"The Wide and Unreasonable Reach of California's Three Strikes Law"

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Introduction

Supporters of California's Three Strikes law claim that it is being used to keep "professional thieves," "career criminals," and "violent criminals" out of circulation (Lungren, 1996; Westerman, 1999). This claim was used when the law was passed in 1994, and is still used today to support the law. That support seems to be waning, however, as the reality of what has happened is contrasted to what voters believed they were approving (Ricciardulli, 2001).

This chapter looks at four Three Strike stories and offers comments that are based on hundreds of letters received from prisoners, as well as official statistics, case files, appellate court opinions, news articles, and interviews with defense attorneys, prosecutors, government officials, and family members and friends of prisoners who have been sentenced under the state's Three Strikes law.

The results paint a picture contrary to that presented by the supporters of the Three Strikes law. Although we did not have access to the records of the entire population of Three Strikers and our sample is not random, many of the cases we reviewed demonstrate 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.

California's Three Strikes Law

On March 7, 1994, California Governor Pete Wilson signed into law AB (that is, Assembly Bill) 971. On November 8 of the same year, California voters by a referendum decision endorsed Proposition 184. AB 971 became encoded in the statutes as part of California Penal Code Section 667, and proposition 184 became Penal Code Section 1170.12. Both Three Strikes laws are virtually identical.

More than 28 states and the federal government have enacted "Three Strikes" laws since the State of Washington first did so in November of 1993 (Clark et al., 1997). California, the second state to pass such a law, stands out because of notably draconian elements of its statute (Vitiello, 1997:397). While the vast majority of jurisdictions require that their Strikes law can be triggered only by a "serious" or "violent" felony, California allows the last strike to be "*any* felony." The California law has drawn criticism from the promoter of Washington's Strikes Law, David La Course, who has stated that California's broad approach "has hurt the movement" (Litvan, 1998).

On close examination, one realizes that the California Three Strikes law is actually two different statutes or sentencing schemes. One part states that any person who has one prior "serious" or "violent" felony and then commits another felony will have the sentence doubled. Many observers call this the "two-strike" part of the law. The other, more publicized, element of the law states that any person who has two or more prior "serious" or "violent" felonies and then commits another felony will receive a minimum sentence of 25 years to life. This is generally referred to as the "three-strike" part of the law. "Serious" and "violent" overlap in many areas, and range from the more heinous crimes of murder, rape, and assault causing serious bodily harm, to robbery, arson, and burglary of a residence, even if the dwelling is unoccupied.

Both parts of the law are controversial, though for different reasons. The two-strike part is seen by some as having the greatest impact on the rapidly escalating number of people incarcerated in California prisons. As of March 31, 2001, there were 59,975 prisoners who had been convicted and were serving a sentence under the two-strike provision (California Department of Corrections, 2001). Combined with the decrease in allowable good-time credits spurred by the "Truth-in-Sentencing" legislation passed by the U.S. Congress in 1994, the average term served by two-strikers is more than three times what they would have had to serve prior to 1994.

The three-strike part of the law, on the other hand, has not materially increased the prison populations—yet—but it is controversial because of what

many consider to be sentences that can be mercilessly out of line with the seriousness of the current felony. As of March 31, 2001, there were 6,700 people sentenced under the three-strike provisions who were serving a minimum term of 25 years to life (California Department of Corrections, 2001). Of that total, 332 had committed a third felony of petty-theft with a prior. For 634 people, the sentencing offense was the possession of a controlled substance, for 154, it was receiving stolen property, and for 380, it was the possession of a weapon. Aggregated numbers indicate that 1,234 of the 6,700 offenses were drug-related (possession, manufacturing, and sale) and only 42.15 percent were "crimes against persons" (See Table 1).

Table 1. Second and Third Strike Cases* by Offense Group, March 31, 2001

	Second Strike Cases		Third Strike Cases	
	Frequency Count	Percent of Total Frequency	Frequency Count	Percent of Total Frequency
Missing	843	1.7	67	1.0
Murder 1st	108	0.2	117	1.7
Murder 2nd	221	0.4	93	1.4
Manslaughter	138	0.3	25	0.4
Vehicular Manslaughter	44	0.1	6	0.1
Robbery	4,034	8.1	1,229	18.3
Assault Deadly Weapon	2,095	4.2	320	4.8
Other Assault/ Battery	2,617	5.2	396	5.9
Rape	165	0.3	113	1.7
Lewd Act with Child	451	0.9	182	2.7
Oral Copulation	57	0.1	42	0.6
Sodomy	18	0.0	16	0.2
Penetration with Object	43	0.1	15	.2
Other Sex Offenses	1,300	2.6	134	2.0
Kidnapping	134	0.3	69	1.0
Burglary 1st	2,534	5.1	722	10.8
Burglary 2nd	3,594	7.2	439	6.6
Grand Theft	1,343	2.7	100	1.5
Petty Theft with Prior	4,551	9.1	332	5.0
Receiving Stolen Property	1,443	2.9	154	2.3
Vehicle Theft	1,912	3.8	203	3.0
Forgery/Fraud	871	1.7	60	0.9
Other Property Offenses	266	0.5	32	0.5
Cont. Sub. Possession	10,182	20.3	634	9.5
C. S. Poss. for Sale, Etc.	2,877	5.7	273	4.1
Cont. Sub. Sales, Etc.	1,513	3.0	182	2.7
Cont. Sub. Manuf.	196	0.4	24	0.4
Cont. Sub. Other	548	1.1	89	1.3
Hashish Possession	11	0.0	–	–
Marij. Possess. for Sale	489	1.0	6	0.1
Marijuana Sales	224	0.4	25	0.4
Other Marijuana Offenses	42	0.1	1	0.0
Escape	275	0.5	34	0.5
Driving Under Infl.	529	1.1	35	0.5
Arson	123	0.2	22	0.3
Possession of Weapon	3,149	6.3	380	5.7
Other Offenses	1,135	2.3	129	1.9
Total	50,075	100.0	6,700	100.0

*Source: California Department of Corrections—Data Analysis Unit.

In many ways, the story of the California Three Strikes law is symptomatic of the social and political "lock 'em up and throw away the key" attitude across the United States (National Criminal Justice Commission, 1996; Baum, 1997; Parenti, 1999). But the story of the California Three Strikes law has some differences. It is being applied to people who have committed a current felony that can be as petty as stealing a pair of jeans from a store, or having possession of less than a tenth of a gram of cocaine.

Usually the California Three Strikes law is not mandatory. Under *People v. Superior Court (Romero)*, judges have limited discretion in regard to the application of the law, though they tend to be extremely wary of appearing to the electorate as being tough enough on criminals by exercising such discretion. Also, the political scenery is different in California than in most states because the prison guard union has grown into a powerful force that will deliver millions of dollars to politicians who favor the union's policy of increasing the prison population.

Passage of California's Three Strikes Law

The impetus for California's Three Strikes law was the kidnapping and murder of Polly Klaas. Prior to Polly's death, the legislative sponsor of the Three Strikes law, Mike Reynolds, whose daughter had been murdered by a purse snatcher, had failed to get the Three Strikes bill out of committee in the spring of 1993 and had been able to obtain only about 15,000 signatures for his proposed ballot initiative during the first month of solicitation (Vitiello, 1997). Within a few days of the highly publicized death of Polly Klaas in the fall of 1993, Reynolds obtained an additional 50,000 signatures, and the Three Strikes initiative became the fastest qualifying ballot in California history (Vitiello, 1997). Reynolds, now able to argue that the public was strongly behind him, convinced the California legislature to enact the Three Strikes law. Politicians, fearful of appearing "soft on crime," managed to pass the "Three Strikes" law as an emergency statute, making it effective immediately. They also incorporated a provision requiring a two-thirds legislative vote or a public initiative to delete or amend the statute. Reynolds, perhaps pressured by politicians running for election who wanted to use it as a campaign issue, or perhaps fearful that the appellate courts would nullify the emergency statute, decided to put his initiative on the ballot anyway. It was passed by a 72 percent majority on November 8, 1994.

The public's emotional outrage and desire to keep another "Polly" from being murdered was the most significant reason for approval of the Three Strikes law. But such a response did not occur in a vacuum. California, and the United States in general, had been marching towards tougher laws and longer sentences for almost two decades, ever since the Nixon administration initiated the "War on Drugs" (Baum, 1997). Political rhetoric, combined with the media's increasing coverage of "true crime" stories, had helped fuel and distort the public's fear of crime (Patterson, 1994; Shuster, 1998). Politicians who might have been inclined to stand up against the "tough on crime" groups instead have tried to outdo them by pushing forward their own "punitive" statutes. In California, the Democrats helped to get the Three Strikes law through the legislature in hopes that it would not become a campaign issue for the incumbent Republican governor to use in the upcoming state elections. After twelve years of a Republican governor, Democrats desperately wanted a change. They were wrong in their gamble, however. Despite the Democrats effort to demonstrate that they could be just as tough on crime, Republican Governor Pete Wilson won another four-year term (Richardson, 1996).

Who Is Locked Up Under the Three Strikes Law?

In interviews with friends and family members of Three Strikers, we found many who voted for the law, but had no idea that it would be so easily applied to a family member or a friend of theirs. Sam Clauder, a subcontractor who employed people to gather signatures for the Three Strikes initiative, said that he had not, himself, looked at the details of the initiative and that he had been told by its promoters that it would be for "violent offenders only." This was the pitch that his employees used when seeking signatures. Michael J. Moore's video documentary, "The Legacy," shows that California politicians running for election in 1994 strongly endorsed the Three Strikes law, and that most of the time they talked about the law's application to "violent" offenders. Marc Klaas, Polly's father, stated: "That was the only message that was ever given out—that Three Strikes was a way to get violent offenders off the streets." (Moore, 1998).

Several years later, the supporters of the Three Strikes law still try to paint the people who have been locked up under the law as "evil," "violent," and "professional criminals." At a debate on the Three Strikes law at Chapman University on October 6, 1999, John Bacin, a deputy district attorney in Orange County, told the audience that it was "evil people," who were targeted by Three Strikes laws. In a column published in the *Los Angeles Times*, Ted Westerman stated: "Because few criminals specialize in only violent crimes, the majority of those going to prison under the three-strikes law are professional felons. Many have committed violent crimes in the past and, if surprised or confronted, would do so again."

Is this true? Are Three Strikers really all "professional" criminals? Have they really all "committed violent crimes in the past?" If surprised or confronted, would they "do so again?"

California's Three Strikes law's broad language allows people to talk about it in a way that can stigmatize everybody sentenced under the law. Murderers and rapists are "averaged" together with burglars, petty thieves, and drug users. The *Sacramento Bee* analyzed a random sample of 233 cases and reported that the "average" person sentenced under the Three Strikes law has had five prior felony convictions (Favre, 1996). Gregg McClain, the deputy district attorney who supervises Three Strikes cases in San Diego County, claimed in a 1999 televised debate on KCET-Los Angeles that the "average" person sentenced in San Diego County as a third striker has had "six prior felony convictions, four to six misdemeanors, and four prior prison commitments." But should the "average" be the factor when the major controversy revolves around the law's being too far-reaching? Is the Three Strikes law an "all-

or-nothing" concept? Or, are there parts of the California law that can be amended to make it more equitable and fair to society and to those who are subjected to incarceration under it?

The question of who is locked up under California's Three Strike law is not an easy one to research and answer. Judges, attorneys, administrators, and others see only a small portion of the criminal justice system and do not have the time or the means to investigate the whole picture. The best overall statistics available are breakdowns by the last felony only (see Table 1).

Methodology of Our Investigation

Our inquiry is not concerned with the overall picture of the Three Strikes law. Instead we focus on that part that allows nonviolent and non-serious offenders to receive what are grossly disproportionate sentences in terms of the crime committed.

The first author has worked with an organization called Families to Amend California's Three Strikes (FACTS) and thereby has been able to interview many family members, friends, and attorneys of people incarcerated under the Three Strikes law. He also has been able to review letters sent to FACTS by prisoners. The letters include waivers by the prisoners allowing media disclosure of what is written. We have not indicated the names of the public defenders, deputy district attorneys, and other government employees who were interviewed as they were apprehensive about having supervisors attach their identities to their comments.

The stories set forth below were verified by discussions with family members, attorneys, review of case files, probation reports, court opinions, and/or newspaper articles. They are not necessarily "typical" Three Strike stories. Instead, they represent cases that might be considered the more unjust. Once again, our concern is not with finding the "typical" or "average" striker, but rather learning how far the law reaches into the realm of what might reasonably be considered unjust or draconian sentences.

Shane Reams

On May 22 1996, Shane Reams, who is half white and half Hawaiian, was found guilty by an Orange County jury of aiding and abetting the sale of a controlled substance (crack cocaine with a street value of $20). The evidence against Shane was that he was standing thirty feet away from the transaction; the prosecutor painted him as the "lookout." Prior to the trial, his private defense attorney had assured Shane and his family that he probably would get

only a year in prison. This was the first Three Strikes case to be handled by this attorney who, after the trial, said she wished she had known more about the law. Because Shane had two prior burglaries on his record, and a dozen or so minor felonies and misdemeanors, Judge Richard Luesebrink said he was going to refuse to invoke his discretionary power. He sentenced Shane to 25 years-to-life under the Three Strikes law. Shane acquired his prior "serious" felonies in 1990, at the age of 21, when he broke into his mother's and a couple of neighbors' homes and stole items of cash and jewelry worth less than $1,000. Upon hearing the neighbor's complaints, Shane's mother suspected her son and confronted him with her suspicions. When he admitted that he had done it, his mother practiced "tough love"—something she had learned from an organization she had joined. She asked him to turn himself in to the police. She now deeply regrets that decision.

His mother had hoped that Shane would be able to get into some type of government rehabilitation program so he could overcome his addiction to drugs. Shane, however, received no treatment in prison for his drug problems. The only time he had gotten any help with his drug use was in 1984 when his family took out a second mortgage on their home and paid $30,000 for one month to a local treatment program that didn't work. His mother says that instead of being treated, her son learned more about drugs from the other kids there.

The co-defendant in Shane's case, who was found guilty of the actual sale of the controlled substance, was not subject to the Three Strikes law and received a four-year sentence and was free from prison after serving two years. Not until the year 2021, when he is 53, will Shane be eligible for parole.

Doug Rash

Like Shane, Doug Rash also was sentenced to 25 years-to-life in an Orange County case. In October of 1994 Doug was in a hotel room with several friends when the police entered after having been given permission by the renter of the room. Seeing drugs and drug paraphernalia in plain view, the police searched everybody and found a little more than (four-tenths) of a gram of cocaine in the pocket of Doug's pants, pants that Doug alleges he had just borrowed from someone else.

Like Shane, Doug's "serious" priors also involved two burglary charges. In 1985, at the age of 19, he had been found guilty of burglary of his dad's home—a place where he often was allowed to shower, sleep, and store his clothes. The theft involved a keyboard that belonged to Doug's brother. Doug was found guilty of burglary because he took the keyboard to a pawnshop.

Then in 1987, Doug was found guilty of another burglary when he and a friend entered his friend's girlfriend's house to retrieve some compact disks.

The girlfriend's father chased them away and called the police. Doug and his friend were charged and convicted of burglary.

Doug, who is white, started using drugs when he was 14. His family paid to put him in a four-day detoxification program, but the clean-up did little to solve his drug problem. He did not receive any treatment while serving time in jail or prison.

Doug will not be eligible for parole until 2019 when he is 53 years old.

Gregory Taylor

At the age of 35, Gregory Taylor, an African-American, was a homeless person who often received free dinners at St. Joseph's Catholic Church in Los Angeles (see *People v. Taylor*, 1999; Bellisle, 1999). About 4 a.m. on July 11, 1997, allegedly too hungry to wait for the meal to be served the next day, Gregory was seen by two guards working a 2-by-4 into a crack in the church door. An arresting police officer later testified that Taylor said he "was trying to go in the kitchen to get something to eat."

Gregory's prior "serious" felonies were two robbery charges. The first was a purse snatching committed in 1982; the purse contained $10 and a bus pass. A year later, he and a buddy were arrested while attempting to rob a man on the street. They were not armed.

Gregory grew up in South Central Los Angeles and was one of nine boys born to a nurse who quit work and went on welfare to care for her children. Gregory left school in the 12th grade and had some run-ins with the police while in his late teens. He has suffered from heroin and cocaine addiction.

Father Allen McCoy, a Franciscan priest at St. Joseph's church where the third strike incident occurred, considers the sentence unjust and describes Gregory "as a peaceful man, a man who helped at the center with the feeding of the street people." Father McCoy has known Gregory for almost a decade and they now exchange letters.

In a dissenting California appellate opinion, Justice Johnson compared Gregory's case to a situation in Victor Hugo's novel *Les Miserable* in which the protagonist, Jean Valjean, is imprisoned for stealing bread. Gregory will be eligible for a parole hearing in 2022, the year he turns 60.

Luciano (Chano) Orozco

In 1996, Chano Orozco, a Latino, was found guilty in San Diego County of possessing five-hundredths of a gram of heroin and was sentenced to 25 years-to-life under the Three Strikes law. His prior "serious" felonies were two counts of burglary. He was convicted of the first burglary in 1988. According to his appellate attorney, Fred Uebbing, his law-breaking act was not classified as a "serious" burglary when his client was convicted. In addition, Uebbing describes the burglary as one in which Chano simply went along with an acquaintance. Chano was convicted of his second burglary in 1992. That offense involved an unusual series of events. Chano's car had broken down and he needed to call a service station or tow truck for help. As luck (obviously "bad" luck it turned out) would have it, Chano was close to his mother's home and decided to telephone from her house. Unfortunately, she was not at home. Instead of attempting to break into his mother's home, which had bars on the windows and was locked up tight, Chano decided to take the easier route and enter into the dwelling of his mother's tenant and make the call from there. While he was on the phone, the tenant came home and Chano said to him, "I'm sorry, brother. I won't do it anymore." Chano then ran past the tenant and out the front door, but he forgot to leave behind the cordless phone. The tenant called the police, and eventually Chano was caught and convicted of residential burglary. There are strong arguments that he should have been convicted instead of trespassing, an offense which does not count as a "strike."

According to Uebbing, Chano was a heroin addict—and, as so often with addicts having little means of support, he had other property and drug offenses on his record. The probation report when Chano was facing his third strike told the story this way:

> The 38-year-old defendant, who is a heroin addict of long standing (20 years), is before the Court for sentencing on a charge of possession of heroin. Such possession is a requirement for a practicing heroin addict. It is sad that the defendant has had numerous chances in the past 15 years or so, to clean up his act, but has not done so. Now, he faces 28 years to life for what could be considered a relatively minor felony charge.
>
> However, the defendant's prior record shows he is a danger to the property of others because he must feed his addiction. However, since the defendant is relatively unemployable because of his long history of criminal involvement and state prison commitments, it is most likely that the defendant would have to resort to property crimes to support his habit. Thus, sadly, the longer the defendant is incarcerated, the safer will be society. It is impractical to believe that at this date, the defendant will, "cure" his drug addiction.

Uebbing and Chano's wife dispute the statement that Chano had "numerous chances..to clean up his act." They point out that he had neither the means nor the opportunity to receive treatment in a decent substance abuse program. Chano will not be eligible for parole until 2021 when he is 61 years old.

No Typical Cases

We found when studying the histories of people who have been convicted under the Three Strikes law that rarely could we describe a case as "typical." Claims of innocence, ineffective assistance of counsel, plea bargaining to a different crime than the one actually committed, allegations of police and prosecutorial misconduct, pleading guilty to help a friend or relative who was the actual perpetrator, and many other issues seemed to be factors in at least one of the strikes in the cases we looked into.

As people involved in the criminal justice system are well aware, many "robberies" and "burglaries" do not match nicely with the public perceptions of the offenses. The Reams, Rash, Taylor and Orozco cases demonstrate that "burglary" can involve dwellings of acquaintances or family members of the alleged offender. In some "burglary" cases we investigated, ex-boyfriends or ex-spouses would break into an ex-lover's home to regain disputed property. These were not episodes of premeditated plans by a "professional burglar," but rather the result of an emotional domestic dispute in which the identity of the burglar was not even necessarily meant to be secret.

In other cases we reviewed, "robbery" included a drunk person snatching a twenty dollar bill out of a person's hand in a store after the victim had been holding it out, waiting to pay for something. In another case, it involved a couple of drunk people getting into a fight and the person who ended up in the hospital noticing that he no longer had a gold chain around his neck. "Assault with a deadly weapon" includes any object that can cause serious damage to another person, including a skate board in one case we investigated.

Characteristics of Strikers

While there may not be any "typical" Three Strike stories, the characteristics of those who fall under the Three Strikes law are somewhat easier to define. Generally, those sentenced under Three Strikes are low income, substance-addicted males, who are people of color.

According to the California Department of Corrections, of the 50,007 Second Strikers sentenced through March 31, 2001, 47,779 (95%) were male, 18,334 (37%) were black, 16,394 (33%) were Hispanic-Mexican, 2,062 (4%) were "other," and 13,285 (27%) were white. Of the 6,700 Third Strikers who received a minimum of 25 years-to-life through March 31, 2001, 6,632 (99%) were male, 2,972 (44%) were black, 1,719 (26%) were Hispanic-Mexican, 293 (4%) were "other," and 1,716 (26%) were white. Blacks make up only 6.0% of the California population, and 31% of the California prison population—but 44% of the Third Striker population (Baraback, 2001; California Department of Corrections, 2001).

California does not keep statistics regarding the income level of prisoners, but based on the letters we read and the interviews we conducted, we believe that the vast majority of letter writers were from lower to lower-middle class backgrounds. The letters conveyed an inability to obtain an attorney, or to obtain rehabilitation, employment, or housing, all indicators of low income.

Very rarely did we find a case where a striker could be identified as not having a substance abuse problem. Statistics indicate that about 80 percent of California prisoners suffer from drug abuse (Little Hoover Commission Report, 1998), and our review of Three Strike cases indicate that strikers have at least that high a rate.

Rehabilitation (or Lack Thereof)

In almost all of the cases we reviewed, persons known to be suffering substance abuse had received little or no rehabilitative treatment from the state of California, despite having been imprisoned or jailed prior to their Three Strike sentence. The lack of treatment programs available to the poor and incarcerated has often been cited as a problem that is particularly pronounced in California (Little Hoover Commission Report, 1998). Using the 80 percent estimate, this indicates that currently, of the 162,000 prisoners in California, about 129,600 suffer from substance abuse. Of these 129,600, only about 3,000 to 4,500 of them are receiving treatment. Politicians sometimes brag about treatment facilities, pretending that they are really doing something significant about drug treatment needs. In a 1998 bi-partisan report analyzing the California prison system, the lack of drug treatment for prisoners was cited as the major reason that in 1995, 60 percent of those admitted to California prisons were parole violators, whereas in New York, the figure was only 22 percent and in Texas only 29 percent (Little Hoover Commission Report, 1998:69).

Given that the Three Strikes law is targeting people who were previously part of a system that might have been able to assist them to control their substance abuse problems, it appears especially indefensible for the California system to turn around and impose 25 years-to-life sentences for what, in so many instances, are drug related crimes and property crimes to support addiction.

Prosecuters' and Judges' Use of Discretion

The Three Strikes law allows prosecutors to use their discretion "in the interests of justice." In June of 1996, the California Supreme Court extended this discretion to judges in the *Romero* decision (*People v. Superior Court (Romero)*, 1996). The use of such discretion by judges, however, is subject to attack on the ground that it is an abuse of their powers, and can be reversed on appeal (*People v. Williams*, 1998). In addition, while the rights against "cruel and unusual" punishment under the United States Constitution and "cruel or unusual" punishment under the California Constitution are available for Three Strikers on a case-by-case basis, only one appellate court has been bold enough to rule in favor of this type of claim in a Three Strikes case. In that case, the trial court had imposed a 25-years-to life sentence on someone whose last offense was failure to register as a sex offender (*People v. Cluff*, 2001).

The result is that a career-minded judges will probably not exercise their discretion because in that way they can avoid the possibility of a reversal on appeal or the chance of a "Willie Horton" type of scenario that could result if the media were to publicize an incident in which an ex-convict who benefitted from judicial discretion ended up committing a heinous crime. Even if the judge may have used discretion in hundreds of other cases, this will likely be ignored as the media and political opponents focus on the one "bad" decision. From a risk-analysis perspective, judges have little to risk when imposing a longer sentence, and much to lose if they choose to mete out shorter sentences. Many of the attorneys we spoke with believed this to be a major factor in how judges employ discretion. Defense attorneys tended to prefer some of the older judges who were nearing retirement because these judges did not have to worry about their careers as much as the younger judges, and therefore were more likely to use their discretion to correct obvious injustices.

District Attorneys generally have to balance their available resources to respond satisfactorily to the pressures and expectations to be "tough on crime." While they are supposed to seek "justice," in practice they "advocate" for the higher charges and longer and harsher sentences. Prosecutors also appear to worry about the "Willie Horton" scenario and their careers often are tied to their win-loss ratio.

The use of prosecutorial and judicial discretion under the Three Strikes law appears to vary widely by county. In some counties it differs within the particular courthouse, the floor of the courthouse, and even with the particular prosecutor or judge assigned to the case. Several attorneys have described the likelihood that a defendant will benefit from the use of discretion as "pure luck" or "capricious and arbitrary." Statistics from the California Department of Corrections and interviews with attorneys show that San Francisco and Alameda Counties have District Attorneys who rarely resort to the Three Strikes law for nonviolent and non-serious current offenses, while Kern, San Bernardino, and Orange counties use the Three Strikes law to a significantly greater degree for nonviolent and non-serious offenses than the average prosecutors. Interviews with public defenders in Los Angeles County, which is responsible for about 42 percent of all third strike cases, indicate that certain courthouses were known to enforce the Three Strikes law more strictly than others. As we note subsequently, these matters changed with the election of a new Los Angeles district attorney in 2000.

In 1996, the *Los Angeles Times* documented discrepancies by showing that the Van Nuys courthouse sentenced 33 percent of third strikers to at least 25 years-to-life, while the San Fernando branch sentenced only 14 percent of third strikers to the same penalty (Krikorian et al., 1996). The difference was said to be due to the varying views of the supervising head deputy district attorneys. According to one public defender we interviewed, in the downtown criminal courts building of Los Angeles, where there was a different prosecuting supervisor on each floor, the floor of the courthouse a defendant was sent to made a big difference in regard to whether discretion to waive a strike was employed or not. In some jurisdictions, juries will on occasion "nullify" the charge; that is, despite what the law stipulates, they will find the offender innocent rather than see imposed what they regard as a too harsh penalty for the offense committed (Dodge & Harris, 2000).

Interviews with attorneys indicate that prosecutors and judges sometimes try to push each other into using their discretion to reduce the charge or penalty because they do not want it to be placed on their own record. Sometimes, it is claimed, the two sides end up giving a striker a harsh sentence in order to call each other's bluff.

A Superior Court judge noted in an interview that prosecutors can often systematically try to manipulate the discretion process by getting certain cases removed from certain judges. This is a power that defense attorneys cannot use as effectively because there are so few judges who are known to be liberal about waiving prior strikes.

Plea Bargaining

The Three Strikes law technically does not allow plea bargaining, but according to interviews, there are tactics to "agree" to plead guilty if a strike or strikes are waived. Public defenders in Los Angeles County say that about

every second strike case involving a nonviolent or non-serious current offense results in an automatic plea offer of 32 months. Defendants face six years or more if they take their case to a jury trial and are found guilty.

In third strike cases, the dilemma facing the defendant is sometimes so severe that public defenders say that they will strongly advise a client to take a plea even if the defendant adamantly professes innocence and the public defender suspects this to be true. Dan Johnson of Orange County was offered a sentence of four years, refused to take it, and after the jury's guilty verdict he received a sentence of 78 years-to-life, though it was reduced on appeal to 28 years-to-life. Michael Robles, also of Orange County, facing a third strike for an attempt to purchase an imitation controlled substance (actually a macadamia nut) for $20 had an offer of nine years, and turned it down. Following the jury's guilty verdict, he received a sentence of 25 years-to-life. After an effective appeal based on the issue of ineffective assistance of counsel and tried before a different judge, who waived some prior strikes, Robles ended up with a five-year term.

Many of the people in the criminal justice system we interviewed said that they see the Three Strikes law currently being used for two types of offenders. The first one is the dangerous "violent" offender that the public voted to enact the law against, while the second is the nuisance recidivist whom many of the law and order types in the criminal justice system have become tired of seeing again and again. But this second category of offender is not the type people had in mind when they voted for the law.

Imbalance of Political Power

Another major factor in California's administration of criminal justice is the pressure put on politicians by special interest groups. Increasing sentences is a relatively easy task for office-holders because rarely are there opposition groups to speak against such moves. Generally the only opposition comes from concerned defense attorneys and altruistic individuals or organizations that recognize a problem that will affect unknown others. Unfortunately, for society, defense attorneys are usually too busy with individual cases to take the time to campaign against more punitive laws, and altruistic individuals and organizations are few in number.

The other side of the picture is very different. There are many special interest groups whose members make a great deal of money as more prisons are being built. In the process, these groups become increasingly powerful.

In 1980 there were only a couple thousand California prison guards and they were guarding 23,511 prisoners and earning an annual salary of about $21,000.

By 1998, there were 24,314 full-time guards for about 160,000 prisoners, with veterans receiving an average salary of $51,000 (Morain & Vanzi, 1998).

In 1994, the California Correctional Peace Officer's Association (CCPOA) contributed more than $100,000 to the Mike Reynolds group that spearheaded the Three Strikes initiative, and provided additional sums to victims' rights groups that fought for approval of the Three Strikes initiative (Roemer, 1996; Vitiello, 1997). In the 1990 and 1994 gubernatorial campaigns, the CCPOA's contributions to Governor Pete Wilson, a Republican, totaled more than $1.5 million. The head of the CCPOA, Don Novey, boasted that it was his union that put Wilson over the top and gave him his victories.

During the 1998 election for governor, the CCPOA switched parties, but was able to stick with the winner as it supplied $2 million in campaign contributions and television ads to Democrat Gray Davis (Salladay, 1999). Since being elected, Governor Davis said: "In this business you have to be strong enough to accept contributions and then vote against the people who contribute the money" (Hoge, 1999). However, the CCPOA and the criminal enforcement agencies have rarely seen a Davis move go against them. Davis consistently has voted against paroling prisoners (Warren, 1999), vetoed a bill that would have allowed reporters to interview prisoners with recording equipment (reporters are not even currently allowed a pencil and paper) (Jacobs, 1999), vetoed a bill that would have limited police seizure of assets (Egelko, 1999), vetoed a bill that would have required police to keep tallies by race of the people they pulled over and detained (Ingram, 1999), and even vetoed a bill that would have funded a study of the Three Strikes law ("Davis Vetoes Study of Three Strikes Law," 1999).

Victim Rights groups also became a powerful lobbying force in California in the 1980s and 1990s, and there has been a symbiotic relationship between the "tough-on" crime politicians and crime victims. Not all victims, however, promote Three Strikes. Disturbed at the use of Polly Klaas's image to justify "draconian" sentences, Marc Klaas and Joe Klaas, Polly's father and grandfather respectively, have spoken out strongly against the Three Strikes law and advocated amending it so it will not be applicable to nonviolent and non-serious offenders.

Other special interests supporting Three Strikes are made up of individuals who do business with prisons and are involved in the construction of prisons. Prison construction requires the purchase of land, materials, and the use of great amounts of labor and is usually financed by the government selling special interest bonds. The sale of the bonds requires lawyers, underwriters, investment brokers, and buyers. The maintenance of prisons involves multi-million dollar contracts for suppliers of food, clothing, utilities, guns, ammunition, supplies, and all of the other materials needed to operate a city be-

hind walls and fences. These people profit from, and are in a position to contribute to politicians who see things as they do.

Prisoners, on the other hand, cannot vote until after they are off parole and they generally come from communities where the voter turnout is very low. The prisoners' friends and family members, generally from lower income levels, are estimated to be less inclined to vote than others even within their communities (Maharidge, 1996).

Recent Trends

On March 7, 2000 California voters passed Proposition 21 that proposed a "tough on crime" approach to juvenile offenders by allowing prosecutors greater discretion to charge some juveniles as adults. Hidden amongst the 43 pages of juvenile and penal code changes in the Proposition were enhancements of the Three Strikes statute in regard to both juveniles and adults. The Proposition broadened the definition of crimes that can be regarded as "violent" or "serious" to include such offenses as "terrorist threats," "conspiracy to commit a serious crime," and "any felony committed by a gang member on behalf of a gang-related activity." Once again, it is difficult to discern the true beliefs of the voters who supported the measure as there was minimum news coverage of specific changes to the Three Strikes law.

In the fall of 2000, however, California voters demonstrated an awakening awareness that the trend to "lock 'em all up" might have gone too far. They passed Proposition 36 that directs first- and second-time drug offenders to rehabilitation programs rather than to incarceration. In addition, in Los Angeles county a new district attorney was elected whose platform advocated a reduced use of the Three Strikes law is an important gesture, though he probably won not because of this position but as a reaction to scandals in the police department that tainted his predecessor.

Proposition 36 benefits people who could be subject to the Three Strikes law, though it can only be used if they have not been convicted or incarcerated during the previous five years, and had not committed a misdemeanor in connection with the current drug offense. Unfortunately, both of these conditions will probably result in the elimination from the drug rehabilitation route most persons who fall under the Three Strikes law. As we have shown, most Three Strikers are drug addicts who often were caught because of petty drug and property offenses.

Steve Cooley, Los Angeles county's newly-elected district attorney, has established a policy built on his pre-election promise that he would ease up on use of the Three Strikes law, but his efforts have received mixed reviews from defense attorneys. Some report great progress toward more humanitarian actions (Riccardulli, 2001), but others insist that little of much significance has changed. And, of course, Cooley's views have no effect on persons already serving out desperately long terms based on a relatively trivial third offense.

Conclusion

The California Three Strikes law differs from the vast majority of other state's Three Strikes laws because it embraces nonviolent and non-serious offenders in regard to the last, or triggering strike. The California Three Strikes law also differs from most mandatory minimum sentencing laws because judges are allowed some discretion.

Our look at some of the nonviolent and non-serious offenders who have been sentenced under the California Three Strikes law demonstrates that supporters exaggerate when they claim that the people being locked up under the law are "professional thieves" or "violent" criminals. Statistics and a review of numerous cases indicate that a significant number of those persons sentenced under the Three Strikes law are small-time property and drug offenders who are suffering from substance abuse, and the state has often been negligent on earlier occasions in regard to offering them an opportunity to overcome their drug problems.

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