	87%	137%	69%
Drug Crimes	265%	96%	125%	50%
Property Crimes	163%	100%	140%	54%
Nonviolent	200%	96%	137%	52%
*All Counties Less 4:				
Number of Counties	11	22	11	10
Violent	119%	92%	126%	86%
Drug Crimes	139%	109%	100%	86%
Property Crimes	130%	114%	100%	84%
Nonviolent	147%	108%	102%	83%

*Excludes Alameda, Kern, Los Angeles and San Francisco Counties

Table 6.15: Third Strikers in the Prison Population from Counties Depending on the Number of State Prisoners in each County as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

	Less Than 2,000	Over 2,000
All Counties:		
Number of Counties	39	19
Violent	67%	157%
Drug Crimes	49%	214%
Property Crimes	54%	193%
Nonviolent	53%	198%
*All Counties Less 4:		
Number of Counties	37	17
Violent	78%	132%
Drug Crimes	75%	137%
Property Crimes	76%	134%
Nonviolent	77%	134%

*Excludes Alameda, Kern, Los Angeles and San Francisco

Table 6.15 demonstrates how counties with over 2,000 state prisoners had an above average number of third strikers--almost twice as many as compared to the rest of the counties when the results included Alameda, Kern, Los Angeles, and San Francisco Counties. One significant exception is Del Norte County--home of the super-max prison at Pelican Bay which is among the counties that have used the law the least against nonviolent third strikers.

Table 6.16: Third Strikers in the Prison Population from Counties of Different Violent Crime Indexes as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

	Less Than 400	400 to 600	600 to 800	Over 800
All Counties:				
Number of Counties	22	16	10	10
Violent	101%	88%	116%	107%
Drug Crimes	81%	88%	138%	97%
Property Crimes	79%	81%	108%	123%
Nonviolent	83%	82%	119%	113%
*All Counties Less 4:				
Number of Counties	22	16	9	7
Violent	103%	90%	119%	95%
Drug Crimes	85%	94%	105%	115%
Property Crimes	83%	85%	104%	130%
Nonviolent	86%	86%	108%	121%

*Excludes Alameda, Kern, Los Angeles and San Francisco

Tables 6.16 and 6.17 show the number of third strikers from counties based on their violent and property crime indexes. While the counties with higher violent crime rates tended to have more third strikers, surprisingly, the results are not as significant as might be expected.

Table 6.17: Third Strikers in the Prison Population from Counties of Different Property Crime Indexes as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

	Less Than 3,000	3,000 to 4,000	4,000 to 5,000	Over 5,000
All Counties:				
Number of Counties	17	17	16	8
Violent	121%	89%	118%	93%
Drug Crimes	65%	95%	172%	49%
Property Crimes	87%	83%	169%	56%
Nonviolent	84%	86%	168%	55%
*All Counties Less 4:				
Number of Counties	17	17	14	6
Violent	125%	91%	85%	141%
Drug Crimes	68%	102%	106%	108%
Property Crimes	92%	87%	116%	105%
Nonviolent	89%	91%	110%	110%

*Excludes Alameda, Kern, Los Angeles and San Francisco

CONCLUSION

The analysis of how counties used the Three Strikes law shows some general patterns: Counties with large urban populations (and higher black and Hispanic populations) and higher crime rates tended to use the Three Strikes law more for nonviolent third strikers in comparison to rural counties with low crime rates. Republican-dominated counties and those with large state prisons also tended to use the law more than average. But more significantly, the analysis demonstrated that for every identifiable pattern there were some major exceptions, indicating that the use of the law is possibly based more on the discretion of prosecutors than the sociological or economic factors of the different counties.

NOTES FOR CHAPTER 6

[1] The quote is taken from court transcripts of *The People of the State of California vs. Ricky Fontenot* (YA021199), June 2, 1995, p. 283, and the story is from the transcripts and interviews with Ricky Fontenot (July 29, 2000) and Fontenot's attorney, Marvin Hamilton (October 3, 2000).

[2] *Second and Third Strikers: December 31, 2002*, California Department of Corrections.
[3] *Prison Census Data,* California Department of Corrections.
[4] *California 1990, 2000 Census Comparison Tables*; *Third Strikers in the Institution Population: July 31, 2002.*
[5] *Third Strike Cases, December 31, 1999,* California Department of Corrections.
[6] Based on a sample of 1,300 cases from the cities of Los Angeles, San Diego, and San Francisco, it was estimated that "more than 75% of Three Strike defendants in this sample would face a 25-year minimum sentence for a current nonviolent offense." Zimring, Hawkins and Kamin, *Punishment and Democracy*.
[7] Kieso and Geis, "The Wide and Unreasonable Reach."
[8] *Reported Crimes and Crime Rates: 1992-2001*, California Criminal Justice Statistics Center; *Second and Third Strikers: December 31, 2002*.
[9] Tables 6.8, 6.9, 6.10 and 6.11 (and the other subsequent tables analyzing use of the Three Strikes law by counties) were based on the following sources: *Census 2000, SF1 Profile: State and County Population Summary,* California Department of Finance; *Final Law Enforcement, Prosecution, and Court Dispositions,* California Criminal Justice Statistics Center; *Reported Crimes and Crime Rates: 1992-2001; Second and Third Strikers: December 31, 2002*.
[10] The detailed information and explanation of sources presented in these tables can be found at Kieso, "The California Three Strikes Law," 181-212.

CHAPTER 7

Discretion and the Three Strikes Law

When the Three Strikes law was first written it looked as if Mike Reynolds wanted all the power and control--the law appeared mandatory and gave little discretion to anybody within the criminal justice system. Most interpreted the law to give prosecutors leeway in the "interests of justice" but such discretion could not be used for plea bargaining. Since prosecutors already are supposed to make decisions based on justice, the Three Strikes law was not granting them anything new--but was actually limiting them. There was little use in waiving strikes if prosecutors could not obtain a guilty plea in exchange. From a practical standpoint, prosecutors have unlimited discretion when they are deciding to indict someone--so any limitation would have been frowned upon. In addition, Reynolds probably was not that concerned with the discretion in the "interests of justice" rule. The popular belief, as promoted by the entertainment and news industry, is that the political pressures and psychologically ingrained motivations to "win" in an adversary system push prosecutors to use all the tools they can to obtain the harshest punishments for the defendants. Prosecutors who obtain the most "wins" and get the stiffest punishments generally advance their careers. As will be discussed in the following chapters, this does not always hold true--especially in regard to the vast amount of crime processed through the system that barely gets noticed by the media.

If the mandatory provisions of the Three Strikes law had gone into effect as they appeared to be written, the RAND Corporation estimated that the prison population would double and cost an extra $5.5 billion annually.[1] Peter Greenwood, from RAND, however, correctly predicted that most likely the bill's stiff penalties would be applied selectively because the system could not handle such an increase. "That's ironic," he said, "because 'Three Strikes' was written to take this out of the hands of prosecutors and judges."[2]

As the death of Polly Klaas became more distant, the economy started doing better, natural catastrophes decreased, crime rates dropped, and people became transfixed with the O.J. Simpson trial, the public sentiment toward harsh punishments began to wane. The news industry changed its focus and began to report the unintended consequences of the Three Strikes law--especially the harsh punishments for minor crimes--and gradually the spotlight used by politicians to beat their chests for hasher punishments began to fade. Politicians, though, did not jump to the other side and demand changes in the law; instead they tried to ignore the issue.

As part of the collective conscious of society, employees of the criminal justice system appeared to react in a manner consistent with the sentiments of the public. When the Three Strikes law was first passed and public opinion was strongly in favor of it, most prosecutors either did not offer plea bargains or did not give very good deals to defendants. Judges also were less likely to override and change the penalty stipulated by the prosecutors. As public support appeared to wane and "crime" became less of a public concern, prosecutors and judges began waiving more prior strikes. From a risk analysis standpoint, however, prosecutors and judges viewed the process of waiving strikes with greater trepidation than not waiving strikes. The fear that the next Richard Allen Davis would be somebody they had waived a prior strike for was always a factor that caused prosecutors and judges to second guess waiving prior strikes. Locking someone up for life reduced the risk because the judges and prosecutors would have only their conscience to worry about, and perhaps the occasional news story about the harsh consequences of the Three Strikes law--and such stories tended to focus on the law rather than on the individual prosecutor or judge.

Even though both prosecutors and judges wanted to retain as much of their discretion as possible, in some cases the use of discretion was seen as something to have the other person do so that they could minimize their individual risk. Prosecutors would sometimes not use their discretion, hoping that the judge would do so, and judges would sometimes not use their discretion, hoping that prosecutors would. In this way, defendants sometimes would be caught between two sides who might be trying to bluff the other into using their discretion. When neither side backed down the defendant would end up the ultimate loser, and with a harsher than normal sentence.

DISCRETION BY AGENCIES OTHER THAN PROSECUTORS

The Victims

The decision of a victim to report a crime may be the most important discretionary moment in the criminal justice system. One study found that 95 percent of criminal incidents known by a large urban police department were acquired from citizen initiative.[3] A small change in the percentage of crimes reported to the police can significantly affect the system. The system would probably be overwhelmed if there was a sudden increase of 10 or 20 percent in victims reporting crimes to the police. In addition, the public's perceptions of crimes could be distorted a great deal because most people and the media identify the crime rate in terms of the amount of crime reported to the police. The amount of crime not reported--commonly called the "dark figure"--was largely unknown until surveys were begun in the late 1960s. In 1972 the United State Census Bureau started an annual survey known as the National Criminal Victimization Survey (NCVS).[4]

The consequences of the harsh punishments of the Three Strikes law might give some victims extra hesitation before reporting a crime--especially if the crime was committed by a family member, a friend, or an acquaintance. Turning someone in who might be facing a two- or three-year sentence is much different than turning someone in who might get 25 years-to-life. Family members and friends who are victims of crime may be just as hesitant to report the offense to a survey-taker as they would to the police because they do not want to risk divulging the information for fear of unduly imperiling the offender. Therefore, any survey analysis on victims during the years the Three Strikes law has become effective may be understated as compared to prior to the enactment of the Three Strikes law.

Shane Reams received a 27 years-to-life sentence for aiding and abetting a $10 drug deal. His prior strikes were the result of burglaries of his mother's home and the next door neighbor's house prior to the enactment of the Three Strikes law. Shane had been charged with burglary after his mother, Sue Reams, had urged him to turn himself in to the police. Sue was hoping that her son would receive drug rehabilitation to help him with an addiction. Shane did not receive any rehabilitation, but learned more about drugs and crime while in prison. In addition, unknown to him in the 1980s, the burglaries would qualify as strikes under the future Three Strikes law. Today his mom regrets talking him into turning himself in to the police and advises people not to do the same.

Victims opposed to the Three Strikes law might also be hesitant to report crime because they do not want to be part of the possible unjust application of the law. Some of the current decrease in reported crime in California might be the result of this phenomenon. Unfortunately,

NCVS data is broken down only by region rather than by state, so a comparison of the decrease in survey-reported crime and police-reported crime for the state of California cannot be made. Not only might crime victims be hesitant to call the police for a felony violation that could give a third strike, but they also might be reluctant to report burglary and other crimes that could qualify as a prior strike.

In California, domestic violence-related calls for assistance increased from 181,112 in 1987 to a peak of 250,439 in 1994 and then decreased to 198,031 in 2001.[5] It is not known how much of the decrease from 1994 to 2001 is due to less domestic violence versus a change in calls for assistance. This is a possible research subject that would be important to the analysis of the Three Strikes law. Knowing if the Three Strikes law has resulted in a significant number of victims not reporting crimes would have important policy implications.

The Police

Police are the first government officials to make a decision about whether a person should be charged with a crime or not, and they thus can greatly influence which criminal acts, which types of people, and which geographical areas will be targeted. The administration can set broad policy through budget allocations, protocol, and how officers are promoted. The officer on the beat has personal discretion, but is also pressured to act in specific ways by the actions of the other officers on the force. Because of officers' high degree of loyalty and dependability, the decisions they make are greatly influenced by the culture of their peers.[6] Along with the direct discretion to make arrests, police officers can also influence or have indirect discretion on how cases are prosecuted: the police and prosecutors often work like a team and if the police believe that prosecutors are being too lenient or not putting in as much an effort as they would like, the officers might be able to put pressure on the District Attorney's office and act in ways that thwart the will of the District Attorney's office.

The police officer's primary limitation on the use of discretion is dictated by law. Through the statutes and the constitutions passed, the police are given the rules they must follow. Prosecutors also influence police discretion by the effort and sentencing they seek when charging indictments and prosecuting arrestees. Prosecutors have greater discretion than police officers because they have the authority not to prosecute the arrests the police make and the ability to seek arrest of those the police have not charged. The police are also limited by local governments which set the budget for the police department and the judicial branch which helps shape the rules the police must follow when making investigations and arrests.[7]

Based on my limited research, I have not found any directives or administrative policy changes that have been made by any police

departments because of the passage of the Three Strikes law. No special Three Strikes training has been required and generally the police officers work their beats in the same manner as prior to the Three Strikes law.[8] The following analyses are observations of some subtle changes or concerns in policing that may have resulted because of the Three Strikes law.

Since police officers usually acquire an "us" versus "them" attitude when thinking about criminals and crime policy, they generally favor harsher punishments against offenders. With regards to the Three Strikes law, however, because the punishment is so severe, officers have become more concerned about their personal safety. Now that simple possession of illegal drugs, petty theft, or other minor felonies can be the difference between freedom and a life sentence for a person being arrested, one would expect more potential arrestees to flee or put up a greater fight. In the first two and a half years of the enactment of the Three Strikes law, it was estimated that there were six killings of officers that could be tied partially to the law.[9] When it was reported that police fatalities were up 27 percent in the United States in 1997, Los Angeles County sheriff deputies blamed the Three Strikes law for the increase in California. "We find more and more guys armed and they don't care," said Deputy John Keiss. "They are going to fight you as much as they can because they don't want to go back to prison," said Deputy Brian Torfney.[10] Los Angeles police spokesman Lt. Anthony Alba, referring to a suicide of a man police were about to apprehend, said: "Third strikers and second strikers facing a third strike have performed violent acts before, based on the theory that they're going to jail for long time. It's not unusual," Alba said. "We've had several armed situations involving third strikers. They resist or commit suicide."[11]

Most arrests are made by police officers when the suspect is surprised in the act of the crime, remains at the scene, or is held by others. In other cases, the police may have set up a sting operation, such as when they attempt to purchase drugs from street dealers. In such cases, police officers generally do not know the suspect and therefore do not know their prior record. Not until they are back at the station do they learn about the prior records of many of their arrestees. In these circumstances, the Three Strikes law is not a factor in their discretion to make the initial arrest. Many times, however, charges are not brought against a person until after the officers have returned to the station and make out a report of the incident. In these circumstances, the prior record might have an effect on how an officer fills out the report. In a discussion with a former Los Angeles police officer, he indicated when there were a number of suspects but no indication who the main culprit was, the police would write the report so that the suspect with the worst prior record would be identified as the primary

suspect or most culpable because he or she was regarded as more "deserving" of the greater charges.[12] The same officer indicated that he and others tended to receive better commendations if they arrested a suspect and it turned out the suspect would receive prison time (a sentence of a year or greater) rather than only jail time. The effect, therefore, is that the Three Strikes law might get applied to someone where it should not have been; and result in its greater application than actually necessary.

At a more sinister level, a police officer might be able to use the Three Strikes law as a tool to help put people in prison that he or she does not like or would prefer to see off the streets. Rather than hit or beat up an offender--which is often the way that police officers retaliate when an arrestee has treated them with disrespect--the officer might exaggerate the type of crime committed or make up a crime that did not actually occur. Michael Caldero, explaining ethics to police officers, said: "I can beat up someone, and they have some marks on them. Maybe a trip to the hospital. Or I can pull out my magic pencil. You guys know what the magic pencil is. I start writing, and he's got a year in jail."[13] In a Three Strikes case, the result could be 25 years or more.

This scenario proved to be the case in revelations made by former Los Angeles police officer Rafael Perez in what became known as the Rampart Scandal.[14] Perez had been caught stealing narcotics from a police evidence storage facility and chose to seek a lighter sentence by becoming a police informant on other officers in the Rampart Division.[15] Through Perez's testimony, it was discovered that Joseph Jones had taken a plea for an eight-year sentence to avoid the possibility of a 25 years-to-life sentence under the Three Strikes law for a drug conviction even though Jones had been factually not guilty. Apparently Rampart police had tried to recruit Jones as an informant who would identify drug dealers the officers could rob. "When he refused to cooperate, they framed him," said attorney David E. Brockway, who represented Jones.[16] When Jones wanted to submit to a polygraph test and fight the possibility of a 25 years-to-life sentence, he was advised by his lawyer to plead guilty. "With that pressure over his head, and the very convincing and persuasive officers . . . testifying against you, what were his chances at trial?" Brockway said.

On March 5, 1997, Ruben Rojas was arrested after Rafael Perez and another undercover officer allegedly watched Rojas sell rock cocaine to two men. According to later testimony by Perez, however, the sale never occurred. The other police officer, Nino Durden, testified at a preliminary hearing that Perez and he watched Rojas make two separate drug sales. Durden said both times the customers handed Rojas money, Rojas then walked to a nearby telephone pole, picked up rocks of cocaine, and then handed the rocks to the customers. Perez and Durden then called for a police squad car to arrest Rojas. Two

months after pleading no contest and receiving a six-year sentence, Rojas wrote a letter to the judge proclaiming his innocence. In it Rojas wrote: "I was informed that I was facing 25 years-to-life by my defense counsel and that there was no way I could have won my case because I was up against a police officer."[17]

As the Perez confessions indicate, framing someone under the Three Strikes law who has two prior strikes is relatively easy. Without the Three Strikes law, if someone wanted to frame somebody and have them receive or threatened with a significant amount of time in prison, they would have to cause severe injuries or death to a victim. Setting up such a scenario so another person is found guilty is complex and fraught with many dangers. However, setting someone up through a violation of possession of drugs, stolen goods, or a weapon is much easier. A person with two prior strikes, therefore, could be the subject of corruption or a frame-up much easier than prior to the Three Strikes law.

Indirectly the Three Strikes law exaggerates all of the problems involving police discretion. A Three Strikes sentence embodies the racial profiling and racial discrimination cases of the past. In the case of Ricky Fontenot discussed at the beginning of chapter 6, he had a prior strike for assault with a deadly weapon. Fontenot was involved in a fight that had three white men against three black men. When the police arrived they immediately arrested the black men and the white men were treated as the victims. When I called one of "the victims" who had allegedly been hit by one of the black men with a pole, he admitted that "We were all wrong."

The accumulation of racial profiling over the last decades results in many blacks having significantly longer rap sheets and prior strikes than they might have had had they been white. When people were convicted after the enactment of the Three Strikes law, those coming into the courtrooms facing Three Strikes were disproportionately people of color, not only because they committed more street crimes and were racially profiled more than whites, but also because historical racial profiling and racial discrimination had resulted in them having disproportionately more severe prior records than they should have had. The result is that the racial problems of crime are exponentially factored into the incarceration rates associated with the Three Strikes law; thus, it is no surprise that even though blacks make up only 6 percent of the California population they make up 44 percent of the third strikers.

The Judges

Chapter 5 discusses many of the key decisions that have been made by the California Supreme Court and the appellate courts. In sum, the major court opinions permit trial judges to: (1) waive or eliminate one

or more prior strikes "in the interests of justice"--thus treating the defendant as a two striker or not as a striker; (2) reduce from felony status to misdemeanor status certain crimes which are known as "wobblers"--thus taking the defendant outside the Three Strikes law; and (3) have separate sentences run concurrently when the current conviction counts were committed on the same occasion or arise from the same set of operative facts.

The discretion by judges, however, is quite limited. As discussed in chapter 5, the judge has to give specific reasons that meet the criteria of the *Williams* case when using his or her discretion. But, more importantly, to limit the effects of the Three Strike law he or she must try to show that the defendant falls "outside the spirit" of the Three Strikes law, a decision which is being decided on a case-by-case basis by the California Supreme Court and the appellate district courts.[18]

Has the California Supreme Court said it's an abuse of discretion when a trial judge has not used discretion to waive a prior strike or classify a "wobbler" as a misdemeanor? Not yet. In fact, there are only a couple of appellate district cases that have taken this position so far. From July 29, 1996 until October 27, 1997 Alan Cluff had failed to register with the local police as a sex offender within five days of his birthdays on July 29, 1996 and 1997.[19] Cluff had nine prior strikes involving lewd and lascivious conduct with a child under the age of 14 from incidents in 1983 and 1984. At sentencing, the trial judge, George A. Miram, refused to use his discretion and gave Cluff, 48 at the time of sentencing, a 25 years-to-life sentence under the Three Strikes law.

When Cluff appealed his sentence, though, the First Appellate District Court of Appeals remanded the case back to Miram saying that the failure to register was a technical violation and therefore Cluff should have had his prior strikes waived.

The California Supreme Court has ruled in three cases that the trial judge did not abuse his or her discretion when decreasing a Three Strikes sentence. In the *Romero* case, the Court said the trial judge did not abuse his discretion when he waived a prior strike and gave Romero a six-year sentence instead of 25 years-to-life. Romero was found guilty on May 9, 1994 of possessing 0.13 grams of cocaine base and his prior strikes were residential burglary (September 2, 1986) and attempted residential burglary (November 16, 1984). His other convictions included second degree burglary (June 25, 1980) and two separate possessions of a controlled substance (April 6, 1992 and June 8, 1993).[20]

In *People v. Alvarez* the California Supreme Court said it was not an abuse of discretion for the trial judge to assign "misdemeanor" status to a wobbler crime when Steven Alverez was found guilty of possession of 0.41 grams of methamphetamine (and Alvarez also admitted he was under the influence of marijuana at the time of arrest

and swallowed the marijuana cigarette in his mouth).[21] Alverez had four prior strikes of residential burglary (the last in 1987), four prior misdemeanor convictions, and had violated parole on several occasions. He received a sentence of one year in jail and three years of probation.

Frequently found in appellate decisions regarding Three Strike cases are reversals by appellate courts saying that trial judges abused their discretion when waiving one or more prior strikes.[22] This has had a chilling affect on judges using their discretion. As an example, during the trial of Daniel Zichwic, Judge Charles Hayden said: "I would like to have Mr. Zichwic serve about 10 or 15 years on this, but I truly do not feel within the law that I can do that given the parameters set forth in the various cases. So I don't feel I have the legal authority to do that. I am sorry."[23] Hayden continued, "It's a long, hard sentence. I don't like it. I don't think I have a choice." Zichwic, therefore, received a 25 years-to-life sentence for breaking into a utility van. His prior record was one residential burglary in 1984, two residential burglaries in 1985, and two residential burglaries in 1992.

In 1997 the *San Francisco Recorder* reported that Santa Clara County judges used their discretion in only 5.5 percent of "strikes" cases; Contra Costa County judges in only 5 percent of cases; and in Los Angeles County about 21 percent of cases.[24]

Jury Discretion

One of the major reasons that jurors of ordinary people rather than government officials make major decisions at trials is because of the historical distrust people have had of government bodies and the need for a buffer between a possibly over-powerful government and acts of tyranny against the populace.[25] At the time of the establishment of the United States Constitution, mistrust in government institutions was extremely high and some of the framers of the Constitution expressed the idea that jurors should not only decide the facts of a case, but also matters of law.[26]

Over the past two hundred years, the ability of jurors to decide matters of law across the nation has been curtailed by legislation, judicial rules, and appellate decisions.[27] Today, California jury trials experience these limitations when during *voir dire* potential jurors are required to answer in the affirmative that they will only follow the law as expressed to them in the instructions presented by the judge. Jurors who do not say "yes" are dismissed from jury duty, and those who answer in the affirmative but later express a desire to not follow the law during deliberations can be replaced by an alternate juror for failure to follow their oath.[28]

California also has the rule that when jurors deliberate on the guilt or innocence at a trial, they are not to take into account the possible

sentence or punishment of the defendant.[29] California jurors, therefore, are generally not allowed to hear or see any testimony or evidence about the possible punishment and told not to discuss the possible penalty during jury deliberations.[30] This matter has been especially pervasive regarding the Three Strikes law as prosecutors have been fearful that jurors will "nullify" a guilty verdict because they might not believe the defendant deserves a life sentence for a minor crime.

"Jury nullification" is most often an issue when there is a controversial law. Jurors who disagree with a law might consciously subvert the system as a matter of protest or because they do not morally want to be part of an unjust process. In addition, jurors who have concerns about a law or overly harsh sentence might consciously or subconsciously raise their standards of evidential proof of the facts. In a criminal trial a guilty verdict has to be proved by the prosecution "beyond a reasonable doubt." Such a standard is very vague and gives jurors a considerable amount of flexibility. Research studies have demonstrated that when mock jurors were confronted with a decision that involved a harsh punishment for a controversial law they were less likely to render a guilty verdict even though the factual evidence of guilt was the same in cases that involved less punishment and less controversial laws.[31]

"Jury nullification" has become a more predominant issue in California as a result of the Three Strikes law.[32] News reports tell of jurors not wanting to follow the law because of what they believe might result in an unjust sentence, and courts have crafted new rules trying to prevent "jury nullification" from occurring. The case of Steven Vincent Bell was publicized in newspapers and reported on the television news magazine show "60 Minutes" primarily because of the actions of two jurors. Bell was being tried on a burglary charge after he was convicted of stealing a bicycle from someone's garage. After the jurors had found him guilty, they were asked to verify his prior strikes for burglaries in the 1980s. Two jurors, then realizing it was a Three Strikes case, refused to validate the prior record because they disagreed with the Three Strikes law.[33] The judge replaced the two jurors with alternates, Bell's prior strikes of burglaries were rendered valid, and Bell received a 35 years-to-life sentence anyway.

Another case where four jurors probably used "jury nullification" and the court did not have the ability to replace them with alternates was that of Foster Morris in Orange County. On August 27, 1997, Morris and a co-defendant were arrested for attempting to purchase imitation rock cocaine--it was a sting operation by the police and instead of using actual rock cocaine, the police used a macadamia nut which looks similar to crack. At the time of trial, it was arguable whether Morris was much of danger to the world--he was wheelchair bound as he had lost both his legs, suffered from cancer, was a diabetic,

had three heart attacks in recent years, had hepatitis C, was blind in one eye, possessed only 50 percent vision in the other eye, and had very limited use of his hands. He also had deterioration of his liver, kidney, heart, lungs, and spleen.

The jury was not allowed to hear that he was facing a possible third strike and did not hear Foster's prior record. There were, however, some indications that this was more than just a normal drug case. Foster was dressed in his jail outfit (indicating he did not receive bail), there were three armed bailiffs present in the courtroom (a requirement of all third strike cases in Orange County), the trial was taking place almost a year after his arrest (which even to a juror probably seemed like a long time to wait until trial), the judge had asked the jurors to not read newspapers, listen to the radio, or watch television when local news was being covered during the course of the trial, the audience had a few more people taking notes than would probably be typical of a regular narcotics trial, and Foster's public defender emphasized the importance of the case and presented arguments in more dramatic tones than might be expected for a normal drug bust.

On August 11, 1988, after two and a half hours of deliberation, the jury forewoman announced that four jurors would not need any further instructions or evidence as the four were certain they would never be convinced beyond a reasonable doubt that Foster was guilty of the drug charge.[34] Judge Toohey declared a mistrial and told the prosecutor that he hoped this case would not come back to his court as there were alternatives the prosecutor's office could probably pursue. The prosecutor resubmitted the case three days later, and in consultation with Foster's attorney agreed to waive the seven prior strikes in return for a plea of guilty. Foster therefore received a three-year sentence (of which the judge then gave him time served).[35]

Survey research has shown that most judges do not approve of jury nullification.[36] While they often cite that they fear jury nullification could lead to anarchy, their position is also probably based on the fact that they do not like mistrials which often result in the time and costs of another trial.[37] With the increasing threat of "jury nullification" for Three Strike cases, California judges tried to break down the wall of privacy of jury deliberations when they started giving the following jury instruction: "[S]hould it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of this situation."[38]

The California Supreme Court, exercising its supervisory powers, said that the instruction creates an inadvisable and unnecessary risk "of intrusion upon the secrecy of deliberations or of an adverse impact on

the course of deliberations" and advised trial courts not to use the instruction.[39] To the extent the instruction was used--and from a cursory review of appellate cases it appears to have been used often--it appears to have always been held not to have affected the deliberations of the jurors.[40]

Defense Attorney Discretion

Defense attorneys make many decisions, and one of the most important is whether to advise a client to go to trial or to take a plea--and, in this regard, the Three Strikes law has had a major impact. There have been many defense attorneys who say that even though they thought their client might be innocent and there was a good possibility of winning the case at trial they strongly advised their clients to take a plea if it involved a relatively small sentence rather than risk a possible 25 years-to-life minimum sentence under the Three Strikes law.[41] They had seen other defendants not take the plea and get the more severe sentence too many times to take the gamble.

Defense attorneys have also said that the increased possibility of "jury nullification" in Three Strike cases has resulted in another dilemma. Many have had to dance around the line created by judges where they cannot acknowledge a case as being a Three Strikes case. They try to give hints to the jury so they can figure it out anyway. As discussed in the story about Foster Morris (see the previous section), defense attorneys might try to do this by having the defendant remain in his or her jail outfit and acting in an overly dramatic manner for the type of case involved.

Defendant Discretion

The other person involved in the criminal justice system whose discretion is rarely discussed is the defendant. Because the system depends on so many defendants to take plea bargains, if there is only a small percentage change in defendants doing so, the system could be overwhelmed. This was the case in a few counties in the initial years after the passage of the Three Strikes law. Many prosecutors were initially confused that plea bargaining was not allowed and many defendants were not receiving any plea bargains or, if they received an offer, it was for an extremely long sentence. The result was that defendants saw little benefit in pleading guilty and believed that trying to win in front of a jury would be their best alternative.

After the passage of the Three Strikes law, there was a lot of desperation among those charged under its provisions. In many cases, persons facing a third strike were hearing from their defense attorneys that there was no offer for a plea bargain or the offer involved a sentence of 25 years-to-life or more--especially if their current

conviction was for a violent or serious offense. In addition, many were told by their defense attorney that they were probably going to lose at trial. Facing such dismal prospects, many defendants believed their only hope lay in trying to get a few jurors to become sympathetic and to use their "jury nullification" powers, and the best way to accomplish this would be to represent themselves at trial. They knew that Three Strikes could not be introduced in the trial and therefore their attorneys would probably not mention it because they would not want to be subject to anger or possible discipline from the judge. They knew that attorneys became part of the system and would have a difficult time trying to do anything that might be perceived as abnormal or frowned upon by the legal community. The defendant, however, had nothing to lose. Before the *Romero* decision in June of 1996, there was little incentive to please the judge because many thought the judge had little or no discretion--the only agents the three strikers could possibly appeal to were the jurors.

In Pomona, the presiding Judge, Robert A. Dukes, said that he had seen more defendants represent themselves than ever before. He said that before the enactment of Three Strikes, defendants would make a request to go "pro per" about once every six weeks. In 1996 he said they were making such requests about 16 times a month.[42] Michael Judge, head of the Los Angeles County Public Defender's office, commenting on the increase in Three Strike defendants representing themselves, said, "There have been many defendants who did not believe their public defender was telling the truth," Judge said, "or thought the P.D. was somehow trying to sell them out."[43]

NOTES FOR CHAPTER 7

[1] Greenwood and Corporation, *Three Strikes and You're Out*.

[2] Colvin, "'3 Strikes' Found Hobbled."

[3] Reiss, *The Police and the Public*.

[4] Klaus and Maston, *National Crime Victimization Survey, 2001*; *National Crime Victimization Survey Redesign*, Bureau of Justice Statistics.

[5] *Crime and Delinquency in California: Domestic Violence-Related Calls*, California Criminal Justice Statistics Center.

[6] "The primary formative influences are the academy, the field training officer, the police culture, the danger and isolation of police work, internal pressures for the production of arrests, and sometimes darker elements of the police socialization process such as corruption." Crank and Caldero, *Police Ethics*, 83 citing Harris, *The Police Academy*.

[7] For a general description of police discretion and their interaction with other agencies, see Williams, "The Politics of Police Discretion."

[8] Research involving the interviews of 14 members of the Los Angeles Police Department found no undue burden on the agencies, with one officer noting that there may have been an increase in subpoenas issued for police to testify in court. Chen, "Lessons in Policy Implementation."
[9] Mulkern, "Study Shows '3-Strikes' May Put Police at Risk." Such fears even brought proposals to make all Californians with two prior strikes register with the police, much like sex offenders. Mulkern, "Stedman's Proposal."
[10] Fox News, Channel 11, Los Angeles, 10:00 p.m., February 13, 1998.
[11] Murkland and Ogul, "'3rd Strikes' Scared Him."
[12] The former officer questioned did not describe a particular instance but said in general that is how the police might use their discretion when giving chase to many suspects running from a stolen car. I have chosen not to identify the former officer.
[13] Crank and Caldero, *Police Ethics*, 71.
[14] *Report of The Rampart Independent Review Panel,* Los Angeles Police Department: Office of the Inspector General, 5-7.
[15] On September 18, 1999, Perez pleaded guilty and in exchange for the guilty plea received a five-year sentence in prison. He also received immunity from further prosecution for a maximum of 12 years so long as he did not lie to investigators. *Report of The Rampart Independent Review Panel,* Ibid., 4.
[16] Daunt and Lait, "Inmate Freed."
[17] Glover and Lait, "Another Inmate Set to be Freed."
[18] Williams.
[19] *People v. Cluff*, 87 Cal. App. 4th 991, 105 Cal. Rptr. 2d 80 (2001). See also *People v. Rushing*, 2002 Cal. App. Unpub. LEXIS 6127 (2002).
[20] *People v. Superior Court (Romero).*
[21] *People v. Alvarez.*
[22] See for example, *People v. Letteer*, 103 Cal. App. 4th 1308, 127 Cal. Rptr. 2d 723 (2002) (in a possession and being under the influence of methamphetamine case, the trial judge abused his discretion when he waived two prior strikes); *People v. Wallace*, 105 Cal. App. 4th 250, 129 Cal. Rptr. 2d 292 (2003) (in an ex-felon in possession of a firearm case, the trial judge abused his discretion by waiving a prior strike for discharging a weapon at an inhabited building).
[23] *People v. Zichwic*, 94 Cal. App. 4th 944, 114 Cal. Rptr. 2d 733 (2001).
[24] Kisliuk, "The '3 Strikes' Crisis that Didn't Happen."
[25] For further discussion on the historical context of jury discretion see Kieso, "The California Three Strikes Law," 241-249.
[26] Historically, the concept that jurors can also decide matters of law can be traced to Bushel's Case (sometimes Bushell or Bushnell), which occurred in the 1670 English trial of William Penn and William Mead. 124 Eng. Rep. 1006 (C.P. 1670).
[27] See *Sparf & Hanson v. United States*, 156 U.S. 51 (1895).
[28] See *People v. Williams*, 25 Cal. 4th 441.

[29] *People v. Shannon*, 147 Cal. App. 2d 300, 305 P.2d 101 (1956). See also *People v. Nichols*, 54 Cal. App. 4th 21, 62 Cal. Rptr. 2d 433 (1997).
[30] In a Three Strikes trial where the jury asked the judge whether it was a Three Strikes case, the First Appellate District Court of Appeals said the trial judge was not in error for declining to answer the jury. *People v. Nichols*, 54 Cal. App. 4th 21.
[31] Horowitz, Kerr and Niedermeier, "Jury Nullification."
[32] See Chiang, "Some Jurors Revolt Over 3 Strikes."
[33] Kroft, "The Bicycle Thief." "Your honor, I have a moral objection to being a part of a process that would impose a life sentence on someone for stealing a $300 bike," said Joe Wilcox to Placer County Judge Joe O'Flaherty. "Morally, I can't do it either," said Debbie Holland. Wilson, "Jurors Booted for '3 Strikes' Objection."
[34] In the hallway, I asked the jury forewoman if the jurors knew it was a Three Strikes case and she said "Oh yeah." She also said, "You would have loved to have heard the jury deliberations."
[35] See also Pfeifer, "Man Let Go."
[36] Horowitz, Kerr and Niedermeier, "Jury Nullification."
[37] For a case where the justice discusses how "jury nullification" could lead to anarchy see *United States v. Dougherty*, 473 F.2d 1113 (1972).
[38] CALJIC No. 17.41.1.
[39] *People v. Engelman*, 28 Cal. 4th 436, 49 P.3d 209 (2002).
[40] See for example, *People v. Jordan*, 108 Cal. App. 4th 349, 133 Cal. Rptr. 2d 434 (2003). A search of LEXIS for California cases from all courts from the time period of January 1, 2003 through June 30, 2003 containing "three strikes" resulted in a reply of 554 cases. When a similar search was made for the phrase "CALJIC No. 17.41.1" the result was 399 cases. And, when the search for cases contained both the phrases "three strikes" and "CALJIC No. 17.41.1," the result was 109 cases. The searches were performed on July 22, 2003.
[41] The author had many discussions with defense attorneys during 1997 through 2003.
[42] Krikorian, et al., "Front-Line Fights."
[43] Ibid.

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CHAPTER 8

Los Angeles County

LOS ANGELES COUNTY

At the turn of the millennium, if Los Angeles County had been a state, it would have had a larger population (9,519,338) than 41 other states.[1] Its area was 4,080 square miles and was ranked as the third most densely populated county in California.[2] Almost 45 percent of its population was Latino, 31 percent white, 12 percent Asian, 9.5 percent black, and 3 percent other.[3] Only one other county in California--Imperial County, inland and next to the Mexican border--had a lesser percentage of white people. In 1999 Los Angeles County's registered voters were 54 percent Democrat and 29 percent Republican, but its major city, Los Angeles, was led from 1993 through 2001 by Republican Mayor Richard Riordan.[4] Los Angeles County's per capita income in 2000 averaged $20,683, but ranged from $8,108 in East Compton to $111,031 in Rolling Hills.[5]

From 1993 to 2001 Los Angeles County had the largest average per capita violent crime index of all the counties in California at about 1,300 per 100,000 people and the second lowest arrest rate for violent crimes of all California counties at 33 percent.[6] Following the drought, mudslides, fires, riot, Northridge earthquake, and trial of O.J. Simpson in the late 1980s to the mid-1990s, the county had a relatively calm period with the only major news item being the Los Angeles Police Department Rampart Division scandal (discussed in chapter 7). Prior to the enactment of the Three Strikes law, Los Angeles County experienced a 16 percent decrease in its crime rate index from 1991 to 1994.[7] From 1993 to 2001, Los Angeles County had a decrease in property crime of 42 percent and violent crime of 44 percent, which was a little more than the state's property crime decrease of 39 percent and violent crime decrease of 43 percent.[8]

In the year 2000, the Los Angeles County District Attorney's office, with a staff of 1,005 attorneys that prosecuted about 350,000 criminal cases a year and sent about 2,000 people to prison each month, was the largest prosecutorial agency in the United States.[9] As Table

8.1 indicates, the percentage of Three Strikers in prison from Los Angeles County differed dramatically, depending on the comparison rate used. Based on population, Los Angeles County had a 170 percent rate (ranked 6th highest), but when based on violent crime it had only an 83 percent rate (ranked 33rd highest). When based on arrests, Los Angeles County had a 149 percent rate (ranked 9th highest), and based on convictions it had a 180 percent rate (ranked 4th highest). The most likely explanation for these differences is that because Los Angeles County experiences a higher rate of violent crime than other counties, it has less policing and prosecutorial power to expend on a per crime basis. Therefore, when deciding which crimes to focus on, there is probably a greater concentration on making arrests and getting guilty verdicts for the more serious crimes.

GILBERT L. GARCETTI

Gilbert L. Garcetti received his surname from his Italian grandfather, but was actually of Mexican descent.[10] He was born in South-Central Los Angeles and grew-up near Exposition Park. After getting an undergraduate degree while on a scholarship at University of Southern California and attending the London School of Economics, he earned his law degree at University of California at Los Angeles in 1967. He worked for a year on the presidential campaign of Democrat Eugene McCarthy and then joined the Los Angeles County District Attorney's office. In the late 1970s he was directing a special investigations unit when he was diagnosed with lymphoma. His hair fell out during treatment. He beat the cancer, but when his hair grew back it was gray.

In 1984, Ira Reiner was elected the district attorney and Garcetti was promoted to chief deputy. Garcetti and Reiner ended up in a feud; Garcetti was demoted, and then challenged Reiner for district attorney in 1992. Reiner and his office were generally blamed for losing the highly publicized cases of Snoop Doggy Dog, the first Menendez Brothers' trial, the "Twilight Zone" trial, and the McMartin pre-school case. In 1992, when Reiner was plagued by the trial of the LAPD officers involved in the beating of Rodney King, he decided to drop out of the election, giving Garcetti an easy victory.[11]

In January of 1994, as the Three Strikes debate was heating up, Garcetti publicly opposed the new proposal. He said he was concerned that people could get a life term without committing any violent crimes, juveniles could acquire strikes, and minor felonies such as passing a bad check could trigger a third strike.[12] On February 17, 1994, Garcetti testified before a Senate Judiciary Committee hearing on the proposed Three Strike laws and said his major fear was that the Jones Bill, AB971, would clog an already overcrowded court system.[13]

Table 8.1: Percentage of Third Strikers in the Prison Population at December 31, 2002 from Los Angeles Co. and its County Ranking per Offense Category Based on Four Factors

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Murder 1	73	173%	8	84%	21	98%	18	183%	7
Murder 2	49	141%	12	68%	20	79%	19	149%	14
Manslaughter	12	110%	14	53%	15	62%	15	116%	11
Veh. Mansl.	0	0%	8	0%	8	0%	8	0%	8
Robbery	694	208%	7	101%	20	94%	29	220%	4
Assault DW	133	141%	13	68%	29	122%	18	149%	16
Other Assault	177	164%	11	80%	29	142%	12	174%	10
Rape	45	121%	14	59%	24	118%	15	128%	14
Lewd Act-Chld	45	53%	29	26%	34	60%	28	56%	31
Oral Cop.	16	117%	15	57%	16	133%	13	124%	13
Sodomy	7	199%	5	97%	8	226%	5	210%	4
Penet w/ Ob.	8	146%	10	71%	12	166%	9	155%	9
Other Sex Off.	45	115%	13	56%	21	131%	11	122%	14
Kidnapping	41	214%	9	104%	16	168%	11	226%	9
Person	1,345	162%	8	79%	35	130%	11	172%	5
Burglary 1st	334	174%	8	85%	25	148%	15	184%	9
Burglary 2nd	220	229%	4	111%	17	194%	5	242%	5
Grand Theft	61	264%	4	128%	11	263%	3	280%	3
Petty Theft	147	183%	8	89%	13	181%	7	193%	6
Rec. Stol. Prop.	63	153%	11	75%	19	153%	14	162%	10
Vehicle Theft	85	159%	8	77%	18	109%	14	168%	6
Forgery/Fraud	30	226%	7	110%	15	166%	7	239%	8
Other Prop.	10	98%	11	48%	0	0%	0	104%	10
Property	950	186%	5	91%	29	158%	9	197%	6
CS Possession	267	168%	7	82%	18	161%	7	178%	6
CS Poss.-sale	97	125%	15	61%	21	119%	14	132%	15
CS Sub.-sales	104	277%	4	135%	11	265%	3	293%	3
CS-Manufact.	7	90%	11	43%	12	86%	12	95%	10
CS-Other	7	47%	7	23%	10	45%	8	50%	8
Marij. Ps.-Sale	1	85%	4	41%	4	82%	4	90%	4
Marij. Sales	9	115%	5	56%	7	110%	5	122%	5
Other Marij.	0	0%	3	0%	3	0%	3	0%	3
Drugs	492	161%	8	78%	25	154%	10	170%	5

Table 8.1: Continued.

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Escape	3	70%	8	34%	8	160%	6	74%	8
DUI	11	91%	13	44%	13	91%	11	96%	13
Arson	15	295%	5	143%	10	276%	7	312%	6
Poss. Weap.	173	201%	9	98%	24	202%	8	213%	9
Other Off.	57	153%	10	75%	0	0%	0	162%	12
Other	259	179%	10	87%	30	182%	7	189%	8
Nonperson	1,701	177%	6	86%	29	163%	7	187%	8
Total	3,046	170%	6	83%	33	149%	9	180%	4

Source: See notes 9 and 10 in chapter 6.

When the law was passed in March of 1994, however, Garcetti believed he had to fully enforce it. As the first nonviolent Three Strikes cases were announced in the newspapers, people immediately questioned Garcetti's use of law.[14] Garcetti, while enforcing the law, continued to criticize it.[15]

As Garcetti predicted, the Los Angeles County court system became overrun by three strikers who normally would have taken a plea bargain and now were instead going to trial. Only one month after passage of the law, Garcetti announced that the court system was so overcrowded his office had stopped filing cases in other areas, such as worker safety, environmental crimes, and major fraud.[16] In May of 1994 Garcetti sent out a memo outlining his policy for implementing the statute. It read: "Only in *rare* instances should the prosecution move to dismiss a prior felony conviction allegation under the 'in the furtherance of justice' standard." A wavier should only occur to avoid a "miscarriage of justice," and prosecutors needed to get the written approval of the supervising district attorney.[17]

In June of 1994, speaking against Reynolds' initiative, Garcetti said "I do believe in the Three Strikes principle. But it should be reserved for the violent repeat offender." Otherwise, he said, "The civil courts will have to close down because criminal cases take precedence."[18] He said not only were more cases going to trial, but Three Strikes trials were more expensive because the statute allowed 20 peremptory challenges for each side. This resulted in *voir dire* taking a lot longer, and a larger pool of jurors were needed.[19]

Garcetti continued to have his critics. Judge Arthur Jean, Jr. noted that because of Three Strikes his courthouse in Long Beach was getting a huge backlog of cases that could have been eased if Garcetti had been more flexible. "What bothers me most of all is that the D.A. says it is . . . a poorly drafted law . . . and he implies it has bad consequences, and

yet he appears to be going full bore after every possible 'three strikes' case," said Jean.[20]

In 1996 Garcetti was strongly challenged by John Lynch in his re-election bid. The Three Strikes law was not a significant issue during the election, but the *Los Angeles Times* endorsed Lynch and cited as one of the reasons that Garcetti was inconsistent in his usage of the Three Strikes law.[21] Garcetti, who also received a great deal of criticism from his office's loss in the O.J. Simpson trial, beat Lynch by less than 5,000 votes of over 2.2 million cast.[22]

Garcetti's county-wide policy on Three Strikes became a mini-version of the rest of the state: every supervising deputy in the downtown and outlying courts had his or her own authority to use the law as they wanted.[23] In July of 1996, the *Los Angeles Times* reported: "Because each supervising prosecutor is given authority to make three-strikes decisions, a defendant's chances of pulling a reduced sentence vary radically depending on the courthouse. In some, such as San Fernando, a three-timer is more than twice as likely to get a prosecutor's plea bargain than in others such as Norwalk, called 'No Walk' for being tough on defendants."[24]

In 1996 the San Fernando courthouse was working out of the Van Nuys branch because of damage from the Northridge earthquake.[25] There were, therefore, two supervising deputy district attorneys within the Van Nuys courthouse: Philip H. Wynn was the head of Van Nuys and Stephen L. Cooley of San Fernando. Both demonstrated a different approach to using the Three Strikes law. Wynn, considered a hard-liner, said he followed the office policy and "the public's marching orders" to put career criminals behind bars. Cooley, however, believing a sense of justice was warranted, felt it was an abuse of his discretion to give nonviolent offenders a life sentence. As an example, Glen Thomas was accused of receiving stolen property, a 1985 Cadillac, and unlawful use of a motor vehicle. Thomas's prior record included burglary and drug possession convictions in 1986 and a robbery charge from 1988. The robbery in 1988 involved the taking of another prison inmate's pack of cigarettes. Instead of treating Thomas as a third striker, Cooley waived the prior strike of robbery so that Thomas, as a second striker, received only a seven-year sentence.

Cooley said he pushed for 25 years-to-life when he felt it was warranted, but more often he was willing to offer a plea bargain that still carried a harsh sentence. "Every time a deputy makes a decision on a Three Strikes case, it's a half-million dollar decision and part of a billion-dollar consequence," said Cooley. "You have to ask yourself, is this worth a half-million dollars of taxpayers' money to take care of this guy for the next 25 years, then have to pay for his open-heart surgery and his kidney dialysis when he's 60 or 65?"[26]

From the time the law took effect through 1995, Cooley's office had given 14 percent of those eligible for a third strike at least a 25 years-to-life sentence while Wynn's office had done so in 33 percent of his cases.[27]

The disparity in sentencing was not limited to the geographic location of courthouses in Los Angeles County. The downtown Criminal Courts building handled the greatest number of cases and had a different supervising deputy district attorney for each floor. The result, therefore, was like a lottery for three strike defendants: which floor a defendant was assigned could make a major difference in the plea offered in a Three Strikes case.[28]

In June of 1996 the California Supreme Court issued the *Romero* decision (discussed in chapter 5) that declared that judges are allowed to use their discretion "in the interests of justice" to waive prior strikes.[29] Because the decision was retroactive, it forced the court system to hold another sentencing hearing for everyone convicted under the law unless the judge had acknowledged on the record that even if he or she had discretion they would not have used it. The court system, which was already bogged down by the initial passage of Three Strikes, became even more inundated as the previous cases came back for re-sentencing. The jails were also stretched to their limits because each re-sentenced striker had a right to be present at the re-sentencing hearing--a right most took because they usually enjoyed the chance to leave prison.

Garcetti kept up the pressure. Within weeks of the *Romero* decision, he sent out a memo insisting all county prosecutors were "duty-bound to object every time a judge opted for leniency" in sentencing under the Three Strikes law. In addition, deputies were told to tell the judge that the intent of the law was "to better protect the community by increasing punishment for recidivist offenders."[30]

About the same time, Charles Lindner, the past president of the Los Angeles Criminal Bar Association, wrote an opinion piece in the *Los Angeles Times* stating:

> Garcetti, more than any other public official in California, is responsible for the *Romero* decision, because it has been his application of "three strikes" penalties to penny-ante crimes that proved prosecutors could not be left with sole discretion over "three strikes" life-imprisonment decisions. . . . Some speculate that strict enforcement of "three strikes" was Garcetti's attempt to move to the right. The O.J. Simpson case cost Garcetti support in the African American community, and losing the case has cost him support on the affluent Westside. By dousing himself in the law-and-order

> holy water of "three strikes," perhaps Garcetti sought to pick up GOP mainstream and backlash votes.[31]

In 1999 the County of Los Angeles Information Systems Advisory Body reported the disposition of second and third strike cases filed in 1998 (see Tables 8.2 and 8.3). With such a large number of cases identified as "Pending, With Outstanding Warrants, Consolidated and Dismissed at April 1, 1999" it is difficult to judge whether the breakdown of cases is an accurate portrayal. The results do show, however, that of 1,226 identifiable third strike cases, only 204 (17 percent) received a sentence of 25 years or more.[32] The breakdown also demonstrated that there were at least 125 defendants who had committed a serious or violent third strike and did not receive a third strike penalty. The report also indicated the large percentage of cases that flow into the system from nonviolent and non-serious charges. Of the 204 defendants who received a sentence of 25 years or more, 133 of the sentences (65 percent) were the result of nonviolent or non-serious convictions.

On October 6, 1999, Stephen L. Cooley, 52, publicly announced his candidacy against Garcetti in the 2000 district attorney election.

Table 8.2: The Disposition of Third Strike Cases Filed in 1998 and Sentences as of April 1, 1999

Cases Sentenced to Probation, County Jail, Etc.		142
Cases Sentenced to 1 to 24 Years in State Facility:		
Serious Charge	83	
Violent Charge	42	
Non-Serious and Nonviolent Charge	755	
Total		880
*Cases Sentenced to 25 Years or More		
Serious Charge	55	
Violent Charge	16	
Non-Serious and Nonviolent Charge	133	
Total		204
Cases Sentenced		1,226
Cases Pending, With Outstanding Warrants, Consolidated and Dismissed at April 1, 1999		1,187
Total Third Strike Cases Filed		2,413

*Not necessarily a life sentence

Source: *Details of Second and Third Strike Cases*, County of Los Angeles Information Systems Advisory Body.

The timing could not have been better as Cooley received a huge windfall from the allegations of corruption about the Rampart Division of the Los Angeles Police Department that tainted Garcetti. Because the Rampart Scandal unveiled perjury and tampering of evidence used at trials, Garcetti's prosecutors were seen as accomplices to the many police officers who lied on the stand. By December it was estimated that about 3,000 cases would have to be overturned because of the problems that resulted from corrupt officers.[33]

By the spring of 2000, the candidates running against Garcetti were very vocal about the Rampart Scandal. "This is the issue in this campaign," said Cooley. "There's some responsibility in our office because we prosecuted those cases." Cooley and Barry Groveman, a corporate and environmental lawyer who was also running for district attorney, both said Garcetti should have made sure his office spotted problems in cases while they were being prosecuted. They said prosecutors should have more closely scrutinized police testimony. [34]

Table 8.3: The Disposition of Second Strike Cases Filed in 1998 and Sentenced as of April 1, 1999

Cases Sentenced to Probation, County Jail, Etc.		702
Cases Sentenced to 1 to 24 Years in State Facility:		
Serious Charge	449	
Violent Charge	170	
Non-Serious and Nonviolent Charge	3,085	
Total		3,704
*Cases Sentenced to 25 Years or More		
Serious Charge	4	
Violent Charge	9	
Non-Serious and Nonviolent Charge	0	
Total		13
Cases Sentenced		4,419
Cases Pending, With Outstanding Warrants, Consolidated and Dismissed at April 1, 1999		2,152
Total Second Strike Cases Filed		6,571

*Not necessarily a life sentence

Source: *Details of Second and Third Strike Cases*, County of Los Angeles Information Systems Advisory Body.

STEPHEN L. COOLEY

Since his young days at Cal State, Stephen Cooley had a conservative, Republican outlook. He joined the Los Angeles County District Attorney's office around 1974. He became the youngest head deputy in the history of the office when he was put in charge of the Antelope Valley branch in 1984. As discussed in the previous section, he became the head of the San Fernando branch office where he was known for his leniency when using the Three Strikes law. Cooley also founded the major narcotics unit. Supporting a candidate for district attorney can be detrimental to getting promotions if your candidate loses. Cooley learned this after favoring Garcetti's opponent, John Lynch, in the 1996 election. For this act, Cooley was demoted to supervise the obscure welfare fraud division. Cooley made the most of it, however, and, probably to Garcetti's surprise, Cooley ended up being profiled by the ABC News magazine television show "20/20" for his innovative work in going after "welfare cheats."[35]

Before the March 8, 2000 primary, Garcetti refused to debate his opponents publicly.[36] Being favored in the polls, he probably thought his name recognition would be enough to win or at least to get him into a runoff election.[37] Cooley and Groveman debated and placed an empty chair on the stage to indicate the absence of Garcetti.[38] The *Los Angeles Times* endorsed Cooley, stating that a change was needed; one of their reasons was Garcetti's overuse of the Three Strikes law.[39]

When the primary election results were tabulated Cooley had beaten Garcetti by fewer than 6,000 votes out of more than 1.3 million cast. Cooley had 37.9 percent of the vote and Garcetti 37.5 percent; Barry Groveman, who spent the most money and was the only candidate to have television advertising, received only 24.6 percent.[40] While the vote differential between Cooley and Garcetti was close, Cooley had the distinct advantage because it was predicted that most of Groveman's total would go against Garcetti.

The campaign between Garcetti and Cooley had a schizophrenic quality to it. Garcetti appealed to liberal voters by emphasizing the prevention programs he had promoted and funded through the District Attorney's office.[41] "Crime prevention is good," Cooley responded. He said he agreed with prevention programs, but they were not "necessarily best done by a prosecutorial agency."[42] Cooley also posted on his campaign web site the statement that if elected, one of the first things he would do is to set a new Three Strikes policy for the entire county. The policy would apply to anybody facing a third strike for a nonviolent or non-serious offense. Such a person would be treated as a second striker for sentencing purposes unless there were special circumstances that dictated that the person should be treated as a third striker.[43]

Generally district attorney races are considered non-partisan and the ballot cannot indicate a party by a candidate's name. Trying to appeal to Democratic Party voters, however, Garcetti painted Cooley as an "ultraconservative Republican . . . [who] would take [the District Attorney's office] back to the '50s in many respects, including partisan politics."[44] Garcetti also pointed out that Cooley once campaigned for Republican Governor George Deukmejian. Garcetti also tried to paint Cooley as being "soft on crime" and sent out mailers and had television advertisements stating that Cooley was not going to enforce the California Three Strikes law.

When polls showed that Cooley had a 55 percent to 18 percent lead over Garcetti in April, Garcetti changed his mind about debates and challenged Cooley to a proposed schedule of 27 debates.[45] Cooley agreed to a lesser number, but the candidates did debate often. While Cooley focused most of his energy in the debates on Garcetti's inaction in the Rampart Scandal, the Three Strikes law was also discussed.[46] At a June 15th debate, Cooley referred to the Three Strikes law by stating: "Mr. Garcetti's policy has been quite abusive, [resulting] in some very bizarre results." Cooley said, "When you have people going off to prison, 25-to-life, for stealing diapers, for stealing clothes, stealing food, this is not just." Garcetti defended himself, saying, "If we get a gang member who stole a CD, and we know he is guilty of other crimes . . . I'm going to use that Three Strike law to put that guy away for the rest of his life."[47]

At a September 25, 2000 debate held in Exposition Park sponsored by the New Leaders, an organization of black professionals, Garcetti stated that he thought the Three Strikes law should not be amended. The crowd of about 100 people loudly booed. "Well, this may not be popular to some people in the audience, but I'll make no excuse for enforcing the three-strikes law the way the voters of this state intended it to be enforced," Garcetti said. He said that if a gang member was arrested for stealing a compact disc, had two prior violent felonies and was suspected in other crimes, he would charge him under the Three Strikes law. The crowed continued to boo.

Cooley stated that he was for a policy of "proportionality," under which a third strike would be charged only if a criminal with two prior strikes was charged with a serious, violent offense. "You've got to consider, if the new offense is nonviolent, non-serious, like stealing a CD, you're not going to see 25-to-life," he said, as the crowd cheered. "That is out of control. It's corrosive." The cheers for Cooley grew louder when he cited the case of Gregory Taylor, a 37-year-old homeless man who was sentenced to 25 years-to-life for trying to take food from a church in 1997. "Mr. Cooley seems to be on a roll," said the debate moderator, KCAL-TV (Channel 9) anchor Dave Clark.

Garcetti, realizing this crowd was strongly against the Three Strikes law, began to backtrack and asked where Cooley was before the law was passed, and once again emphasized Cooley's Republican roots. "Where was he before March 1994?" Garcetti yelled. "He is a Republican. He was an advisor to Governor Wilson. I'm the one who went up to Sacramento and said, 'Let's limit it to violent, serious offenses.' Did you ever hear him urge the governor to, c'mon, limit it? The answer is, no, you didn't, because he never did it."[48]

On November 7, 2000 Los Angeles County voters elected Cooley by a 63 percentage vote.[49] The vote was probably more against Garcetti for the O.J. Simpson trial loss and the problems involving the Rampart Scandal than for the differences each of the candidates had on the use of the Three Strikes law--but the election still sent a signal: running for an election and supporting a "softer" use of the Three Strikes law would not hurt a candidate.

Even before the election, many defense attorneys could see that if Cooley were to win--and the polls indicated he would--then a client facing a possible third strike would fare much better if the trial was continued until after Cooley was in office and his new policy was in effect. Long Beach Deputy Public Defender Edward Cook said he had four nonviolent Three Strike cases--all of which he timed so they did not go to trial until after Cooley took office on December 4, 2000. He said he began asking for continuances as early as May of 2000.[50]

Not all were able to extend their trial dates, however, including Mark Bishop who had been sentenced just a few months prior to Cooley's directive.[51] In December of 1999 Bishop had been stopped by a police officer when he was not wearing a seat belt. The car was searched and 4.4 grams of methamphetamine and an unspecified amount of marijuana in a baggie were found. After a jury trial, Bishop was found guilty of possession of a controlled substance. He had a prior record which included two residential burglaries in 1981 and 1982, and he therefore met the requirements for a third strike.[52] The prosecutor and judge denied Bishop's request to have a strike waived and Bishop received a sentence of 25 years-to-life. Had he been sentenced under Cooley's policy, he probably would gotten the prior strike waived and at most would have received an 11-year sentence, with the possibility of reducing the amount of the sentence by 20 percent for good conduct credits. On appeal, the appellate court said "The change of policy in the District Attorney's office has no bearing on the issue presented" and allowed the long sentence to stand. The appellate court also noted that the trial court had incorrectly calculated the fines that Bishop was required to pay and assessed Bishop an additional $85.[53]

California Secretary of State Bill Jones, who had authored the Three Strikes law when it was passed by the Legislature in 1994, was

critical of Cooley's new policy and accused Cooley of preparing to "let career, serious and violent criminals off the hook" if their third felonies are nonviolent. "It's just a matter of time," Jones said, "before one of these violent career criminals who could have been removed from our neighborhoods for a nonviolent felony will be released to rape, rob, molest or murder innocent Californians."[54]

The results demonstrate that Cooley has kept his word. Not every nonviolent and non-serious offender is spared the use of the Three Strikes law in Los Angeles County, but compared to when Garcetti was the district attorney there has been a significant drop in Three Strike cases. Table 8.4 shows the number of second and third strike commitments from the state and Los Angeles County to the California Department of Corrections by each year from 1994 through 2001.

Table 8.4: Second and Third Strikers Admitted to Prison by Delivery Date for Los Angeles County April 1994 Through December 2001

	1994	1995	1996	1997	1998	1999	2000	2001
2nd Strikers	3,613	10,117	9,727	9,161	9,427	8,892	8,216	8,419
Los Angeles Co.	1,644	4,394	4,291	4,035	3,944	3,809	3,423	3,563
Total less LA Co.	1,969	5,723	5,436	5,126	5,483	5,083	4,793	4,856
3rd Strikers	134	866	1,333	1,248	1,174	1,022	813	635
Los Angeles Co.	48	347	556	541	481	392	303	226
Total less LA Co.	86	519	777	707	693	630	510	409

Source: *Number of 2nd and 3rd Strike Commitments: April 1994 Through December 2001*, California Department of Corrections.

As can be seen, the number of third strikers decreased in 2001 to 41 percent for Los Angeles and 53 percent for the rest of the state in comparison with the their peaks in 1996. While part of the decreases have been attributable to the decrease in crime over the years 1994 through 2001, defense attorneys and analysts say that much of the drop is also attributable to a change in policy by the district attorneys to not use the Three Strikes law as much for nonviolent offenses.[55]

Table 8.5 indicates the use of the Three Strikes law in Los Angeles County for the year 2002 as compared to the prior years, based on the change in prison populations. As the numbers indicate, there was a large decline in application of the law, with the most significant decreases in the categories of property and drug crimes. In addition, there was a significant drop in the use of the law for convictions for assault with a deadly weapon, first degree burglaries, and even

Table 8.5: The Average Number of Third Strikers Prior to 2002 and the Number of Third Strikers for 2002 for Los Angeles County, By Prison Population

Third Strike	Average Prior to 2002	Total for 2002	Percentage Decrease
Murder 1	8.67	8	8%
Murder 2	6.27	2	68%
Manslaughter	1.60	0	100%
Veh. Manslaughter	0.00	0	
Robbery	85.07	56	34%
Assault DW	17.60	1	94%
Other Assault	20.40	24	-18%
Rape	5.07	7	-38%
Lewd Act w Child	5.07	7	-38%
Oral Copulation	2.00	1	50%
Sodomy	1.07	-1	194%
Penet w/ Object	1.07	0	100%
Other Sex Off.	5.33	5	6%
Kidnapping	4.80	5	-4%
Crimes-Person	164.00	115	30%
Burglary 1st	43.47	8	82%
Burglary 2nd	28.53	6	79%
Grand Theft	7.73	3	61%
Petty Theft	18.80	6	68%
Rec. Stolen Prop.	8.13	2	75%
Vehicle Theft	11.07	2	82%
Forgery/Fraud	4.00	0	100%
Other Prop.	1.20	1	17%
Crimes-Prop.	122.93	28	77%
CS Possession	34.13	11	68%
CS Possess-sale	12.53	3	76%
CS Sub.-sales	13.20	5	62%
CS-Manufact.	0.80	1	-25%
CS-Other	0.67	2	-200%
Marij. Poss-Sale	0.13	0	100%
Marij. Sales	1.07	1	6%
Other Marij. Off.	0.00	0	
Crimes-Drugs	62.53	23	63%

Table 8.5: Continued.

Third Strike	Average Prior to 2002	Total for 2002	Percentage Decrease
Escape	0.27	1	-275%
DUI	1.33	1	25%
Arson	1.87	1	46%
Poss. Weap.	19.87	24	-21%
Other Off.	6.80	6	12%
Crimes-Other	30.13	33	-10%
Crimes-Nonperson	215.60	84	61%
Total	379.60	199	48%

Source: *Second and Third Strikers in the Institution Population, December 31, 2001, California Department of Corrections; Second and Third Strikers: December 31, 2002*, California Department of Corrections.[56]

robberies. Cooley, however, appears to have used the law in the same manner as Garcetti did for possession of weapon convictions--which is consistent with the policy directives Lael Rubin noted above.

While defense attorneys have been pleased with Cooley's policy, there are many judges and prosecutors who were critical of it. Superior Court Judge Dan Oki, who was supervising judge of Los Angeles County's criminal courts, wrote a memo after Cooley's policy was unveiled that said; "Perhaps the district attorney's policy is what the law *should be*, but it is not what the law currently *is*."[57] The memo had no legal impact, but indicated there were some judges who disagreed and perhaps would overrule Cooley's policy.

The *Los Angeles Times* reported the case of Billy Ray Pimpton who was charged with petty theft with a prior for stealing $38 worth of whiskey from a Carson convenience store.[58] The prosecutor of the case was troubled by Pimpton's prior record, which included a gun battle with Compton police 20 years earlier and a more recent alleged attack on his girlfriend with box cutters. Following Cooley's policy, the deputy district attorney ordered that no third strike be pursued; but, at his supervisor's urging, the prosecutor told the judge about Pimpton's past.[59] The judge then denied the District Attorney office's motion to waive the prior strikes and gave Pimpton a sentence of 25 years-to-life. The judge in the case said "Whether I personally agree with it or not, [it] appears to be what [voters] intended to do."

"D.A.s aren't the ones who decide what the law should be or the ultimate meaning of a law; that's not our role," said Deputy District Attorney Marc Debbaudt. Tom Higgins, a prosecutor who is exploring

the idea of running against Cooley in 2004 said: "What Steve has done is lay out the welcome mat for every crook in the state 'We're soft,' and the word gets out."[60]

Cooley's policy can be overridden by deputy district attorneys by seeking approval from their supervisor. The supervisors then must get the go-ahead from senior administrators. There is no record of such requests, but according to the *Los Angeles Times* "there are only a few dozen a year, almost all of which are granted.[61]

Cooley received criticism from the *Los Angeles Times* and their columnists for doing little or nothing with the Rampart and Belmont Learning Complex scandals--two issues Cooley criticized Garcetti about. In addition, in October of 2003 the *Los Angeles Times* printed a long investigative story about how the District Attorney's office failed to follow up on graft allegations involving an influential lobbyist who has also managed numerous government construction projects in Southern California.[62] Later, Cooley had the case reopened, but columnist Steve Lopez commented: "Cooley whiffed on the LAPD's Rampart police scandal and the Belmont Learning Center fiasco. And now, with another chance to knock one out of the park, he couldn't get the bat off his shoulder."[63]

NOTES FOR CHAPTER 8

[1] *Census 2000, SF1 Profile: Population by Gender, Age and Race, California Department of Finance; States Ranked by Population: 2000*, U.S. Census Bureau.

[2] *Square Mileage by County,* California State Association of Counties.

[3] *Census 2000, SF1 Profile: Population by Gender, Age and Race*.

[4]Block and Buck, California Political Almanac: 1999-2000.

[5] Median and Per Capita Income, Los Angeles Almanac.

[6] *Final Law Enforcement, Prosecution, and Court Dispositions; Reported Crimes and Crime Rates: 1992-2001*. Los Angeles County's clearance rate (as calculated here by taking convictions divided by arrests) was ranked 45th out of 58 counties.

[7] *Reported Crimes and Crime Rates:1991 to 2001,* California Criminal Justice Statistics Center.

[8] *Reported Crimes and Crime Rates: 1992-2001*.

[9] Landsberg, "Garcetti Headed Into Runoff."

[10] Landsberg, "Garcetti Stresses His Latino Heritage."

[11] Landsberg, "Garcetti Headed Into Runoff."

[12] Morain, "Lawmakers Jump on '3 Strikes' Bandwagon."

[13] Morain, "5 '3-Strikes' Bills."

[14] Murphy and Morain, "50-Cent Caper."

[15] Proffitt, "Los Angeles Times Interview."

[16] Muir, "Supervisors Warned on '3-Strikes'."
[17] Austin and Irwin, *It's About Time* citing Special Directive 94-04 of the Los Angeles County District Attorneys Office, May 2, 1994.
[18] "Garcetti Urges Revision of 'Three Strikes' Law," *Los Angeles Times*, June 9, 1994, B-2.
[19] Ford, "Jury-Summons Scofflaws."
[20]Judge Arthur Jean, who has a reputation of having little sympathy for repeat offenders, was a prosecutor for 14 years before his appointment to the bench by Governor George Deukmejian. Colvin, "Tough Judge Assails 'Three Strikes'."
[21] "For District Attorney: John Lynch," *Los Angeles Times*, March 17, 1996, M-4.
[22] *Official Election Returns,* County of Los Angeles: Registrar-Recorder/County Clerk.
[23] Abrahamson, "Prosecutors Told To Object."
[24] Krikorian, et al., "Front-Line Fights."
[25] Ibid.
[26] Ibid.
[27] It was also reported that the Compton courthouse handed down maximum sentences to third strike defendants in only 10.1% of the cases, and defendants facing third strike charges in Norwalk and Pomona received 25 years-to-life in 27.6% and 34.2% of the cases, respectively. Krikorian, et al., "Front-Line Fights Over 3 Strikes."
[28] Interviews with public defenders who worked at the Criminal Courts Building in downtown Los Angeles.
[29] *People v. Superior Court (Romero).*
[30] Abrahamson, "Prosecutors Told To Object."
[31] Lindner, "State Court's Final Count."
[32] The California Department of Corrections reported receiving 481 and 392 third strike cases from Los Angeles County in the years 1998 and 1999, respectively. *Number of 2nd and 3rd Strike Commitments: April 1994 Through December 2001*.
[33] Weinstein, "Rampart Probe."
[34] Hong, "Rivals Lay Some Blame."
[35] Ramos, "Garcetti Aide Announces Campaign." Landsberg, "D.A.'s Race Shapes Up."
[36] Hong, "Garcetti Refuses to Debate Opponents in District Attorney Race."
[37] If one person running for district attorney received a majority of the vote during the primary then that person would be declared the final winner; if, however, nobody received a majority vote, then the top two vote getters would have a run-off in the fall.
[38] Landsberg, "As Garcetti Steers Clear of Foes."
[39] "Cooley for District Attorney," *Los Angeles Times*, February 27, 2000.
[40] *Final Official Election Returns,* Los Angeles County Department of Registrar-Recorder/Clerk; Landsberg, "D.A.'s Race Shapes Up."

[41] Landsberg, "D.A. Defends Crime Prevention Efforts."
[42] Ibid.
[43] Cooley, *Issues and Answers: Position Paper 5: Three Strikes Policy*.
[44] Landsberg, "Cooley, Garcetti Clash in Hostile Radio Debate."
[45] Ibid.; Landsberg, "Garcetti Seeks Weekly Debates With Foe."
[46] Rabin, "Debate in D.A.'s Race Focuses on Corrupt Police."
[47] Landsberg, "D.A. Hopefuls Spar Over 3-Strikes Law, Gun Controls."
[48] Landsberg, "Garcetti and Cooley in Spirited Exchange on 3-Strikes Law."
[49] *Final Official Election Returns*.
[50] Russell and Barrett, "'3-Strikes' Cases Held."
[51] *People v. Bishop*, 2002 Cal. App. Unpub. LEXIS 4827 (2002).
[52] Bishop's prior record also included a 1984 petty theft with a prior, a 1987 second degree burglary, a 1989 possession of cocaine base for sale, and convictions from 1992 for petty theft with a prior and second degree burglary.
[53] See also *People v. Roman*, 92 Cal. App. 4th 141, 111 Cal. Rptr. 2d 553 (2001) (no retroactive application of a district attorney change in policy required in a case where the defendant received 25 years-to-life for possession of a small quantity of methamphetamine when sentenced just prior to Cooley's new Three Strikes policy).
[54] "Author of 3-Strikes Law Attacks Cooley," *Los Angeles Times*, November 30, 2000.
[55] Riccardi, "Prosecutors Seek Fewer 3rd Strikes."
[56] Details on calculations can be found at Kieso, "The California Three Strikes Law," 283.
[57] Riccardi, "Prosecutors Seek Fewer 3rd Strikes."
[58] Ibid.
[59] *People v. Pimpton*, 2002 Cal. App. Unpub. LEXIS 2296 (2002).
[60] Riccardi, "Prosecutors Seek Fewer 3rd Strikes."
[61] Ibid.
[62] Frammolino, Riccardi and Rohrlich, "How D.A.'s Office Failed."
[63] Lopez, "Let's See if Cooley."

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CHAPTER 9

San Francisco and Alameda Counties

SAN FRANCISCO

The City and County of San Francisco were officially created in 1850; the only California city that also is a county. It is the smallest county in size, with only 91 square miles (the next smallest is Santa Cruz County with 440 square miles) and had a population of 776,773 in 2000, making it the most densely populated county in the state.[1] The population was 44 percent white, 31 percent Asian, 14 percent Latino, 8 percent black, and 3 percent other in 2000.[2] It had the largest percentage of Asians of any county in California, and only 8 counties had a lower percentage of whites. In 1999 its registered voters were 59 percent Democrat and 15 percent Republican.[3] San Francisco opposed the death penalty in 1978, was the only county in the state that voted against the three strikes law in 1994, and supported legalization of medical marijuana by the highest margin of any county in 1996--thus, presenting the District Attorney of San Francisco with unique political pressures.[4] San Francisco's per capita income in 2000 was an average of $49,464, second only to its neighbor to the north, Marin County at $57,982.[5]

In 1993 San Francisco had the highest violent crime rate of the California counties, at 1,806 incidents per 100,000 people. It also had the second highest property crime rate, at 7,886 per 100,000.[6] However, due to the greatest decrease in crime shown by any county in the state from 1993 to 2001--about a 60 percent decrease--San Francisco moved to a violent crime rate of 579 per 100,000 (10th highest in the state) and a property crime rate of 3,308 per 100,000 (22nd highest in the state). Prior to the enactment of the Three Strikes

Table 9.1: Percentage of Third Strikers in the Prison Population at December 31, 2002 from San Francisco and its County Ranking per Offense Category Based on Four Factors

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Murder 1	3	72%	21	49%	26	95%	19	55%	23
Murder 2	1	31%	25	21%	25	41%	23	24%	25
Manslaughter	0	0%	19	0%	19	0%	19	0%	19
Veh. Mansl.	0	0%	8	0%	8	0%	8	0%	8
Robbery	15	42%	31	29%	44	21%	45	32%	39
Assault DW	3	34%	35	24%	38	28%	37	26%	36
Other Assault	2	19%	38	13%	38	15%	38	15%	38
Rape	0	0%	29	0%	29	0%	29	0%	29
Lewd Act-Chld	0	0%	36	0%	36	0%	36	0%	36
Oral Cop.	2	174%	10	119%	15	273%	5	134%	12
Sodomy	0	0%	9	0%	9	0%	9	0%	9
Penet w/ Ob.	0	0%	14	0%	14	0%	14	0%	14
Other Sex Off.	0	0%	27	0%	27	0%	27	0%	27
Kidnapping	1	48%	20	33%	22	56%	20	37%	21
Person	27	33%	45	23%	51	27%	47	26%	46
Burglary 1st	6	31%	37	21%	39	24%	39	24%	38
Burglary 2nd	0	0%	27	0%	27	0%	27	0%	27
Grand Theft	0	0%	20	0%	20	0%	20	0%	20
Petty Theft	0	0%	22	0%	22	0%	22	0%	22
Rec. Stol. Prop.	2	51%	22	35%	25	28%	25	39%	24
Vehicle Theft	0	0%	23	0%	23	0%	23	0%	23
Forgery/Fraud	0	0%	20	0%	20	0%	20	0%	20
Other Prop.	0	0%	13	0%	0	0%	0	0%	13
Property	8	15%	44	10%	45	9%	45	12%	44
CS Possession	0	0%	31	0%	31	0%	31	0%	31
CS Poss.-sale	0	0%	27	0%	27	0%	27	0%	27
CS Sub.-sales	0	0%	20	0%	20	0%	20	0%	20
CS-Manufact.	0	0%	13	0%	13	0%	13	0%	13
CS-Other	0	0%	11	0%	11	0%	11	0%	11
Marij. Ps.-Sale	0	0%	5	0%	5	0%	5	0%	5
Marij. Sales	0	0%	8	0%	8	0%	8	0%	8
Other Marij.	0	0%	3	0%	3	0%	3	0%	3
Drugs	0	0%	39	0%	39	0%	39	0%	39

Table 9.1: Continued.

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Escape	0	0%	9	0%	9	0%	9	0%	9
DUI	0	0%	14	0%	14	0%	14	0%	14
Arson	0	0%	12	0%	12	0%	12	0%	12
Poss. Weap.	1	11%	37	7%	37	12%	37	8%	37
Other Off.	0	0%	27	0%	0	0%	0	0%	27
Other	1	7%	40	5%	40	8%	40	5%	40
Nonperson	9	9%	50	6%	51	5%	51	7%	50
Total	36	20%	48	14%	53	12%	52	16%	50

Source: See notes 9 and 10 in chapter 6.

law, San Francisco experienced a decrease in its crime rate index of 14 percent from 1991 to 1994.[7]

As Table 9.1 indicates, as of December 31, 2002 San Francisco did not give a third strike for many crimes, and gave third strikes at a generally a much lesser rate than the rest of the state. The raw numbers show that there were only 27 third strikers for violent crimes, 8 for property crimes, and one for possession of a weapon. As of July 31, 2002, the racial breakdown of third strikers from San Francisco was about 75 percent black, 11 percent Latino, 8 percent white, and 3 percent other.[8] Based on relative population, blacks were 51 times more likely to get a third strike than whites--the highest black-to-white multiple in the state.

ARLO SMITH

At the start of 1995 the San Francisco District Attorney's office had a $19 million yearly budget, a staff of more than 150 lawyers, and was headed by a man who was seeking his fifth term.[9] He was a balding man who was self-deprecating about his looks and joked that he was no Mel Gibson but could still get the job done.[10] His name was Arlo Smith.

Smith attended the University of California at Berkeley for his undergraduate degree and received his law degree from the same university's Boalt Hall School of Law.[11] His legal career started in the State Attorney General's office where he rose to head the criminal division. He worked in that office for 27 years and handled hundreds of trials and appeals on behalf of the state.[12]

In 1979 the San Francisco District Attorney, Joe Freitas, faced many challengers one year after failing to convict Dan White of murder for the 1978 killings of San Francisco Mayor George Moscone and Supervisor Harvey Milk.[13] Arlo Smith jumped into the race with the

platform that he was a "professional, not a politician."[14] Smith won and was never challenged in subsequent elections until 1995.[15]

In 1990, at the age of 63, Smith tried to run for state attorney general. It was in this and his subsequent election campaigns that we can see a man from a city that prided itself on being liberal and different struggling with how to define himself in a state that was becoming "tough on crime." In the Democratic primary his main challenger was Ira Reiner, the district attorney of Los Angeles County, who had recently lost the highly-publicized McMartin pre-school case in which the owners of the school were accused of molesting children. During the primary campaign, Smith made many references to the McMartin case and filed murder charges against Richard Ramirez, the notorious "Night Stalker," who had been convicted of 13 murders in Los Angeles County. Few saw any benefit of using San Francisco's resources to prosecute a man who already was condemned to death, and Smith was accused of filing the charges purely for political purposes.[16]

Reiner argued that Smith was not a good prosecutor because only half of the arrests made in San Francisco in 1988 resulted in charges being filed, whereas nearly two-thirds of such cases in Los Angeles County resulted in charges. Both prosecutors had Superior Court conviction rates of about 95 percent, although Smith's rate in Municipal Court was lower, 54 percent compared with Reiner's 74 percent (the statewide average was 67 percent). Smith said the lower court conviction rate was caused by extensive use of diversion to treatment programs in drug cases.[17]

With one week to go before the primary, Smith and Reiner were tied in the polls, with a large number of Democratic voters still undecided.[18] Smith's young and inexperienced campaign consultant, Marc Dann, almost cost Smith a primary victory when he asked a San Francisco chief deputy district attorney to speed up the prosecution of a highly-publicized case of a Sacramento developer who was accused of corruption in the construction of a new baseball stadium to house the San Francisco Giants--but luckily for Smith the gaffe did not get state-wide publicity.[19] On June 6, 1990, Smith beat Reiner by a 52 percent to 48 percent vote and would face Congressman Dan Lungren in the fall election.[20]

In a political campaign involving a district attorney, every case under their administration becomes fair game. Lungren released a commercial accusing Smith of coddling big-time campaign contributors charged with crimes--in particular noting the case of businessman Donald Werby who was able to plea bargain for no jail time on charges of sexually molesting 13-year-old girls, providing crack cocaine to minors, and attempted bribery. Werby, his brother, Robert Werby, and their business contributed $7,500 to Smith's campaign, which he subsequently returned.[21]

On election day, Smith, had a narrow lead over Lungren (46.7 to 46.3 percent); but absentee ballots, known to favor conservatives, were still uncounted.[22] On November 19th, twelve days after the election, Lungren was declared the winner by a 46.8 to 46.4 percent vote.[23]

In August of 1993, the *San Francisco Chronicle* produced a report on the San Francisco District Attorney's office showing that it had the lowest murder conviction rate of any major county in California. Among the reasons were liberal juries and fear of witnesses coming forward. But most damaging to Smith were accusations that San Francisco prosecutors were performing poorly.[24] Smith countered by saying "Those numbers are a great measure of our success in combating organized crime and gang violence. We simply don't have as many cases of first-degree murder."[25]

In 1993, Smith announced that he would challenge Lungren a second time for state attorney general in the 1994 election. In the fall of 1993, he filed a civil action seeking to expand the list of weapons included in California's assault weapons ban--another move that was considered to be purely political for upcoming election purposes. Smith claimed that the blood of Californians was on Lungren's hands because he had refused to expand the ban to include copycat weapons. A Superior Court Judge dismissed the case, saying the weapons ban does not grant "any type of duty that this court can or should enforce."[26]

When the Three Strikes law became a hot issue in the 1994 election, this put Smith in an awkward position. Voters around the state appeared to want a "tough on crime" approach, but liberal San Franciscans seemed to react in an opposite manner. Smith's answer was somewhat curious: He tried to paint Republican Governor Wilson as being soft on crime:

> [I]f tough talk solved violent crime, we wouldn't have any crime in California. Governor Wilson's policy has been "three strikes, you're safe," because of his refusal as governor to automatically revoke parole of repeat offenders. He absolutely has that authority. Parole violators like Richard Allen Davis (charged in the kidnap-slaying of Polly Klaas) don't go directly to jail even if they commit an additional crime while on parole. I've always supported the notion that we should have an indeterminate sentence for rapists or arsonists for a long period of time. The recidivism rate for arsonists and rapists is extremely high. The question to ask the people of California, do they feel safer now than when Pete Wilson took office?[27]

On February 18, 1994 in front of the State Senate Public Safety Committee, three District Attorneys--Los Angeles D.A. Gil Garcetti, Ventura County D.A. Michael Bradbury, and Contra Costa County D.A. Gary Yancey--spoke against the Three Strikes law. Smith said that he supported the initiative, but preferred the alternative bills.[28] Smith's opponent in the Democratic primary was Assemblyman Tom Umberg--who already had positioned himself in the Three Strikes debate by putting forward his own Three Strikes bill (see chapter one). Smith was an easy target in a state where public opinion was strongly "tough on crime." Umberg attacked Smith for his low conviction rates calling Smith "the worst district attorney in California." Umberg, a former federal prosecutor, continued: "A careful study of crime statistics in San Francisco clearly shows that Arlo Smith has failed as district attorney. Why should he be promoted to attorney general with such a miserable record?"[29]

On March 11, 1994, just four days after the passage of the Three Strikes law, Smith dropped out of the election, stating: "My decision is based on the reality that neither Democratic candidate, after a hotly contested primary battle, would defeat [Lungren]. The negatives and the high cost incurred in a primary skirmish would only aid a sitting attorney general."[30]

On March 17, 1994, San Francisco reported its first Three Strikes case.[31] Donald Rae Brown, 45, was arrested for breaking into a car and stealing its radio. He had several burglary convictions from more than 20 years earlier. The case received even greater notoriety when the victim, Joan Miller, 71, realizing that Brown faced a life sentence, at first avoided being subpoenaed by the District Attorney's office, and, once served and ordered to testify, refused--risking jail for contempt of court. In the end, Brown took a plea for a four-year sentence.[32] "I favor a three-strikes law, but it must be a rational policy and focus on serious and violent offenders, not something like this or a bounced check," said Smith, referring to Brown's case.[33]

By May, Smith reported that San Francisco had gotten 53 second and third strike cases--75 percent for nonviolent crimes--since the law went into effect on March 7th.[34] In July of 1994 in nearby Sonoma County a judge refused to send Jeffrey Dean Missamore, 32, to prison under the Three Strikes law for possession of eight grams of marijuana while in a correctional facility. After being threatened with a 15-year sentence as a second striker, Missamore pled guilty to and got an 8-year sentence. The judge, however, overruled the deal and sentenced Missamore to one year in jail and an additional year to a rehabilitation facility. When questioned about the case, Smith said "I think it's clear that that's not permitted by the law." Although Smith said he did not agree with the Three Strikes law, he continued, "I have a duty to apply the law. Every D.A. does and certainly we will. And every judge has

that same duty." Smith said the drafters of the initiative wrote it to give little discretion to judges "because the drafters clearly didn't trust the judiciary. . . . All this judge is doing is lending credence to their arguments."[35]

In November of 1994, the San Francisco District Attorney's office received a statement about the Three Strikes law when San Franciscans voted fifty-seven percent against it.[36] At the same time, San Francisco was bracing itself for a tidal wave of Three Strike cases as Superior Court Judge David Garcia, who ran the felony calendar at the Hall of Justice, began sending criminal cases to judges sitting in civil departments. Garcia said the calendar overload had been delayed because defense lawyers needed more time to research motions challenging prior strikes and had asked for and gotten continuances. District Attorney Smith estimated that criminal cases were going to use up three of the city's 20 civil departments in the coming months. That would not only squeeze out civil trials, but also posed an additional problem involving housing because the city's civil courtrooms did not have holding cells for defendants.[37]

In response to widespread jury nullification and the expected overcrowding of the court system, Smith chose to not use the Three Strikes law.[38] Through March of 1995 he brought only eight third strike cases to trial. "We are using a common-sense approach," Smith said, explaining that prosecutors were examining each defendant's history, the length of time that had elapsed since the last conviction, and the seriousness of the charge.[39]

In the spring of 1995 the *San Francisco Recorder* interviewed 43 people about their thoughts on Smith and the District Attorney's office. The *Recorder* reported that there was a concern that Smith was stagnant and that he had lost focus over the years. The same article, however, predicted he would still easily win in the upcoming election because nobody had declared they were going to run against him and he had received the endorsement of the most high-profile names in San Francisco politics, including Assembly Speaker Willie Brown, U.S. Senator Barbara Boxer, and 9 of the 11 members of the San Francisco Board of Supervisors. He also claimed the support of many community groups, including the Council of District Merchants and the Council of Labor, as well as many gay and Chinatown political organizations.[40]

Then the Fair Political Practices Commission (FPPC) accused Smith and his campaign treasurer of 18 violations of state clean-government laws during the 1990 state's attorney general election. If found guilty, they faced up to $36,000 in fines.[41]

One of Smith's deputy district attorneys, Bill Fazio, saw that Smith was vulnerable and told his boss that he was going to run against him in the election. Smith immediately fired Fazio and the dismissal became a legal issue that was not resolved until a few years later.[42] Fazio had

worked in the San Francisco District Attorney's office almost 20 years. He was a "head attorney" for the homicide division and handled high-profile cases.[43]

In April, Terrence Hallinan was running for mayor of San Francisco when he learned that the popular Assembly Speaker Willie Brown was going to throw his hat into the mayoral race. Hallinan, who was in his second and last term on the San Francisco Board of Supervisors, had a $1,000 advertisement in the *San Francisco Independent* asking San Franciscans to call a phone number to let him know whether they preferred him to run for mayor or district attorney. Hallinan announced that an overwhelming majority of callers said they wanted him to run for district attorney, so he joined Fazio in trying to defeat Smith. In his official press conference declaring his candidacy, Hallinan criticized Smith for lax oversight of juvenile justice issues, racist prosecution of Three Strike cases, and a passive approach to law enforcement.[44]

TERRANCE TYRONE "KAYO" HALLINAN

Terrance Hallinan's father, Vincent Hallinan, was a legendary San Francisco lawyer who, among other things, represented Harry Bridges, the leader of a longshoremen's union, during his trial in 1950 on charges that he lied when he denied being a Communist. The elder Hallinan later ran for President under the Progressive Party banner, while serving time in jail for contempt. He was twice suspended from the practice of law and spent 18 months in a federal prison for tax evasion.

Vincent Hallinan literally taught his six sons how to fight. Terrence Hallinan recalled: "My father said, 'Teach them how to box and they'll stand up for things they believe in.' I got into a lot of fights when I was a kid."[45] Terrence and his brothers grew up in a mansion with a swimming pool, a boxing ring, and dinner conversations dominated by the liberal political views of their father. The young Hallinan continued to fight at the college level while attending University of California at Berkeley and made the 1960 Olympic trials.[46]

In his youth, Hallinan also had his first experiences with the criminal justice system. He was arrested at age 15 on a reckless driving charge, was made a ward of the court at 17, and by his mid-20s was arrested for such offenses as petty theft, battery, and disturbing the peace.[47] Hallinan said he was known as "the toughest guy in Marin County."[48] He said he had a lot of aggression and anger as a youth and earned the nickname "Kayo" because of his penchant for knockouts--in and out of the ring.[49]

In college, Hallinan turned his aggression toward the student activist movements of the 1960s. He founded a student group to study

Marxism and after graduating from Berkeley he received a degree from University of California's Hastings College of Law in San Francisco. He was beaten and jailed at civil rights demonstrations in Mississippi and was arrested 16 times during protests. In 1964 he was sentenced to 60 days in jail for leading a demonstration on San Francisco's so-called "auto row" to push for more jobs for minority workers. In 1968 during a demonstration against the Vietnam War he was beaten by the police until his face dripped with blood. Within weeks, Hallinan, with 100 protesters, stood before the San Francisco Police Commission and demanded that the cops stop their brutality.[50]

Hallinan practiced law with his father and then developed his own general practice, handling a mixture of criminal defense, family law, and civil litigation. In a biography of Janis Joplin, "Pearl," Ellis Amburn suggests that Hallinan nearly died of a heroin overdose administered by Joplin. Hallinan strongly denied the story, but admitted using marijuana in his younger days.[51] In 1985 he claimed he was not the father of a former client's child until a court-ordered blood test proved otherwise.[52]

After serving on the local Democratic Central Committee, Hallinan was elected to San Francisco's Board of Supervisors in 1988 and again in 1992, where he successfully sponsored legislation guaranteeing equal rights for people who had or were changing their sex. He was well known for advocating the decriminalization of prostitution and legalization of medical marijuana.[53] While a supervisor, he settled a wrongful termination and sexual harassment case filed against him by a former staff member.[54]

In any other county Hallinan would probably not have been taken seriously as a candidate for District Attorney. But San Francisco is famous for the saying "only in San Francisco." It became apparent that Fazio would be painted as the conservative hard-liner, Smith somewhere in the middle, and Hallinan as the liberal.

In September of 1995, the *San Francisco Examiner* ran a critical four-part series evaluating Smith and the District Attorney's office during his years in office. The series focused on the low conviction rate of Smith's office, and accused Smith of mismanaging the office, and exhibiting political favoritism in some cases.[55]

The timing of the four-part series could not have been worse for Smith. With a wife who was in the hospital for cancer and less than two months before the election, he was having a difficult time holding off his opponents.[56]

Hallinan gave speeches announcing that he was going to clean house and hire new deputy district attorneys who would be more reflective of the ethnicity of the people who faced the criminal justice system. He claimed he was going to be tough on violent crimes but "look at other solutions for non-violent crimes such as marijuana

possession and prostitution." He also said that although he was personally opposed to the death penalty, he would "leave it up to a jury to decide whether particularly heinous crimes should receive the death penalty."[57] Smith responded by saying "Terence, let's face it, you're running for the wrong office. Terence Hallinan for public defender." Smith also called Hallinan's decriminalization of prostitution a magnet to increase street crime.[58]

Hallinan used the "tough on crime" movement to his advantage, stating: "Pat Buchanan's and Jesse Helms' brand of Republican politics seems to be sweeping the nation. I'm the only candidate who has the vision and track record to turn San Francisco's District Attorney's office into a national platform for challenging right-wing approaches to crime. Together, we can set up programs that promote prevention instead of only punishment, and bring safety back to our families and our neighborhoods."[59]

All three candidates took a critical stance on the Three Strikes law. Fazio attacked Smith for prosecuting Three Strike cases for "bad checks and stolen bicycles," and Hallinan focused on the racially disproportionate application of the law by Smith's office. Smith said "I try to prosecute the Three Strikes cases rationally. I don't go after every one of them. That's ridiculous." He also claimed the charges of racism were "ludicrous," saying that three out of the 11 assistant district attorneys were black, and 50 percent of the office's investigative staff was made up of "women, minorities, and gays and lesbians."[60]

Fazio received endorsements from law enforcement, the San Francisco Bar Association, and the major San Francisco newspapers.[61] Hallinan received the endorsement of the National Organization of Women (NOW).[62] About a week before the election, Fazio held a slight lead in the polls at 22 percent, with Smith receiving 20 percent and Hallinan at 17 percent--but 41 percent remained undecided (probably because they did not know who the candidates in the race were).[63]

On November 8, 1995, the undecideds came out strongly for Hallinan with the result that he received 68,980 (38.3 percent) of the votes, Fazio 64,143 (35.7 percent), and Smith 46,785 (26.0 percent).[64] Since no candidate had a majority, a run-off election between Hallinan and Fazio was scheduled for December 12th. Mayoral candidate Willie Brown was also in a run-off on the same date and it was thought this would be an advantage to Hallinan because it would bring more liberals to the voting booths.

Both candidates tried to play the other as an extremist. Hallinan's campaign manager said Fazio had a "Newt Gingrich approach to criminal justice . . . very right-wing, a very conservative approach." Fazio tried to scare business owners by saying "[I]n light of Hallinan's

interest in legalizing prostitution, (I'd) start looking for a district attorney who doesn't play that game."[65]

On December 1st the *San Francisco Chronicle* reported a poll that showed that Hallinan had 34.4 percent of the vote and Fazio 34.1 percent--the rest were undecided.[66] Smith endorsed Hallinan; and on December 12th Hallinan won the run-off with 52 percent of the vote.[67] Willie Brown also won his mayoral election and it was estimated before the election that 75 percent of the people who voted for Brown were also supporting Hallinan--thus, probably accounting for the margin that made Hallinan victorious.[68]

In January of 1996 Hallinan fired 14 deputy district attorneys out of an office of 115, computerized the office during the year, hired paralegals for the first time, and secured $8.2 million in grants as part of his $26.4 million budget. He hired about 40 new staffers, including 14 minorities, eight women, and eight lesbians and gays and received praise for his diversification of the office.

Hallinan had said he was going to allow juries to decide whether to impose the death penalty. He gave a jury one chance, and they rejected it. After that Hallinan decided his office would not pursue a death sentence, saying jurors rarely apply it, it sparks long and costly appeals, and he questioned whether the state should take a person's life. "It was agonizing for me," he said, adding that in the most serious cases he would seek life without parole.

Many police officers distrusted Hallinan as being soft on crime. Tensions grew when Hallinan announced that his office would assume the lead role in investigating officer-involved shootings. In apparent reply, officers in August 1996 failed to let Hallinan know they were going to join a raid led by Republican State Attorney General Dan Lungren on medical marijuana advocate Dennis Peron's Cannabis Buyers' Club on Market Street. As a compromise, Hallinan took back his office's lead role in officer-involved shootings and instead doubled to two the number of deputy district attorneys who would review the internal investigations made by the police department.

Before the 1999 election campaign, the *San Francisco Chronicle* wrote a negative report about Hallinan stating that his conviction record ranked last among California's 58 county prosecutors. The analysis also showed that fewer than 4 in 10 felony suspects arrested in the city were found guilty of crimes. The *Chronicle* reported "serious charges such as assault, rape and robbery are frequently thrown out and hundreds of felons--many of them with previous convictions--pay little or no penalty for their crimes."

Hallinan's office had also lost some high-profile cases. In a case against a landlord where a deck collapsed killing a person and injuring 12 others, Hallinan personally prosecuted the property owner who was found guilty of only two misdemeanor violations. A mistrial was

declared in a murder case after Hallinan discussed information about the case with a newspaper on the eve of the trial and then made matters worse by trying to approach the judge *ex parte* to explain his discussion with the reporter. Hallinan was critical of the judge and the case was removed from the San Francisco office and had to be taken over by the state's attorney general.[69]

Hallinan denied the *Chronicle's* conclusion and accused the paper of running the story in retaliation for his investigation into the possible antitrust implications of the sale of the *Chronicle* to the Hearst Corporation. The weekly *Bay Guardian*, which supported Hallinan, came to his defense with its own story disputing the *Chronicle's* report--as did the *San Francisco Independent*.

On September 22, 1999, less than two months prior to the fall election, it was reported that 21 percent of the San Francisco public favored Hallinan's return to lead the District Attorney's office. Bill Fazio, running again, had 14 percent support, and three lesser-known candidates, deputy public defender Matt Gonzalez and former deputy district attorneys Steven Castleman and Mike Schaefer--all received less than 5 percent each. In addition, 59 percent were still undecided. Many who held an unfavorable view of Hallinan said they did so because of the *Chronicle* report.[70]

On October 29th, less than a week before the election, the *San Francisco Examiner* reported that Fazio was leading the polls with 34 percent in his favor as compared to Hallinan's 24 percent.[71] The November 2nd election resulted in Fazio and Hallinan both receiving 38 percent of the vote--a run-off was scheduled for December 14th.[72]

Mayor Willie Brown was once again involved in a runoff--which was again expected to benefit Hallinan--especially since Brown's opponent was considered even more to the left than Brown. Fazio, a Democrat, promised to enlarge the diversion programs run by Hallinan. Once again law enforcement and most conservatives backed Fazio with the more liberal endorsements going to Hallinan. At debates, Hallinan and Fazio seemed to focus on particular cases prosecuted by the other that were later overturned because of prosecutorial misconduct. Fazio maintained that Hallinan's conviction rate was significantly lower than when Smith was District Attorney.[73] The Three Strikes law was not much of an issue: Hallinan said he was against using a felony drug case as a third strike. Fazio also opposed using drug cases as third strikes; his preference was to use only violent crime as a third strike. Fazio did say he would not rule out counting a burglary conviction as a third strike if the suspect had a history of violence.[74]

Less than two weeks prior to the run-off election it was reported that during a police vice raid at the Dragon massage parlor Fazio had been among about a dozen men who had been let go because the police said they had no evidence that any of the men had committed a crime.[75]

Fazio said he was at the massage parlor interviewing a witness in a murder case in which the defendant was accused of shaking down massage parlors. Hallinan made it a campaign issue by mailing out a pink flyer with a prostitute standing in front of the Dragon massage parlor with the heading "He wants us to believe he was interviewing a witness." Fazio responded by questioning Hallinan about the prior sexual harassment claim that had been made against him when he was on the Board of Supervisors.[76]

The run-off election count was so close that it was not until a substantial amount of absentee ballots were counted that Hallinan was able to declare victory.[77]

In November of 2003 Hallinan was seeking a third term in the 2003 election and, once again, Fazio was running against him.[78] This time, instead of disagreeing with Hallinan on his non-use of the death penalty, Fazio, like Hallinan, pledged he would not seek death. Hallinan responded by stating that Fazio was "stealing my issues." Fazio, however, still was the conservative as he appeared with police and crime victims at fundraising events.[79] In addition, Hallinan was opposed by Kamala Harris, a deputy city attorney, who previously was a prosecutor in Alameda County.[80] Harris, who received an endorsement from Arlo Smith, said she would prosecute cases in the same manner as Hallinan--that is, seek diversion for drug cases, not apply the Three Strikes law for nonviolent crime, and not seek the death penalty--but would manage the office better--an office which she said was "completely dysfunctional" under Hallinan.[81]

If elected Fazio said he would create a policy whereby if a prosecutor decides to allege one or two strikes in a case, the defendant's attorney would be given an opportunity to meet with the prosecutor to present exculpatory or mitigating information that might change his or her mind. Fazio also said he would spell out guidelines for Three Strike cases in a manual for the office, but that none of them would be hard-and-fast rules. Harris said if she was elected Three Strike policies would be flexible. "As varied as human beings are, that's how varied the cases are. So necessarily there's not going to be a strict formula."[82]

On November 4, 2003, Hallinan and Harris were the top two candidates, but neither had received a majority vote, so, as this is being written, they will be facing each other in a runoff in December.[83]

Table 9.2 indicates the number of Third Strikers admitted to prison by delivery date for San Francisco and California. Smith was only the District Attorney for 1994 and 1995 and the statistics do not demonstrate a clear decrease in use of the law when Hallinan led the D.A.'s office.

Table 9.2: Third Strikers Admitted to Prison by Delivery Date for San Francisco and the Total for California from April 1994 Through December 2001

	1994	1995	1996	1997	1998	1999	2000	2001	Total
San Francisco	1	8	5	3	7	5	2	2	33
	3%	24%	15%	9%	21%	15%	6%	6%	100%
California	134	866	1,333	1,248	1,174	1,022	813	635	7,225
	2%	12%	18%	17%	16%	14%	11%	9%	100%

Source: *Number of 2nd and 3rd Strike Commitments: April 1994 Through December 2001*, California Department of Corrections.

ALAMEDA COUNTY

At 825 square miles and a population of 1,443,741, it grew to have the fourth densest population of any county in California based on the 2000 census.[84] With 458 farms in 1997, however, about 55 percent of its land area was reportedly used for farming.[85] Its largest cities included Oakland (population of 399,484), Fremont (203,413), Hayward (140,030), and Berkeley (102,724). The population was 41 percent white, over 20 percent Asian, 19 percent Latino, 14 percent black, and 5 percent other.[86]

Alameda County had the largest percentage of blacks of any county in California and only five counties had a lesser percentage of whites. In 1999 its registered voters were 58 percent Democrat and 21 percent Republican and, like San Francisco, had a reputation for being liberal.[87] It is the home of University of California at Berkeley which was the leader in the radical youth movement of the 1960s. The Black Panther Party was founded in Oakland in 1966. Alameda County's per capita income in 1999 was an average of $34,131 (8th highest in the state), and it had an unemployment rate of three percent (8th lowest in the state).[88]

In 1993 Alameda County had the fourth highest violent crime rate of the California counties at 1,318 incidents per 100,000 people. It also had the fifth highest property crime rate at 6,872 per 100,000.[89] However, due to a decrease in violent and property crime from 1993 to 2001 of about 51 percent and 34 percent, respectively, the county was able to move to a violent crime rate of 638 per 100,000 (5th highest in

Table 9.3: Percentage of Third Strikers in the Prison Population at December 31, 2002 from Alameda Co. and its County Ranking per Offense Category Based on Four Factors

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Murder 1	11	145%	9	124%	15	185%	9	136%	9
Murder 2	5	84%	19	72%	22	108%	15	79%	19
Manslaughter	2	118%	13	101%	14	151%	11	111%	12
Veh. Mansl.	0	0%	8	0%	8	0%	8	0%	8
Robbery	54	81%	17	69%	33	77%	34	76%	18
Assault DW	6	37%	33	31%	35	50%	31	34%	34
Other Assault	2	10%	39	9%	39	14%	39	9%	39
Rape	8	136%	13	116%	18	124%	14	128%	13
Lewd Act-Chld	4	35%	34	30%	35	52%	32	33%	34
Oral Cop.	1	45%	17	38%	19	67%	16	42%	18
Sodomy	0	0%	9	0%	9	0%	9	0%	9
Penet w/ Ob.	2	225%	7	192%	9	336%	5	211%	6
Other Sex Off.	1	16%	26	13%	26	23%	26	15%	26
Kidnapping	2	51%	18	44%	21	59%	19	48%	17
Person	98	65%	30	56%	41	84%	21	61%	35
Burglary 1st	14	39%	32	33%	38	46%	32	36%	33
Burglary 2nd	0	0%	27	0%	27	0%	27	0%	27
Grand Theft	0	0%	20	0%	20	0%	20	0%	20
Petty Theft	1	6%	21	5%	21	5%	21	6%	21
Rec. Stol. Prop.	2	27%	25	23%	26	20%	26	25%	26
Vehicle Theft	0	0%	23	0%	23	0%	23	0%	23
Forgery/Fraud	0	0%	20	0%	20	0%	20	0%	20
Other Prop.	0	0%	13	0%	0	0%	0	0%	13
Property	17	17%	42	15%	44	13%	42	16%	41
CS Possession	0	0%	31	0%	31	0%	31	0%	31
CS Poss.-sale	1	8%	26	7%	26	6%	26	7%	26
CS Sub.-sales	0	0%	20	0%	20	0%	20	0%	20
CS-Manufact.	0	0%	13	0%	13	0%	13	0%	13
CS-Other	1	51%	9	44%	9	38%	10	48%	9
Marij. Ps.-Sale	0	0%	5	0%	5	0%	5	0%	5
Marij. Sales	0	0%	8	0%	8	0%	8	0%	8
Other Marij.	0	0%	3	0%	3	0%	3	0%	3
Drugs	2	4%	38	3%	38	3%	38	3%	38

Table 9.3: Continued.

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Escape	0	0%	9	0%	9	0%	9	0%	9
DUI	0	0%	14	0%	14	0%	14	0%	14
Arson	0	0%	12	0%	12	0%	12	0%	12
Poss. Weap.	3	17%	36	15%	36	16%	36	16%	36
Other Off.	2	30%	25	26%	0	0%	0	28%	25
Other	5	18%	39	15%	39	21%	39	17%	39
Nonperson	24	13%	46	11%	49	11%	49	12%	47
Total	122	37%	40	31%	49	34%	42	34%	41

Source: See notes 9 and 10 in chapter 6.

the state) and a property crime rate of 4,511 per 100,000 (6th highest in the state). Prior to the enactment of the Three Strikes law, it had a decrease of about 7 percent in its crime rate index from 1991 to 1994.[90]

THOMAS ORLOFF

According to the *San Francisco Recorder*, the Alameda County District Attorney's office is considered to be one of the best in the state, despite its reputation as being "inbred and protective of its own ranks."[91] When John "Jack" Meehan announced that we would not seek another term as the District Attorney of the county, Thomas Orloff, second in command, jumped at the position.[92] Orloff's only serious opposition appeared to be the former U.S. District Attorney General for the Northern District of California William Hunter and a Hayward solo criminal defense attorney named Frederick Remer. Orloff met his possible opponents for dinner and emphasized that he was going to go the extra mile to get the position as the head District Attorney. When Orloff stated he was willing to spend an estimated $300,000 on the campaign--and willing to use some of his own money--Hunter and Remer decided not to run.[93] Thus Orloff won unopposed in 1994--which had been the case every time his predecessor, Meehan, ran since 1982--and was also the case when Orloff won in 1998 and 2002.[94]

When Orloff took office he said that the county had about 20 other third strike cases and predicted his office would have no option but to try "a good number of them," forcing other cases off the docket and increasing the already overcrowded court system. Orloff said he supported "Three Strikes" in principal. Orloff pledged to take as much latitude as possible in interpreting the measure, but he realized the law would overload the trial calendar. The bottom line, he said, was that the office would cope as best it could.[95] In some cases, Orloff said, the law has been a "godsend, allowing us to do what really should happen

to these folks." But in other instances, he said, it is a curse, resulting in penalties that amount to "cruel and unusual punishment."[96] Yet even in Alameda County, where they took a lenient approach to the law, defendants were shocked and outraged over the new, longer sentences they were receiving.[97]

Liberal juries probably have great influence on how the Alameda County District Attorney's office is run. Criminal defense attorney James Giller said Alameda County's reasoned charging philosophy predates Orloff and goes back as far as he can remember. "Alameda County has always been a place where you can talk to someone about cases," said Giller. "It has always had a reputation of being firm but reasonable." Orloff said he personally reviews every Three Strikes case in his office to ensure that the law is uniformly applied.[98]

Table 9.4 indicates the number of Third Strikers admitted to prison by delivery date for Alameda County and California. The table demonstrates a fairly stable use of the law over time--with only a significant decrease during 2001.

Table 9.4: Third Strikers Admitted to Prison by Delivery Date for Alameda County and the Total for California from April 1994 Through December 2001

	1994	1995	1996	1997	1998	1999	2000	2001	Total
Alameda Co.	1	9	17	21	15	19	16	11	109
	1%	8%	16%	19%	14%	17%	15%	10%	100%
California	134	866	1,333	1,248	1,174	1,022	813	635	7,225
	2%	12%	18%	17%	16%	14%	11%	9%	100%

Source: *Number of 2nd and 3rd Strike Commitments: April 1994 Through December 2001*, California Department of Corrections.

NOTES FOR CHAPTER 9

[1] *Census 2000, SF1 Profile: State and County Population Summary*; *Square Mileage by County*.
[2] *California County Profiles,* California Department of Finance.
[3] Block and Buck, *California Political Almanac: 1999-2000*. Noble, "Fighting Crime, Gently."
[4] Rosenfeld, "Hallinan Living Up to Image."
[5] *California County Profiles.*
[6] *Reported Crimes and Crime Rates: 1992-2001*.
[7] *Reported Crimes and Crime Rates:1991 to 2001*.
[8] *Third Strikers in the Institution Population: July 31, 2002*.
[9] Johnson, "Fur Flies in Three-Way Dogfight."

[10] Smith, "A Solid Record."
[11] Gunnison and Lucas, "Race for Attorney General."
[12] Schreiner, "The Men in the Nasty Contest."
[13] The case of Dan White was famous in the legal world for the strategy of the "twinkie defense" in which it was argued White was depressed and consumed twinkies and coca cola--which furthered his depression and diminished his capacity to think clearly--and, this negated the element of premeditation required for a "murder" verdict. Instead, White was found guilty of voluntary manslaughter and sentenced to seven years and eight months in prison. From 70 to 80 percent approval ratings, Feitas saw them plummet to less than 30 percent after the White verdict. Gunnison and Lucas, "Race for Attorney General."
[14] Kisliuk, "Arlo."
[15] One of the only incidents to come back and haunt Smith was from 1982 when he and a deputy district attorney were detained by police after a drinking session because the police said they were too tipsy to drive. Gunnison and Lucas, "Race for Attorney General."
[16] Part of the expenses included extra jail costs to accommodate the many female fans who wanted to see the attractive Ramirez. Kisliuk, "Arlo."
[17] Gunnison and Lucas, "Race for Attorney General."
[18] Roberts, "3-Way Debate."
[19] Richardson, "Pulling the Strings."
[20] "Statewide Results," *San Francisco Chronicle*, June 7, 1990*,* A9.
[21] Yoachum, "Lungren's TV Ad."
[22] Lucas, "Absentees to Settle."
[23] Kershner, "State Says Lungren Won."
[24] Matier and Ross, "Few Convictions for Murder."
[25] Ibid.
[26] Kisliuk, "Arlo."
[27] "Reaction to Wilson's Speech," *San Francisco Examiner*, January 6, 1994*,* A16. See also Gunnison, "Polly Suspect."
[28] Ainsworth, "Despite Prosecutors' Objections."
[29] Epstein, "Attorney General Race Begins."
[30] Gunnison and Roberts, "Smith Drops Out."
[31] "Ex-Con Becomes First '3 Strikes' Case in S.F.," *San Francisco Chronicle*, March 17, 1994*,* C6.
[32] "Editorial: Three-Strike Travesty," *San Francisco Chronicle*, May 2, 1994*,* A20. Pertman, "'3 Strikes' Laws."
[33] Pertman, "'3 Strikes' Laws." Later, Joan Miller lost some credibility in her stance against the Three Strikes law when she admitted that she had not told the press that she had also found out just prior to her defiant stand in the Brown case that her son, Jed Miller, was arrested for driving a stolen truck with two bicycles in back and faced a possible Three Strikes sentence. "Woman Against

'3 Strikes' Law Has Son Facing Third Strike," *San Francisco Recorder*, August 25, 1994, 4.
[34] "Editorial: Three-Strike Travesty."
[35] Hatfield, "Judge Says No."
[36] Bowers, "The Integrity of the Game."
[37] Kisliuk, "Three Strikes and You've Got."
[38] Bowers, "The Integrity of the Game," 1175-1176. Mittelstaedt, "Jury Justice." In the case of Eugene Jones facing a possible third strike sentence for carjacking in San Francisco one juror said: "I cannot send a man to jail for burglary for life. . . . I don't care. I'm sorry. Hold me in contempt of court. I cannot send a man to prison for the rest of his life for burglary and carjacking. If he'd murdered somebody that's one thing. . . . I think it's too harsh. I think Three Strikes should be for people who commit severe, severe crimes." After other complaints by jurors, the judge called a mistrial. Record at 1066, 1071-72, People v. Jones, No. 157934 (S.F. County Sup. Ct. Jan. 26, 1995) cited in Bowers, "'The Integrity of the Game is Everything'," note 69.
[39] Butterfield, "'3 Strikes' Law in California."
[40] Kisliuk, "Arlo."
[41] King, "Arlo Smith Accused"; Opatrny, "DA Finalists Come Out Swinging."
[42] Fazio sued Smith and the City of San Francisco for wrongful termination and defamation of character. The result was that Fazio's wrongful termination claim based on First Amendment grounds was thrown out, the City agreed to a $45,000 settlement for the defamation charges, and Smith publicly apologized for statements he had made. "Fired Assistant DA Sues His Boss," *San Francisco Chronicle*, May 10, 1995, C4. *Fazio v. San Francisco*, 125 F.3d 1328 (1997) (cert. denied, 1998 U.S. Lexis 2559 (1998)); Rix, "9th Circuit Rejects Fazio Firing Suit." Fries, "Ex-Prosecutor, City Settle Suit."
[43] *Fazio*, 125 F.3d 1328 (1997).
[44] Kisliuk, "And in This Corner."
[45] "I had a lot of anger . . . Dad was in prison," Hallinan said. "It was the '50s and a tough time to be a liberal. That's why my father taught us to box. He wanted us to be able to defend ourselves." Marinucci and Finz, "SFPD in Crisis."
[46] Noble, "Fighting Crime, Gently."
[47] Marinucci and Finz, "SFPD in Crisis."
[48] One newspaper described him as the "bully boy of Marin County." Ibid.
[49] Opatrny and Marinucci, "Hallinan: I'll Focus on Preventing Crime."
[50] Marinucci and Finz, "SFPD in Crisis."
[51] Ibid.
[52] Opatrny and Marinucci, "Hallinan: I'll Focus on Preventing Crime."
[53] Kisliuk, "And in This Corner"; Rosenfeld, "Hallinan Living Up to Image."
[54] The City of San Francisco settled the suit in 1994 for $40,000 and gave the woman a $38,000-a-year job in the Public Health Department. Opatrny, "DA Contenders Spar."

[55] Winokur, "Arlo Smith: A Fixture for 15 Years"; Winokur, "How Politics Influences"; Winokur, "Mr. District Attorney, Second of Four Parts"; Winokur, "To be Young, Gifted and Held Back."
[56] Matier, "S.F. District Attorney's Election."
[57] Brandt, "Local Candidates Criticize San Francisco Politics."
[58] Johnson, "Fur Flies in Three-Way Dogfight"; Opatrny, "DA Contenders Spar."
[59] Hallinan, "Top Priority: Violent Crimes."
[60] Brandt, "DA Candidates Aim High."
[61] Ibid.; "It's Time for a Change: Bill Fazio for D.A.," *San Francisco Chronicle*, October 23, 1995, A22.
[62] Brandt, "DA Candidates Aim High."
[63] Matier, "S.F. District Attorney's Election."
[64] "San Francisco Election Results," *San Francisco Chronicle*, November 10, 1995, A26.
[65] Opatrny, "DA Finalists Come Out Swinging."
[66] Matier and Ross, "Free-for-All in DA Race."
[67] Ibid.; Opatrny and Marinucci, "Hallinan: I'll Focus on Preventing Crime."
[68] Yoachum, "As U.S. Tilts Right."
[69] Wallace, "Hallinan's Record Worst in State."
[70] Matier and Ross, "Support for D.A. Hallinan's Re-Election."
[71] Hartlaub, "Fazio Leading Hallinan."
[72] Rosenfeld, Hartlaub and Zamora, "DA Runoff."
[73] Wallace, "Court Overturned 6 Fazio Convictions." Hallinan accused Fazio of misconduct in a 20 year-old murder case which then backfired on Hallinan when relatives of the victim confronted Hallinan at a debate. Opatrny, "Victim's Family."
[74] Zamora, "Study: 3 Strikes Hasn't Cut Crime."
[75] Matier and Ross, "A Little Mud."
[76] Matier and Ross, "Hallinan Goes for Broke."
[77] Hallinan won by less than 2,000 votes in over 200,000 cast. Howe, Wildermuth and Wilson, "Hallinan Declares Victory." Brown easily won his run-off with 60 percent of the vote. Epstein, "Brown in a Landslide."
[78] Smith, "The Incumbent."
[79] Smith, "Round Three."
[80] During the campaign, Fazio sent out a mailer that was critical of Harris getting two appointments to well-paid state commissions from her then-boyfriend, then-state Assembly Speaker Willie Brown. Hoge, "D.A. Race."
[81] Hampton, "Former DA Arlo Smith"; Smith, "Girding for Battle."
[82] Smith, "Strike Three: DA Terence Hallinan."
[83] Hoge, "D.A. Race."
[84] *Census 2000, SF1 Profile: State and County Population Summary*; *Square Mileage by County*.
[85] *California County Profiles*.

[86] Ibid.
[87] Block and Buck, *California Political Almanac: 1999-2000*.
[88] *California County Profiles*.
[89] *Reported Crimes and Crime Rates: 1992-2001*.
[90] *Reported Crimes and Crime Rates:1991 to 2001*.
[91] Bay, "The Stealth Reformer."
[92] Aquino, "Alameda DA Meehan."
[93] The major issues confronting Orloff was criticism that the office did not have enough ethnic diversity and hired relatives of local politicians. Bay, "The Stealth Reformer."
[94] Ibid.; "County by County Election Results: Alameda County," *San Francisco Chronicle*, June 9, 1994, A22; "County by County Election Results: Alameda County," *San Francisco Chronicle*, June 3, 1998, A25; "County-by-County Election Results: Alameda," *San Francisco Chronicle*, March 7, 2002, A21.
[95] Bay, "The Stealth Reformer." Yaffe, "Hallinan Limits '3 Strikes'."
[96] Chiang, "Law Frustrates Prosecutors."
[97] Chiang, "Uneven Justice."
[98] Fried, "Alameda DA Gears Up."

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CHAPTER 10

Kern, Kings, and Del Norte Counties

KERN COUNTY

Kern County is the third largest county in California at 8,170 square miles and has the largest amount of farming land at 4,471 square miles.[1] In 2000 its population was 661,645 and its biggest cities were Bakersfield (247,057), Delano (38,824) and Ridgecrest (24,927).[2] The racial mix was 49 percent white, 38 percent Latino, 6 percent black, and 6 percent other.[3] In 1999 its registered voters were 45 percent Republican and 41 percent Democrat and had a reputation for being conservative.[4] In the 1920s the Ku Klux Klan in Kern County was said to rival that of the Deep South--but aimed at whites as well as black and brown citizens--and became especially aggressive against farm workers coming from Oklahoma, Arkansas and other depressed states during the 1930s.[5] In 1975, the city of Taft in Kern County made national news when thirteen black athletes were run out of town by whites and the town of Oildale apparently had signs that read "No Niggers Allowed."[6] Kern County's per capita income in 2000 was an average of $19,886--ranked 47th lowest of the 58 counties--and an unemployment rate of 11 percent--12th highest of the 58 counties.[7] Like many other counties in the Great Central Valley, Kern County had been experiencing economic depression and welcomed the placement of prisons within its borders with the hopes of bringing jobs and an economic stimulus.

With eight prisons, Kern County has 17,367 state prisoners--the most of any county within the state. In addition, the county has 6,018 people in jail--higher than any other county in the state except Los Angeles.[8] Considering there are also prisons in neighboring counties and that Bakersfield is the largest city in the area, one can safely assume a large number of prison guards live in Kern County.

From 1993 to 2001 Kern County's crime rate was similar to the average of California. Kern had an average crime rate index of 5,294 per 100,000 people when the California average was 5,139.[9] The county also experienced similar reductions in crime during this period as it had a 43 percent decrease in reported violent crime and a 36 percent decrease in property crime.[10] Prior to the enactment of the Three Strikes law it had experienced a slight decrease in its crime rate index of two percent from 1991 to 1994.[11]

As Table 10.1 indicates, as of December 31, 2002 Kern County has used the Three Strikes law at much higher rates than the rest of the state. On a per capita basis, Kern County's 390 third strikers were the highest in the state at 271 percent--although the county ranking is less when based on violent crime (4th), arrests (3rd), and convictions (8th). Kern County has been particularly tough on nonviolent offenders with a high percentage usage rate against those convicted of petty theft, receiving stolen property, the possession and sale of drugs, and driving while under the influence. As of July 31, 2002, the racial breakdown of third strikers from Kern County was about 34 percent Latino, 31 percent white, 28 percent black, and 3 percent other.[12] Based on relative population, blacks were 8 times and Latinos 41 percent more likely to get a third strike than whites--which was less than the state multiples of 12.4 times for blacks and 46 percent for Latinos.

EDWARD R. JAGELS

The Kern County District Attorney's office became so notorious for its aggressive prosecutorial approach that it provided Edward Humes with a national best selling book called *Mean Justice*.[13] Humes focuses on the evidence in what appears to be the wrongful murder conviction of Bakersfield resident Patrick Dunn. Humes' book reviews many other cases from Kern County that were overturned on appeal, or that Humes believes should be overturned because of prosecutorial misconduct. A summary of "wrongful prosecutions" since 1982 in Humes's Appendix A tallies 193 to 269 individuals who were actively investigated or arrested for serious criminal charges in Kern County: 103 of these were then charged for the crimes, 55 of who were later convicted, and only 9 whose convictions were later upheld by appellate courts--with the strong suggestion by Hume that the remaining convictions should also be overturned.

Table 10.1: Percentage of Third Strikers in the Prison Population at December 31, 2002 from Kern Co. and its County Ranking per Offense Category Based on Four Factors

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Murder 1	6	172%	3	219%	8	116%	15	90%	18
Murder 2	6	228%	5	290%	7	154%	11	119%	16
Manslaughter	1	129%	12	164%	11	87%	14	67%	15
Veh. Mansl.	0	0%	8	0%	8	0%	8	0%	8
Robbery	53	178%	4	227%	5	205%	9	93%	14
Assault DW	20	283%	5	360%	9	181%	9	147%	12
Other Assault	16	184%	10	234%	10	117%	15	96%	21
Rape	3	110%	15	140%	16	65%	21	57%	24
Lewd Act-Chld	15	305%	6	388%	7	160%	10	159%	15
Oral Cop.	1	100%	16	128%	14	53%	18	52%	16
Sodomy	0	0%	9	0%	9	0%	9	0%	9
Penet w/ Ob.	1	239%	6	304%	7	126%	10	124%	10
Other Sex Off.	11	412%	2	524%	5	217%	6	215%	9
Kidnapping	4	233%	4	297%	5	143%	9	122%	12
Person	137	207%	4	263%	7	138%	7	108%	14
Burglary 1st	39	249%	3	317%	5	202%	7	130%	12
Burglary 2nd	17	190%	3	242%	6	154%	4	99%	12
Grand Theft	6	264%	3	336%	3	175%	5	138%	7
Petty Theft	21	317%	2	404%	3	211%	3	165%	4
Rec. Stol. Prop.	13	421%	2	536%	3	280%	6	219%	6
Vehicle Theft	5	116%	11	147%	12	160%	10	60%	19
Forgery/Fraud	2	162%	8	206%	8	127%	11	84%	15
Other Prop.	3	456%	3	581%	0	0%	0	238%	7
Property	106	248%	2	315%	4	198%	4	129%	8
CS Possession	90	775%	1	986%	1	513%	3	403%	2
CS Poss.-sale	15	268%	2	341%	5	177%	10	140%	12
CS Sub.-sales	8	209%	3	266%	3	138%	7	109%	8
CS-Manufact.	0	0%	13	0%	13	0%	13	0%	13
CS-Other	4	490%	3	623%	3	324%	3	255%	3
Marij. Ps.-Sale	0	0%	5	0%	5	0%	5	0%	5
Marij. Sales	2	372%	2	473%	2	246%	2	194%	3
Other Marij.	0	0%	3	0%	3	0%	3	0%	3
Drugs	119	516%	1	657%	3	342%	3	269%	2

Table 10.1: Continued.

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Escape	1	386%	6	491%	5	78%	8	201%	6
DUI	7	1004%	1	1277%	2	796%	2	523%	2
Arson	1	186%	6	237%	6	142%	8	97%	9
Poss. Weap.	13	172%	8	218%	12	124%	14	89%	18
Other Off.	6	206%	7	262%	0	0%	0	107%	16
Other	28	234%	5	298%	10	166%	5	122%	14
Nonperson	253	325%	1	414%	4	234%	4	169%	6
Total	390	271%	1	344%	4	190%	3	141%	8

Source: See notes 9 and 10 in chapter 6.

Among the many wrongfully convicted were those who had been accused of being part of "sex rings" where the participants allegedly sexually abused children--sometimes as part of satanic rituals. Kern County was one of the first places in America where a wave of "modern witch hunts" took place during the 1980s and 1990s. Whole towns seemed to get caught-up in believing accusations from children and the national news media would come to the town, interview people, and help legitimize the story.

In the summer of 1984, Kern County officials had identified eight separate "sex ring" cases, each involving several people.[14] According to Humes:

> More than seventy people were arrested. Hundreds more were implicated and put under investigation. Dozens of children were taken from their parents after social workers, sheriff's deputies and investigators from the district attorney's office decided that they had been used and abused in the most hideous ways imaginable for years, virtually in the open. . . . The same awful story was told by victim after victim: Children were drugged, hung from hooks, violated and sometimes beheaded. Blood was guzzled like sacramental wine. Photographs and movies were taken of the molestations.[15]

The Kern County cases were investigated and brought forward with great haste, and almost all those tried were convicted and received record-long prison sentences. Because of denials from the sheriff's department and district attorney's office that they had made mistakes or withheld exculpatory evidence, many of the cases took years to go through the appellate court system. Some of the convicted were in

prison 16 years until their cases were overturned.[16] The criminal investigations finally died out when the District Attorney's office began to question some of the cases, and especially when the children accused a prosecutor, deputy sheriff, and a social worker of being satanic molesters.[17]

Since 1983 the head of Kern County's District Attorney's office has been Edward R. Jagels. He grew up in the wealthy enclave of San Marino, went to prep school, and graduated with a degree in history from Stanford University.[18] As a college student during the Vietnam War, Jagels actively sided against the anti-war movement.[19] He graduated from San Francisco's Hastings College of Law, passed the bar, and three months later, in April of 1975, began work at the Kern County District Attorney's office.[20] He quickly established himself for being openly critical of judges, calling one a "chicken" and referring to another's courtroom as "Department 352"--a reference to the Evidence Code pertaining to the exclusion of evidence considered prejudicial or misleading.[21] He was not known by the public, but had made a name for himself in legal circles when during the trial of Tony Perez the judge had to repeatedly order Jagels to calm down, and, finally, charged Jagels with misconduct. Jagels responded by saying that if criminal-coddling judges were critical of him, then he must be doing his job right.[22]

In 1982, District Attorney Al Leddy had decided not to run in that year's election and Jagels, 33, jumped at the opportunity. Jagels ran on the platform that he would create the most aggressive District Attorney's office in the state. He would push the envelope on the streets and in the courtrooms, doing whatever it took to put criminals in prison. His campaign slogan was "Ask a cop." He received major support from a victims rights group called the Mothers of Bakersfield and their leader, Jill Haddad.[23]

Jagels only opponent was Superior Court Judge Marvin Ferguson, the same judge whose courtroom Jagels referred to as "Department 352." Ferguson appeared to be the early leader in the race until he was confronted at a public forum by an angry Haddad, who stood up in the crowd waving a fistful of papers. Haddad put the judge on the spot by referring to a sexual abuse case that had been handled in his courtroom years before. Haddad accused the judge of mishandling the case, and--against the recommendation of county child care workers--releasing a young girl back into the home of a step-father who had beat her. Eight months after her return the step-father beat the girl to death. When confronted at the forum, the judge could not remember the facts of the case to defend himself. A week later the judge pointed out that the District Attorney's office was partially to blame as they did not send a representative to the hearing or provide any documentation indicating protective separation for the girl. But the damage had been done and

Ferguson never recovered. Jagels won by a 56 percent to 44 percent vote. According to a later grand jury investigation, the file involving the abused girl had been given by deputy district attorney Colleen Ryan to Jagels' political consultant and then "mysteriously" found its way to Haddad. Jagels refused to follow the grand jury's recommendation to discipline Ryan for divulging confidential information and years later he recommended her for a judgeship. "It's hard to discipline somebody that helped him get elected," then Kern County Supervisor Gene Tackett said.[24] Jagels has also responded that the taking of the file by Ryan was technically not a breach of confidentiality since the girl in question was dead.[25]

On top of winning the District Attorney position, Jagels, in 1982, became the Kern County co-chairman of Proposition 8, the "Victims Bill of Rights." After getting it passed, he turned his attention to the California Supreme Court and what he called the "pro-defense fanaticism" of Chief Justice Rose Bird.[26] He helped found and became the steering committee chairman of Crime Victims for Tort Reform that was considered the principle organization that kept Bird and two other liberal justices from being reconfirmed in 1986.[27] In 1990, he was co-author of Proposition 115, the "Crime Victims Justice Reform Act," another sweeping criminal procedure initiative, and chairman of its campaign organization, the Crime Victims California Justice Committee.[28] In the mid-1990s, Jagels was president of the California District Attorney's Association (CDAA), was appointed to the Governor's Law Enforcement Steering Committee, and selected as the chairman of the Attorney General's Policy Council on Violence Prevention.

In 1994 Jagels supported but was not actively involved in the Three Strikes campaign. In a 1995 effort to demonstrate that the law was working, Jagels said the number of people charged with a third strike had surged at first but had dropped off significantly in the spring of 1995. "I can't explain that decrease, except to assume that people with criminal records are not committing crimes," Jagels said. "The police are doing nothing differently than they were 14 months ago."[29] Such a decrease must have been short-lived, however, because the conviction rate for third strikers in Kern County increased in 1996 and peaked in 1997 (see table 10.2).

In 1995, perhaps in response to increasing jury nullification in Three Strikes cases, Jagels co-sponsored an initiative called the Public Safety Protection Act that proposed that only 10 out of 12 jurors could return a binding guilty or not guilty verdict in criminal trials, except for death penalty cases. Jagels said, "We need to put an end to the terrible waste of resources involved in the many hung jury cases each year."[30] Jagels and his supporters failed, however, to qualify the initiative for the ballot.

Table 10.2: Third Strikers Admitted to Prison by Delivery Date for Kern County and the Total for California from April 1994 Through December 2001

	1994	1995	1996	1997	1998	1999	2000	2001	Total
Kern Co.	8	48	69	70	53	57	36	33	374
	2%	13%	18%	19%	14%	15%	10%	9%	100%
California	134	866	1,333	1,248	1,174	1,022	813	635	7,225
	2%	12%	18%	17%	16%	14%	11%	9%	100%

Source: *Number of 2nd and 3rd Strike Commitments: April 1994 Through December 2001*, California Department of Corrections.

Jagels' website declares that during his tenure as District Attorney, "Kern County has had the highest per capita prison commitment rate of any major California County."[31] In addition the website states that Jagels "is frequently asked to participate in newspaper, radio and television discussions on such subjects as 'Three Strikes and Your Out,' victim's rights, court reform, and legislation." When giving lectures at prisons, Jagels said he was surprised at how well the prisoners knew the details of the Three Strikes law and this bolstered his belief that the law was acting as a deterrent.[32] When questioned about the costs of the law, Jagels pointed out that there would be a significant decrease in the costs to local spending, but not to the state budget.[33]

In the fall of 2002 a scandal hit Jagels' office and brought a resurfacing of many earlier controversial cases. On September 13th, the second in command at the district attorney's office, Stephen Tauzer, was found murdered at his home. In the following weeks a former police officer and investigator for the District Attorney's office, Chris Hillis, was charged. It was suspected that the motivation for the killing had to do with a possible homosexual relationship between Tauzer and Hillis's son, Lance. Lance, a drug-addict, had repeatedly been granted leniency by the Kern County criminal justice system when Tauzer stepped in on his behalf. Lance's father was upset at the leniency granted his son and spoke to Tauzer about it. Then when Lance was killed while fleeing a rehabilitation clinic in a stolen car that he drove head-on into an oncoming truck, Hillis apparently became so angry at Tauzer that he murdered him.

The unusual leniency granted Lance, the homosexual relationship, and the murder brought to surface many cases that had been a part of local folklore in Bakersfield in the late 1970s and 1980s. The old legend, called "The Lords of Bakersfield," was being talked about by townspeople so extensively that the local paper ran a multi-part series

trying to explain the legend and the similarities involving the current case.[34] As explained by the *Bakersfield Californian*, the Lords legend involved several men who ran Bakersfield but also lived double-lives. The secretive network included county executives, judges, prosecutors, defense attorneys, and even the newspaper's publisher. The legend says that some of the men were homosexual, preyed on young men and boys, then used their power and influence to protect each other from possible ramifications.[35] Five unusual murders occurred during this time period. The District Attorney's office seemed to show leniency or unusual carelessness in the prosecution of many of the suspects--especially since this was an office that openly bragged about having the highest per capita conviction rate in the state.

Whether Jagels knew of Tauzer's leniency in regard to Lance Hillis is questioned--but also many are wondering of his possible involvement in the Lords of Bakersfield legend.[36] Rumors are circulating about Jagels' sexual orientation--which apparently were circulating before Tauzer was killed.[37] Jagels refuses to comment and some say he may even be contemplating early retirement.[38] In October of 2003, Hillis pleaded guilty to voluntary manslaughter and received a 12-year sentence.[39]

KINGS COUNTY

Kings County is located north of Kern County and west of Tulare County in what might be described as the heart of the Great Central Valley. It is small in comparison to the surrounding counties at only 1,436 square miles--of which 74 percent is dedicated to farming (5th highest percentage in the state).[40] In 2000 its population was 129,461 and its biggest cities were Hanford (41,686) and Lemoore (19,712).[41] The racial mix was 44 percent Latino, 42 percent white, 8 percent black, and 7 percent other.[42] Not mentioned anywhere on the Kings County web site is that over 13 percent of its residents are state prisoners.[43] Like Kern County, Kings County also believed that its economy would improve by having state prisons built within its confines. The influx of prison jobs, however, still has not brought Kings County its economic revival as its per capita income in 2000 was an average of $15,732--ranked lowest in the state, and it had an unemployment rate of 14 percent--6th highest of the 58 counties.[44] In 1999 the county's registered voters were 43 percent Democrat and 42 percent Republican--but with a large number of prison guards living in its communities, the county is considered more conservative than most.[45] In 1994 over 81 percent of its voters were for the Three Strikes law--the 6th highest percentage in the state.[46]

From 1993 to 2001 Kings County's crime rate was lower than the average of California: it had an average crime rate index of 3,901 per 100,000 people when the California average was 5,139.[47] During the

same period, the county experienced a 50 percent decrease in reported violent crime and a 33 percent decrease in property crime.[48] Prior to the enactment of the Three Strikes law, the county had a decrease from 1992 to 1994 in its crime index of 7 percent.[49]

As Table 10.3 indicates, as of December 31, 2002, like Kern County, Kings County has used the Three Strikes law at much higher rates in comparison to the rest of the state. On a per capita basis, Kings County's 76 third strikers were the second highest in the state at 262 percent--and highest when based on violent crime at 584 percent. The county has a high percentage of third strikers no matter the category of crime. As of July 31, 2002, the racial breakdown of third strikers from Kings County was about 34 percent Latino, 29 percent white, 25 percent black, and 4 percent other.[50] Based on relative population, blacks were 4 times and Latinos 13 percent more likely to get a third strike than whites--which was less than the state multiples of 12.4 times for blacks and 46 percent for Latinos.

GREGORY STRIKLAND AND RONALD L. CALHOUN

Gregory Strickland was born in South Bend, Indiana, graduated from the University of Southern California in 1974 with a Bachelors degree in biology-chemistry, and from the Whittier College School of Law in 1980. He began working with the Kings County District Attorneys' office in 1981 and ran against incumbent Garry Gonsalves for the head District Attorney job in 1994. Strickland said if elected he wanted to increase communication with law enforcement agencies, giving them a stronger voice in the criminal justice system. Strickland won by taking 60 percent of the votes.[51]

Ronald L. Calhoun was born in Mineral Wells, Texas and graduated from College of the Sequoias with a degree in Criminology in 1978. From 1975 through 1988 he was a police officer with the Hanford police department, graduated from San Joaquin College of Law in 1988, and practiced law until running for District Attorney of Kings County in 1998. In the 1998 election, Calhoun contended that the line of communication between Strickland's office and law enforcement agencies had broken down, and he would be the right person to mend the problem.[52]

Table 10.3: Percentage of Third Strikers in the Prison Population at December 31, 2002 from Kings Co. and its County Ranking per Offense Category Based on Four Factors

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Murder 1	1	145%	7	322%	4	441%	2	119%	11
Murder 2	5	980%	1	2179%	1	2983%	1	805%	1
Manslaughter	2	1372%	2	3051%	2	4177%	1	1126%	2
Veh. Mansl.	0	0%	8	0%	8	0%	8	0%	8
Robbery	13	221%	3	491%	4	566%	3	181%	3
Assault DW	3	210%	9	467%	6	167%	11	173%	11
Other Assault	0	0%	40	0%	40	0%	40	0%	40
Rape	3	571%	2	1269%	2	475%	3	469%	3
Lewd Act-Chld	5	507%	1	1128%	1	318%	4	416%	2
Oral Cop.	2	1064%	2	2366%	1	666%	2	874%	2
Sodomy	0	0%	9	0%	9	0%	9	0%	9
Penet w/ Ob.	1	1241%	2	2760%	2	777%	3	1019%	2
Other Sex Off.	2	365%	4	811%	1	228%	5	299%	5
Kidnapping	1	293%	2	651%	1	335%	3	240%	4
Person	38	289%	1	642%	2	251%	2	237%	2
Burglary 1st	8	255%	2	568%	2	332%	2	210%	3
Burglary 2nd	2	112%	7	250%	3	146%	6	92%	13
Grand Theft	0	0%	20	0%	20	0%	20	0%	20
Petty Theft	4	299%	3	664%	1	519%	1	245%	3
Rec. Stol. Prop.	1	156%	10	347%	7	271%	5	128%	13
Vehicle Theft	0	0%	23	0%	23	0%	23	0%	23
Forgery/Fraud	1	414%	1	920%	1	597%	2	340%	4
Other Prop.	0	0%	13	0%	0	0%	0	0%	13
Property	16	186%	3	414%	3	312%	3	153%	7
CS Possession	8	314%	2	697%	2	712%	1	257%	3
CS Poss.-sale	2	177%	8	394%	3	403%	1	146%	11
CS Sub.-sales	4	532%	1	1183%	1	1208%	1	437%	1
CS-Manufact.	0	0%	13	0%	13	0%	13	0%	13
CS-Other	0	0%	11	0%	11	0%	11	0%	11
Marij. Ps.-Sale	0	0%	5	0%	5	0%	5	0%	5
Marij. Sales	0	0%	8	0%	8	0%	8	0%	8
Other Marij.	0	0%	3	0%	3	0%	3	0%	3
Drugs	14	289%	2	643%	2	657%	1	237%	3

Table 10.3: Continued.

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Escape	0	0%	9	0%	9	0%	9	0%	9
DUI	1	636%	2	1414%	1	758%	1	522%	1
Arson	0	0%	12	0%	12	0%	12	0%	12
Poss. Weap.	4	268%	5	596%	4	427%	1	220%	6
Other Off.	3	525%	2	1167%	0	0%	0	431%	2
Other	8	336%	3	747%	2	443%	1	276%	3
Nonperson	38	240%	2	535%	2	435%	1	197%	2
Total	76	262%	2	584%	1	349%	2	215%	2

Source: See notes 9 and 10 in chapter 6.

Even though Strickland's record appeared good on paper--he had doubled welfare fraud convictions and had a 95 percent conviction rate against sexual offenders--he had made the mistake of prosecuting some local prison guards.[53] Days before the election, hundreds of fliers hit the doorsteps of voters in Kings County from the 29,000-member California Correctional Peace Officers Association (CCPOA) calling for the defeat of Strickland. The full-color piece implied that if the prison inmates could vote, they would reelect Strickland.[54] Strickland lost 58.8 percent to 40 percent.[55]

Not only had the flier been endorsed by the CCPOA, but the union had given Calhoun nearly $30,000 for his campaign--a huge sum for such a small county election. Two incidents lay behind the reason Strickland was targeted by the CCPOA. In 1995 Strickland had prosecuted Corcoran State prison guards who choked, punched, and beat shackled prisoners and Strickland assisted state and federal investigators who were trying to bring a case against Corcoran prison guards who had set up a prisoner for rape by another inmate known as the "Booty Bandit."[56]

The rate of Third Strikers admitted to prison from Kings County is presented in Table 10.4. Except for the large number in 1995, the rate was relatively stable--which also might be a little unusual considering that the rest of the state showed significant decreases in 2000 and 2001.

Table 10.4: Third Strikers Admitted to Prison by Delivery Date for Kings County and the Total for California from April 1994 Through December 2001

	1994	1995	1996	1997	1998	1999	2000	2001	Total
Kings Co.	4	15	7	9	9	8	8	8	68
	6%	22%	10%	13%	13%	12%	12%	12%	100%
California	134	866	1,333	1,248	1,174	1,022	813	635	7,225
	2%	12%	18%	17%	16%	14%	11%	9%	100%

Source: *Number of 2nd and 3rd Strike Commitments: April 1994 Through December 2001*, California Department of Corrections.

In 2000, Calhoun's office received notice from the state Department of Corrections suggesting that correctional employees might be charged with involuntary manslaughter for placing an inmate who was suspected of murdering another prisoner in contact with other prisoners. The prisoner then killed his cellmate and another inmate and Calhoun's office maintained that it had insufficient evidence to bring charges. Calhoun said the decision had nothing to do with the CCPOA's 1998 endorsement of Calhoun's run for district attorney.[57]

In 2001, Calhoun's office investigated an incident in which police officers beat Michael Correa while trying to take him into custody and Correa died 10 hours later at a hospital. The officers contended that Correa physically attacked them, but witnesses reported that they saw the officers continue to hit Correa after he was handcuffed and after he was unconscious. Calhoun's office determined that the officers' actions during the arrest "were appropriate and all force used was a necessary and measured response to Mr. Correa's escalating physical combativeness."[58]

On March 1, 2002, Lemoore police officer Jeff McCabe stopped Peter Contreras for a traffic incident. According to McCabe, Contreras got into a scuffle with him, got back into his car, and almost hit McCabe while trying to flee. During the incident Contreras was shot and killed by McCabe.[59] Four days later, the election for District Attorney was held and Calhoun won unopposed.[60] A week after the election, the 50-year-old Calhoun suffered a stroke while bass fishing.[61] In April, while recovering and working part-time, Calhoun decided to bring manslaughter charges against the officer. The decision to prosecute was reported as "very, very difficult" and did not represent the unanimous view of senior prosecutors.[62] On May 23, 2002, Kings County Superior Court Judge Ronald Maciel dismissed the charges against McCabe saying the evidence presented during a 2 1/2-day preliminary hearing proved McCabe's life was in danger when he shot Contreras. The decision sparked an angry outburst from Contreras'

widow, who screamed obscenities as she was pushed out of the courtroom by deputies. The deputy district attorney handling the case said afterward that upon further review of the evidence he agreed with the judge that McCabe's life was in danger when he fired his gun.[63]

DEL NORTE COUNTY

California has two "super-max" prisons that are advertised as holding the "worst of the worst" prisoners in the state. Kings County has one in Corcoran, and Del Norte County has the other at Pelican Bay.

Del Norte County borders the Pacific Ocean and Oregon, is heavily wooded, and includes recreational areas such as the Redwood State and National Parks. At 1,003 square miles and with a population of only 27,507 in 2000, like many northern counties, Del Norte has a low population density (ranked 43rd in the state).[64] Its largest city is Cresent City with a population of only 4,006.[65] The racial mix was 70 percent white, 14 percent Latino, 6 percent American Indian, 4 percent black, and 6 percent other.[66] Similar to Kings County, over 12 percent of Del Norte County residents were state prisoners. Its per capita income in 2000 was an average of $17,722--ranked 54th out of the 58 counties in the state, and it had an unemployment rate of 8.7 percent.[67] In 1999 the county's registered voters were 42 percent Democrat and 38 percent Republican.[68]

From 1993 to 2001 Del Norte County's crime rate was lower than the average of California: It had an average crime rate index of 3,609 per 100,000 people when the California average was 5,139.[69] From 1993 to 2001 the county experienced a 3.75 percent increase in reported violent crime and a 13 percent decrease in property crime.

As Table 10.5 indicates, as of December 31, 2002, Del Norte County used the Three Strikes at an above average rate for violent third strikes, but had only one third striker for a non-violent crime--that being vehicle theft.

WILLIAM CORNELL

William Cornell became District Attorney in Del Norte County in 1989 just as nearby Pelican Bay State Prison was starting to get its first prisoners. In 1998 as he prepared to run for reelection, Cornell faced a formidable opponent--not because of who the person was--but because his challenger was backed by the CCPOA. The reason the CCPOA disliked Cornell was that he had investigated and prosecuted prison guards for prisoner abuse. Most recently Pelican Bay prison guards felt the sting from deputy district attorney James Fallman who was investigating a series of shootings, stabbings, and beatings at Pelican

Table 10.5: Percentage of Third Strikers in the Prison Population at December 31, 2002 from Del Norte Co. and its County Ranking per Offense Category Based on Four Factors

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Murder 1	0	0%	28	0%	28	0%	28	0%	28
Murder 2	1	898%	2	1654%	2	410%	25	559%	2
Manslaughter	0	0%	19	0%	19	0%	19	0%	19
Veh. Mansl.	0	0%	8	0%	8	0%	8	0%	8
Robbery	4	319%	2	588%	2	543%	4	199%	2
Assault DW	0	0%	39	0%	39	0%	39	0%	39
Other Assault	1	272%	5	501%	5	124%	13	170%	7
Rape	0	0%	29	0%	29	0%	29	0%	29
Lewd Act-Chld	0	0%	36	0%	36	0%	36	0%	36
Oral Cop.	0	0%	20	0%	20	0%	20	0%	20
Sodomy	0	0%	9	0%	9	0%	9	0%	9
Penet w/ Ob.	0	0%	14	0%	14	0%	14	0%	14
Other Sex Off.	0	0%	27	0%	27	0%	27	0%	27
Kidnapping	0	0%	23	0%	23	0%	23	0%	23
Person	6	213%	3	393%	4	103%	15	133%	8
Burglary 1st	0	0%	40	0%	40	0%	40	0%	40
Burglary 2nd	0	0%	27	0%	27	0%	27	0%	27
Grand Theft	0	0%	20	0%	20	0%	20	0%	20
Petty Theft	0	0%	22	0%	22	0%	22	0%	22
Rec. Stol. Prop.	0	0%	27	0%	27	0%	27	0%	27
Vehicle Theft	1	557%	1	1025%	1	334%	2	347%	1
Forgery/Fraud	0	0%	20	0%	20	0%	20	0%	20
Other Prop.	0	0%	13	0%	0	0%	0	0%	13
Property	1	55%	27	101%	26	38%	33	34%	35
CS Possession	0	0%	31	0%	31	0%	31	0%	31
CS Poss.-sale	0	0%	27	0%	27	0%	27	0%	27
CS Sub.-sales	0	0%	20	0%	20	0%	20	0%	20
CS-Manufact.	0	0%	13	0%	13	0%	13	0%	13
CS-Other	0	0%	11	0%	11	0%	11	0%	11
Marij. Ps.-Sale	0	0%	5	0%	5	0%	5	0%	5
Marij. Sales	0	0%	8	0%	8	0%	8	0%	8
Other Marij.	0	0%	3	0%	3	0%	3	0%	3
Drugs	0	0%	39	0%	39	0%	39	0%	39

Table 10.5: Continued.

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Escape	0	0%	9	0%	9	0%	9	0%	9
DUI	0	0%	14	0%	14	0%	14	0%	14
Arson	0	0%	12	0%	12	0%	12	0%	12
Poss. Weap.	0	0%	38	0%	38	0%	38	0%	38
Other Off.	0	0%	27	0%	0	0%	0	0%	27
Other	0	0%	41	0%	41	0%	41	0%	41
Nonperson	1	30%	39	55%	34	20%	43	18%	43
Total	7	113%	10	208%	7	67%	31	70%	26

Source: See notes 9 and 10 in chapter 6.

Bay in the late 1990s.[70] Cornell said he supported the work of Fallman.[71]

The CCPOA gave almost $20,000 to Cornell's opponent--which some believed was the largest amount ever given to a candidate for District Attorney in Del Norte. The prison guard union's money was used to set up an automated telephone campaign that was so aggressive it backfired by irritating many of the recipients of the calls.[72] Cornell won the election, but, tired of being a district attorney in a prison county, he resigned in January 1999. In 1994 Cornell said he preferred the Rainey Bill, which would have required the third strike to be violent or serious, instead of Reynolds' initiative. In one case, Cornell used his prosecutorial discretion not to give a burglar a second strike. The case involved a 19-year-old man who had been arrested for breaking into his parents' home and stealing a jar of old silver coins. His prior strike was for assault with a deadly weapon. Instead of receiving an eight-year sentence, the man was charged with misdemeanor petty-theft and received a sentence of less than one year in jail.

NOTES FOR CHAPTER 10

[1] *Census 2000, SF1 Profile: State and County Population Summary*; *Square Mileage by County. California County Profiles*. The "Visit Kern County" web site states Kern County is larger than Massachusetts, New Jersey or Hawaii. *Discover Kern County*, Kern County Board of Trade.

[2] *Census 2000, SF1 Profile: State and County Population Summary*; *Square Mileage by County*.

[3] *California County Profiles*.

[4] Block and Buck, *California Political Almanac: 1999-2000*.

[5] According to Edward Humes, "[b]y 1922, avowed Klan members controlled the Bakersfield mayor's office, various police departments throughout the county, much of the sheriff's force of deputies, several judgeships, the city school district, and the county board of supervisors." Humes, *Mean Justice*, 22. According to Humes, the Klan's allure in Kern County was due in part to its marketing itself as a "Christian fraternity that could combat the frontier corruption plaguing Bakersfield and other cities of the era." Humes, *Mean Justice*, 22.
[6] Humes, *Mean Justice*, 22.
[7] *California County Profiles*.
[8] Ibid.
[9] *Reported Crimes and Crime Rates: 1992-2001*.
[10] In comparison, the state average was a 43 percent decrease in violent crime and 39 percent decrease in property crime. Ibid.
[11] *Reported Crimes and Crime Rates:1991 to 2001*.
[12] *Third Strikers in the Institution Population: July 31, 2002*.
[13] Humes, *Mean Justice*.
[14] Nathan and Snedeker, *Satan's Silence*, 93.
[15] Humes, *Mean Justice*, 166.
[16] Ibid., 429-438. See also Rodriguez, "New Trial Unlikely in Kern Molestation Case."
[17] Nathan and Snedeker, *Satan's Silence*.
[18] *Management,* Kern County District Attorney's Office; Price, "The Rise of Ed Jagels."
[19] Humes, *Mean Justice*, 81.
[20] Ibid., 82.
[21] Price, "The Rise of Ed Jagels."
[22] Humes, *Mean Justice*, 82-85.
[23] Ibid., 75.
[24] Price, "The Rise of Ed Jagels."
[25] *Junk Journalism,* Kern County District Attorney's Office.
[26] *Management*. Proposition 8 was a constitutional amendment that changed many facets of the criminal justice system regarding restitution, evidence, bail, sentencing, victim statements, and plea bargaining. See Proposition 8 at http://holmes.uchastings.edu/cgi-bin/starfinder/21564/calprop.txt.
[27] Humes, *Mean Justice*, 88.
[28] *Management*.
[29] Brandon, "'3 Strikes' Law."
[30] Martineau, "Initiative to Allow Non-Unanimous Jury Verdicts." Lopez, "Fred Goldman."
[31] *Management*.
[32] Brandon, "'3 Strikes' Law."
[33] Ibid.
[34] "The Lords of Bakersfield," *Bakersfield Californian*, January 20, 2003.

[35] Price, "The Legend of the Lords of Bakersfield."
[36] Price, "Questions Dog Jagels."
[37] Price, "Stubborn Rumors."
[38] Price, "What's Next for Jagels?'
[39] Johnson, "Man Guilty in Death of D.A. Assistant."
[40] *Census 2000, SF1 Profile: State and County Population Summary*; *Square Mileage by Count; California County Profiles.*
[41] *Census 2000, SF1 Profile: State and County Population Summary*; *Square Mileage by County*.
[42] *California County Profiles*.
[43] Ibid.; *Welcome to Kings County*, Kings County.
[44] *California County Profiles*.
[45] Block and Buck, *California Political Almanac: 1999-2000*.
[46] *Statement of Vote: November 8, 1994*.
[47] *Reported Crimes and Crime Rates: 1992-2001*.
[48] Ibid.
[49] *Reported Crimes and Crime Rates:1991 to 2001*.
[50] *Third Strikers in the Institution Population: July 31, 2002*.
[51] Galvan, "Hanford Lawyer Faces Incumbent."
[52] Ibid.
[53] Ibid.
[54] MacLean, "The Strong Arm," 25.
[55] "Kings County--Election '98," *Fresno Bee*, June 4, 1998, A14.
[56] MacLean, "The Strong Arm"; Podger, "Prison Guard Union Wins Delay."
[57] Fitzenberger, "3 Corcoran Staffers."
[58] Ginis, "Hanford Officers' Actions Cleared."
[59] Griswold, "Officer Faces Charge."
[60] Ibid.
[61] Ginis, "Stroke Puts Kings DA in the Hospital."
[62] Griswold, "Officer Faces Charge."
[63] Ginis, "Officer Cleared in Fatal Flight."
[64] *Census 2000, SF1 Profile: State and County Population Summary*; *Square Mileage by County*; *California County Profiles*.
[65] *Census 2000, SF1 Profile: State and County Population Summary*; *Square Mileage by County*.
[66] *California County Profiles*.
[67] Ibid.
[68] Block and Buck, *California Political Almanac: 1999-2000*.
[69] *Reported Crimes and Crime Rates: 1992-2001*.
[70] Sward, "Pelican Bay Killings."
[71] MacLean, "The Strong Arm."
[72] Ibid.

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CHAPTER 11

Orange County

ORANGE COUNTY

Orange County is located south of Los Angeles County and north of San Diego County and has 42 miles of coastline along the Pacific Ocean. Orange County is known as the home of Disneyland. It is only the 47th largest county in California at 785 square miles, but had the second highest population in 2000 at 2,846,289, making it the second densest county in the state.[1] Orange County had a greater population than 20 of the country's states, including Mississippi, Kansas, and Arkansas.[2] Cities of Orange County include Santa Ana (337,977), Anaheim (328,014), Huntington Beach (189,594), Garden Grove (165,196), Irvine (143,072), Orange (128,821) and Fullerton (126,003).[3] The racial mix in 2000 was 51 percent white, 31 percent Latino, 13 percent Asian, 1.5 percent black, and 3 percent other. In 1999 its registered voters were 51 percent Republican and 32 percent Democrat.[4] The county has had a reputation for being very conservative--but with a growing Latino population has seen political changes--the most recent being the 1998 election of Democrat Loretta Sanchez over outspoken Republican Bob Dornan as a U.S. Representative. Orange County's per capita income in 2000 was an average of $33,805--ranked 9th highest of the 58 counties, and an unemployment rate of 2.5 percent--4th lowest of the 58 counties.

From 1993 to 2001 Orange County's crime rate was significantly lower than the rest of California. Orange County had an average violent crime rate index of 408 per 100,000 people when the California average was 832.[5] During the same time period, compared to the rest of the state, Orange County experienced a similar reduction in violent crime but a greater reduction in property crime. Prior to the enactment of the Three Strikes law, Orange County had experienced a decrease in its crime rate index of 16 percent from 1991 to 1994.[6]

As Table 11.1 indicates, as of December 31, 2002 Orange County has used the Three Strikes law at lower rates in comparison to the rest

Table 11.1: Percentage of Third Strikers in the Prison Population at December 31, 2002 from Orange Co. and its County Ranking per Offense Category Based on Four Factors

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Murder 1	8	50%	22	110%	17	99%	17	60%	21
Murder 2	6	50%	21	108%	17	97%	18	59%	22
Manslaughter	1	28%	18	61%	16	55%	16	33%	17
Veh. Mansl.	1	182%	7	397%	7	355%	7	217%	7
Robbery	58	42%	27	93%	22	76%	35	51%	29
Assault DW	9	27%	36	59%	32	50%	29	32%	35
Other Assault	22	56%	28	122%	19	104%	17	67%	26
Rape	2	16%	28	35%	28	31%	28	19%	28
Lewd Act-Chld	19	85%	24	186%	19	140%	13	102%	20
Oral Cop.	0	0%	20	0%	20	0%	20	0%	20
Sodomy	0	0%	9	0%	9	0%	9	0%	9
Penet w/ Ob.	1	52%	13	113%	10	85%	11	62%	12
Other Sex Off.	4	31%	25	68%	22	51%	23	37%	25
Kidnapping	3	38%	22	82%	17	66%	17	45%	18
Person	134	44%	40	96%	31	81%	23	52%	37
Burglary 1st	47	66%	26	144%	16	65%	24	79%	21
Burglary 2nd	39	100%	12	217%	7	99%	12	119%	8
Grand Theft	4	38%	18	82%	14	48%	16	45%	17
Petty Theft	17	55%	13	120%	11	71%	14	66%	15
Rec. Stol. Prop.	9	62%	20	135%	14	80%	20	74%	17
Vehicle Theft	12	62%	17	136%	14	107%	13	75%	17
Forgery/Fraud	5	92%	14	202%	9	129%	10	111%	11
Other Prop.	1	31%	12	68%	0	0%	0	37%	12
Property	134	69%	22	151%	11	97%	22	82%	17
CS Possession	40	69%	19	150%	14	88%	16	82%	17
CS Poss.-sale	14	54%	21	118%	18	70%	21	65%	19
CS Sub.-sales	13	76%	13	166%	9	97%	12	91%	11
CS-Manufact.	0	0%	13	0%	13	0%	13	0%	13
CS-Other	2	51%	8	111%	7	65%	7	61%	7
Marij. Ps.-Sale	0	0%	5	0%	5	0%	5	0%	5
Marij. Sales	2	81%	7	176%	4	104%	6	97%	6
Other Marij.	0	0%	3	0%	3	0%	3	0%	3
Drugs	71	64%	24	140%	18	83%	22	77%	22

Table 11.1: Continued.

		Population		Violent Crime		Arrests		Convictions	
Third Strike	Num.	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk	Perc.	Rnk
Escape	0	0%	9	0%	9	0%	9	0%	9
DUI	0	0%	14	0%	14	0%	14	0%	14
Arson	0	0%	12	0%	12	0%	12	0%	12
Poss. Weap.	15	43%	30	94%	26	66%	26	52%	29
Other Off.	12	93%	16	204%	0	0%	0	112%	15
Other	27	49%	32	107%	26	83%	21	59%	30
Nonperson	232	64%	22	141%	13	83%	21	77%	22
Total	366	55%	30	120%	24	79%	25	66%	28

Source: See notes 9 and 10 in chapter 6.

of the state when based on population, arrests, and convictions, but not when based on violent crime.

As of July 31, 2002, the racial breakdown of third strikers from Orange County was about 37 percent white, 32 percent Latino, 21 percent black, and 5 percent other.[7] Based on relative population, blacks were 20 times and Latinos 47 percent more likely to get a third strike than whites--which was more than the state multiple of 12.4 times for blacks and about the same multiple of 46 percent for Latinos.

MICHAEL CAPIZZI AND SCOTT BAUGH

Michael Capizzi, District Attorney of Orange County from 1990 to 1998, and Scott Baugh, State Assemblyman from Orange County from 1995 to 2002, both Republicans, had their paths cross to the political detriment of both. In addition, both had their own roles in the California Three Strikes law's history. Ironically, their paths probably would not have crossed except for the Three Strikes law.

The story begins in 1994 after Republicans, riding the Three Strikes "tough on crime" platform, were able to go from a 47 to 33 minority to a 41 to 39 majority in the State Assembly--the first time they had a majority in the Assembly since 1970.[8] Republicans were looking forward to putting a member of the GOP in as assembly speaker. In addition, they were relieved to finally conclude Democrat Willie Brown's tenure as speaker, the longest in state history. But then Brown did what appeared impossible. He expelled one of the Republican members and convinced Republican Paul Horcher of Diamond Bar to become an independent and vote for him. Horcher, however, was quickly recalled by angry voters from his district. But Brown pulled his magic again when he was able to persuade

Republican Doris Allen of Huntington Beach to run for speaker with the backing of Democrats.[9]

Republicans in Orange County responded again and had a recall election for Allen. Scott Baugh, a Huntington Beach attorney for the Union Pacific Railroad, was talked into running in the recall by his friend, Republican U.S. Representative Dana Rohrabacher. In the recall election, Baugh faced two other Republicans and one Democrat. Because the candidate with the highest vote total replaces a recalled official--regardless of the percentage of the vote--Baugh and Rohrabacher were concerned that the three Republican candidates would split the vote and the lone Democrat would then win.[10]

What followed was a scandal of major or minor proportions depending on who was asked. In an attempt to spread the Democratic vote, Republicans convinced Laurie Campbell to jump into the campaign as a Democrat. Baugh, however, had received a $1,000 campaign donation from Campbell and her husband and then appeared to intentionally hide this fact from required public disclosure. At first Baugh denied knowing Campbell, but later revealed that he had known the Campbell family for eight years.[11] Campbell was thrown out of the election race by a Sacramento judge, one of the Republicans running against Baugh was persuaded to drop out of the contest, and Baugh easily won the recall on November 28, 1995.[12] Republicans finally were in full control and elected Curt Pringle of Garden Grove as the Speaker of the Assembly in January of 1996.[13]

Orange County District Attorney Michael Capizzi, however, investigated the possible legal violations and had Baugh's home searched by law enforcement officers. Baugh, extremely upset about the raid, claimed that he was assaulted by police officers during the search.[14] Another issue involved petitions that Cambell turned in to qualify for the ballot. She swore in an affidavit that she was the sole signature gatherer and others said the same. Later it was admitted that staff from Rohrabacher's and Pringle's offices had helped gather signatures, and four persons pled guilty to misdemeanor election fraud and perjury.[15]

Baugh was indicted with 22 counts of criminal conduct, including many felonies. Orange County Republicans fumed, claiming Capizzi was overzealous and that the matter would be better handled by the Fair Political Practices Commission, which can only issue fines, not jail time. "I see a district attorney acting like a fascist," Rohrabacher said. "He's basically out to hurt people who are in my political family."[16] They also claimed that Capizzi was using the issue for political grandstanding since he wanted to run for state attorney general in 1998.[17] Backing their claims was the fact that Capizzi had referred to the Baugh case in letters seeking campaign contributions just a week after he had announced he would run for attorney general.[18]

If Capizzi was using the indictments against Baugh as a means to help achieve higher office, he couldn't have picked a worse strategy. Baugh, Rohrabacher, Pringle, and many others in the GOP made Capizzi a pariah to the Republican Party. In February of 1997 at a state Republican meeting in Sacramento, a resolution was passed urging Capizzi not to run for attorney general or any other public office because of his prosecution of Baugh.[19] Baugh and Rohrbacher filed a complaint against Capizzi with the state bar--which was later dismissed.[20] At the November 1997 State Republican Party Convention in Anaheim organizers gave Capizzi's opponent in the Republican primary for attorney general, David Sterling, a high-profile committee chairmanship and prime-time convention speaking opportunities. Officials said, however, that they could not even find room for Capizzi to set up a campaign table in the hotel lobby. When Stirling was talking to reporters about the Baugh indictments he said the prosecution constituted an abuse of power of Capizzi.[21]

Capizzi had decided not to run for re-election as District Attorney and focused his full efforts on the attorney general position. The other major issue that confronted Capizzi during his leadership in the District Attorney's office was the Orange County Bankruptcy in 1994 (see chapter 2). Some complained that his office was overzealous in prosecuting some of the county officials, and others complained that he was not diligent enough in getting longer sentences or enough restitution from those who were prosecuted. According to polls taken by the *Los Angeles Times*, Capizzi's approval ratings slipped significantly from May of 1994--before the bankruptcy--to October 1996--after all the publicity surrounding the bankruptcy and campaign-related prosecutions.[22]

Capizzi lost to Stirling in the March 1998 primary by a 2 to 1 margin.[23] Stirling then lost the November election to Democrat contender Bill Lockyer.[24] In 1999 a judge decided that there was a conflict of interest in having the new District Attorney of Orange County handle the prosecution of Baugh and the matter was handed over to the state's attorney general. Ironically, it was Democrat attorney general Lockyer who then declined to prosecute Baugh and handed the case over to the Fair Political Practices Commission.

With the indictments hanging over his head and the first-hand experience of a police search, Baugh had a new attitude toward the criminal justice system. In 1999 he sided with defense attorneys and pushed forward bills that allowed those who appear before a grand jury to have a lawyer present, gave compensation to a wrongly convicted man, and prohibited police training that circumvents a suspect's right to remain silent and have a lawyer present.

On January 30th 1999, Baugh announced at a meeting with members of Families to Amend California's Three Strikes (FACTS)

that he was going to introduce a bill in the Assembly to amend the Three Strikes law.[25] Baugh said his bill would not be as broad as SB79 (a bill introduced by Senator Tom Hayden to confine the law to only violent and serious offenses), but would probably target the removal of some minor crimes such as possession of a controlled substance and petty theft from the Three Strikes law. Baugh said his desire to change the law stemmed from the election fraud accusations against him and because of a brother with a criminal record who was a methamphetamine addict. Baugh said he thought he could get 10 other Assembly Republicans to support his bill which, combined with Democrat votes, would meet the two-thirds legislative requirement to amend the law. In February, however, Baugh backed down and said he would introduce a bill to only study the effects of the Three Strikes law. In April, after being elected the minority GOP assembly leader, he decided that he was not going to put forward his own study bill but instead would support a similar bill (SB873) put forward by Democrat state Senator John Vasconcellos of San Jose. SB873, needing only a majority vote, was passed by both the senate and assembly, but was vetoed by Governor Gray Davis on September 10, 1999.

Michael Capizzi worked for the District Attorney's office in Orange County for 25 years before succeeding Cecil Hicks as District Attorney in 1990. He was once president of the Orange County Bar Association, president of the California District Attorney's Association (CDAA), and had been selected as "California Prosecutor of the Year" by the CDAA.[26]

In February of 1994 Capizzi announced he supported the Three Strikes law and said the legislation was long overdue. Capizzi said the Klaas tragedy had fueled legitimate public concerns about putting dangerous felons in prison and keeping them there.[27]

When Capizzi took over the reigns of the District Attorney's office in 1990, he continued Hick's policy of not allowing prosecutors to plea bargain with defendants. Since the Three Strikes law appeared to say that plea bargaining was not allowed (see chapter 5), Capizzi felt all the more justified in imposing his ban in such cases. This policy quickly resulted in Orange County having an overcrowded court system and a reputation for giving third strikers with minor felonies sentences of 25 years-to-life.[28] Capizzi was also eyeing the state's Attorney General's office, and the 1998 election brought out many politicians eager to show their "tough on crime" credentials.

Because Capizzi's prosecutors were not allowed to plea bargain, judges were left to try to apply the law with whatever mercy they felt was reasonable.[29] As described in chapter 5, however, the judges did not know if they had discretionary power until the *Romero* decision in 1996 and they feared the threat of reversals on an appeal if they went too far. In addition, the discretion used by judges varied, based on

each particular judge's sentencing philosophy: thus, defendants were subject to the random judicial assignment system and those who won might get a sentence of only four years, while those who lost could get 25 years-to-life.[30]

One person who lost the judicial assignment lottery in 1994 was Doug Rash. Rash received a 25 years-to-life sentence for possession of .4 grams of cocaine. The drugs were found in Rash's pockets at a party in a hotel room. Rash had prior burglary convictions from 1985 and 1987. The first burglary charge was for the alleged theft of an electronic piano keyboard belonging to Rash's brother--but really involved a scheme to defraud through an insurance recovery claim. Rash's mom says her son pled guilty to the burglary charge so others involved would not also be charged in the fraud scheme. The second burglary conviction resulted from Doug and a friend breaking into the friend's ex-girlfriend's house so that he could recover his audio CDs. The father of the ex-girlfriend saw the two of them, called the police; and after being apprehended, Doug and his friend pled guilty to the burglary charge.

Another one of those who lost the lottery was Shane Reams (mentioned in previous chapters). Reams was given a sentence of 25 years-to-life in 1996 when he stood 30 feet away from a $20 sale of crack cocaine and the prosecutor claimed he was aiding and abetting the sale. The person who conducted the sale was given a sentence of four years and was released from prison after serving only two years. Reams' priors stemmed from some residential burglaries in 1986 and 1990 in which a total of less than $1,000 in goods was stolen. In one of the burglaries, Reams' mother suspected her son and talked him into turning himself in--a decision she now regrets.

The *Orange County Register*, having a reputation as a conservative and libertarian paper, had many articles, opinion pieces, and editorials in favor of amending the Three Strikes law to only violent offenders. In addition, they also criticized Capizzi for what they viewed as his overuse of the law.[31]

ANTHONY RACKAUCKAS

Tony Rackauckas was a gang member as a teenager and had been convicted of assault with a deadly weapon.[32] Turning his life around, he became a deputy district attorney in Orange County for 16 years, went into private practice as a defense attorney for several years, and then was appointed to a Municipal Court judge position in 1990.[33] He was then promoted to the Superior Court in 1993 and is one of the few people in California to have had discretion as a judge and as a district attorney during the Three Strikes era. During his judgeship, a third striker would probably have considered himself or herself lucky had

they been assigned to Rackauckas. Sitting on the bench, Rackauckas was not afraid to use his discretion when he believed it was warranted.

According to *Orange Coast* magazine, out of 17 Three Strike cases heard by Rackauckas, 11 were reduced from felony convictions to misdemeanors.[34] In 1997 the *Orange County Register* reviewed the case of Ronnie Lara, Jr. who had avoided a third strike when Rackauckas reduced a felony charge of check forgery down to a misdemeanor. Lara had a prior record that included 20 violent felony convictions--including kidnapping and 16 counts of armed robbery. Rackauckas gave him the reduced sentence because Rackauckas said he believed Lara, who recently converted to Christianity, and said he would devote his life to his family.[35]

When Rackauckas was campaigning for District Attorney, he promised that if elected he would give his prosecutors greater discretion. "By discretion," Rackauckas said he meant more than just reducing the level of charges to induce a defendant to plead guilty. "I'm talking about professional judgment, like prosecutors dealing without compromise with [hardened] criminals ... [and], on the other hand, dealing differently with someone who is not a danger to society." Rackauckas complained that the policy under Capizzi resulted in judges being thrust into the discretionary role when it was better done by prosecutors, who had talked to witnesses, victims, and law enforcement officers. Prosecutors lose credibility with judges, he said, if they handle each case as if it is the worst crime and worst defendant. Rackauckas's opponent, Wallace Wade, an administrator who supervised Orange County bankruptcy investigations, said that if he was elected he would not change the basic charging and sentencing policies.[36]

Rackauckas's reputation for taking a reasonable approach with the Three Strikes law was well known. Wade, by comparison, promised to enforce the statute "vigorously."[37] In response to the Capizzi-Baugh conflict, Rackauckas promised the Republican Party that he would reduce the office's involvement in political corruption cases.[38]

The Orange County Deputy District Attorneys Association, which represented 175 of the 230 deputies in the office, endorsed Rackauckas.[39] In the June 1998 primary, Rackauckas beat Wade by a 61.5 percent to 38 percent vote and since a majority was achieved by Rackauckas, no run-off election was necessary. In March of 2002 Rackauckas beat Wade again by a nearly identical margin of 62 percent to 38 percent.[40]

After taking office in January of 1999, Rackauckas said that he met with supervisors and trial prosecutors and impressed upon them his thinking about their use of the discretion he had given them. "I've tried to avoid making what we do plea bargaining," said Rackauckas. He encouraged his prosecutors to evaluate their cases and agree to less than

the minimum sentence, reduce charges, and waive a prior strike when it was reasonable. Rackauckas said that his goal was "to get the most appropriate sentence in each case. My experience is that if we are not going to use our discretion, the judges will take it from us."[41]

Rackauckas issued a policy memo to all the deputy prosecutors stating that "a standardized policy can neither anticipate all that justice may require in any given case, nor substitute for the professional judgment of the individual prosecutor." Rackauckas gave an example of two first-degree burglary cases, one in which a professional thief clears a home of its furniture and possessions, and a second in which a teen-ager selling magazines door to door walks into an open garage and steals a bicycle. "You have two people who the law treats in the same manner," he said. "You have to look at the facts and look at the defendants and use your professional judgment to determine an appropriate sentence for each."[42]

According to Judge Gregory H. Lewis, the maximum was the regular sentencing recommendation by prosecutors when Capizzi was in office. Since Rackauckas became District Attorney, he said, the deputies began participating in pre-plea discussions and sometimes recommended lesser sentences rather than automatically recommending the maximum.

Judge Carl Biggs, a former prosecutor under Capizzi, said that the policy of recommending only the maximum undermined the credibility of the prosecutor's position. "It's like the boy who cried wolf," Biggs said. "If every time we have a minor case the DA says 10 years, then pretty soon I'll ignore it. If the DA says 30 days most of the time, when they say 10 years, I'll listen."

The *Orange County Register* interviewed judges and defense attorneys from the Superior Court in Santa Ana and the five branch courts about three strikes. Some saw little difference at some branches, and some saw "a big difference." In most cases, prosecutors using their discretion appeared to be progressing, but slowly.[43]

Rackauckas's tenure as District Attorney has been rocky with a host of family and friends who have ended up in the criminal justice system. Rackauckas had a daughter-in-law arrested on drunken driving charges and his son was arrested on possession of controlled substance charges when he was found by police naked and asleep in a truck carrying drug paraphernalia and two grams of cocaine.[44] Rackauckas's pledge to lessen prosecution of political corruption cases may have come back to haunt him. In every year Rackauckas has been District Attorney, actions deemed political, based on favoritism, or involving a conflict of interest have occurred.[45] In addition, Rackauckas's office handled some cases where they appeared to be overly zealous.

During his election campaign Rackauckas was criticized for asking for and taking donations from deputy district attorneys. After being

elected he was then accused of promoting a disproportionate number of prosecutors in the office who had given him the campaign donations.[46] Rackauckas was criticized for creating a $73,000 salaried media relations director for the District Attorney's office and then hiring a reporter who had covered his campaign and was friends with his wife to fill the position.[47] In 1999 one of Rackauckas's prosecutors, Bryan Ray Kazarian, was arrested for passing confidential information to drug ring leaders.[48] In September of 2000, Rackauckas admitted that his office may have wrongly convicted Dwayne McKinney for murder during a restaurant robbery in 1980. After an appellate court said the case needed to be retried, Rackauckas decided to dismiss the case for lack of evidence. Ironically, the prosecutor who aggressively persuaded the jury of McKinney's guilt and even pushed for the death penalty 19 years earlier was Rackauckas.[49]

Table 11.2: Third Strikers Admitted to Prison by Delivery Date for Orange County and the Total for California from April 1994 Through December 2001

	1994	1995	1996	1997	1998	1999	2000	2001	Total
Orange Co.	1	43	73	57	65	57	30	21	347
	0%	12%	21%	16%	19%	16%	9%	6%	100%
California	134	866	1,333	1,248	1,174	1,022	813	635	7,225
	2%	12%	18%	17%	16%	14%	11%	9%	100%

Source: *Number of 2nd and 3rd Strike Commitments: April 1994 Through December 2001*, California Department of Corrections.

ORANGE COUNTY AND THREE STRIKES

In March of 2002 the *Los Angeles Times* reviewed more than 1,000 Orange County third strike cases and found that nearly 90 percent of them were handled without a trial--"a significant increase" over Capizzi's record. In addition, nine out of ten third strike cases resulted in the defendants getting strikes waived, and 90 percent of these cases were the result of plea-bargaining with the District Attorney's office.[50] Table 11.2 shows the number of third strikers admitted to prison from Orange County per year. While the year 1999 shows a lower percentage decrease in the use of the law from the previous year as compared to the rest of the state, the years 2000 and 2001 demonstrate a significant decrease in the use of the law under Rackauckas as compared to the when Capizzi was District Attorney.

Table 11.3: The Average Annual Number of Third Strikers by Type of Offense for Orange County Prior to and After June 30, 1999

Third Strike	Average Prior to 30-Jun-99	Average After 30-Jun-99	Percentage Decrease
Murder 1	1.33	0.57	57%
Murder 2	0.22	1.43	-543%
Manslaughter	0.22	0.00	100%
Veh. Manslaughter	0.22	0.00	100%
Robbery	8.67	5.43	37%
Assault DW	2.00	0.00	100%
Other Assault	2.89	2.57	11%
Rape	0.44	0.00	100%
Lewd Act w Child	2.67	2.00	25%
Oral Copulation	0.00	0.00	
Sodomy	0.00	0.00	
Penet w/ Object	0.22	0.00	100%
Other Sex Off.	1.11	-0.29	126%
Kidnapping	0.67	0.00	100%
Crimes-Person	20.67	11.71	43%
Burglary 1st	9.78	0.86	91%
Burglary 2nd	6.67	2.57	61%
Grand Theft	0.22	0.86	-286%
Petty Theft	2.89	1.14	60%
Rec. Stolen Prop.	1.78	0.29	84%
Vehicle Theft	2.00	0.86	57%
Forgery/Fraud	0.67	0.57	14%
Other Prop.	0.44	-0.29	164%
Crimes-Prop.	24.44	6.86	72%
CS Possession	7.33	2.00	73%
CS Possess-sale	2.89	0.29	90%
CS Sub.-sales	2.67	0.29	89%
CS-Manufact.	0.00	0.00	
CS-Other	0.44	0.00	100%
Marij. Poss-Sale	0.00	0.00	
Marij. Sales	0.44	0.00	100%
Other Marij. Off.	0.00	0.00	
Crimes-Drugs	13.78	2.57	81%

Table 11.3: Continued.

Third Strike	Average Prior to 30-Jun-99	Average After 30-Jun-99	Percentage Decrease
Crimes-Drugs	13.78	2.57	81%
Escape	0.00	0.00	
DUI	0.00	0.00	
Arson	0.00	0.00	
Poss. Weap.	2.89	0.57	80%
Other Off.	1.33	1.71	-29%
Crimes-Other	4.22	2.29	46%
Crimes-Nonperson	42.44	11.71	72%
Total	63.11	23.43	63%

Source: *Third Strike Cases by Offense and Ethnic Group: June 30, 1999*, California Department of Corrections.

Table 11.3 shows the breakdown by offense for the average number of third strikers sent to prison under Capizzi versus Rackauckas. Under Rackauckas there was a 43 percent decrease in third strikers for violent crimes and a 72 percent decrease for nonviolent crimes.

NOTES FOR CHAPTER 11

[1] *California County Profiles*; *Census 2000, SF1 Profile: State and County Population Summary*; *Square Mileage by County*.
[2] States Ranked by Population: 2000.
[3] *Census 2000, SF1 Profile: State and County Population Summary*; *Square Mileage by County*.
[4] Block and Buck, *California Political Almanac: 1999-2000*.
[5] *Reported Crimes and Crime Rates: 1992-2001*.
[6] *Reported Crimes and Crime Rates:1991 to 2001*.
[7] T*hird Strikers in the Institution Population: July 31, 2002*.
[8] Gunnison, "Showdown Day Arrives"; Kerr, "GOP Leading"; Rawls and Bean, *California: An Interpretive History*, 464.
[9] Capps, "Legislature Seethes." Block and Buck, *California Political Almanac: 1999-2000*, 241; "Transition in the Assembly," *Sacramento California Journal Weekly*, June 5, 1995.
[10] Block and Buck, *California Political Almanac: 1999-2000*, 241.
[11] "Republicans Protest Raid on Home of New Orange County Assemblyman," *Fresno Bee*, December 25, 1995, B15.

[12] Gerber, "Assemblywoman Loses Recall Vote."
[13] Martineau, "Republicans Hope."
[14] "Republicans Protest Raid."
[15] Block and Buck, *California Political Almanac: 1999-2000*.
[16] Gunnison and Lucas, "Election Fraud Probe Could Weaken Speaker."
[17] "GOP's Orange County Shadow," *Fresno Bee*, April 1, 1996, B4.
[18] "Scott Baugh," *Los Angeles City News Service*, January 26, 1998.
[19] "Capizzi," *Los Angeles City News Service*, February 24, 1997.
[20] "Capizzi Cleared," *Los Angeles City News Service*, September 16, 1997.
[21] "Southern Exposure," *Sacramento California Journal*, November 1, 1997.
[22] "Southern Exposure--Michael Capizzi," *Sacramento California Journal*, January 1, 1997.
[23] "Stirling's Win by Margin of 2-1 Surprise," *Ventura County Star*, June 4, 1998, A11.
[24] Block and Buck, *California Political Almanac: 1999-2000*, 53-54.
[25] I was present at this meeting and had conversations with Baugh's office.
[26] Cousart, "DA Running"; "Editorial: For Attorney General--Lockyer, Capizzi," *Fresno Bee*, May 25, 1998, B6.
[27] Lichtblau, "Assessing Hits."
[28] Simon, "Civil Courts"; Weinstein, "3 Strikes'-Spawned Crush."
[29] Pfeifer, "Second Chances."
[30] Wisckol, "Second Thoughts."
[31] Bock, "The Law Strikes Out."
[32] Moxley, "Third Strike."
[33] Franklin, "D.A. Race."
[34] Heller, "Yer Out!"
[35] Pfeifer, "Second Chances."
[36] Franklin, "D.A. Race."
[37] Flier handed out by Wallace Wade during campaign.
[38] Coker, "Clockwork Orange."
[39] Franklin, "D.A. Race."
[40] Pfeifer and Morin, "Orange County D.A."
[41] McDonald, "More Choice."
[42] Ibid.
[43] Ibid.
[44] Moxley, "Toxic Politics."
[45] Coker, "Clockwork Orange."
[46] "OC District Attorney," *Los Angeles City News Service*, June 4, 1999.
[47] Moxley and Pignataro, "Tori! Tori! Tori!"
[48] Pfeifer, "Suspect Allegedly Talked."
[49] ""Man Released After 19 Years in Prison for Murder Conviction," *Associated Press*, January 31, 2000. Moxley, "Third Strike."
[50] "Third Strike," *Los Angeles City News Service*, February 15, 2002.

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CHAPTER 12

Policy Research and Constitutional Analysis

POLICY RESEARCH

When the Three Strikes bill (AB971) came before the Assembly Committee on Public Safety in April of 1993 there was no analysis presented on its costs or benefits because the proposal was not expected to pass at the committee level.[1] Jeff Long, a Legislative Analyst, said: "The first time it came around, we never really did any fiscal assessment of it because it didn't pass the so-called giggle test. It wasn't worth the effort because this wasn't going to go anywhere--it was so patently stupid."[2] And, as predicted, the bill did not make it out of the committee. In January of 1994, however, with polls showing high favorability ratings and Reynolds gathering signatures at a record pace, legislators were taking AB971 a lot more seriously. This time, though, because the measure was being fast-tracked as an urgency bill, there was too little time for an appropriate cost assessment. The forecasts given to legislators by the California Department of Corrections in the spring of 1994 were based on 100 percent mandatory usage of the law--which caused the numbers to be greatly exaggerated.[3] The operational prison costs related solely to the Three Strikes law were predicted to be $2.3 billion by 2003 and then continue to rise to $5.7 billion annually for the years 2027 and thereafter.[4]

On March 31, 1994, after AB971 had passed, Governor Pete Wilson's chief economist, Philip Romero, provided his statistical assessment of the "benefits" of Three Strikes when he announced his projection that by 2001 there would be over 84,000 strikers in the prison system and each would save the California economy an average of 20 crimes per year, thus leading to a savings of about $200,000 per striker per year.[5] He multiplied the dollar figure with the projected number of strikers and concluded that the additional incarceration costs of $2.7 billion would be more than offset by the $16.8 billion in social

savings, with a net benefit to Californians of $14.1 billion.[6] In another announcement, he claimed savings of $23 billion in the law's first five years.[7]

In the summer, as politicians were touting their support for Three Strikes during the campaigns for the upcoming election, the RAND Corporation issued a report on the cost-benefits of Three Strikes with the bulk of the analysis devoted to comparing Reynolds' initiative with other possible sentencing schemes.[8] Their study, like the previous projections, was based on 100 percent mandatory use of the law, and therefore, in hindsight appears very overblown.

Between 1993 and 1996 there were at least 29 states and the federal government that added "strikes" laws to their statutes.[9] California's measure, however, quickly separated itself from the others as being the broadest and incarcerating the most people. By 1998, all other jurisdictions had fewer than 3,000 strikers combined, whereas California had more than 39,045 second strikers and 4,884 third strikers.[10] The states that used the law the most after California were Georgia (942), South Carolina (825), Nevada (304), Washington (121), and Florida (116).[11] In the first four and a half years of its existence, the federal Three Strikes law--that had received such loud ovations when President Clinton mentioned it in his 1994 State of the Union speech--had only netted 35 offenders.[12]

Despite the fact that California crime rates had already started a downward trend in 1991, supporters of the Three Strikes law ignored any possible previous trend and took the decrease in crime numbers from 1993 and multiplied them by estimates of the average damages per crime to try to demonstrate billions of dollars saved from crime episodes.[13] Others have criticized their calculations as "unsophisticated" with the obvious implication that because of their political views they were presenting biased numbers.[14] With regard to the trends in crime rates, the studies with more stringent methodologies have demonstrated that there was little difference between the decreasing crime rates before and after the Three Strikes law became operative.[15] In addition, studies also showed that crime rates had decreased across the nation, especially among large urban populations, thus indicating a national trend independent of the Three Strikes law that accounted for much of California's crime decrease.[16] Thus the more sophisticated research saw the vast majority of the reduction in California crime as part of a national trend--with little or no support to prove that the reduction in California crime came from the uniquely harsh consequences of its Three Strikes law.[17]

Academics have conducted research to try to determine why the United States had such a large decrease in crime in the 1990s. In the 2000 book *The Crime Drop in America* several studies advanced the following conclusions.[18]

They attributed part of the national reduction in crime to the increase in incarceration rates from laws like California's Three Strikes law, but most of the decrease was assigned to an abnormal increase in violent crime from the late 1980s to the early 1990s. The abnormally high rates then returned to their "normal" status because they generally cannot be sustained for too long.[19] In some cases, governmental policies may have helped accelerate changes in crime rates, but in almost all cases, the studies demonstrated that supporters of the governmental policies usually gave a lot more credit than the empirical studies could support. Most of the increasingly high rates of violent crime from the late 1980s to the early 1990s were attributed to gang-related crime which had escalated as gang members fought over new crack cocaine markets. In addition, gang members had much easier access to semi-automatic handguns than any other time in history. A majority of the decrease in violent crime after 1991, therefore, was said to be the result of a decline in the demand for crack cocaine, a stabilization of the narcotics markets, and the crackdown on illegal sales of semi-automatic handguns.[20]

Other factors that may have caused some of the decrease in crime during the 1990s were: (1) the change in age demographics (there was a decrease in the percentage of the population of people 18 through 24--the age bracket statistically demonstrated as responsible for the most crime); (2) changes in the hourly wage rate of youth (real earnings for youth decreased significantly in the 1980s through the early 1990s); (3) a cultural civilizing process (an increase in people viewing aggressive behavior as distasteful, unsightly, uncouth and "animalistic"); (4) changes in the number of police and in policing techniques; and, (5) the legalization of abortion (prior to legalization unwanted pregnancies led to more neglectful and abusive parent-child relationships, thus with legalization there were fewer babies born into high-risk families; and the age-group of children not born during legalization would have been coming into their crime-prone years starting with the early 1990s).[21]

A county-by-county analysis shows that there was little difference in the decrease in crime for the counties that used the Three Strikes law the most--whether for all felonies or only nonviolent felonies--compared to those that used the law the least (see Tables 12.1 and 12.2). In fact, with San Francisco having a decrease in crime of almost 60 percent from 1993 to 2001, it appears that counties that used the Three Strikes law the least had the greatest decrease in crime.[22]

Table 12.1: Decrease in Crime Based on the Percentage of All Third Strikers in the Prison Population per County as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

Percentage Use	Greater than 125%	125% to 95%	95% to 75%	75% to 50%	50% to 25%	Less Than 25%
Number of Counties	12	9	9	9	9	10
Decrease in Crime:						
Violent Crime	-42%	-40%	-42%	-22%	-44%	-59%
Property Crime	-40%	-37%	-42%	-32%	-33%	-47%
Total Crime	-40%	-38%	-42%	-31%	-34%	-49%
*All Counties Less 4:						
Number of Counties	11	11	7	9	7	9
Decrease in Crime:						
Violent Crime	-33%	-38%	-44%	-32%	-27%	-34%
Property Crime	-36%	-36%	-45%	-29%	-35%	-32%
Total Crime	-36%	-36%	-45%	-30%	-34%	-32%

*Excludes Alameda, Kern, Los Angeles and San Francisco

Source: See notes 9 and 10 in chapter 6.

Franklin E. Zimring, Sam Kamin, and Gordon Hawkins reviewed 1,800 arrests from the cities of Los Angeles, San Francisco, and San Diego before and after the Three Strikes law took effect. They found that before the statute came into effect 13.9 percent of adult felony arrests were from the group targeted by the law (that is, they had one or more prior strikers) compared to 12.8 percent after Three Strikes became operative. The difference was not statistically significant, and "[w]hatever has reduced crime in California over the mid-1990s, it does not appear that the 1994 legislation played a major role."[23]

In response to arguments that the Three Strikes law reduces a significant amount of crime because it targets the small percentage of high-rate offenders, Linda S. Beres and Thomas D. Griffith created a predictive model of offending based on high- versus low-rate offenders and concluded: "Because most high-rate offenders are already imprisoned for most of their criminal careers, only a modest reduction in crime can be achieved by incarcerating them for longer terms."[24]

Table 12.2: Decrease in Crime Based on the Percentage of Nonviolent Third Strikers in the Prison Population per County as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

Percentage Use	Greater than 125%	125% to 95%	95% to 75%	75% to 50%	50% to 25%	Less Than 25%
Number of Counties	10	11	5	7	9	16
Decrease in Crime:						
Violent Crime	-44%	-35%	-40%	-43%	-31%	-52%
Property Crime	-40%	-37%	-46%	-36%	-31%	-39%
Total Crime	-41%	-36%	-46%	-37%	-31%	-41%
*All Counties Less 4:						
Number of Counties	9	11	5	9	7	13
Decrease in Crime:						
Violent Crime	-34%	-39%	-29%	-32%	-37%	-32%
Property Crime	-36%	-39%	-36%	-35%	-32%	-30%
Total Crime	-36%	-39%	-35%	-35%	-32%	-31%

*Excludes Alameda, Kern, Los Angeles and San Francisco

Source: See notes 9 and 10 in chapter 6.

CONSTITUTIONAL ANALYSIS

In 1923 California legislators passed the Habitual Criminal Act as Penal Code § 644. Because only a majority vote was needed to amend the law, it was constantly being rewritten and today still exists in its transformed form as § 667.7.[25] From 1927 to 1935, the Habitual Criminal Act appeared to be as harsh as today's Three Strikes law--or in some cases harsher. It had two parts. The first stipulated that if somebody had been convicted of two prior serious or violent felonies and then convicted of any other felony, that person would be adjudged a habitual criminal and receive a 12 years-to-life sentence. The second part said that if somebody had been convicted of three prior felonies and then was convicted of a fourth, they would be adjudged a habitual criminal and receive a sentence of life without parole. In essence, from 1927 to 1935, California had a three strikes law like today's which resulted in a 12 years-to-life sentence, and also a four strikes law where all of the strikes could be for any felony and the "habitual criminal" would receive life without parole.[26] Thus, many of the current issues

confronting the appellate courts regarding today's Three Strikes law had been decided in the 1920s and 1930s and earlier. To some extent, therefore, when Three Strikes cases flowed into the appellate courts in the 1990s, the results were shaped by the precedent from those earlier times.

Cruel and/or Unusual Punishment

The Eighth Amendment to the United States Constitution says "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Article 1, § 17 of the California Constitution says "Cruel or unusual punishment may not be inflicted or excessive fines imposed."[27]

What did the "cruel and unusual" clause mean when the United States passed its Bill of Rights in 1791? Where did the words prohibiting "cruel and unusual punishment" come from? The U.S. Constitution had been ratified in 1788 and the first U.S. Congress met in the spring of 1789.[28] During the debates to establish the federal constitution, there was a strong division between a group that became known as the Federalists and another group known as the Antifederalists. The Antifederalists, having just thrown off the oppressive government of England after a lengthy war, were fearful of granting power to a federal institution that might become oppressive. They, therefore, called for a Bill of Rights that would spell out specific limitations on the federal government. During the ratifying process many states voted to pass the U.S. Constitution, but only under the condition that the Constitution be amended to include a Bill of Rights. The Federalists had argued that a Bill of Rights was not necessary and some worried that an enumerated list might not be able to contain all the rights necessary to protect state interests, but in the spring of 1789 the representative from Virginia, James Madison, took up the cause and put together a proposed Bill of Rights--even though as a Federalist he considered the amendments unnecessary. He sorted through some two hundred proposed amendments that eight of the state ratifying conventions had submitted. He eliminated duplicates, and then, based on his own proclivity, narrowed the list further by taking only amendments proposed by at least four states. His came up with a potential 22 amendments which he then winnowed and combined into 9--which are very similar to the eventual 10 that were passed. In the meantime, the Antifederalists lost interest in a Bill of Rights and were talking about having a second constitutional convention. Madison, fearful that all the work accomplished at the original convention would be wasted, was now in the position of pushing his amendments on the Antifederalists--a reversal in roles from when the idea of the Bill of Rights was first pressed by the Antifederalists. Author Peter Irons, notes the following:

> Madison clearly resented those who stirred up fears of an omnipotent and oppressive national government. In his mind, "the great danger lies rather in the abuse of the community than in the Legislative body," referring to Congress. The real danger, he argued, "is not found in either the Executive or Legislative departments of government, but in the body of the people, operating by the majority against the minority."[29]

Madison proposed his amendments to Congress on June 4, 1789 during a three-hour speech. One of his proposals was that Congress ban the infliction of "cruel and unusual punishments." Discussion on the provision was minimal.

So where did the words come from? It is believed that Madison chose the wording from Virginia's constitution which had been passed in 1776; and George Mason, a delegate to the Virginia State Constitutional Convention, is credited with having acquired the wording from the English Bill of Rights of 1689. The transference of the words from the English Bill of Rights of 1689 to the U.S. Constitution has been described as constitutional "boilerplate."[30]

As with almost any analysis of the original meaning of a constitutional provision there are many issues that are unclear, with different people having different evidence, and each having differing speculations and explanations regarding some of the data.

Because of the importance of "precedent," the viewpoints of Justice Scalia and Justice White in the 1991 case of *Harmelin v. Michigan* are worth noting. Scalia's analysis was part of a concurring opinion that only Justice Rehnquist joined and Justice White's analysis was a dissenting opinion.[31] Scalia's opinion is the most recent and detailed U.S. Supreme Court statement of the original meaning of the "cruel and unusual" clause, and Justice White's dissent the most recent and detailed response. Although both arguments might not be considered current "black letter law" regarding how "cruel and unusual" punishments are defined, the arguments may indirectly affect the narrowness or broadness of the application of the "cruel and unusual" clause as judges grapple with trying to operationalize it.

The federal "cruel and unusual" clause is almost identical in wording to the phrase in the English Bill of Rights of 1689 which stated: "that excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."[32] At the time of the passage of the U.S. Constitution in 1791, five state constitutions prohibited "cruel or unusual" punishments (Delaware, Maryland, Massachusetts, North Carolina, and New Hampshire), two prohibited "cruel" punishments (Pennsylvania and South Carolina), and Virginia prohibited "cruel and unusual" punishments.[33] Justice Scalia

presented a detailed analysis of the original meaning of "cruel and unusual" when adopted by the English in 1689, and then a separate analysis of its meaning when adopted by Americans for the national constitution in 1791.

Scalia stated that the English used the "cruel and unusual" clause as a means to prevent "methods" of punishment that were not considered a part of the common law at that time. In particular he described how the English adopted the "cruel and unusual" clause in response to Lord Chief Justice Jeffreys of the King's Bench during the Stuart reign of James II. Jeffreys was known for "'inventing' special penalties for the King's enemies, penalties that were not authorized by common-law precedent or statute."[34] In addition, Scalia presents evidence that the term "unusual" often meant "illegal" during that time and therefore was a reference to the common law existing at that time.

Scalia conceded that the Americans may not have understood the words "cruel and unusual" as the English had in 1689; for instance, since the American federal government did not have a common law system of justice, the word "unusual" probably did not mean the "common law" but was probably means "such as [does not] occur in ordinary practice."[35] Scalia pointed out that several states had constitutional provisions requiring proportionality in punishment, and since the framers had the state constitutions available when contemplating the wording of the Bill of Rights, the exclusion of the words must have been intentional--thus meaning they that purposely excluded any proportionality requirement.[36]

Justice White, in opposition, presented the following quote:

> No express restriction is laid in the constitution, upon the power of imprisoning for crimes. But, as it is forbidden to demand unreasonable bail, which merely exposes the individual concerned, to imprisonment in case he cannot procure it; as it is forbidden to impose unreasonable fines, on account of the difficulty the person fined would have of paying them, the default of which would be punished by imprisonment only, it would seem, that imprisonment for an unreasonable length of time, is also contrary to the spirit of the constitution. Thus in cases where the courts have a discretionary power to fine and imprison, shall it be supposed, that the power to fine is restrained, but the power to imprison is wholly unrestricted by it? In the absence of all express regulations on the subject, it would surely be absurd to imprison an individual for a term of years, for some inconsiderable offence, and consequently it would seem, that a law imposing so severe a punishment must be contrary to the intention of the framers of the constitution.[37]

White did not give any direct examples to confront Scalia's analysis of the meaning of the "cruel and unusual" clause in England's Declaration of Rights of 1689, but stated: "One such scholar, after covering much the same ground as does JUSTICE SCALIA, concluded that 'the English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties.'"[38] White was also critical of Scalia's reasoning that if the Americans had wanted to add "proportionality" to the "cruel and unusual" provision they would have done so to make it clear their meaning. White then gave two examples where early Americans were obviously less than clear in their intentions and left the courts to decide the meaning of the words--the 5th Amendment's Due Process Clause and the Fourth Amendment's provision against unreasonable searches and seizures. In addition, White pointed out that the Americans could have written a provision excluding "proportionality" to make it clear that that was their intent--therefore, it could be argued that lacking an exclusionary provision, this might be interpreted to show their intent that "proportionality" was to be included. White also pointed to a lack of evidence regarding what the state ratifying conventions had in mind when they voted in favor of the 8th amendment.[39]

Trying to decipher the original intent or original meaning of language has been criticized as being political or subjective. If someone wants a certain result, they can perform a fishing expedition for evidence from the past, create seemingly logical conclusions, and get the result they originally desired. Justice Scalia's and Justice White's analyses appear to be prime examples of this phenomenon. Both are persuasive and seem to have reasonable explanations of how the "cruel and unusual" provision was adopted.

The history of the usage of the "cruel and unusual" clause by state courts is probably Scalia's strongest argument regarding its original meaning.[40] For more than a hundred years state courts limited the "cruel and unusual" clause to governmental methods of punishment and dismissed the idea that the clause had a "proportionality" concern.[41] Whether or not the courts that first used it were incorrect in its usage, their interpretation created a strong precedent that following courts could not easily overrule because of *stare decisis*.[42]

Crime, considered a state matter, rarely resulted in the federal government having to rule on the federal constitution's "cruel and unusual" clause, and it was not officially incorporated into state action until 1962 in the case of *Robinson v. California*.[43] The U.S. Supreme Court however, heard the case of *Weems v. United States* in 1910, a case that involved a government disbursing officer who was convicted

of making false entries of small sums in his account book. He was sentenced by Philippine courts to 15 years of "hard and painful labor" with chains fastened to the wrists and ankles at all times.[44] The court in a 5 to 2 decision said that the sentence violated the eighth Amendment's "cruel and unusual punishment" clause.[45] Confusion arose as to whether the punishment violated the "cruel and unusual punishment" clause because of a disproportionate sentence or an unusual method of "painful" labor that included "chains fastened to the wrists and ankles at all times." Language in the opinion can be interpreted to support either side of the "proportionality" argument. Those who claim there is not a "proportionality" test hold that the sentence was unconstitutional because of the method of punishment, while those who support a "proportionality" test see the case as having been decided on proportionality grounds.[46] The majority opinion in *Weems* also included a lengthy discussion advocating that there were times when constitutional rights need to be broadened--an evolving standard argument.[47] McKenna also gave examples where the U.S. Supreme Court had expanded previous constructions involving the *ex post facto* clause and the 14th Amendment--but then acknowledged that it did not have to evolve new standards to make its determination in the case at hand.[48]

Two years later, the United States Supreme Court held in *Graham v. State of West Virginia* that equal protection and due process were not violated when James Graham received a longer sentence under a recidivist statute.[49] Graham had received a life sentence for grand larceny. His prior record included a grand larceny and burglary conviction, so that his third conviction put him under the state's recidivist statute. At the end of the majority opinion, the court made a one sentence statement: "Nor can it be maintained that cruel and unusual punishment has been inflicted."[50] Because there was no analysis, the phrase is sometimes treated as dicta.[51]

California enacted its constitution in 1849 and the delegates were advised that it had taken its first 8 provisions--which included the cruel or unusual clause--from the state constitutions of New York and Iowa.[52] There is no recorded debate on the provision at the California constitutional convention except that "a few verbal errors [were] corrected, and then passed."[53] In 1860, the California Supreme Court set an early tone on interpreting the "cruel or unusual" clause when it said: "The power over the whole subject of punishment for crime is vested in the Legislature. The only limitation upon its exercise is the inhibition against the infliction of cruel and unusual punishments, which are held to mean those of a barbarous character, and unknown to the common law."[54] In 1873, the same court said: "It may be, and doubtless is true, that under our statute cases may arise in which the severity of the punishment would be out of all just proportion to the

comparatively trivial nature of the offense. But that is a subject for the consideration of the Legislature and not of the courts."[55] In 1879, California had another constitutional convention, and when the new constitution was passed it contained the same "cruel or unusual" clause as the constitution of 1849.[56] In 1928 the California Supreme Court reviewed a § 644 habitual criminal case and denied that the sentence was cruel or unusual when a defendant received life without parole for a fourth conviction of passing a bad check. The three prior felony convictions were for "fraudulently issuing a fictitious check," "fraudulently drawing a check without sufficient funds to meet said check", and "making and passing a fictitious instrument."[57] Language in the decision appeared to use a "proportionality" standard--but based on this precedent setting case, the California Supreme court did not hold a prison sentence unconstitutional until 1972.

In February of 1972, the California Supreme Court declared in *People v. Anderson* that the death penalty was unconstitutional under the state's "cruel or unusual" provision. The court held that previous California Supreme Court decisions had applied the "cruel or unusual" clause incorrectly, as if the "or" was an "and." It then analyzed the death penalty as to whether it was "cruel" separately from whether it was "unusual" and decided that the death penalty violated both terms separately. As part of its analysis, the court took into account contemporary standards of decency.[58]

In June of 1972, in *Furman v. Georgia*, the U.S. Supreme Court declared the death penalty unconstitutional under the "cruel and unusual" clause of the 8th Amendment and the "equal protection" clause of the 14th Amendment on grounds that the death penalty was being applied in an "arbitrary and capricious" manner.[59] On November 7th of the same year, California voters passed Proposition 17 (67.5 percent "yes" to 32.5 percent "no") that amended the constitution reinstating all state statutes regarding the death penalty and said the death penalty shall not constitute the infliction of cruel or unusual punishment. The initiative nullified the *Anderson* decision but could do nothing to undermine the federal *Furman* holding.

In December of 1972, the California Supreme Court, for the first time ever, used a proportionality test, to hold that a prison sentence was unconstitutional under California's "cruel or unusual" clause. The court held unconstitutional John Lynch's sentence of one year-to-life as "cruel or unusual" when Lynch was convicted under a recidivist statute for sexual offenders. Lynch received the penalty for an indecent exposure charge after having been convicted of a similar charge nine years previously.[60] The standard applied was whether a sentence was "so disproportionate to the crime for which it is imposed that it 'shocks the conscience and offends fundamental notions of human dignity.'" When applying the test, the court considered: (1) the degree of danger

the offender or the offense pose to society; (2) how the punishment compares with punishments for more serious crimes in the same jurisdiction; and (3) how the punishment compares with punishment for the same offense in other jurisdictions.[61]

In 1974, applying the *Lynch* criteria, the California Supreme Court found a 10 years-to-life sentence given to Robert Nathan Foss both cruel and unusual punishment when Foss had been sentenced under a habitual criminal narcotics statute.[62] Foss's last conviction was for "furnishing heroin" and his prior conviction that allowed for the increased sentence was a possession of heroin charge 14 years earlier. The court also said that part of its decision was that Foss was suffering as a drug addict and committed the crimes to support his addiction.[63]

In 1976, the U.S. Supreme Court in *Gregg v. Georgia* held that Georgia's new statutory provisions regarding the death penalty were not in conflict with the "cruel and unusual punishments" and "equal protection" clauses in the federal constitution.[64] In the plurality opinion, a proportionality test was said to be applicable to analyzing whether a death sentence violated the "cruel and unusual" clause. Elsewhere in the opinion, the plurality emphasized that the death penalty, being the most extreme sentence, should be more closely scrutinized than other penalties. In 1977, the U.S. Supreme Court held in *Coker v. Georgia* that the death penalty for rape was unconstitutional under the "cruel and usual" clause.[65] The plurality opinion said that the death sentence was disproportionate to the crime.

In 1980 the U.S. Supreme Court decided the case of *Rummel v. Estelle*.[66] The 5 to 4 decision written by Justice Rehnquist declared that William James Rummel's sentence of life with the possibility of parole after 12 years was not cruel and unusual punishment when he was convicted of obtaining $120.75 by false pretenses. His prior record included credit card fraud involving $80 worth of goods and passing a forged check for $28.36. Rehnquist said the "cruel and unusual" clause did not contain a proportionality test. The court did not search for the original meaning of the clause, but instead noted the variety of sentences available to legislatures and that some decisions would be better left for them to decide. However, in a footnote, the decision said: "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, . . . if a legislature made overtime parking a felony punishable by life imprisonment."[67] In the lengthy dissent written by Justice Powell, he analyzed the original meaning of the "cruel and unusual" clause (similar to that one discussed earlier by Justice White), found the *Weems* case to favor a proportionality test, and an increasing use of proportionality by various states. Powell also said: "I recognize that the difference between the petitioner's grossly disproportionate sentence and other prisoners' constitutionally valid sentences is not

separated by the clear distinction that separates capital from noncapital punishment. 'But the fact that a line has to be drawn somewhere does not justify its being drawn anywhere.' . . . The Court has, in my view, chosen the easiest line rather than the best."[68] In addition, Powell stated: "We are construing a living Constitution. The sentence imposed upon the petitioner would be viewed as grossly unjust by virtually every layman and lawyer."

The California Constitution was amended in 1982 by the passage of Proposition 8 (the "yes" vote was 56 percent and the "no" vote was 44 percent), called the Victim's Rights Bill. It provided: "In criminal cases the rights of a defendant . . . to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, . . ."[69] Thus, California law regarding its "cruel or unusual" clause would once again revert to an analysis as if the "or" were an "and" and the interpretation of the clause was dependant on what the U.S. Supreme Court would say on the matter.

In 1983, just three years after the *Rummel* decision, Justice Powell was able to get Justice Blackmun to swing to his side and the U.S. Supreme Court appeared to reverse itself when it used a proportionality test regarding a person sentenced under a recidivist statute. The case, *Solem v. Helm*, resulted in a 5 to 4 vote and was written by Justice Powell. He said that a life without parole sentence for Jerry Helms violated the "cruel and unusual" clause when the defendant was convicted of writing a bad check for $100 and he had six previous nonviolent felony convictions.[70] Powell applied a three-prong test and held that the sentence was disproportionate to the crime. The test Powell used looked at: (1) a comparison of the gravity of the offense and the harshness of the penalty, (2) a comparison with sentences imposed for other crimes in the same jurisdiction, and (3) a comparison with sentences imposed for the same crime in other jurisdictions.[71] The federal test differed little, if at all, from the California test put forward in *Lynch*. Powell's opinion said that *Rummell* was not being overruled but that Rehnquist's opinion in *Rummell* had allowed a proportionality test when it said: "This is not to say that a proportionality principle would not come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment." In dissent, Chief Justice Burger said: "The controlling law governing this case is crystal clear, but today the Court blithely discards any concept of *stare decisis*, trespasses gravely on the authority of the states, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases."[72] In his analysis, Burger also included a citation to academic research studies conflicting with Powell's

historical analysis of the original meaning of the "cruel and unusual" clause.

In 1991 the U.S. Supreme Court decided the case of *Harmelin v. Michigan*. The case did not involve a recidivist, but a first-time offender, Ronald Harmelin, who had received a life without parole sentence for possession of 672 grams of cocaine. The court held in a 5 to 4 decision that Harmelin's sentence was not unconstitutional. Justice Kennedy's plurality opinion slightly modified the *Solem* decision by holding that if the requirements under the first prong did not show that the penalty was "grossly disproportionate" to the gravity of the offense, then there was no need to continue the analysis to the second and third prongs.[73] He then analyzed the danger to society of 672 grams of cocaine and said the life without parole sentence was not grossly disproportionate to the crime. While other previous courts had discussed "grossly disproportionate," this was considered to be the first case that actually used such a standard.[74]

When California passed the Three Strikes law in 1994, many defendants filed motions that their sentence was in violation of the "cruel and unusual" punishment clauses of the federal and state constitutions. The courts struggled with the *Harmelin* decision because it was not on point with Three Strikes cases--*Harmelin* did not involve a recidivist statute. The California courts, therefore, most often tried to compare the facts of the case at hand with those from the two prior U.S. Supreme Court cases of *Solem v. Helm* and *Rummel v. Estelle*.[75]

In 2002, the U.S. Supreme Court decided to look at California's Three Strikes law when it agreed to hear the cases of Gary Ewing and Leandro Andrade.[76] Ewing received a 25 years-to-life sentence after he was convicted of grand theft for trying to steal three golf clubs worth $399 each. He had tried to walk out of a golf shop without paying for them. Ewing's prior strikes were three residential burglaries and a robbery conviction. Andrade had received a 50 years-to-life sentence after he was convicted in two separate incidences of shoplifting. The two shoplifting incidents involved a total value of $153.54 of children's video tapes stolen from two separate K-Marts. Andrade said he was going to sell the tapes to support his heroin addiction. Andrade's prior strikes were three nonviolent residential burglaries.

In a 5 to 4 decision, the court rejected Ewing's claim saying his sentence was not "cruel and unusual punishment." Justice O'Conner wrote a plurality decision, joined by Justices Rehnquist and Kennedy, saying that Ewing's sentence was not grossly disproportionate to the gravity of his offense and the history of his crimes. Her opinion described the passage of the Three Strikes law as based on the will of the people--a will she described as "rational."[77] She also strongly endorsed the notion that states be allowed to set sentencing laws without federal interference--because "the Constitution 'does not

mandate adoption of any one penological theory.'"[78] Justices Scalia and Thomas wrote separate opinions saying Ewing's sentence was not cruel and unusual because no proportionality test should be used unless the death penalty was at issue.

In the dissents of *Ewing*, Justice Stevens wrote in defense of the use of a proportionality test for the "cruel and unusual punishment" clause in non-capital cases. As part of his analysis he pointed to many other constitutional issues where the court has had to make decisions on a case-by-case basis rather than applying a "bright line" approach as has been strongly advocated by Justice Scalia. Justice Breyer wrote a separate dissent demonstrating in detail why Ewing's sentence fell between *Solem* (where the sentence was found unconstitutional) and *Rummel* (where the sentence was held to be constitutional). In particular, Breyer emphasized that Rummel was only sentenced to life with the possibility of parole after 12 years, while Ewing was sentenced to life with the possibility of parole after 25 years. Breyer continued with the three-pronged criteria when he presented some crimes of a more egregious nature in California that would have received less than or equal the sentence than Ewing had received, and finally Breyer gave only one example of a case where someone in recent years had received a sentence similar to Ewing's in a jurisdiction other than California indicating its unusualness.

Andrade also lost his appeal by a 5 to 4 decision. The U.S. Supreme Court did not decide the case directly in terms of the Eighth Amendment, but said that under the rules of federal habeas corpus the California appellate court's rejection of Andrade's cruel and unusual punishment claim was not "contrary to, or involved an unreasonable use of clearly established law."[79] Thus they concluded that the California state court's decision that Andrade's sentence was constitutional should be upheld. Technically the question of federal "cruel and unusual punishment" is left open if a third strike case proceeds to the U.S. Supreme Court on direct review with a gravity of harm from the current conviction in combination with the defendant's criminal history is less than in the *Ewing* case.[80] In dissent, Justice Souter said federal habeas review was allowed because the California Appellate Court decision was an "unreasonable application of clearly established precedent" and "if Andrade's sentence is not grossly disproportionate, the principle has no meaning."

Other Constitutional Issues

The California appellate courts have generally followed precedent with little explanation of many of the other constitutional issues regarding Three Strikes. The use of prior strikes that resulted from crimes committed before the enactment of the Three Strikes law has been held not to violate the *ex post facto* provisions of the federal and state

constitutions.[81] Likewise, the use of prior convictions to enhance a sentence for a later conviction is not a violation of double jeopardy, nor are the proceedings used to prove prior convictions protected under the federal and state double jeopardy provisions (see chapter 5).[82] Use of the same prior conviction as an element of the current conviction and as a sentencing enhancement has been held not to be unconstitutional.[83]

Various parts of the Three Strikes law have been declared by the California appellate courts as not being unconstitutionally vague and providing adequate notice of the punishment to be imposed.[84] The Three Strikes law is not unconstitutional for failing to have a rational relationship to a state interest.[85] The statute has been held to not violate federal and state constitutional provisions requiring equal protection under the law.[86] And, the fact that one county uses the law more strictly than another county has also been held not to be unconstitutional.[87]

As indicated in chapter 5, the only major constitutional issue won by strikers regarded separation of powers when judges were allowed discretion to waive prior strikes in the *Romero* decision.[88] And, technically, the court based its opinion on the interpretation of the statute rather than the constitution (although six of the seven justices indicated that they would have held that the law also violated the separation of powers clause).

CHAPTER 12 NOTES

[1] See *Bill Analysis: AB971; April 19, 1993,* Assembly Committee on Public Safety.

[2] Moore, *The Legacy*.

[3] Later in 1999 with some hindsight, researchers Franklin E. Zimring, Sam Kamin and Gordon Hawkins estimated that between 30 and 60 percent of eligible second strikers were treated as such, while only 10 to 20 percent of the third strike eligible cases received a minimum of 25 years-to-life. Zimring, Kamin and Hawkins, *Crime and Punishment in California*, 3.

[4] Bill Analysis: AB971; January 24, 1994, California State Senate. See also Tristan, Memorandum: Estimates of the "Three Strikes" Initiative.

[5] Franklin Zimring questioned the report's assertion that 20 crimes would be prevented each year for each prison inmate. At that rate, based on the number of people incarcerated since 1980, "the crime rate should be less than zero," he said. Kershner, "3 Strikes' Initiative."

[6] Romero, *How Incarcerating More Felons*.

[7] Kershner, "3 Strikes' Initiative."

[8] Greenwood, et al., "Estimated Benefits and Costs."

[9] See Clark, Austin and Henry, *Three Strikes and You're Out;* Vitiello, "Three Strikes: Rationality." There are many differences across the states on how

"strikes" are defined, how many "strikes" need to be triggered, and the sentence prescribed. See Clark, Austin and Henry, *Three Strikes and You're Out*. See also Austin and Irwin, *It's About Time*.

[10] Greenwood and Hawken, *An Assessment of the Effects*; *Second Strike Cases: December 31, 1998*, California Department of Corrections; *Third Strike Cases: December 31, 1998*, California Department of Corrections.

[11] King and Mauer, *Aging Behind Bars*, 3.

[12] Zimring, Hawkins and Kamin, *Punishment and Democracy*, 168.

[13] See, for example, Lungren, "Three Cheers for 3 Strikes." In addition, the Republican Senate Caucus reported the same findings as the Jones' analysis. *Briefing Report: The Debate About Three Strikes,* California Senate Republican Caucus: Office of Policy.

[14] Greenwood and Hawken, *An Assessment of the Effects*.

[15] Lisa Stolzenberg and Stewart J. D'Alessio reviewed monthly data from the 10 largest cities in California and performed an uninterrupted time-series design and found that the Three Strikes law "did not decrease serious crime or petty theft rates below the level expected on the basis of preexisting trends." Stolzenberg and D'Alessio, "Three Strikes and You're Out." Zimring, Kamin and Hawkins reviewed the crime trends in California before and after the Three Strikes law was put in effect and said "the 1994 law might have contributed to the later years of the trend but there is no evidence of this from the time pattern." Zimring, Kamin and Hawkins, *Crime and Punishment in California*.

[16] In addition to the Uniform Crime Reports, according to the National Crime Victimization Survey, from 1993 to 2001 personal crimes decreased 50.4 percent and property crimes decreased 47.7 percent across the nation. Rennison, *National Crime Victimization Survey*.

[17] Austin, et al., "The Impact of Three Strikes and You're Out"; Greenwood and Hawken, *An Assessment of the Effects*. See also Austin and Irwin, *It's About Time*, 212-213.

[18] Blumstein and Wallman, *The Crime Drop in America*.

[19] Using mathematical modeling techniques, William Spelman said that only 27 percent of the national violent crime drop was attributable to increased incarceration. Spelman, "The Limited Importance of Prison Expansion." It should also be noted that California had a large increase in incarceration prior to the enactment of the Three Strikes law (see chapter 4) and there were also other laws continuously passed during and after 1994 that increased sentences of offenders, including the One Strike Sexual Offender statute in 1994 (AB1029), § 667.61 and the passage of the 10-20-life use of a gun penalty enhancement statute in 1997 (AB4), § 12022.53.

[20] Blumstein, "Disaggregating the Violence Trends"; Johnson, Golub and Dunlap, "The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York"; Wintemute, "Guns and Gun Violence." See also Golub and Johnson, *Crack's Decline*.

[21] See Donohue and Levitt, *Legalized Abortion;* Eck and Maguire, "Have Changes in Policing"; Fox, "Demographics and U.S. Homicide"; Grogger, "An Economic Model"; Rosenfeld, "Patterns in Adult Homicide: 1980-1995"; Zimring and Hawkins, *Crime Is Not the Problem*.

[22] For similar findings from previous research, see Austin, et al., "The Impact of Three Strikes and You're Out"; Austin and Irwin, *It's About Time*, 210-211; Macallair and Males, *Striking Out*.

[23] Zimring, Kamin and Hawkins, *Crime and Punishment in California*, 4. Another significant finding in their research was that only 10.6 percent of felony arrests were subject to the Three Strikes law: 7.3 percent attributable to second strikers and 3.3 percent attributable to third strikers. They concluded, therefore, that even if there was a 100 percent deterrence effect on the target group, there would be only a minimal effect on total crime rates attributable to the law." Zimring, Kamin and Hawkins, *Crime and Punishment in California*, 77-82. Another study reviewed the effect of the Three Strikes law on different age groups, expecting the age-groups most affected by the law to experience the largest drops in crime, but found the opposite. Macallair and Males, *Striking Out*.

[24] Beres and Griffith, "Do Three Strikes Laws." Similar conclusions based on "dangerousness" were made by Auerhahn, *Selective Incapacitation*.

[25] According to California statutory history it was created in 1923 (ch. 111 § 1), and amended various times. It was repealed by 1976 Cal. Stats. ch 1139 § 261.5, which became operative July 1, 1977. It was then transformed into § 667.7 in 1981 by Cal. Stat. 1981 ch. 1108 § 1; which was then amended many times.

[26] A California Supreme Court ruling said that prior convictions would only be considered "felonies" under the statute if they had resulted in a prison sentence. *In re Rosencrantz*, 211 Cal. 749, 297 P. 1931 (1931). And, in 1935, legislation further stipulated that the prior prison terms had to be served separately. *People v. Gump*, 17 Cal. App. 2d 221, 61 P.2d 970 (1936). The current Three Strikes law does not have such requirements.

[27] Prior to November of 1974, this article was contained in CAL. CONST. art. I, § 6.

[28] The discussion herein regarding the passage of the federal Bill of Rights and James Madison is from Irons, *A People's History*, 71-82.

[29] Ibid., 73.

[30] Granucci, "'Nor Cruel and Unusual Punishments Inflicted'."

[31] Justice Kennedy's concurrence and middle position said: "Regardless of whether JUSTICE SCALIA or JUSTICE WHITE has the best of the historical argument, . . . *stare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years. *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991).

[32] See *Harmelin v. Michigan*, 501 U.S. at 966.

[33] See *Harmelin v. Michigan*, 501 U.S. at 966.

[34] Justice Scalia describes in detail one story of a "notorious prejurer," Titus Oates, who was sentenced to "pay a fine of '1000 marks upon each Indictment,' that he should be 'stript of [his] Canonical Habits,' that he should stand in the pillory annually at certain specified times and places, that on May 20 he should be whipped by 'the common hangman' 'from Aldgate to Newgate,' that he should be similarly whipped on May 22 'from Newgate to Tyburn,' and that he should be imprisoned for life." *Harmelin v. Michigan*, 501 U.S. at 970. The perjured testimony of Oates was said to have caused the executions of 15 Catholics for treason. Granucci, "'Nor Cruel and Unusual Punishments Inflicted'," 857.

[35] *Harmelin v. Michigan*, 501 U.S. at 976.

[36] Scalia gave the examples of Pa. Const., § 38 (1776) (punishments should be "in general more proportionate to the crimes"); S. C. Const., Art. XL (1778) (same); N. H. Bill of Rights, Art. XVIII (1784) ("All penalties ought to be proportioned to the nature of the offence"). *Harmelin v. Michigan*, 501 U.S. at 977.

[37] Benjamin Oliver, *The Rights of an American Citizen* (1832), 185-186 cited in *Harmelin v. Michigan*, 1010. Justice Scalia's response was: "If 'cruel and unusual punishments' included disproportionate punishments, the separate prohibition of disproportionate fines (which are certainly punishments) would have been entirely superfluous. When two parts of a provision (the Eighth Amendment) use different language to address the same or similar subject matter, a difference in meaning is assumed." He added: "There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. at note 9.

[38] *Harmelin v. Michigan*, 501 U.S. at note 1 of the dissent citing Granucci, "'Nor Cruel and Unusual Punishments Inflicted'," 839. Granucci presents evidence that negates a causal connection between the punishments used by Lord Chief Justice Jeffreys and the "cruel and usual" clause and describes the punishment of Oates as raising "cruel and unusual" concerns because of its severity--not the method of punishment--thus enhancing the "proportionality" argument.

[39] Scalia stated that when finding original meaning justices should comport to the following rule: "We do not bear the burden of 'proving an affirmative decision against the proportionality component,' [citation to White's dissent] rather, JUSTICE WHITE bears the burden of proving an affirmative decision in its favor. For if the Constitution does not affirmatively contain such a restriction, the matter of proportionality is left to state constitutions or to the democratic process." *Harmelin v. Michigan*, 501 U.S. at note 6.

[40] Scalia stated: "Perhaps the most persuasive evidence of what 'cruel and unusual' meant, however, is found in early judicial constructions of the Eighth Amendment and its state counterparts. . . . Throughout the 19th century, state courts interpreting state constitutional provisions with identical or more expansive wording (*i.e.*, 'cruel *or* unusual') concluded that these provisions did not proscribe disproportionality but only certain modes of punishment." *Harmelin v. Michigan*, 501 U.S. at 982-983.

[41] Scalia continued: "In the 19th century, judicial agreement that a 'cruel and unusual' (or 'cruel or unusual') provision did not constitute a proportionality requirement appears to have been universal." The only exception involved a state with a "cruel" only provision and the statement was made in dictum. *Harmelin v. Michigan*, 501 U.S. at 984-985 citing *State v. Becker*, 3 S.D. 29, 41, 51 N.W. 1018 (1892). In addition, there were a couple of cases that also mentioned "proportionality" early in the 20th century--but once again the statements were only in dictum. *Harmelin v. Michigan*, 501 U.S. at 985 citing *Jackson v. United States*, 102 F. 473, 488 (1900); *Territory v. Ketchum*, 10 N.M. 718, 723, 65 P. 169 (1901). For a lengthy discussion on how state's used their "cruel and/or unusual" clause see *Graham v. State of West Virginia*, 224 U.S. 616, 622-628 (1912).

[42] Granucci attributes the misinterpretation of the "cruel and unusual" clause by Americans to the over-reliance of Blackston's *Commentaries on the Laws of England* (1768) which was written in a way so that the misreading could easily occur. Granucci, "'Nor Cruel and Unusual Punishments Inflicted'," 860-865.

[43] The case is famous for holding that incarcerating a person for 90 days merely as a drug addict was cruel and unusual punishment. *Robinson v. California*, 370 U.S. 660 (1962).

[44] The U.S. Supreme Court justices interpreted the Philippine Constitution's "cruel and unusual" clause as if it were the U.S. Constitution because the Philippine clause was virtually identical to the U.S. clause.

[45] *Weems v. United States*, 217 U.S. 349 (1910).

[46] The dissent in *Weems* also does not understand how the majority made its decision, but then gives many arguments as to why "proportionality" should not be interpreted as contained within the 8th Amendment--many of the same arguments that Scalia later used in *Harmelin*. *Weems v. United States*, 217 U.S. at 383.

[47] *Weems v. United States*, 217 U.S. at 373.

[48] *Weems v. United States*, 217 U.S. at 373-374.

[49] *Graham v. State of West Virginia*, 224 U.S. 616 (1912).

[50] *Graham v. State of West Virginia*, 224 U.S. at 631.

[51] See *Rummel v. Estelle*, 445 U.S. 263 (1989) (Powell's dissent, note 7).

[52] See *People v. Anderson*, 6 Cal. 3d 628, 635, 493 P.2d 880 (1972).

[53] At some point in the process, the California "cruel and unusual" clause was changed to "cruel or unusual," but there is no record as to why such a change was made. See *People v. Anderson*, 6 Cal. 3d at 634-635.

[54] *California v. McCauley*, 15 Cal. 429 (1860).
[55] *People v. Stanley*, 47 Cal. 113 (1873). This was upheld in 1918 when the California Supreme Court said the "cruel and unusual punishment" clause "relates to the character of the punishment, and imprisonment is neither cruel nor unusual." *In re Garner*, 179 Cal. 409, 177 P. 162 (1918). The court, however, did allow a proportionality test when the death penalty was an issue. *People v. Oppenheimer*, 156 Cal. 733, 106 P. 74 (1909).
[56] There appears to have been little debate on changing the meaning, except a concern about whether whipping would be considered "cruel." *People v. Anderson*, 6 Cal. 3d at note 18.
[57] *In re Rosencrantz*, 205 Cal. 534, 536, 271 P. 902 (1928).
[58] "We are mindful, too, that article I, section 6, like the Eighth Amendment, is not a static document. Judgments of the nineteenth century as to what constitutes cruelty cannot bind us in considering this question any more than eighteenth century concepts limit application of the Eighth Amendment." *People v. Anderson*, 6 Cal. 3d at 647.
[59] *Furman v. Georgia*, 408 U.S. 238 (1972).
[60] *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921 (1972).
[61] In 1975, applying the *Lynch* criteria, the California Supreme Court said that using civil proceedings to declare a person a "mentally disordered sex offender" and committing the person to an "institutional unit" on the grounds of a prison with an admitted lack of treatment for those detained within the unit when the facts were similar to Lynch was also both cruel and unusual punishment. *People v. Feagley*, 14 Cal. 3d 338, 535 P.2d 373 (1975). In 1975 the court held that Rudolfo Rodriguez's indeterminate prison sentence, of which he had already served 22 years, was cruel and unusual punishment for being convicted of lewd conduct with a child. *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384 (1975).
[62] *In re Foss*, 10 Cal. 3d 910, 112 Cal. Rptr. 649 (1974).
[63] Later, the court denied a minimum sentence of six years was "cruel and unusual" punishment for a first-time drug offender who was not an addict when the defendant had been convicted of two separate drug transportation charges. *In re Adams*, 14 Cal. 3d 629, 536 P.2d 473 (1975).
[64] *Gregg v. Georgia*, 428 U.S. 153 (1976).
[65] *Coker v. Georgia*, 433 U.S. 584 (1977).
[66] *Rummel v. Estelle*, 445 U.S. 263 (1980).
[67] *Rummel v. Estelle*, 445 U.S. at note 11.
[68] *Rummel v. Estelle*, 445 U.S. at 306 citing *Pearce v. Commissioner*, 315 U.S. 543, 558 (1942) (Frankfurter, J., in dissent).
[69] CAL. CONST. art. I, § 24.
[70] Helms was previously convicted three separate times for third-degree burglary, once for obtaining money under false pretenses, once for grand larceny, and once for DUI. *Solem v. Helm*, 463 U.S. 277 (1983).

[71] *Solem v. Helm*, 463 U.S. at 286-303. Even without the required federal analysis under Art. I, § 24 of the California Constitution, the United States Supreme court had said the federal U.S. Constitution's "cruel and unusual" clause applied to state action in *Robinson v. California*, 370 U.S. 660 (1962).
[72] *Solem v. Helm*, 463 U.S. at 304.
[73] *Harmelin v. Michigan*, 501 U.S. 957 (1991).
[74] Justice Scalia, who was joined by Justice Rehnquist, wrote the concurring opinion that included much of the analysis about the original meaning of the "cruel and unusual" clause discussed previously in this chapter. The dissent by Justice White was also discussed previously.
[75] Some of the first decisions regarding this issue were *People v. Cartwright; People v. Diaz*, 41 Cal.App. 4th 1424, 49 Cal. Rptr. 2d 252 (1996); *People v. Ingram*, 40 Cal. App. 4th 1397, 48 Cal. Rptr. 2d 256 (1995); *People v. Kinsey*, 40 Cal. App. 4th 1621, 47 Cal. Rptr. 2d 769 (1995). The California Supreme Court has never addressed the issue, but denied hundreds of cases where defendants lost their cruel and usual punishment claims at the lower appellate courts. Many California appellate courts continued to use the standard set forth in *Lynch* analyzing the cases as if California standards might be applicable.
[76] *Ewing v. California*, 538 U.S. 11, 155 L. Ed. 2d 108 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 155 L. Ed. 2d 144 (2003).
[77] Summing it up she said: "To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." *Ewing v. California*, 155 L. Ed. 2d at 123.
[78] *Ewing v. California*, 155 L. Ed. 2d at 120 citing *Harmelin v. Michigan*, 501 U.S. at 999.
[79] *Lockyer v. Andrade*, 155 L. Ed. 2d at 155.
[80] Ibid.
[81] U.S. CONST. art. I, § 9 and § 10 and CAL. CONST. art. I, § 9. See, for example, *People v. Brady*, 34 Cal. App. 4th 65, 40 Cal. Rptr. 207 (1995). See also *In re Rosencrantz*, 205 Cal. at 538. The U.S. Supreme Court has also said a recidivist statute does not violate the *ex post facto* clause. *Spencer v. Texas*, 385 U.S. 554 (1967).
[82] See *Graham v. State of West Virginia*, 224 U.S. 616 (1912); *Spencer v. Texas*, 385 U.S. 554 (1967); *People v. Kinsey*, 40 Cal. App. 4th 1621, 47 Cal. Rptr. 2d 769 (1995); *People v. Sipe*, 36 Cal. App. 4th 468, 42 Cal. Rptr. 2d 266 (1995); *People v. Hamilton*, 40 Cal. App. 4th 1615, 47 Cal. Rptr. 2d 749 (1995); *People v. Monge*, 16 Cal. 4th 826, 941 P.2d 1121 (1997).
[83] *People v. Sipe*, 36 Cal. App. 4th 468, 42 Cal. Rptr. 2d 266 (1995).
[84] *People v. Murphy*, 25 Cal. 4th 136, 19 P.3d 1129 (2001); *People v. Askey*, 49 Cal. App. 4th 381, 56 Cal. Rptr. 2d 782 (1996); *People v. Kinsey*, 40 Cal. App. 4th 1621, 47 Cal. Rptr. 2d 769 (1995); *People v. Sipe*, 36 Cal. App. 4th 468, 42 Cal. Rptr. 2d 266 (1995); *People v. Hamilton*, 40 Cal. App. 4th 1615, 47 Cal. Rptr. 2d 749 (1995)

[85] *People v. Kilborn*, 41 Cal. App. 4th 1325, 49 Cal. Rptr. 2d 152 (1996); *People v. Sipe*, 36 Cal. App. 4th 468, 42 Cal. Rptr. 2d 266 (1995)
[86] *People v. Sipe*, 36 Cal. App. 4th 468, 42 Cal. Rptr. 2d 266 (1995); *People v. Hamilton*, 40 Cal. App. 4th 1615, 47 Cal. Rptr. 2d 749 (1995)
[87] *People v. Andrews*, 65 Cal.App.4th 1098, 76 Cal. Rptr. 2d 823 (1998).
[88] *People v. Superior Court (Romero)*.

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CHAPTER 13

The Element of Randomness and Lack of Democracy

THE EXPECTATION OF NONRANDOMNESS IN PUNISHMENTS

The criminal justice system is not perfect--and no one expects it to be. The gap between the amount of crime committed and the number of people convicted is very large. Those who are caught might be more careless, underestimate the actions of victims, be specifically targeted by the police, or be trapped by a host of other systematic factors, but there is also the element of randomness--perhaps being in the wrong place at the wrong time. This element is reasonable and expected.

Randomness or a disparity in sentencing, however, is not as tolerable--especially when the disparity is great. The system is set up so that once guilt has been established, there is an expectation of punishment--and that every person punished for the same crime will receive the same punishment--with reasonable modifications based on mitigating and aggravating circumstances, although people with the same set of mitigating and aggravating circumstances, including recidivism, are still expected to be treated in the same manner.

Complaints involving the randomness or disparity in sentencing are not new and the system has at times tried to correct itself. Some examples include the "inventiveness" that judges used when sentencing criminals in England during the 1600s that resulted in the establishment of the cruel and unusual punishment clause in England's Declaration of Rights in 1689 (see chapter 12); the disparity in punishments from indeterminate sentencing that led to determinate sentencing in the 1970s (see chapter 4); and, the "arbitrary and capricious" manner in which the death penalty was given prior to its temporary abolishment in the 1970s (see chapter 12).

RANDOMNESS AND THE DISPARITY OF SENTENCING WITH THE THREE STRIKES LAW

The following sections describe some of the evidence regarding the elements of randomness that could occur or have been shown to occur that result in the disparity of sentencing under the Three Strikes law. One of the unique characteristics of the law is the almost "all or nothing" concept regarding the third strike part of the law. As discussed in the case of Ricky Fontenot (chapter 6), the difference between him taking his plea bargain and going to trial was 4 years versus 27 years-to-life. The fact that many defendants are presented with such a dilemma demonstrates a large disparity in how the law can be applied. Fontenot was convicted of possession of a weapon and his prior strikes were an assault with a deadly weapon and robbery--both from 1979. When I interviewed defense attorneys, almost all indicated that within their own case loads there was a large disparity in sentencing among their clients with regard to the Three Strikes law. Families to Amend California's Three Strikes (FACTS) has collected a database of third strike cases and posted what they consider the 150 most "unjust" cases on their web site (www.facts1.com). The 150 stories represent only a small portion of similar cases as there are many individuals who probably did not write to publicize their stories. At the time of this writing, Fontenot was ranked 126th on the list--with the 1st on the list ranked as most "unjust."[1] Many defense attorneys I interviewed have acknowledged they had eligible third strike clients who received a far lesser sentence with records involving more egregious crimes than those is the stories listed on the FACTS web site. Los Angeles County acknowledged that of the third strike cases filed in 1998 and sentenced by April 1, 1999, 83 with a serious third strike and 42 with a violent third strike were sentenced to less than 25 years-to-life in prison--while only 55 with a serious third strike and 16 with a violent third strike received a sentence of 25 years or more.[2] Referring to a large sample of eligible third strike cases, Franklin E. Zimring, Gordon Hawkins, and Sam Kamin said "that the gap in punishments assigned to lucky and unlucky third-strike defendants was very wide. The same criminal record and current crime could result in a short stay in a parole return center or a 25-year-to-life prison term."[3]

Inherent Disparities within the Law

A person can be convicted under the Three Strikes law with as little as two residential burglary charges and petty theft. Entering another's garage to take a bicycle can count as residential burglary. Shoplifting a bottle of aspirin can count as petty theft.[4] The total amount of harm caused by such incidents could be minimal and the person could receive a 25 years-to-life sentence. On the other hand, a first-time

offender who has been convicted of first-degree murder can receive the same sentence of 25 years-to-life.[5] A first-time offender convicted of voluntary manslaughter can receive a prison sentence of three, six, or eleven years; and a person convicted of involuntary manslaughter of two, three, or four years.[6] Any person who commits "mayhem," which is when someone "unlawfully and maliciously deprives another of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear or lip" can be imprisoned for two, four, or eight years.[7] Kidnapping can receive a prison sentence of three, five, or eight years.[8] Rape can receive a prison sentence of three, six, or eight years.[9]

James Ely, who received 25 years-to-life for attempted burglary of a vacant car at a car wash at 2:00 a.m. and two prior strikes of residential burglary, wrote: "I in no way excuse my actions, and I do indeed deserve to be punished. But, like a lot of 3 strikers, I got more time than a cold-blooded killer, yet I was convicted for a 'wobbler' offense. The crime? Second Degree, Commercial Burglary. An offense which carries 16 months, 2 years plus, 3 years as maximum."[10] In addition, if reciprocity were a goal in sentencing--meaning that the punishment should be somewhat equal to the harm committed by the crime--then the Three Strikes law can and does grossly violate the principle.

A quirk in the law also says that if a person has two prior murder or rape convictions and no prior theft-related convictions and then commits a petty theft, the petty theft can be treated as only a misdemeanor--thus giving a sentence of at most a year in jail. The quirk in the law results from § 666 which increases a petty theft to felony status only if the person has been convicted of a prior petty theft, grand theft, auto theft, burglary, carjacking, robbery, or for receiving stolen property. Therefore, if the person in the scenario above had just one prior petty theft on their record, instead of one year in jail they would be subject to 25 years-to-life.

Another disparity in sentencing can result from the sequence of crimes committed. If somebody were to commit petty theft and then two residential burglaries, the last burglary charge would be treated as a second strike and a five-year enhancement added for a maximum total of 17 years (with a possible 20 percent reduction in the sentence allowed for good time credits).[11] The same is true if someone commits their crimes in the sequence of burglary, petty theft, burglary. However, if the sequence is burglary, burglary, petty theft, then offenders can be subject to 25 years-to-life. Is there any rational reason that someone should receive a longer sentence for committing the petty theft after two burglaries than if he or she had committed the petty theft before the second burglary?[12]

The Disparity in Sentencing of Various Counties

In 1999, Dan Macallair and Mike Males published a study demonstrating that there was a large disparity in the sentencing rates under the Three Strikes law across 12 of California's largest counties.[13] Chapter 6 sets out the same results and considers whether demographic characteristics are the cause--perhaps supplying plausible explanations of why district attorneys use the law differently. The findings of chapter 6 showed that counties that tended to use the law more for nonviolent offenders were those that had large urban populations, slightly higher crime rates, a greater percentage of people of color, were Republican dominated, and/or had a larger state prisoner population. But more significantly it was demonstrated that there were a lot of exceptions--indicating that district attorneys had a great deal of flexibility about how they used the law independent of the circumstances of their county.

One could argue that a disparity in different counties is not a problem because it allows counties to act differently based on their financial resources. The financial resources argument has some legitimacy, but also suggests another possible problem: One could argue that because of the way state and county budgets are allocated to the criminal justice system there is an inherent benefit for district attorneys to overuse the Three Strikes law. District attorneys are under pressure from county supervisors to keep costs at a minimum to save funds in the county budget. Sending someone to prison as a third striker becomes a cost of the state budget, whereas giving the person a jail term is an expense to the county.[14]

One could argue that the disparity in the application of the Three Strikes law across counties is not a problem because it demonstrates democracy in action. Mike Reynolds discussed this issue on his web site by stating: "Another factor at work is that District Attorneys and Judges must be re-elected and thus their actions must be at the approval of the people they represent. No DA or judge whose actions run against the grain of common decency will be returned to office. Thus each county and its people therein reaffirm or repeal their support for the law every time they vote."[15]

Two issues arise from this subject: First, is there evidence that shows district attorneys apply the law according to the wishes of their constituents? Second, are district attorneys elected or re-elected by the public based on issues such as the Three Strikes law?

Do District Attorneys Follow the Wishes of Their Constituents?

The evidence that the Three Strikes law was used based on the desires of the voters is not clear. As indicated by Table 13.1, there is not much

difference in how counties used the Three Strikes law based on how voters supported Proposition 184--except at the extremes.

The counties that had a passage rate for Proposition 184 of less than 66.2 percent used the law about 42 percent of the time as compared to the rest of the state for drug, property, and nonviolent crimes (however, when the four extreme counties are removed, the percentage use of the law on such crimes is closer to the rest of the state at 81 to 97 percent). When the four extreme counties are removed, the counties that had a passage rate for Proposition 184 of greater than 79.5 percent used the law from between 139 percent and 154 percent for drug, property, and nonviolent crimes as compared to the rest of the state (however, when the four extreme counties are included, the percentage use of the law for the same crimes is closer to the rest of the state at between 119 and 129 percent). Except for the extremes, there does not appear to be much difference between the counties that had a passage rate between 66 percent and 79.5 percent--which is where two-thirds of the counties fell. A detailed analysis also demonstrates many exceptions. Fresno County, home of Mike Reynolds and Bill Jones, had an 82 percent passage rate for Proposition 184 (4th highest in the state), but used the law only for nonviolent crime at a 99 percent rate as compared to the rest of the state.[16] Imperial County had a 79.4 percent passage rate for Proposition 184 (12th highest in the state), but used the law only for nonviolent crimes at a 24 percent rate (43rd in the state). Madera County had the highest voter percentage rate in the state at 84.04 percent, but used the Three Strikes law for nonviolent offenders at the same rate as the rest of the state (100 percent). Marin County had a voter passage rate of 52.8 percent (2nd lowest only to San Francisco), but used the Three Strikes law for nonviolent crimes at a 214 percent rate (6th highest in the state). Santa Cruz County had a voter passage rate of 56.04 percent (4th lowest in the state), but used the Three Strikes law for nonviolent crimes at a 122 percentage rate (11th highest in the state). Los Angeles County had a voter passage rate of 73.01 percent (39th highest in the state), but used the Three Strikes law for nonviolent crimes at a 153 percentage rate (8th highest in the state).

In addition, the payoff for counties that voted for the law the most did not correlate with a greater decrease in crime. Table 13.2 demonstrates that the counties that voted for the law the least (when all the counties are counted) ended up with a slightly larger decrease in violent crime that the rest of the counties, (although when the four

Table 13.1: Third Strikers in the Prison Population from Counties of Different Passage Rates of Prop. 184 as Compared to the Rest of the State Based on Average of Four Factors as of December 31, 2002

Percentage Vote	Greater than 79.5%	79.5% to 77.2%	77.2% to 75.6%	75.6% to 73.05%	73.01% to 66.2%	Less Than 66.2%
Number of Counties	9	10	10	9	10	10
Violent	95.3%	90.8%	90.4%	105.8%	137.0%	68.6%
Drug Crimes	119.3%	153.4%	83.2%	106.6%	118.1%	41.9%
Property Crimes	128.9%	112.0%	69.4%	102.0%	134.3%	42.1%
Nonviolent	124.7%	122.8%	74.2%	102.6%	131.4%	41.8%
*All Counties Less 4:						
Number of Counties	9	9	10	9	9	8
Violent	102.7%	70.6%	95.0%	113.0%	127.5%	95.5%
Drug Crimes	139.3%	80.6%	89.8%	117.7%	71.1%	96.8%
Property Crimes	153.7%	90.1%	74.5%	112.4%	76.1%	81.1%
Nonviolent	146.8%	85.9%	79.6%	112.7%	79.1%	85.3%

*Excludes Alameda, Kern, Los Angeles and San Francisco Counties

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Source: *Statement of Vote: November 8, 1994*, California Secretary of State and see notes 9 and 10 in chapter 6.

extreme counties are removed, the decrease in violent crime is the least).

What is the Link between the Voter and the District Attorney's Policy on Three Strikes?

Chapters 8 through 11 reviewed in greater detail how Los Angeles, San Francisco, Kern, Kings, Del Norte, and Orange counties used the Three Strikes law and it discussed the different philosophies of the district attorneys and their use of the statute. When one thinks of the classic elements of democracy, one thinks of voters electing representatives who will act in the voters' interest, but tempered by the representative's own knowledge and experience of the issues. District attorneys, however, are not necessarily elected to express policy--but more as the best "check and balance" to prevent corruption and favoritism. If they were appointed by county supervisors, then there would be a concern about their independence from the supervisors that might hamper investigations into anything involving the supervisors or the supervisor's supporters and friends. As demonstrated by chapters 8

through 11, even with an independent election, political favoritism still often is a problem for district attorneys.

Table 13.2: Decrease in Crime from 1993 to 2001 for Counties of Different Passage Rates of Propostion 184

Percentage Vote	Greater than 79.5%	79.5% to 77.2%	77.2% to 75.6%	75.6% to 73.1%	73.0% to 66.2%	Less Than 66.2%
Number of Counties	9	10	10	9	10	10
Decrease in Crime:						
Violent Crime	-39.5%	-41.0%	-24.4%	-40.9%	-44.0%	-46.1%
Property Crime	-35.4%	-43.1%	-30.4%	-39.7%	-39.3%	-40.6%
Total Crime	-36.0%	-42.9%	-29.7%	-39.9%	-40.3%	-41.4%
*All Counties Less 4:						
Number of Counties	9	9	10	9	9	8
Decrease in Crime:						
Violent Crime	-39.5%	-40.5%	-24.4%	-40.9%	-36.5%	-25.0%
Property Crime	-35.4%	-44.6%	-30.4%	-39.7%	-31.4%	-37.8%
Total Crime	-36.0%	-44.2%	-29.7%	-39.9%	-32.1%	-36.4%

*Excludes Alameda, Kern, Los Angeles and San Francisco Counties

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Source: *Reported Crimes and Crime Rates: 1992-2001,* California Criminal Justice Statistics Center*; Statement of Vote: November 8, 1994*, California Secretary of State.

There also is the question of whether the public even knows much about their district attorney. Other than elections for U.S. President, State Governor, and maybe U.S. Senators, most people probably do not know the names of officials and representatives--and even less do they know who are their county and municipal officials. People rarely know who their district attorney is--except when there are scandals or high-profile trials.

Chapters 8 through 11 show that the incumbent district attorney has a distinct advantage over challengers. The most likely successful challenger of an incumbent probably comes from the ranks of the deputy district attorneys. As was demonstrated, for a deputy district attorney to challenge a district attorney is hazardous to one's career; in fact, they have to be careful who they support. If the challenger loses, they usually get transferred to a less desirable position or might be fired. Therefore, it is not uncommon for district attorneys to run

unopposed in elections. Obviously, when a candidate is running unopposed, there is little democratic choice for the voter.

The following sections provide further analysis on the district attorneys discussed in chapters 8 through 11.

Los Angeles County (chapter 8)

Gil Garcetti said that he disagreed with the law, but then set a policy to fully enforce it with only "rare" exceptions--apparently feeling he had a mandate from the voters. At the same time, he left it up to the supervising district attorneys to decide how they wanted to enforce the law. Not only did Los Angeles County use the law inconsistently, but Garcetti appeared to be inconsistent with his views on the Three Strikes law.

Unlike Garcetti, Steve Cooley did not believe he had any mandate from or obligation to the voters to fully enforce the Three Strikes law. He established a policy severely restricting its use for nonviolent offenders, and removed a lot of discretion from the deputy district attorneys. One could argue that his policy decreased the disparity in the usage by prosecutors within Los Angeles County, but it is also possible that the level of randomness was raised to a higher level--and out of the media radar that was concerned with the use of the law for minor felonies.[17] For example, the gray area for deciding to wave third strikes under Garcetti might have involved a current offense of "petty theft," "possession of a controlled substance," "receiving stolen property," "fraud" and similar minor felonies, while the gray area under Cooley might have been moved to the more serious felonies of "commercial burglary," "residential burglary," "robbery," and similar type of felonies.

Some of the defense attorneys I talked with after Cooley was elected believed that this might be the case. They expressed surprise at getting prior strikes waived when the current offense was for more serious crimes such as robbery.

As for the link between democracy and usage of the law, Garcetti was criticized for his use of the statute but still won re-election in 1996--did this mean that the voters' approved of his policy? Cooley made Three Strikes more of an issue in 2000, but he probably would have won regardless. Many in the public were getting tired of Garcetti, there was continuing dissatisfaction with him from white voters because of the not guilty verdict in the O.J. Simpson trial, and Garcetti had been criticized for doing nothing about the Rampart Scandal and the problems involving the Belmont Learning Complex. The change in policy of the Three Strikes law, therefore, could be described as the product of random events rather than an elective decision by the voters.

San Francisco County (chapter 9)

The analysis of San Francisco County also showed the randomness involved in elections. Arlo Smith barely lost to Dan Lungren in the state's attorney general's race in 1990. What if he had won? Would the next district attorney have applied the Three Strikes law in the same manner that Smith had? The two run-off elections won by Terence Hallinan were primarily the result of Willie Brown being on the same ballot in a mayoral run-off--which boosted the number of liberal voters in the election, allowing Hallinan to triumph both times. If Brown had not been on the ballot and Bill Fazio had won, would he have used the Three Strikes law in the same manner as Hallinan? For those people who might have been treated differently under Fazio rather than Hallinan, should the difference between a 4-year sentence and a 25-years-to-life sentence be the result of the fact that Willie Brown happened to be in a run-off election?

The story of Arlo Smith demonstrated another concern regarding politically ambitious district attorneys. If they are running for state office, they will probably be more concerned with how voters from across the state will judge them rather than just the voters from their own county. Thus, they might not use the Three Strikes law in a manner that their constituents really desire. Should the fate of someone's three strike sentence rest on whether a district attorney has higher political ambitions?

Alameda County (chapter 9)

The election of Thomas Orloff in 1994 demonstrates a weak link between the voters and the application of the Three Strikes law because he ran unopposed--and also ran unopposed in subsequent elections. He was elected primarily because he had been promoted within the District Attorney's office and was willing to outspend his potential opponents--his Three Strikes policy probably had very little to do with his victory. Would he have lost the election or re-elections with a different Three Strikes policy?

Kern County (chapter 10)

District Attorney Ed Jagels consistently used the Three Strikes law in a harsh manner. In my telephone interview with Kern County public defender Michael C. Lukehart on June 15, 2001, he said there had been "some" cases where Jagels' office did not file a third strike, "but very damn few"; and, as far as Lukehart knew, he did not think the office had ever waived any prior strikes. Lukehart said that because prosecutors would not waive prior strikes, judges were the only hope for the defendant. Lukehart noted that there were "no liberal judges in

Kern County" but there were about three or four judges who would seriously consider waiving prior strikes, "four to six in the middle of the road," and about three or four who are a "hard sell." Lukehart said judges are informally assigned based on courtroom availability with the oldest cases assigned first to the most available judge. He said the assignment can make a big difference in the outcome of a third strike case.[18]

Lukehart believed that it often made a big difference who the third striker might get as a defense attorney. He said that the Public Defender's office would thoroughly research earlier offenses and then vigorously argue for the waiver of a prior strike because of mitigating circumstances about them; but Lukehart said he saw many cases where "appointed counsel" from private practice did not do any research on the prior strikes.

As for Jagels' use of the Three Strikes law and the link to the voters, the way Jagels initially won election as District Attorney involved suspicious circumstances and is probably not a good example of democracy in action. Again, one has to ask whether he would have lost re-election had he used the Three Strikes law in a different manner. In addition, with regard to chapters 2 through 4, Jagels appears to have taken advantage of every social psychological phenomenon regarding the development of attributions, schemas, prejudices, stereotypes, and the anxieties of the white voters in economically depressed Kern County. One has to question whether this is an example of "good democracy."

Kings and Del Norte Counties (chapter 10)

One suspects that the prison population would commit more felonies than the outside population because there are many laws regarding illegal contraband, problems involving competing gangs, and the use of violence to solve problems. Considering that prisoners have a considerably higher rate of previous convictions than people on the outside, one would also suspect that there might be a higher than normal rate of incarcerated offenders getting second and third strikes.[19] In addition, because of the influence that the prison guards have on the community and their involvement with the election of district attorneys, the counties that have a large number of state prisoners would probably have district attorneys who take a "tough" approach in their enforcement of the Three Strikes law. This appears to be the case when reviewing the greater use of the Three Strikes law in counties with state prisons (see chapter 6).

Del Norte County's minimal use of the law, however, is somewhat of a mystery. Del Norte County, with a population of about 27,000, uses the law for nonviolent offenders at a 31 percent rate (ranked 40th) compared to the rest of the state (it only had given one nonviolent third

strike for vehicle theft). Del Norte County is home of Pelican Bay Prison, one of only two super-maximum security prisons in California, a place that the guards like to brag has "the worst of the worst." One could argue that Del Norte County is so small that it does not have as many people outside of prison eligible for a third strike. But this does not make much sense when compared to Lassen County which has a population of only about 34,000 (state prisoner population of 8,367) which uses the Three Strikes law for nonviolent strikers at a 263 percent rate (3rd highest in the state).

It is possible that the district attorneys are responsible for the difference in the use of the law in the above counties, but it also is possible that the state prisons have different policies regarding the reporting to the local district attorneys the crimes committed by prisoners. It is recognized that prisoners have to protect themselves by carrying a weapon, fighting another person, or they may become pressured into committing illegal activity by the threat of violence. Drug use is also prevalent. To some extent prison administrators understand the circumstances of prison are different from outside society and when such infractions are committed the incidents are not reported to the district attorney, but rather result in the deduction of good time credits or other penalties within the prison. To what extent does Pelican Bay have a different policy of reporting incidents to the district attorney of the county? Is the prison policy different or has the district attorney decided not to pursue prison incidents?

On another matter, one California Department of Corrections employee who I spoke with--who wishes to remain anonymous--said that she is aware of some guards who like to harass prisoners with two or more prior convictions because they know such prisoners have much more to risk if they retaliate against a guard. She also indicated that some guards target such prisoners when searching for contraband or investigating possible felonies because the guards want the targeted prisoner to receive a third strike. In the discussion in chapter 7 regarding police discretion, it was noted the ease with which a police officer could lie to give someone a third strike--the same is true, maybe more so, of prison guards. Given California's history of prison guard abuse of prisoners (see chapter 4), this might further increase disparity and "injustice" of the Three Strikes law in a more hideous manner.

The examples of Kings and Del Norte counties also demonstrate how a special interest group can greatly affect the election of district attorney in small counties. Is this an example of 'good democracy"?

Orange County (chapter 11)

Michael Capizzi's harsh use of the Three Strikes law appears to mirror much of what was said about Jagels in Kern County. Judges and juries felt it necessary to use their discretion to prevent injustices, and,

therefore, those eligible for a third strike were often subject to the judicial and juror lottery systems. Anthony Rackauckas, like Cooley, has promoted the use of the Three Strikes law for only violent and serious felonies, but, unlike Cooley, he has given much broader discretion to his deputy district attorneys.

One of the reasons it may be difficult to eliminate a disparity in sentencing within a county is that there is a lot of pressure on the district attorney to allow the individual prosecutors to use their own discretion. As demonstrated in Orange County, Anthony Rackauckas received the endorsement of the deputy district attorneys from Orange County after promising that he would allow the prosecutors greater discretion and plea bargaining power.[20]

Concluding remarks

Chapters 8 through 11 and the analysis above demonstrate that there are many reasons a district attorney is elected, re-elected, or not re-elected. It could be a matter of luck that a deputy district attorney has been promoted and been in the right place at the right time when the district attorney decides to retire. Highly publicized scandals and trials seem to be a major factor in determining whether a district attorney can remain in office. To a lesser extent, mismanagement of the office or dissatisfaction of the deputy district attorneys can also cause a change in leadership. Where a district attorney stands on particular issues also has an effect on an election, but given the unlimited number of issues, it is difficult to claim any particular one--such as the Three Strikes law--can make a significant difference in an election.

THE PROBLEMS WITH THE DISPARITY OF SENTENCING

One could argue that the relationship between the counties and the state of California is similar to the relationship between the states and the United States, and therefore it is fine to have the different counties apply the law as they want. The problem, however, is that the state of California created the Three Strikes law as a matter of state law--the individual counties did not create their own Three Strikes laws.

Joshua Bowers described the checkerboard variation in the use of the Three Strikes law across California as an "affront to integrity."[21] Using concepts derived by Ronald Dworkin, Bowers describes the disparity in the use of the statute as a core problem because it involves "the incoherent application of different principles under a single law to equally situated individuals within a single sovereign state." As an example, it would be an affront to equal protection if the state disallowed abortion in every other county, but allowed it in the remaining counties. Extending the example, it would also be unjust if the state passed a law specifying that different counties were to give

different punishments to people who committed crimes within its jurisdiction. The disparity in use of the law by different counties, having the same consequence, is also just as unjust.

But the disparity of the use of the Three Strikes law across counties is only part of the problem. It appears that many counties have used, and continue to use, the statute in a disparate manner within their borders. Because of judicial discretion, even if a prosecutor uses the law on a consistent basis, the lottery system of selecting judges will still cause a disparity in its use.

In addition, I would add that the integrity of the government is also visibly diminished because those who are punished under the law are combined together in state prisons--which makes the inequality of the use of the law that much more obvious to all of those who are incarcerated, work in, or visit the prisons. If we want the people in our prisons and jails to become a part of the social contract under which complying with laws is part of their duties, then it would seem all the more advantageous that laws appear as fair and as just to them as possible. A disparity in sentencing--especially involving extremely disproportionate sentences--is one of the most obvious signs to prisoners that the law is not just.

Peter Greenwood notes that California District Attorneys recognized that the disparity in sentencing was a problem and discussed whether it would be a good idea to establish formal guidelines that they all would adhere to. However, they failed to reach a satisfactory agreement, with one of the reasons being that they feared the guidelines could be used against them to take away their discretion in other areas.[22]

The Disparity in Sentencing Over Time and From the Election of New District Attorneys

Prosecutors and judges are using their discretion to waive prior strikes for nonviolent third strikes. Table 13.3 presents the average annual number of third strikers by offense prior to 1999 in comparison to the annual average from 1999 through the end of 2002.[23] The average use of the law for violent crime decreased by 24 percent, while the average use for nonviolent crime decreased by 63 percent.

One of the problems for opponents of the Three Strike law--especially those already incarcerated under it--is that many in the media and public do not see the law as a problem anymore.[24] An argument that grows more forceful with time, however, is that the initial Three Strikers are the victims of a disparity in sentencing. The less nonviolent and non-serious offenders receive waivers of prior strikes during sentencing, the greater the "uniqueness" of those who received third strike sentences in the earlier days of the law. In addition, for those who are continuing to receive third strikes for nonviolent offenses

Table 13.3: The Average Number of Third Strikers by Type of Offense Prior to 1999 and the Average From 1999 to 2002

Third Strike	Average Prior to 1999	Average From 99 to '02	Percentage Decrease
Murder 2	18.00	16.00	11%
Manslaughter	4.20	6.33	-51%
Veh. Manslaughter	0.80	1.00	-25%
Robbery	215.40	157.00	27%
Assault DW	54.60	34.00	38%
Other Assault	64.20	44.00	31%
Rape	17.60	17.33	2%
Lewd Act w Child	31.80	34.33	-8%
Oral Copulation	6.60	5.33	19%
Sodomy	3.20	0.00	100%
Penet w/ Object	2.60	3.00	-15%
Other Sex Off.	21.20	13.67	36%
Kidnapping	10.40	12.67	-22%
Crimes-Person	450.60	344.67	24%
Burglary 1st	131.60	56.00	57%
Burglary 2nd	78.80	24.00	70%
Grand Theft	16.80	12.00	29%
Petty Theft	59.40	18.67	69%
Rec. Stolen Prop.	27.20	10.67	61%
Vehicle Theft	36.00	14.00	61%
Forgery/Fraud	9.60	5.33	44%
Other Prop.	5.40	3.00	44%
Crimes-Prop.	364.80	143.67	61%
CS Possession	115.60	31.67	73%
CS Possess-sale	47.80	18.67	61%
CS Sub.-sales	34.00	9.67	72%
CS-Manufact.	3.80	2.67	30%
Marij. Poss-Sale	0.80	0.00	100%
Marij. Sales	5.20	1.00	81%
Other Marij. Off.	0.40	0.00	100%
Crimes-Drugs	207.60	63.67	69%

Table 13.3: Continued.

Third Strike	Average Prior to 1999	Average From 99 to '02	Percentage Decrease
DUI	5.40	5.00	7%
Arson	3.60	3.33	7%
Poss. Weap.	66.20	20.67	69%
Other Off.	23.00	12.33	46%
Crimes-Other	98.20	41.33	58%
Crimes-Nonperson	670.60	248.67	63%
Total	1,121.20	593.33	47%

Source: See note 23.

in counties that push the law to its extreme their sentences are increasingly disparate as compared to what happens in other counties and compared to those in the same county who were lucky to win in the judicial lottery system.

On the other hand, one cannot easily predict the future. There is no assurance that Steve Cooley will win his next election and that whoever replaces him will continue his Three Strikes policy. The same can be said for every district attorney in every county. In addition, one never knows if the anxieties that were present in 1993 and 1994 might not come around again and a highly publicized case pushes district attorneys again to use the law in a harsh manner. Sure, there are somedistrict attorneys who say they like the availability of the Three Strikes law as an additional "tool" if they need to use it, but one could probably say the same thing about torture.

NOTES FOR CHAPTER 13

[1] All of the cases listed on the website were based on correspondence from prisoners who signed a form indicating FACTS was allowed to publicize their case. I received permission from FACTS to help collect and corroborate the stories and to be able to use the stories in my research. Most of the stories have been verified by legal documents such as copies of probation reports, transcripts, appellate briefs prepared by attorneys, sentencing records, and appellate opinions. Others were verified by telephone interviews with defense attorneys. *150 Three Strikes Stories,* Families to Amend California's Three Strikes.

[2] Raymond Mendez, who received a 79 years-to-life sentence for possessing and trying to cash stolen checks with a total value of less than $400 and had two prior robbery strikes from 1978 and 1983, wrote: "Within the last few

months I have seen about 7 men that were facing the 3-strikes. Their strikes had dated around 1986, 87, 88. Most for armed robbery with a firearm. These men had gotten their strikes dismissed and were sentenced to 6, 7, 8 years." Letter received by FACTS. See *150 Three Strikes Stories,* Families to Amend California's Three Strikes. The *Ventura County Star* reported that after Mendez was sentenced by the judge under the Three Strikes law, his sister began crying loudly in the courtroom. The judge then ordered the relatives from the courtroom, and as they left Mendez's nephew turned and said "[expletive] you!" to the judge. The judge ordered the young man's arrest, listened to his apology, then ordered him to spend 5 days in jail. Koehler, "Man Gets 87 Years."

[3] Zimring, Hawkins and Kamin, *Punishment and Democracy*, 84.

[4] The FACTS website of 150 unjust stories at October of 2003 included the following convictions that triggered a third strike sentence: "stealing a spare tire," "shoplifting a $70 drill from Sears," "perjury for filling out a false DMV application," "shoplifting a $47 deadbolt lock," "3 counts of credit card fraud," "shoplifting a baseball glove," "shoplifting a pack of t-shirts worth $33," "possession of a knife," "forgery of a check for $94.94 at Alpha Beta," "shoplifting $2.69 worth of double AA batteries," "aiding someone who stole baby formula and Tylenol," "welfare fraud that amounted to about $2,100," "lying on a drivers license application," "trying to cash a $193 forged check at a bank," "shoplifting an air compressor," and numerous possession of drug charges where the amount of the drugs was of minimal quantities, such as "possession of .05 grams of heroin." *150 Three Strikes Stories*.

[5] See § 190.

[6] See § 193.

[7] See § 204.

[8] See § 208.

[9] See § 264.

[10] Letter received by Families to Amend California's Three Strikes (FACTS). See *150 Three Strikes Stories*.

[11] First degree burglary carries a sentence of a term in prison of two, four, or six years. § 461. The five-year sentence enhancement is applicable through § 667(a)(1).

[12] See the same discussion at Zimring, Hawkins and Kamin, *Punishment and Democracy*, 9-11.

[13] Macallair and Males, *Striking Out*.

[14] Another argument is that there are "experimental" benefits in allowing counties to try different approaches so researchers can then analyze which is the preferred alternative. Although, if this is the case, then it is time to end the experiment regarding usage of the law for nonviolent offenders because the empirical evidence shows no difference in the decrease in crime between the counties that use it more versus those who use it less (see chapter 12).

[15] Reynolds, *Mike's Corner*.

[16] See voting percentage rates for counties at *Statement of Vote: November 8, 1994*. See the percentage use of the Three Strikes law for nonviolent crimes for each county as compared to the rest of the state herein at Table 6.6.

[17] To some extent under Cooley's policy there is still an element of discretion that lies with the individual prosecutor regarding nonviolent offenses. If a prosecutor wants to give a third strike for a nonviolent or non-serious offense, he or she can write a memo indicating why Cooley's presumption of waiving prior strikes in such circumstances should not apply. One can assume that the more conservative prosecutors will write such requests, while the more moderate or liberal prosecutors will not--thus allowing for disparity to creep into the process.

[18] Lukehart was the public defender of Johnny Quirino who received 25 years-to-life in 1996 for having shoplifted "razor blades." His prior strikes were two separate residential burglaries in 1982 and 1989. Lukehart said the judge assigned to Quirino's case was one he had never seen waive a prior strike. See Quirino's case at *150 Three Strikes Stories*.

[19] The testimony of Frank Ramos could be a sad example. According to Ramos he was serving a 12-year robbery sentence with only 6 months left on his sentence when he was approached by a high ranking gang member to smuggle drugs into prison. Ramos declined, but a month later, the gang member asked him again. Ramos went through with the plan and swallowed 9 balloons of black tar heroin he had received from a visitor while in the visitation room. Ramos, however, had been observed swallowing the balloons by a prison guard and prison officials confiscated the evidence after Ramos went to the bathroom the next day. Ramos was then sentenced to 25 years-to-life under the Three Strikes law and lost his appeal that his sentence was cruel and unusual punishment. *People v. Ramos*, 2003 Cal. App. Unpub. LEXIS 5973 (2003).

[20] Another example was the case in Los Angeles County where one prosecutor thwarted Cooley's standards by openly asking the judge that he use his discretion to not waive prior strikes (see chapter 8). If a prosecutor is willing to go to such lengths in open court to show his displeasure over Cooley's policy, the odds are that there are others who also disagree with Cooley's policy and put pressure on him to either change it or allow exceptions.

[21] Bowers, "The Integrity of the Game."

[22] Greenwood and Hawken, *An Assessment of the Effects*.

[23] The details of the calculations and sources can be found at Kieso, "The California Three Strikes Law," 445.

[24] Peter Greenwood wrote: "Many believe that the three strikes law as written is now dead . . . ." Greenwood and Hawken, *An Assessment of the Effects*. See also Ricciardulli, "Voters Get Their Way."

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CHAPTER 14

The Politics of Three Strikes After 1994

POLITICAL EVENTS

In 1998 politicians were still plugging their support for the Three Strikes law. Lieutenant Governor Gray Davis, a Democrat, was running for governor and had advertisements saying he supported the Three Strikes law as endorsed by the California District Attorney's Association (CDAA). Opponents of the Three Strikes law were upbeat because they knew that--even though the public might not catch it--the CDAA in 1994 did not support Reynolds' initiative, but rather favored the Rainey Bill which limited Three Strikes to violent and serious felonies (see chapter 1).[1] After Davis was elected, however, he quickly established himself as a full supporter of the Three Strikes law and in October of 1999 even vetoed SB873--a bill that requested a study of the statute.

Davis received $2 million in campaign contributions and television ads from the California Correctional Peace Officer's Association (CCPOA) during his 1998 election. Since being elected he consistently demonstrated a "tough on crime" attitude. He went to great lengths to not allow prisoners to be paroled and said that "[i]f you take someone else's life, forget it."[2] Davis refused to parole anyone for the first two years of his office, and during his tenure as governor only granted 8 paroles of the 294 agreed to by the Board of Prison Terms (of which all the members had been picked by "tough on crime" politicians).[3] Davis vetoed a bill that would have allowed reporters to interview prisoners with recording equipment, vetoed a bill that would have limited police seizure of assets, and vetoed a bill that would have required police to keep records by race of the people they pulled over and detained.[4]

In the 2002 elections, Three Strikes was no longer an issue, but Davis still took a "tough on crime" approach so that his opponent, Republican Bill Simon, would not be able to use it as an issue against

him.[5] In 2003, when Davis was being recalled, he received little sympathy from many of those who were involved in and knowledgeable about criminal justice issues. During Governor Wilson's and Davis's tenures, there were many legislators who proposed legislation to amend the Three Strikes law (see for example chapter 11), but without the governor's support the legislation usually died before a full vote was taken.[6]

The Three Strikes law was not an issue, but Republican candidate and eventual winner Arnold Schwarzenegger had indicated he would support it.[7]

Prisoner rights advocates, at first, were encouraged by the first couple of weeks that Schwarzenegger was governor. Schwarzenegger was inaugurated on November 17, 2003 and by November 26th had already agreed to a second case of allowing parole to a convicted murderer.[8] The day after his inauguration, his new administration agreed to 9-year-old class-action lawsuit brought by ex-convicts that was predicted to allow thousands of parolees who would have gone directly to prison for a parole violation to instead be diverted to a residential drug treatment center, home detention or electronic monitoring, among other options.[9] The new policy was predicted to reduce the prison population by as many as 15,000 inmates by June 2005.[10] On November 28, 2003, Schwarzenegger said he planned to go along with most of the recommendations given by the state parole board.[11] For the first time in decades, victims' advocates were expressing concern about the governor. Mike Reynolds warned the new governor that he was playing "political Russian roulette."[12] "Obviously, if they were to let somebody out [who] does re-commit [a crime]), you are going to end up with a lot of political repercussions on that," said Reynolds. Eventually, as pointed out at the end of this chapter, even Schwarzenegger was persuaded to fully join the "tough on crime" crowd.

Prior to 2004, there were two efforts to try to put a public initiative regarding Three Strikes on the fall 2000 ballot. An effort by Citizens Against Violent Crime (CAVC) fell through in January of 2000 for lack of funding and sufficient volunteers. An effort by the California Three Strike Project lasted until June of 2000, but finally announced that its supporters were "not close" to getting the number of signatures required for the ballot. CAVC tried again in 2002, but once again pulled out when it did not have enough funding or volunteers.

Chapter 12 described the policy arguments concerning the Three Strikes law: studies done by politicians generally have indicated that all the decrease in crime after 1993 was due to the statute; while research by academic and professional researchers give the more complex story that little, if any, of the decrease in crime was due to the harsh consequences of the measure. The policy arguments given by

politicians, however, have probably had more of an appeal to the public because they are simpler to understand and usually coincide with many of the public's social psychological processes that stigmatize criminals (see chapter 2). In addition, politicians, familiar with being in front of the television cameras, have been able to give the better "sound-bites," than those offered by the academic researchers.[13] Newspapers generally have been critical of the Three Strikes law (with most editorial boards requesting amendments to the law), but, such opinion pieces are usually placed in the back pages of the "metro" section only once or twice a year if something about the Three Strikes law makes the news; and, are often lost among the daily deluge of violent crime stories.

BRIEF HISTORY AND COMMENTS ON THE EFFORTS TO AMEND THE THREE STRIKES LAW

The first major statewide organization that has tried to change the Three Strikes law is Families to Amend California's Three Strikes (FACTS).[14] The organization had its initial origin from two separate organized efforts, one in Los Angeles and the other in Orange County that began to take form in 1995 and 1996, respectively. The Los Angeles contingent started with a few members of a group called Mother's Reclaiming Our Children (Mother's ROC) who decided that with the growing number of people getting struck out by the law, a separate organization needed to be formed to concentrate solely on it as an issue. Geri Silva was one of the principle leaders of the new group and eventually would become president of FACTS. In 1996 a group of women from Orange County met each other in a visiting room at a prison and discovered they had sons or husbands who were sentenced under the Three Strikes law. They talked about what could be done and decided to form a group, Orange County Residents to Amend Three Strikes. Christy Johnson, Barbara Brooks, and Sue Reams were the initial leaders of the Orange County Group. In 1997 the two groups decided to merge their efforts and formed the organization FACTS.

Throughout its history, FACTS has been dominated by its members from Los Angeles and Orange counties, but it has had chapters from areas such as Bakersfield, San Diego, Sacramento, San Bernardino, Claremont/Pomona, Palmdale and San Jose. There have been a few members who have broken away from FACTS to form their own organizations with mixed and unsatisfactory results. CAVC formed in 2000 and had members that primarily came from the Orange County FACTS chapter (with some members belonging to both organizations). Joe Klaas, the grandfather of Polly Klaas, also became a member and speaker on behalf of CAVC. After the 2004 initiative effort (see end of chapter), CAVC appears to have disbanded or taken a break from its efforts.

According to the FACTS financial reports, they had annual revenues that grew from $5,000 in 1997 to $104,000 in 2001. Almost 95 percent of the funding has come through the Los Angeles chapter or the state office (which is located in Los Angeles); and a large majority of the funding is derived from grants received from liberal fundraising organizations or people associated with such organizations. Most of the funding that has been received has been conditional for payroll and other operating expenses.

The Los Angeles chapter has had regular weekly meetings since it began, with Orange County having weekly meetings in its early years and then meeting less often in more recent years. The other chapters have sometimes tried to have weekly meetings but usually resorted to meetings every other week. The chapter meetings usually involve planning for upcoming demonstrations, fundraising efforts, and other miscellaneous events. In Los Angeles the attendance at meetings can vary from about 10 to 30 people, and most of the other chapters are lucky if they get 10 or more people at a meeting.

Most of the members of FACTS are family members of Three Strikers, but some of most active have joined the organization because they recognize the injustice of the Three Strikes law. The formal membership fee of $10 does not really give any extra benefits over non-members except a right to vote for a board of directors. There are probably between 100 or 200 members, but there are also many non-members who participate in FACTS functions.

Some of the largest events for FACTS have involved demonstrations or fund-raisers of several hundred people, which sometimes result in television and newspaper coverage. The organization has been featured or been involved in shows on the Three Strikes law on 60 Minutes, 60 Minutes II, Fox Files, Court TV, and on numerous local news stations. They have been featured or contributed to stories in *Time*, the *Washington Post*, the *Guardian* (London), and almost every major newspaper in California. When presenting stories about the Three Strikes law, most of the news media appear to be sympathetic to FACTS‘ cause, although, once again, compared to the daily deluge of crime stories, the message from FACTS is barely heard.

Other organizations and people have come to trust that FACTS is not a “here today, gone tomorrow” organization so its prospects of receiving greater funding may increase in the future. FACTS frequently works with the national organization Families Against Mandatory Minimums (FAMM), and the American Civil Liberties Union (ACLU) for southern California has assigned one of its staff to cooperate with FACTS in trying to amend the Three Strikes law. In addition, FACTS has strong ties with the Liberty Hill Foundation of Los Angeles.

FACTS has experienced all the growing pains that grass roots organizations go through--but the problems are greater because most of its members and leaders are largely new to organizational efforts and many are from lower income brackets. Many family members and friends of prisoners have a tough time attending functions or meetings because they have to rely on public transportation and some are working two jobs trying to survive--a condition that is worsened when their spouse is in prison.

PROPOSITION 66

In 2002, FACTS and CAVC paid for a private poll that asked Californians whether they supported the Three Strikes law or not.[15] Over 69 percent of those surveyed said that they strongly or somewhat supported the law; however, when asked in detail whether they supported the use of the law for petty theft, grand theft, drug possession and various other nonviolent crimes, 73 percent of the people said they did not support the law in those situations.[16]

With these results, in 2004 they were able to convince Jerry Keenan, a wealthy insurance brokerage owner, to put forward a large sum of money toward an initiative effort--which eventually was assigned as "Proposition 66."[17] Keenan, who put up $1.56 million of his own money, appeared motivated because he had a son who was serving time in prison and it was reported that his son's sentence would be reduced from an 8-year sentence to only about 4 years if the initiative would pass. The elder Keenan said that he simply was in a better position to understand the injustice of the law because of his son's personal experience. The supporters of the initiative received a large boost when Joe Klaas, the grandfather of Polly Klaas, supported the initiative in advertisements on TV.[18]

A Los Angeles Times Poll taken October 14-18, 2004 said 62 percent favored the measure, 21 percent opposed and 17 percent were undecided.[19] The forces in opposition to the initiative, however, quickly gathered a massive amount of funding and used the popularity of Governor Arnold Schwarzenegger in advertisements that blitzed the radio and TV air waves two weeks prior to the November 2nd elections causing the proposition to be defeated by a 52.7 to 47.3 percent margin.[20] Schwarzenegger, who was being strongly advised by former Governor Pete Wilson, put up over $2 million of specially funded money against the measure. The opposition effort also received $700,000 from the California prison guards' union (CCPOA) and $3.5 million from Henry T. Nicholas III, co-founder of the high-tech firm Broadcom and whose sister was slain in 1984.[21] The advertisements showed Schwarzenegger walking in front of mug shots of prisoners stating: "Under Proposition 66, 26,000 dangerous criminals will be released from prison. Child molesters. Rapists. Murderers. Keep them

off the streets and out of your neighborhood. Vote No on 66. Keep them behind bars."[22] There were some disagreements on the "26,000" number used in the ad because of a question on whether the statute would be used for second strikers or not.[23] Supporters of Proposition 66 claimed that only 4,100 non-violent third strikers would be eligible for resentencing.[24] There were threats of subsequent law suits based on false advertising by Schwarzenegger, but political advertising is notoriously protected by the courts under the First Amendment and the threats quickly died away.

In 2005 there was once again a legislative push to amend the Three Strikes law; however, the effort has been primarily backed by district attorneys and has a lot less reform than Proposition 66 proposed.[25] The more cynical view is that the district attorneys are trying to put forward the bill to hinder the possible more substantial efforts at reform in the future.

NOTES FOR CHAPTER 14

[1] George Michael Lane, who received 25 years-to-life for possession of $40 worth of a roommate's jewelry and two prior residential burglary convictions, wrote in a letter prior to the election "While we got the chance we must do all we can to get Davis elected." Letter received by Families to Amend California's Three Strikes (FACTS). See *150 Three Strikes Stories*.

[2] Vogel, "Gov. Paroles Second Killer"; Warren, "State Slams Door."

[3] Vogel, "Gov. Paroles Second Killer."

[4] Egelko, "Davis Veto"; Ingram, "Davis Vetoes"; Jacobs, "Davis Says 'No'."

[5] In California, because state officials have to depend on getting votes from the entire state, they tend to have greater success if they take a moderate position. Crime, however, appeared not to have a moderate position; the only way to neutralize the issue appeared to be just as "tough" as any possible opponent.

[6] See AB1444 (1995-96), SB2089 (1996), SB1317 (1997), SB2048 (1998, study bill that passed legislature but was vetoed by Governor Wilson), SB79 (1999), SB873 (1999, study bill that passed the legislature but was vetoed by Governor Davis), AB2447 (2000), AB1652 (2001-02), AB 1790 (2002). The best hope for a legislative change in the Three Strikes law was in 1999 when Republican Scott Baugh said he was going to try to amend the law (see chapter 11), but his efforts ran out of steam as legislators knew Davis would veto it.

[7] Schwarzenegger, *Arnold's Views*.

[8] Vogel, "Gov. Paroles Second Killer"; Warren, "Governor OKs Parole of Murderer."

[9] Warren, "Many Parole Violators Will Avoid Prison."

[10] Warren, "Panel Calls Prison Policies Costly Failure."

[11] Bluth, "Parole Board."

[12] Ibid.

[13] The way television tries to "give both sides of the story" has also been a detriment to opponents of the Three Strikes law. Typical television coverage of a protest will show demonstrators and interview a few people who may argue that the 3-strikes law is "unjust," then at the end of the show, coverage will cut to a politician or news anchor person who will mention that crime since 1993 has decreased by "x" percent and that supporters of the law attribute the decrease to the Three Strikes law. On the opposite side, typically when pro-Three Strikes politicians give a press conference about the Three Strikes law, they cite the decrease in crime, and generally the opposition is mentioned only when the anchor introduces the story with something like ". . . the controversial Three Strikes law which has been argued to give unfair sentences for minor crimes such as stealing a slice of pizza . . . ." Rarely does the news media find a researcher in opposition to the Three Strikes law to present their policy arguments. Thus, the argument by the supporters of the Three Strikes law that it has resulted in California's decrease in crime has become the overwhelming view presented on television.

[14] Much of this section is based on interviews with many organizers of the groups and from personal experience when attending meetings.

[15] The poll was conducted by Fairbank, Maslin, Maullin & Associates of Santa Monica, a professional polling firm, and they estimated a margin of error of plus or minus 3.8 percent.

[16] A telephone survey in 1999 of 4,245 California residents conducted by Ph.D. student Valerie Jean Callanan, showed 93 percent of those surveyed supported the Three Strikes law for three violent felonies, but decreased to 56 percent for two violent convictions and one "less serious" conviction. The survey also showed only 47 percent support for the law for three serious property offenses and only 26 percent for two serious property offenses and one "less serious" property offense. Callanan, "Determinants of Punitiveness."

[17] Morain, "Man Bankrolls Initiative." While Proposition 66 had provisions to increase sentences for child offenders, it also was attacked for being too broad in its leniency. It limited the third strike to violent and serious offenses and changed the definition of what would be considered violent or serious by taking six items off their lists. In addition, multiple counts could not count as multiple strikes.

[18] Marc Klaas, Polly's father, however, was in opposition to Proposition 66 and news reporters liked interviewing both Joe and Marc for both sides of the story. See, for example, Murphy, "California Rethinking."

[19] Rowley, "Courts Wait"; Slater and Nicholas, "Battle Over 3-Strikes Measure Heats Up."

[20] Votes For and Against Statewide Ballot Measures: November 2, 2004, California Secretary of State.

[21] Furillo, "Prop. 66 Foes Prepare TV Campaign"; Mathews, "How Prospects for Prop. 66 Fell." In the final week, the support for Proposition 66 tried to

counter with more money and received additional donations of $500,000 each from billionaires George Soros and John G. Sperling, but it was too little and too late. Garvey, "Big Money Pours In."

[22] Garvey, "Big Money Pours In."

[23] Hoffman, "Ad Blitz."

[24] "Editorial: Ignore Attack on Prop. 66," *Sacramento Bee*, November 1, 2004.

[25] At the time of this writing, AB50 is being put forward by Assemblyman Mark Leno and allows for retroactive application resentencing of third strikers in very limited circumstances. Its prospective reform of the Three Strikes law is more extensive but also cannot be used for crimes involving a deadly weapon, a sexual offense, or a large quantity of illegal drugs.

CHAPTER 15

Justice and Democracy

POLICY ANALYSIS AND JUSTICE ANALYSIS

Policy arguments, such as cost versus benefit effectiveness, are currently the predominant means of arguing whether a particular enactment like the Three Strikes law is a good law or not. "Justice" is considered vague and subjective and sometimes thought less powerful an argument as compared to the complex analysis, calculations, and mathematical formula used more often when making policy arguments.

The idea of "justice" or "injustice" is often identified most with concerns about equality and with many of the rights established within the federal and state constitutions. When "justice" is invoked in the area of punishment, it often relates to concepts of reciprocity or retribution. The federal and state constitutions are generally thought to be the final and ultimate protectors of the public's rights and freedoms and to promote "justice"--but they tend to limit their effect to extreme "injustices."

Reviewing a law or action based on traditional constitutional analysis generally recognizes that there are certain "trump cards" or "extra weights" given to particular rights or freedoms. For example, free speech is not considered absolute, but when weighing the costs versus benefits of allowing someone to speak, members of the government are supposed to give greater weight to allowing someone to speak than to disallowing it. From a judicial point of view such issues are given "stricter scrutiny."[1]

Historically, when courts in the United States have answered constitutional questions, the holdings are usually based on nonscientific and nonmathematical formula and rely more on a weighing of rights, original meaning, and precedent with a narrower acknowledgement of the costs versus the benefits of an issue in a non-quantified manner.[2] A famous and rare exception regarding the usage of scientific evidence was the United States Supreme Court decision of *Brown v. Board of Education* which relied on expert testimony regarding the negative

psychological effects experienced by black children in separate schools.[3]

Do "policy analysis" and "justice analysis" have to be two separate disciplines? Not necessarily. Some might argue that justice analysis is policy analysis without identifiable mathematics; or policy analysis can be made in an all-inclusive manner by quantifying or at least acknowledging the "justice" variables. In practical terms, the separation might be a result of two disciplines focusing on what they do best. Policy analysts learn quantifiable techniques and therefore try to quantify things as much as possible, while lawyers and judges learn the law and try to analyze from a legal principles point of view. Another major reason may be that many justice issues are so vague and subjective that they cannot be quantified in any manner that will fit nicely into policy analysis. How would someone measure the costs versus benefits of somebody being allowed to give a speech?

The most difficult costs to estimate are referred to as external and social costs--which probably overlap with some of the vague justice issues that a justice analysis perspective would acknowledge. An area of controversy regarding research in cost-benefit analysis is how researchers should publish cost-benefit studies so they are not misinterpreted by the public.[4] News media usually want to summarize an issue in the smallest amount of time and space possible--thus they ignore many costs and benefits that are not quantified, and forget to mention the possible external and social costs. Researchers might acknowledge issues involving "justice," but when 99 percent of the discussion involves explaining how they have quantified their research and a detailed analysis of the results, the one percent left to mention possible external or justice issues gets lost or ignored by readers. Should researchers hold back cost analysis studies from public review if they know the conclusions exclude significant non-quantifiable external and social costs? What if they realize the study could easily be used in a manipulative or deceptive manner?[5]

Policy analysis regarding punishment presents some unique questions. Are the pain and suffering experienced by those punished a cost or benefit, or should they be recognized at all?[6] What about the pain and suffering experienced by family members and friends of those punished? Can a community be affected by a type of punishment if a large number of its members are subject to it? What are the costs of having a law that creates a random disparity in its application? What are the costs if a measure appears to target particular racial or social economic groups more than others? What are the costs to society of having a law perceived as unjust--even if only a minority of people have such a view? One of biggest problems with policy analysis regarding sentencing alternatives might not be the difficulty in making

estimates but rather in answering or acknowledging these types of questions.

THE OVERLOOKED "JUSTICE" ISSUES REGARDING THREE STRIKES

It is perhaps the misfortune of "constitutional analysis" that if a law or action is deemed "constitutional" by the judicial branch that the issue involving the "justice" of the action dies away. Just because the courts do not deem a law or action as unconstitutional does not mean that there are no elements of injustice involved.

The Three Strikes law overlaps with many areas of questionable justice that the appellate courts have rubber stamped with boiler plate explanations taken from preceding court decisions. Oliver Wendell Holmes once said: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[7] With regards to subsequent analyses of Three Strikes law, many areas of questionable justice have appeared to have been lost in both policy and constitutional analyses.

The "cruel and unusual" punishment arguments concerning the disproportionate sentence received by third strikers for nonviolent and non-serious crimes is probably the greatest injustice of the law--and has deservedly received the most publicity. The disparity or randomness of the application of the law as described in chapter 13 is a secondary issue but also compounds the injustice. But there are also other injustices created by the Three Strikes law that often have been overlooked or ignored.

Prohibitions against *ex post facto* laws and double jeopardy and the rights to equal protection and due process are all arguably infringed upon by California's Three Strikes law--but generally get dismissed as irrelevant by appellate courts that cite past precedent (see the end of chapter 12). In addition, there are the intricate injustice issues that may affect only particular cases; for example, chapter 5 demonstrated concerns about the use of juvenile adjudications for prior strikes. Perhaps alone they appear to be insignificant--but they add to the injustice felt by those sentenced under the Three Strikes law and their family members and friends.

The reason the injustice involved is more pronounced under the Three Strikes law compared to other recidivist statutes is because of (1) the "all or nothing" quality that a Three Strikes enhancement can have, (2) the large disproportionality between the penalty to the crime, and (3) the ability of the law to be triggered by a minor offense such as shoplifting. A recidivist statute that enhances a penalty by a proscribed amount of five years is considerably different than one that can push a four-year sentence up to 25 years.[8] As mentioned in chapter 5, when defendants are presented with a plea bargain, the system treats them as

if they are entering into a contractual relationship. Judges, prosecutors, and even defense attorneys see the plea bargaining process as a contractual obligation--"you give us something and we give you something in return." Just as with a regular contractual agreement, there is the appearance of finality to the agreement. It generally implies that if defendant agrees to do the time, the state does not have to incur the costs of a trial--and the possibility of many issues that could have been subsequently litigated on appeal. When making such plea bargains those who enter into them are probably aware that their conviction could be used against them under sentencing enhancement statutes, but before the enactment of the Three Strikes law the amount of the enhancement was more reasonable--especially if the possible subsequent crime was a nonviolent or non-serious offense.

Giving penalty enhancements because of someone's prior record or "history" is not unreasonable and such enhancements have been used throughout much of England's and America's recorded history.[9] To some extent, a person who has been convicted previously and is then convicted again demonstrates more culpability than a person convicted of the same crime for the first time: the recidivist has been specifically made aware of the consequences of what can happen when they commit a crime and has chosen to do so again.[10] But, when the subsequent crime can be as little as "petty theft" or "possession of a controlled substance" it is difficult to match the culpability and harm involved in committing such a minor crime with an enhancement in penalty from a couple of years to 25 years-to-life. The punishment seems to be based more on the prior convictions than the latest conviction--which appears to infringe directly with the constitutional *ex post facto* and double jeopardy provisions.

Some might argue that the Three Strikes law is not necessarily designed to give extra punishment for those with more culpability, but is primarily designed to incapacitate or deter recidivists who have statistically demonstrated a higher propensity to commit further crimes. This could be a rational reason for passing a recidivist statute. But also it demonstrates that the Three Strikes law is vastly different from previous sentencing enhancement statutes. Before the Three Strikes law, defendants agreed to plead guilty, do their time, and be subject to possible enhanced penalties of a more reasonable nature--not to be subject to a law that could incapacitate them or be used as an example to others by giving them 25 years or more.[11] In their eyes, the plea bargain was a contract--and the application of the unreasonable length in sentence by the Three Strikes law has broken the contract. In addition, the judges who uphold their sentence with technical boilerplate are seen as part of an unjust system.

It could be argued that third strikers should have been aware that subsequent laws might be passed to enhance recidivist penalties, but

one could also argue had they been so aware, they probably would have thought the risk of the passage of such an extreme law was low considering there were no academic studies indicating that such incapacitation would be an effective policy.

As an example of many letters received by FACTS regarding this issue, Richard W. Haskin, who received 25 years-to-life for possession of .3 grams of methamphetamine and had prior strikes of residential burglary (1980) and robbery (1982), wrote: "I served my country honorably in the United States Marine Corp 1973-1976. This 25 to life sentence was never part of the picture when I signed my plea bargain agreements on my prior convictions and I feel this is grossly unfair and violation of due process and ex post facto laws, laws for which I was willing to serve my country in the military. 25 to life for a non-violent offense is a very bitter pill."

The feeling of "injustice" is not limited to those who took a plea regarding their prior strikes. Even those who went to trial and were found guilty had an expectation that once they "did their time" they would not be punished again for the same crime. Despite the supporters and prosecutors pleas that third strikers are being punished for the "history" of their crimes, it is hard to get around that "but for" the last conviction, in the vast majority of cases, the offender could have been a free person. Is the difference between freedom and 25 years-to-life justified by one shoplifting or drug conviction?

The other "injustice" felt by many within the prison system is that the law is racist because 44 percent of the third striker population is black when blacks make up only 6 percent of the California population (see chapter 6). Even though there is no direct evidence that the law is being applied in a racist manner, the disproportionate numbers lead many to believe (or increase their belief) that institutional racism is pervasive within the system and/or society. To some extent this could be true. As sentencing researcher Vincent Schiraldi has pointed out regarding the high percentage of blacks in their twenties who become enmeshed in the criminal justice system: Do you think white parents would sit by and not react if 30 percent of their children were being sent to prison, jail, or on probation when they reached their twenties?[12]

One could also argue that the state is committing an injustice in applying the Three Strikes law when there is little evidence in its effectiveness, or that there appear to be better alternatives at decreasing crime that provide for less pain and punishment (see chapter 12). Why cause such severe pain to people when the same goals can be met with cheaper alternatives?

The strikers recognize that many special interests make money from their sentence. They are constantly under the control of the prison guards who helped pay for and continue to support the existence of the Three Strikes law. The increase in the prison population from the

Three Strikes law has given the prison guards greater job security. Because of such special interest politics (see chapters 1 and 14), many in prison feel not only are the law unjust, but its passage and continual support is also unjust.

Every third striker has a different story and many have felt "injustices" were involved in some of their prior convictions. To the extent they felt they received a prior strike because of other "injustices" in the system, the enhanced penalty given under the Three Strikes law because of such prior convictions compounds the feeling of the inequity.

These injustices compound each other. It is not merely that a recidivist statute infringes somewhat on the prohibition of *ex post facto* and double jeopardy laws, but that the infringement becomes more pronounced the greater the disproportionality of the punishment. The unequal application of the law, its ineffectiveness in meeting its goals, and the self-interested politics surrounding its passage become more explicit because of the cruel and unusual punishment.

When deciding whether a particular statute or action by the government is constitutional, courts usually apply a "yes" or "no" analysis based on each separate provision within the constitution with no accumulation of injustices that might render the law or action unconstitutional.[13] The above-mentioned injustices, although real to third strikers, have had little effect on judicial analysis of whether the Three Strikes law is "cruel and unusual," and also are excluded from policy analysis because of the difficulty in measuring such items--in some ways they might be considered to have fallen into the "black hole" of analysis.

Now that the U.S. Supreme Court in *Ewing* has said the law is not unconstitutional, the injustice of the extremely disproportionate sentence may also lose status in the Three Strikes debate as lower appellate courts start inserting the boilerplate: "Comparing defendant's current crime and his criminal history with those of defendant Ewing, we cannot say that the sentence of [x] years to life is grossly disproportionate to his criminal culpability so as to constitute cruel and unusual punishment under the United States Constitution."[14]

It is hard to comprehend how so many prosecutors, trial judges, and appellate justices can dismiss 25 years as not being grossly disproportional to the record and current conviction of many of the third strikers. My guess is that if third strikers were offered the opportunity to trade their sentence with losing a limb that most would trade the limb. Twenty-five years is not a short time--for many it will be a death sentence as they die in prison from old age or other circumstances.

Some have decided death is a better alternative. Ituaso Naea, 22, threw himself off the 10th floor of the Orange County Courthouse on

November 12, 1998.[15] Clinton James Warner, 22, of Fullerton, shot and killed himself in October of 1996 because he faced a possible 25 years-to-life sentence under the Three Strikes law.[16]

In 1998, a meeting was held in Santa Cruz by jail personnel to focus on ways to reduce jail suicides which had been on the increase in recent years. A survey prior to the meeting was sent to every county health director in the state: of the 35 that responded, 12 indicated they had seen an increase in jail suicides since the passage of the Three Strikes law. Tulare County Sheriff's Lt. Steve Keithley, a jail supervisor, said a 21-year-old woman from Tulare was rescued by jail staff members after she tore her T-shirt into strips and was tying them around her neck. A suicide note was later found in her cell. The woman, who had been arrested January 29, 1998 for drug and traffic violations, indicated in her note that she thought she was facing 25 years-to-life in state prison if convicted.[17]

Table 15.1: Attempted Suicides and Suicides in California Prisons from 1992 through 2001

Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Attempted Suicides	163	199	223	188	185	243	256	381	419	459
Suicides	14	32	16	22	19	19	22	29	14	30

Source[18]: *Number and Type of Inmate Incidents*, California Department of Corrections.

THE EFFECTS OF "INJUSTICE" FROM THE THREE STRIKES LAW ON SOCIETY

The "injustices" of the Three Strikes law obviously have the greatest affect on the prisoners who are subjected to the law, but also affect their family members and friends, and perhaps to a lesser extent the communities where they come from, and to the rest of society.[19] The further removed someone is from the problem; the easier it is for them to ignore it. Some prisoners may come to "accept" their predicament and not let it bother them because it is easier to go on in life without dwelling on "injustices" (although psychologists might question whether ignoring something is effective); others may dwell on their circumstances to such an extent that their personality becomes permanently affected. The same might be said of those who are family

members and friends of the prisoners; or members of communities who are especially targeted by the law.

No one really knows how to measure the corrosive effect that "injustice" can have on people in society. Political and legal philosophers talk about the lack of "integrity," "credibility," or "respect" people might have about a government that commits "injustice" and how this might lead to greater lawlessness.[20] It is also possible that "injustice" has a way of seeping into people's personalities and may affect how they view the world and change how they interact with others. But how are such things measurable?

There is no way of measuring how "injustices" might accumulate and to what extent adding another "injustice" on top of others might affect people. The Three Strikes law, to the extent it is deemed unjust, might not have any significant consequence on society as a whole by itself, but maybe when combined with other perceived "injustices" it becomes part of a combination that does.

The extent to which an "injustice" might wipe out the people who are being treated unjustly might paradoxically cure society of the "injustice." To some extent this may be what is occurring with the Three Strikes law. The most unjust parts of the law are putting those who are directly affected by it in an environment where society cannot hear or see them--for at least 25 years. Because the California Department of Corrections (CDC) only allows reporters to interview specific prisoners with a writing instrument and paper, this only increases the ability of the "injustice" to be kept from the rest of society.[21]

DEMOCRACY, LEGISLATIVE ACTION, AND THE THREE STRIKES LAW

The U.S. Supreme Court decisions regarding the "cruel and unusual" clause give great deference to legislation enacted through democratic means (see chapter 12). Justice O'Connor's opinion in *Ewing* even goes so far as to call the actions of the California legislature "rational."[22] This is ironic, because the passage of the California Three Strikes law demonstrates many of the imperfections and problems that can occur with democratic action. The statements made by O'Connor (and pervasive in many of Justice Scalia's opinions) are not unusual, however, because many people say the same thing without consciously analyzing what they are saying. It is built into the American psyche. Typically the reaction is: To the extent the majority has voted on an issue, it is democracy in action, and because democracy is good, the result must be just. There is almost a dismissive attitude that anything critical of a democratic action is irrelevant. A typical response to an unjust law might be "well, the people voted for it."

THE IMPERFECTIONS OF DEMOCRACY CONCERNING THE PASSAGE OF THE THREE STRIKES LAW

Chapter 1 discussed the actions by the legislature leading up to and after the passage of the Three Strikes law on March 7, 1994 and chapter 12 considered the policy analysis conducted in legislative committees and on the legislative floors prior to the vote. The data given to legislators was inaccurate and incomplete. Even if it had been accurate it probably would not have been relevant: the legislators were pushed into action because they worried about votes. It was a good example of how the protections of a representative democracy had broken down. Representative democracy is considered a benefit because it allows the give and take of legislative compromise and also allows for greater expertise to be a part of the deliberations (see chapter 5).[23] But these benefits were cast aside because of Reynolds' initiative. When Reynolds would not back down, the legislature was handcuffed and accepted his version of the law.[24] Even with four alternative bills proposed--some put forward by Republican legislators--they were meaningless unless Reynolds retracted his initiative. Thus, there was very little "legislative" action in the classic sense when the passage of the law took place--instead, what occurred was a form of direct democracy.

Chapters 2 through 5 explained many of the problems that arose with the direct democratic actions of the voters when they passed the Three Strikes law. I would argue that the California public actually passed the law in the fall of 1993 by its extreme actions after Polly Klaas was found murdered.[25] The media shifted gears and spotlighted Reynolds' initiative. Then there was a synergistic effect of the media and populace creating substantial support for a law no one really knew the details of except the sponsors--and they only emphasized that Polly would still be alive had the law been in place, and that this was a way to get "violent" offenders off the streets. As discussed in chapter 5, one of the problems with direct democracy is that people often vote on matters they are not educated about and the details are lost in the convoluted language of the proposed statute. This is especially true during the signature gathering stages of a petition where people are confronted by others with pen and paper and asked to sign their name. At this time the public did not even have the booklets of materials the state sends them before an election (see chapter 5). Thus, when the legislators voted for the law in March of 1994, they were the conduits of flawed direct democratic action.[26]

While there might have been many people who were polled or voted for the Three Strikes law who did not really know its contents, there were many who also probably favored it because they wanted or did not care that the law had unjust provisions. Because the law was presented as "all or nothing," those polled and who voted for the law

with the knowledge of its application to nonviolent offenders may have said or voted "yes" because they (1) thought the unjust provisions of the law were insignificant "collateral damage" and acceptable, or (2) hoped, incorrectly, that the legislature or judicial branch would be able to take care of the problems later.[27] As discussed in chapter 5, this is one of the complaints about direct democracy--when voters are presented with a thumbs up or thumbs down alternative, they also are stuck with details they might not really like. When classic legislative action by representatives takes place, it is hoped that many of the "unwanted" details will be worked out of the proposed bill through discussion and bargaining.

An additional problem revolves around the possibility that there may have been many people who wanted to pass the law--and even liked the fact that it would be applicable to nonviolent offenders. To what extent should we worry about "tyranny of the majority"? Should our court system entertain the possibility that laws are passed by "tyranny of the majority"? Is this a concept that James Madison and others talked and wrote about during the ratification process of the constitution that is arcane and irrelevant today?

When the Three Strikes law was passed, it targeted an uncertain, hypothetical, stigmatized, powerless population (see chapter 2). People with two strikes were not going to come forward to legislative hearings, speak to the media, or protest the law. To do so would have put them in a possibly embarrassing situation, and one that would have been easily countered by supporters of the Three Strikes law who would have said, "If he or she wants to avoid the penalties of the law, they can just stop committing felonies." This would have been a true statement at the time--but obviously meaningless to those who have since been convicted and sentenced under its provisions.

As discussed in chapter 5, another problem with democracy is the extent to which special interests can influence the passage of laws. Because most people convicted of violent and serious felonies are from lower income groups and do not have significant special interests which can lobby on their behalf--especially regarding the criminal law, one could argue that this was a "tyranny" of wealthy special interests against the poor. As discussed in chapter 1, Reynolds was receiving significant direct funding from the National Rifle Association (NRA), the California Correctional Peace Officers' Association (CCPOA), and politicians who wanted to use the Three Strikes law as an issue in the 1994 election. In addition, there were also many businesses that profited from the expansion of the prison population who probably gave support by talking with legislators and encouraging the passage of the law in indirect ways. There were no special interests spending significant money against the passage of the law because there were no special interests that would profit directly by not building prisons.

Chapters 2 through 4, considered the social psychology of Californians during and leading up to 1994. Admittedly, the empirical science of social psychology might involve a lot of uncertainty and untestable features--especially when trying to analyze society at the macro level--but to ignore that social movements and social psychological *gestalts* can take place is also fraught with dangers. History is full of stories where in hindsight it was shown that the masses were deceived and acted in counterfactual, irrational, and/or emotional ways. A book written by Charles Mackay as early as 1841 called *Extraordinary Popular Delusions and the Madness of Crowds* described in detail such events as the "South Sea Bubble" and "Tulipomania" when people irrationally speculated in investments and drove the markets so high that when the investments crashed many were left with vast fortunes lost; witch trials and crusades were also described as resulting from irrational or emotional decisions made by the public.[28] When researchers analyze the growth of Nazism in democratic Germany during the 1930s and 1940s, it is described as a phenomenon that could only grow because of the social psychology of the people at that time.[29] As pointed out in chapter 4, California was a part of the national movement to be "tough on crime" but was especially vulnerable because of anxiety over natural disasters, a riot, the economy, and illegal immigrants. It seems that "criminals" were the easiest scapegoat and target so citizens would feel relief from their anxieties. The death of Polly Klaas was the random event that sparked the fire.

Justice O'Connor not only ignores the fact that the California populace could have been acting under the influence of a social psychological movement, but uses the public's reaction to support her view that democracy was in full force. When describing the reaction to the defeat of AB971 in the spring of 1993, she says: "Public outrage over the defeat sparked a voter initiative to add Proposition 184, based loosely on the bill, to the ballot in the November 1994 general election."[30] Actually, the only "public outrage" from the spring of 1993 until Polly Klaas was kidnapped on October 1st was that of Reynolds and his relatively small group of supporters. O'Connor then described the events concerning Polly Klaas' death and said:

> Polly Klaas' murder galvanized support for the three strikes initiative. Within days, Proposition 184 was on its way to becoming the fastest qualifying initiative in California history. On January 3, 1994, the sponsors of Assembly Bill 971 resubmitted an amended version of the bill that conformed to Proposition 184. On January 31, 1994, Assembly Bill 971 passed the Assembly by a 63 to 9 margin. The Senate passed it by a 29 to 7 margin on March 3, 1994. Governor Pete Wilson signed the bill into law on March 7,

> 1994. California voters approved Proposition 184 by a margin of 72 to 28 percent on November 8, 1994.[31]

Her description is accurate, but she misses the point: The actions of the public and the legislature did not demonstrate democracy in all its glory--rather it demonstrated democracy in all its failure.

FURTHER DISCUSSION ON THE ELEMENT OF RANDOMNESS AND THE THREE STRIKES LAW

In the search for patterns or laws to explain social phenomenon, social scientists often become so absorbed in trying to interpret something that they ignore what is obvious to most laypersons--sometimes historical events are shaped because of random occurrences and the personalities, charisma, and will of the people involved. The harshness of the California Three Strikes law was enacted into a law because of many different conditions, events, and people--all of which could be described as having an element of randomness connected to them, and the fact that they came to together at the same time might make the passage of the Three Strikes law an extraordinary exceptional event.

But for the natural disasters, shaky economy, fears of immigrants, and perceptions about the increase in crime, Californians would not have been at such a high anxiety level in 1993. But for the death of Kimber Reynolds, her father Mike Reynolds, a man with a fierce stubbornness to enact his statute without any amendments, (also a man with an element of charm when he presented his arguments on television), would never have put forward the Three Strikes initiative. But for the kidnapping of the photogenic Polly Klaas from her home during a slumber party in a small town with a quaint name and a grandfather who had been a radio disk jockey which led to connections that publicized her kidnapping, anxious Californians and the rest of the world would probably not have been so greatly concerned with trying to find her. But for the locating of her murdered body after two months of searching and the discovery that her killer had a prior record, anxious Californians probably would not have given such extreme support to Reynolds' measure. But for the high ratings in the polls and speed with which Reynolds' gained signatures, politicians probably would not have taken notice of his public initiative. But for Governor Pete Wilson's low voter approval rating and an upcoming election, Wilson might have been able to throw support and that of many others toward one of the alternative Three Strike bills. But for desperate Democrats not having the governor's office for three terms and possibly a fourth if Wilson were to win again, they might have been able to act in a united manner to pass one of the alternative Three Strike

bills--even with the threat of losing the chance of having a Democratic governor.

All of these people and events came together at the same time resulting in the passage of California's harsh Three Strikes law. If some of the elements had not come together in the way they did, California probably would have passed a Three Strikes law similar to those enacted in the other states and by the federal government.

To make matters even worse for third strikers with minor crimes are the thoughts that but for one U.S. Supreme Court vote in *Rummel v. Estelle*, *Harmelin v. Michigan* or *Ewing v. California*, all decided against the defendant in each case by a 5 to 4 vote, the court would probably not be using such an extremely narrow "grossly disproportionate" standard and many convicted for minor felonies would have been re-sentenced outside the provisions of the Three Strikes law.[32] Or what about James Madison's choices when he put together the Bill of Rights? What about his decision to take the language from his own state's "cruel and unusual" clause? Was this simply a random act of his that was based more on the fact that it was from his home state or did he purposely choose the language because he thought it was better? What if the vagaries of historical evidence regarding the origins of the "cruel and unusual" clause from England's Declaration of Rights of 1689 had more clearly indicated that "proportionality" was to be taken into account when interpreting its usage. Would this have changed Justice Scalia's vote? Would the course of history regarding how the federal and state courts interpreted and applied the "cruel and unusual" clause have been different?

Even though the law was created by many random events, significant consequences in history often seem to come about through randomness. One could argue that the protections built into our constitutions and laws are tested more by the elements of randomness than routine day-to-day events. Thus, studying the passage of the Three Strikes law is an important endeavor that can help us improve our constitutions and laws.

If we accept that the Three Strikes law has "unjust" elements to it--not an unreasonable assumption--not only should we look at how the law was passed, but should also examine the reasons it has not been fixed. Chapter 14, on the aftermath of the political efforts to try to change the law, demonstrates many of the continuing problems with the structure of California's democracy.

Because of the requirement that a two-thirds legislative vote is needed to amend the Three Strikes law, it is almost impossible for legislative action to accomplish this. In addition, because the law targets the poor, and there are very few special interests that directly profit from a change in the law, there is a huge imbalance of power against change. Polls indicate the public would vote for changes to

amend the law so it would not be applicable to nonviolent and non-serious offenders--but there is no way to satisfy the public's desires. Behind closed doors, many state legislators admit that the law needs to be changed (see, for example, the chapter 11 discussion on Assemblyman Scott Baugh).

The fact that the issues of discretion, jury nullification, and the disparity in the use of the law became so prevalent says something about its "justice." If the law was considered "just," it would not be questioned by so many.

The fact that the usage of the Three Strikes law for nonviolent offenders has decreased over time demonstrates that the passage and use of the law in the earlier years was probably a result of temporary social psychological attitudes among Californians. One could argue this further demonstrates "injustice" of the law in that as the social psychological anxiety is removed more and more people are recognizing its "injustice" and/or policy problems.

The fact that no other states have passed a law as harsh as California's is also telling; especially since "tough on crime" rhetoric still lingers across the nation. First, it demonstrates that what happened in California probably was based on the coming together of extraordinary random events. Second, it probably also demonstrates that many other states--even Republican-dominated states--recognize that the California law has either policy or justice problems or both.

NOTES FOR CHAPTER 15

[1] For a discussion on free speech as an absolute versus balancing of interests, see Nowak, Rotunda and Young, *Constitutional Law*, 837-839.

[2] The basic principles of law generally accepted by courts are informally known as the "black letter law." Black, *Black's Law Dictionary*, 154.

[3] Brown v. Board of Education, 347 U.S. 483 (1954).

[4] See Zimring and Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime* cited in Welsh and Farrington, "Assessing the Economic Costs."

[5] To what extent should other researchers acknowledge that other studies may be issued with the purpose of manipulating the reader or the public? Is it enough to respond with their own research studies and politely acknowledge that they disagree with the other research studies? What if the "manipulative" studies have been highly publicized?

[6] An argument that such costs should be included can be found in Zimring, Hawkins and Kamin, *Punishment and Democracy*, 191-192.

[7] *Hyde v. United States*, 225 U.S. 347, 391 (1912).

[8] Prior to the Three Strikes law, the most common sentencing enhancement of any significance was § 667(a)(1) which provided an additional five year

enhancement for every prior "serious" felony conviction on someone's record if they were subsequently convicted of another "serious" felony. Subsequent convictions involving non-serious crimes involved a sentencing enhancement of a year or two at most.

[9] See Morris and Rothman, *The Oxford History of the Prison;* Walker, *Popular Justice*. The ability to give enhancements based on prior convictions is easier today, however, because of such things as fingerprinting and having criminal records that other jurisdictions can access. Prior to such technological features, the principle means of letting the court know that someone was a recidivist was to somehow mark their body, such as when an ear was cut off .

[10] A second argument is that the repeat offender demonstrates a character trait of the persistent disregard of others' rights--which renders the subsequent acts more culpable. See Dubber, "Unprincipled Punishment."

[11] One could also argue that there was already a habitual criminal statute in the California Penal Code (§ 667.7), so they were aware such extreme penalties could occur if they continued their criminal behavior, but as admitted by supporters, one of the reasons they wanted the Three Strikes law was because it was so much broader in application than the existing statute.

[12] See Moore, *The Legacy*.

[13] An example of an exception might be when the United States Supreme Court created the Right to Privacy from the "penumbras" and "emanations" of several guarantees under the Bill of Rights. *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Statement of Vote: November 8, 1994*.

[14] *People v. Richardson*, 2003 Cal. App. Unpub. LEXIS 9886 (2003).

[15] Kandel, "Suicide Jumper"; McDonald, Tran and Hopenstand, "Man Dies in Fall."

[16] Hoyer, "Fear of Prison." Other examples of suicides because of fear of the Three Strikes law can be found at Kieso, "The California Three Strikes Law," 470-471.

[17] Galvan, "Tulare County Officials."

[18] *Number and Type of Inmate Incidents,* California Department of Corrections.

[19] This section is not reflecting on the normal pain and suffering that occurs from punishment by incarceration--it is discussing the extra pain, suffering and anger someone might experience because they feel they have been treated in an unjust manner.

[20] See, for example, Dworkin, *Law's Empire*.

[21] The CDC only allows interviews with recording equipment on a random basis. See *Media Policies,* California Department of Corrections and Cal. Code of Regs. tit. 15, § 3260-3267 (2003).

[22] Justice O'Connor's opinion states: "To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." *Ewing v. California*. One could argue that O'Connor is referring to the "rational relationship test" often used in

constitutional analysis that says any possible reason is enough to pass constitutional muster, but this would not make sense as applied here because then any punishment would meet the test--which would then make the "grossly disproportionate" standard irrelevant. Since she explicitly endorsed the grossly disproportionate" standard, she is most likely referring to the "rational" actions of the legislature in a more qualitative manner. Scalia's concurring opinion seems to uphold this when he criticizes her for using "policy analysis" within her decision.

[23] Even if legislators wanted to gain more knowledge about the pros and cons of the law, their ability was hampered when Governor Wilson pushed the passage of the law into a shortened time schedule by declaring it an urgency statute.

[24] There also was at play the possible political gamble taken by Democrats in hoping that Reynolds might back down if they passed the law--a gamble that they lost. But this action only enhances the argument that the classic democratic and legislative checks and balances were not at work.

[25] It could also be argued that because of the overwhelming immediate response presented in the news, many who hadn't really thought about the law may have been influenced into following the majority. As presented in chapter 2, because of our social psychological processing we generally have a much easier time following the beliefs of others than trying to oppose them.

[26] The overwhelming popular interest by voters from the time Polly Klaas' body was found through the November 1994 election was probably sustained because news reports kept many confused. President Clinton, federal law makers, and state politicians were continuously quoted in newspapers saying they supported a Three Strikes law for "violent" offenders and California politicians were continuously talking about supporting a Three Strikes law to put away "violent" criminals. No one was saying "We need to lock shoplifters and illegal drug users up for life." The passage of the law in March gave an extra boost because many voters may have falsely believed that the legislators had rationally deliberated and negotiated the provisions of the law--giving the law a false legitimacy. On Mike Reynolds' website he points to the fact that "[w]ithin just a few days 'strike' cases were coming in from all over the state. While all drew publicity, none was more visible than a man who stole a slice of pizza in southern California. 'Pizza Man' made the news day after day throughout California, the United States and all over the world. If it hadn't been before, it was certainly clear at that point that the third strike need not be a violent offense." Reynolds, *Mike's Corner*. Reynolds' makes somewhat of a good point, but even the pizza thief case was confusing because the crime involved taking the food from some individuals with an element of a threat--which could have been interpreted as a "robbery." A crime even Reynolds' clearly believed was "violent."

[27] Hoping the judicial branch would fix the problem later is not an unreasonable expectation in California. Proposition 187, regarding the ending of public

services to illegal immigrants which was passed in the same election as the Three Strikes law, proved this by later being held unconstitutional in federal court. See *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297 (1997).

[28] Mackay, *Extraordinary Popular Delusions*.

[29] See, for example, Botwinick, *A Holocaust Reader*.

[30] *Ewing v. California*, 155 L. Ed. 2d at 113.

[31] *Ewing v. California*, 155 L. Ed. 2d at 113. Democrats were also handcuffed into passing the law by such high margins because Governor Wilson had set the stage by calling for an urgency statute--which requires a two-thirds vote for passage. CAL. CONST. art. 4 § 8(d). If the Democrats did not push the vote over the two-thirds requirement, they would have been an easy target as being "soft on crime."

[32] *Ewing v. California*; *Harmelin v. Michigan*; *Rummel v. Estelle*, 445 U.S. 263 (1980).

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CHAPTER 16

Recommendations

According to Samuel Walker, the habitual criminal statutes passed in the late 1800s went largely unused and somewhat nullified because prosecutors refused to enforce the laws.[1] This may some day be the fate of California's Three Strikes law. But such a fate would not help those already sentenced. Besides, having the statute available for prosecutors to use means it would probably continue to be applied in a disparate manner, with "tough on crime" prosecutors pushing the law for political advantage whenever they perceived they could take advantage of public anxiety. Trying to craft some sort of agreement among district attorneys or amending the law to limit the discretion of judges and prosecutors would not work. Politically, neither group would support such an effort, but it would probably also be impossible to limit prosecutorial discretion because American tradition has no oversight or ability to appeal if they do not prosecute. In addition, changing discretion after the fact will not change the disparity in sentencing that has already occurred.

The better short-term alternative is to either abolish the law, or at least amend it, and make the changes retroactive to those already sentenced under the statute. The easiest and most understandable way to fix the Three Strikes law is to amend it so it applies to only violent and serious offences. Some of the less egregious items that are listed as "strikes" might also be eliminated (see chapter 5). Other changes could include a wash-out period that says that only convictions within the previous ten (or fifteen) years can be used. The time period might also include the stipulation that the defendant was not incarcerated within the previous ten (or fifteen) years for the conviction in question, and juvenile adjudications could be excluded from the provisions of the Three Strikes law, especially since most district attorneys do not use them anyway. The adding-on of other sentence enhancement statutes and consecutive sentencing for every current conviction might also be amended to prevent some of the exceedingly long sentences that can result.[2]

If it ever becomes politically possible, Californians should have a constitutional convention and overhaul much of the patchwork slapping together of provisions that has occurred from almost a century of initiatives. At the same time the constitution is amended, the state statutes--especially those that require a super-majority--should also be re-crafted.[3]

In place of all the sentencing laws, California should set up a sentencing commission similar to the one in Minnesota to provide a more sophisticated sentencing scheme. It ought to provide for greater proportionality in sentencing and eliminate the "all or nothing" aspect of the Three Strikes law. The commission should be insulated from the passions of the public as much as possible. For instance, the sentencing commissioners should be appointed to staggered terms and selected and approved in some combination by both the governor and the legislature.[4]

Although I think direct democracy should be limited in some manner by making it harder for the public to pass public initiatives, it would be a mistake to alter it before voters had a chance to try to amend previous initiatives--such as the Three Strikes law.[5] Perhaps there could be a provision that allowed amendments to previous public initiatives based on the rules that applied at the time the original initiative was passed.

To allow voters to choose between alternative ballot initiatives, the legislature should be given greater flexibility to put alternative measures on the ballot, perhaps allowing them to do so without the approval of the governor. Another safeguard might be to allow for an automatic vote of approval by the voters two to five years after an initiative has passed, but once again allowing the legislature flexibility to place alternative measures on the same ballot. There also might be some way to create a scheme where the two largest majority parties would be able to place separate alternative measures on the ballot thereby giving voters even more choice. This would probably increase the complexity of the issues and increase the amount of reading material, but that consideration would probably be outweighed by eliminating the problems that result from voters having an "all or nothing" vote. Also, if such a proposal came out with other proposals to reduce the number of ballot initiatives, then the amount of reading material provided to the voter might not be as much of a problem.

Some miscellaneous matters to consider are as follows:

* California constitutional issues should not be limited by how the federal government interprets the constitution--except, of course, to the extent that rights granted by the federal constitution cannot be limited (which cannot be changed by California law anyway).

* The constitutional clause regarding "cruel or unusual" punishments should be amended to recognize proportionality and evolving standards of decency.
* There should be a constitutional provision requiring all initiatives to comply with a strict single subject rule.
* There should be a constitutional provision that allows a majority vote of the legislature to make amendments to a law passed by a public initiative if the California Supreme Court deems provisions of the public initiative to have been buried in the details or written in a way that the ordinary layperson could not understand.

NOTES FOR CHAPTER 16

[1] Walker, *Popular Justice*, 99.

[2] For instance, Billy Ochoa received 326 years-to-life for 13 counts of welfare fraud (and an additional one year sentencing enhancement) even though the total amount of fraud was only $2,100. See story highlighted in Sasha Abramsky, *Hard Time Blues* (New York: St. Martins Press/Thomas Dunne Books, 2002).

[3] In 1994 the state legislature created a Constitutional Revision Commission to look at California's experience with its governmental structure and to recommend changes. A body of work resulted but nothing has been implemented. Some of the recommendations by the panel were: "Constitutional changes would require a supermajority vote of the electorate in two consecutive elections. Initiative and referendum statutes would be secure only for a sufficient number of years to gain experience with them. After a few years, they would have to be reenacted by either the legislature or the voters. And, the legislature would have the power to amend initiative statutes before they appear on the ballot with the consent of the proposer, or in any case a few years after they are passed." Cain and Noll, *Constitutional Reform in California: Making State Government More Effective and Responsive*, 3-4.

[4] A much greater in-depth discussion on the pros and cons of such a commission and how best to set it up is presented in Zimring, Hawkins and Kamin, *Punishment and Democracy*.

[5] One limitation is that constitutional amendments might be allowed only with the approval of both a supermajority of the legislature and a supermajority of the voters. Currently all that is needed to amend the constitution is a petition circular gathering signatures of 8 percent of the previous votes cast for governor and then a majority vote of the public. Other limitations include increasing the number of signatures to be gathered for both public constitutional and statutory initiatives.

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