California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?

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INTRODUCTION

From its inception, California's Three Strikes law[1] has gained national attention.[2] Widely reported Three Strikes cases have involved trivial offenses — such as the theft of a bicycle, a slice of pizza, cookies or a bottle of vitamins — that have resulted in severe sentences. Such cases evidence the media's conclusion that Three Strikes is "the toughest law in America."[3]

Despite what appear to be excessive sentences for minor criminal offenses, for several years after Three Strikes' enactment, no appellate court found a Three Strikes sentence to be grossly disproportionate.[4] With the exception of dictum in one state appellate court decision,[5] California's courts of appeal have been hostile to defendants' claims that their sentences violate either federal or state constitutional guarantees against excessive sentences.[6] The California Supreme Court has not

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[1] CAL. PENAL CODE §§ 667, 1170 (West 2002 & Supp. 2003).

[2] *E.g., Crumby Crime: Life Sentence for Cookie Thief*, 82 A.B.A. J. 12 (1996); *60 Minutes: The Bicycle Thief* (CBS television broadcast, May 26, 2002) (transcript available from Burrelle's Info. Servs.) [hereinafter *60 Minutes*]; Rene Lynch & Anna Cekola, *"3 Strikes" Law Causes Juror Unease in O.C.*, L.A. TIMES, Feb. 20, 1995, at A1; Eric Slater, *Pizza Thief Receives Sentence of 25 Years to Life in Prison*, L.A. TIMES, Mar. 3, 1995, at 9B.

[3] *60 Minutes*, *supra* note 2.

[4] Riggs v. California, 525 U.S. 1114 (1999) (respecting denial of petition for writ of certiorari).

[5] People v. Cluff, 105 Cal. Rptr. 2d 80 (Ct. App. 2001).

[6] *E.g.*, Lockyer v. Andrade, 538 U.S. 63 (2003) (upholding two consecutive 25-year-to-life sentences for stealing videotapes valued under $200); Ewing v. California, 538 U.S. 11 (2003) (upholding 25-year-to-life sentence for stealing nearly $1200 worth of golf clubs); People v. Barrera, 82 Cal. Rptr. 2d 755 (Ct. App. 1999) (upholding 25-year-to-life sentence for forging $400 check); People v. Smith, 58 Cal. Rptr. 2d 9 (Ct. App. 1996) (reversing trial court's decision to strike prior serious felony convictions); People v. Cooper, 51 Cal. Rptr. 2d 106 (Ct. App. 1996) (upholding 25-year-to-life sentence for being ex-felon in possession of handgun); People v. Kinsey, 47 Cal. Rptr. 2d 769 (Ct. App. 1995) (upholding 29-year-to-

reviewed those issues.[7]

In 1999 and again in 2001, four United States Supreme Court justices raised questions about the constitutionality of some Three Strikes sentences.[8] The justices seemed particularly concerned with cases in which the defendants' third strike was petty theft.[9] Influenced by the views of the four justices, the United States Court of Appeals for the Ninth Circuit held that a Three Strikes sentence did violate the Eighth Amendment.[10] Leonardo Andrade received a sentence of fifty years to life after his conviction on two counts of petty theft.[11] Thereafter, in *Brown v. Mayle*, the Ninth Circuit struck down two other Three Strikes sentences of twenty-five years to life in two more cases involving a third strike of petty theft.[12] Subsequently, the U.S. Supreme Court granted the writ of certiorari in *Andrade*, along with a companion case from the state court, *Ewing v. California*.[13]

The Ninth Circuit decisions and a subsequent district court opinion provided a brief moment of hope for opponents of Three Strikes' more extreme sentences. Efforts at legislative reform had come to a dead-end as had litigation in the state courts.[14] The federal courts finally offered a

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life sentence for attempted injury on cohabitant, assault and battery); People v. Drew, 47 Cal. Rptr. 2d 319 (Ct. App. 1995) (reversing trial court's decision to strike prior serious felonies to avoid Three Strikes sentence of 25 years to life for possession of codeine); People v. Patton, 46 Cal. Rptr. 2d 702 (Ct. App. 1995) (modifying lenient sentence to 25 years to life for possession of cocaine base in order to reflect correct Three Strikes sentence); People v. Cartwright, 46 Cal. Rptr. 2d 351 (Ct. App. 1995) (upholding sentence of 428 years to life for rape); People v. Superior Court (Missamore), 45 Cal. Rptr. 2d 392 (Ct. App. 1995) (reversing sentence of probation for possession of marijuana when it was defendant's fourth felony); People v. Gore, 44 Cal. Rptr. 2d 244 (Ct. App. 1995) (reversing order to dismiss prior felony); People v. Bailey, 44 Cal. Rptr. 2d 205 (Ct. App. 1995) (reversing trial court's decision to strike prior offenses to avoid Three Strikes sentence of 25 years to life for shoplifting items valued at $250); People v. Superior Court (Romero), 37 Cal. Rptr. 2d 364 (Ct. App. 1995) (vacating lower court's order striking prior serious offenses allowing for Three Strikes life sentence for possession of controlled substance).

[7] Durden v. California, 531 U.S. 1184 (2001) (Souter & Breyer, JJ., dissenting).

[8] *Id.* at 1184; *Riggs*, 525 U.S. at 1114..

[9] While two justices thought that the Court should grant the writ of certiorari, Justice Stevens concurred in the denial of the writ because neither lower federal courts nor the California Supreme Court had considered the issue. *Riggs*, 525 U.S. at 1114.

[10] Andrade v. Att'y Gen. of Cal., 270 F.3d 743 (9th Cir. 2001), *rev'd*, 538 U.S. 63 (2003).

[11] *Id.* at 746.

[12] 283 F.3d 1019 (9th Cir. 2001).

[13] Lockyer v. Andrade, 538 U.S. 63 (2003); Ewing v. California, 538 U.S. 11 (2003). While those cases were pending, a district court judge extended the Ninth Circuit decisions to a case in which the offender's third strike was trivial, but not a "wobbler." Duran v. Castro, 227 F. Supp. 2d 1121, 1128-29 (E.D. Cal. 2002).

[14] *See, e.g.*, Assembly Floor Analysis of AB 2447, 1999-2000 Leg., at 1 (imposing factors court can consider when determining whether to "strike" previous serious or violent

new forum in which to challenge Three Strikes sentences. Optimism, however, was premature.

On March 5, 2003, the Supreme Court reversed the Ninth Circuit's decision in *Andrade* on narrow procedural grounds[15] and held in *Ewing* that the offender's Three Strikes sentence did not violate the Eighth Amendment.[16] The Court was deeply divided in *Ewing*, resulting in a judgment of the Court with no majority opinion.[17] Piecing together the plurality and dissenting opinions in *Ewing* suggests that, under very narrow circumstances, Three Strikes defendants may be able to raise successful Eighth Amendment challenges to their sentences. But those cases will be so rare that they offer little hope for those who seek federal help in reforming California's Three Strikes' sentencing policy.[18]

Critics may argue that the Ninth Circuit decisions were result-oriented and that the court refused to follow settled precedent to achieve desirable social ends.[19] On that score, I agree with the court's critics: *Andrade* and the subsequent extension of that case in *Brown* departed from governing law.[20] Even prior to the United States Supreme Court's decision in *Ewing*, the Court's case law was begrudging in extending the Eighth Amendment to terms of imprisonment and emphasized that such cases would be exceedingly rare.[21] Not only did the Ninth Circuit have little Supreme Court precedent in its favor, it also had to overcome a significant procedural hurdle: because the defendants in *Andrade* and

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offense); Assembly Comm. on Pub. Safety, Comm. Analysis of AB 1652, 2000-01 Leg., at 2-3 (exempting drug possession from being third-strike offense); Assembly Comm. on Appropriations, Comm. Analysis of AB 1790, 2001-02 Leg., at 1 (narrowing definition of third strike); Senate Rules Comm., Senate Floor Analysis of SB 1517, 2001-02 Leg., at 1 (removing convictions for certain nonviolent crimes from third-strike penalties).

[15] 538 U.S. 63, 70-77 (2003).

[16] 538 U.S. 11, 25-30 (2003).

[17] For a discussion of the decision in *Ewing*, consult *infra* notes 630-38 and accompanying text.

[18] For a discussion of the decision in *Ewing*, consult *infra* notes 630-38 and accompanying text.

[19] I am tempted to call both the Ninth Circuit and the state appellate courts "activist" in their willingness to ignore settled precedent. Defining "activism," however, is contentious. *See, e.g.*, William P. Marshall, *Conservatives and The Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1220-21 (2002) (discussing difficulty in defining activism and observing that decision may be activist in one sense, but not in another); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1166 (2002) (discussing situations in which one form of activism conflicts with another form of activism). While result-orientation is often part of a definition of activism, defending any particular definition of "activism" would distract from my main theme concerning the Ninth Circuit and state appellate courts.

[20] *See infra* text accompanying notes 132-53.

[21] *See infra* note 253.

Brown sought the writ of habeas corpus, they had to demonstrate that the state court decision was "contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States."[22] The limited Supreme Court cases, often decided by narrow majorities, simply do not meet that standard.[23]

One can level the same charge of result-orientation against California's courts of appeal. In the state courts, defendants argued that their particular Three Strikes sentences violated California's state constitutional provision against cruel *or* unusual punishment,[24] not just that they violated their Eighth Amendment right to be free from cruel *and* unusual punishment.[25] The difference in constitutional language is more than a linguistic quibble.

In contrast to federal case law,[26] the California Supreme Court has found that numerous criminal sentences violated Article I, section 17 of the state constitution.[27] The court refined its case law for over a decade, culminating in *People v. Dillon* in 1983.[28] There, the court found that a term of life in prison for a seventeen-year-old convicted of first degree felony murder violated the state constitution. California's appellate courts had ample authority to find that individual Three Strikes sentences violated the state constitution. Instead, state appellate court judges rejected settled precedent, leaving them open to criticism similar to that directed at the Ninth Circuit.[29]

The respective positions of the federal and state appellate court judges may be attributed to institutional realities. The Ninth Circuit's willingness to take a politically unpopular position may be a result of the judicial independence of Article III judges,[30] while state judges, who must face reelection, may be more politically sensitive than their federal

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[22] 28 U.S.C. § 2254(d)(1) (2002).

[23] *See infra* note 158.

[24] CAL. CONST. art. I, § 17.

[25] U.S. CONST. amend. VII; *e.g.*, People v. Barrera, 82 Cal. Rptr. 2d 755 (Ct. App. 1999); People v. Cooper, 51 Cal. Rptr. 2d 106 (Ct. App. 1996); People v. Kinsey, 47 Cal. Rptr. 2d 769 (Ct. App. 1995); People v. Cartwright, 46 Cal. Rptr. 2d 351 (Ct. App. 1995).

[26] *See infra* notes 48-75.

[27] *See infra* notes 255-79.

[28] 34 Cal. 3d 441 (1983).

[29] *See infra* notes 309-15.

[30] For a more detailed discussion of the extent to which federal judges depart from majoritarian sentiment, see Michael Vitiello, *How Imperial Is the Supreme Court: An Analysis of Supreme Court Abortion Doctrine and Popular Will*, 34 U.S.F. L. REV. 49 (1999).

counterparts.[31] But the fact that the Ninth Circuit decision may be explained by judicial independence does not necessarily make it correct. After all, critics often attack decisions by politically unaccountable judges when those decisions frustrate the will of the majority.[32] Thus the positions taken by the Ninth Circuit and state appellate courts beg a further question: who has it right? Had the Ninth Circuit's decision stood, would it have undercut a statute that has proven effective in reducing crime? Or would the Ninth Circuit's decision have provided a healthy corrective to legislative and voter excess? This Article examines those questions.

Part I analyzes the Ninth Circuit's decision in *Andrade* and the Supreme Court's opinion reversing the Ninth Circuit.[33] It also reviews the Ninth Circuit's decision in *Brown*, extending *Andrade* beyond its limited facts.[34] Part I concludes that the Ninth Circuit extended existing precedent. Even if the Supreme Court should have extended its case law to strike down the Three Strikes' sentences, the Ninth Circuit's conclusion that the state court opinions in *Andrade* and *Brown* were "contrary to, or involved an unreasonable application of clearly established Federal law" was unwarranted.[35]

Part II examines California case law relating to its constitutional guarantee against cruel or unusual punishment, and appellate court decisions rejecting defendants' arguments that their Three Strikes sentences were excessive. That section argues that the state appellate courts did not follow settled precedent.[36]

Thereafter, this Article asks whether California would have been better served by the decisions of the Ninth Circuit or the state appellate courts. Part III discusses the penological debate surrounding recidivist statutes like Three Strikes and the extent to which long sentences imposed under those statutes are morally justified. That section concludes that many Three Strikes sentences raise serious moral questions because they are disproportionate to the defendant's culpability.[37]

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[31] *See* Paul J. Pfingst, Gregory Thompson & Kathleen M. Lewis, *"The Genie's Out of the Jar": The Development of Criminal Justice Policy in California*, 33 MCGEORGE L. REV. 717, 724-30 (2002).

[32] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 17 (1990); Jeremy Rabkin, *Partisan in the Culture Wars*, 30 MCGEORGE L. REV. 105 (1998).

[33] *See infra* notes 158-62 and accompanying text.

[34] *See infra* notes 168-87 and accompanying text.

[35] *See infra* notes 206-15 and accompanying text.

[36] *See infra* notes 217-50 and accompanying text.

[37] *See infra* notes 375-459 and accompanying text.

Despite the moral questions surrounding Three Strikes, its supporters claim that Three Strikes works.[38] Part IV addresses those claims by reviewing empirical data on whether Three Strikes caused the downturn in California's crime rates. Existing data suggest that Three Strikes does not deliver on its promises.[39]

Part V discusses possible reform of Three Strikes. It reviews the state of the law after the Supreme Court's decision in *Ewing*, which forecloses virtually all challenges to Three Strikes sentences.[40] Further, absent action by the state supreme court, California cannot hope for a judicial solution to the problems created by Three Strikes. Despite Three Strikes' unnecessary cost, few politicians are willing to advocate reforming the law. Prominent politicians backed Three Strikes when popular sentiment against crime was at fever pitch. Those politicians show no willingness to admit error; many of them are dependent on financial backing from groups that favored laws that have led to unnecessary expansion of California's prisons and their populations.[41] Politicians who would reform Three Strikes face a difficult task because Three Strikes requires a super-majority for its modification.[42] Legislative efforts to place an initiative on the ballot that would have limited Three Strikes have repeatedly failed.[43] As a result, judicial activism may have been California's best hope for reform. The Ninth Circuit's willingness to ignore precedent had the potential to usher in a modest rational reform that the democratic process may not be able to achieve.[44]

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[38] *See infra* notes 460-71 and accompanying text.

[39] *See infra* notes 472-574 and accompanying text.

[40] *See infra* notes 631-57 and accompanying text.

[41] *See infra* notes 601-11 and accompanying text.

[42] CAL. PENAL CODE §§ 667(j), 1170.12 (4) (West 2004).

[43] *See, e.g.*, Cal. A.B. 112, 2003-04 Leg., (Jan. 13, 2003) (requiring current conviction be "serious" or "violent" felony to receive third-strike enhanced sentence). This bill was made inactive on a motion by the author and effectively "killed" on July 8, 2003. See also the various attempted modifications discussed at *supra* note 14.

[44] *See infra* notes 644-57 and accompanying text.

I. THE SUPREME COURT'S EIGHTH AMENDMENT CASE LAW AND THE NINTH CIRCUIT'S VIEW

A. Supreme Court Precedent on Terms of Imprisonment

While the Supreme Court has held that the death penalty must be proportionate to the crime[45] and has reaffirmed that position in a number of cases,[46] whether the Eighth Amendment requires that a term of imprisonment be proportionate to the crime rests on less firm footing. The Ninth Circuit's legal analysis in *Andrade* focused on three leading Supreme Court cases, decided between 1980 and 1991, that dealt with terms of imprisonment.[47]

Decided in 1980, *Rummel v. Estelle* rejected the defendant's claim that his sentence of life in prison violated the Eighth Amendment.[48] Rummel was a recidivist who, over a period of nine years, was convicted of three nonviolent theft offenses involving a total of less than $230.[49] He was sentenced to a term of life imprisonment under Texas's habitual offender statute.[50] A closely divided Court upheld the punishment and observed that "the length of the sentence actually imposed is purely a matter of legislative prerogative."[51] *Rummel* did rely on the fact that, under Texas law, the prisoner would be eligible for parole within twelve years.[52] In addition, the Court did not foreclose the possibility that a term of imprisonment might violate the Eighth Amendment.[53]

Three terms later, for the first and only time, the Court, again deeply divided, found that a term of imprisonment without more did violate the Eighth Amendment.[54] In *Solem v. Helm*, the defendant was sentenced

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[45] Coker v. Georgia, 433 U.S. 584 (1977).

[46] *E.g.*, Thompson v. Oklahoma, 487 U.S. 815 (1988); Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982).

[47] Harmelin v. Michigan, 501 U.S. 957 (1991); Solem v. Helm, 463 U.S. 277 (1983); Rummel v. Estelle, 445 U.S. 263 (1980). As discussed below, the Supreme Court has decided a small number of additional cases that neither the Ninth Circuit nor the Supreme Court relied on in *Andrade*. *See* discussion *infra* notes 160-65.

[48] *Rummel*, 445 U.S. at 263.

[49] *Id.* at 265-66.

[50] TEX. PENAL CODE ANN. § 12.42(d) (2003); *Rummel*, 445 U.S. at 266.

[51] *Rummel*, 445 U.S. at 274.

[52] *Id.* at 280.

[53] *Id.*

[54] Solem v. Helm, 463 U.S. 277, 303 (1983) (suggesting that *Weems v. United States*, 217 U.S. 349 (1910), may have turned on form of punishment). *Robinson v. California*, 370 U.S. 660 (1962), involved a term of imprisonment; however, the punishment was based upon the status of the offender and the Court found that any sentence would violate the Eighth

under South Dakota's recidivist statute.[55] His prior record, although longer than Rummel's, also involved a succession of relatively minor felonies.[56] In *Solem*, the Court found that earlier precedent had established proportionality review and that *Rummel* had reaffirmed it.[57] The Court recognized that legislatures retain broad authority to determine appropriate punishments, and instances in which a term of imprisonment might violate the Eighth Amendment would be "exceedingly rare."[58] Nonetheless, it found that the severity of the punishment may far outweigh the gravity of the harm posed by a criminal offense.[59] It emphasized that a court must assess the culpability of the offender and the harm threatened to society from the offender's conduct.[60] Without indicating whether the distinction was a necessary condition for its holding, the Court distinguished the punishment under South Dakota law from the punishment under Texas law:[61] South Dakota provided for a true life sentence.[62] In South Dakota, the governor would have to commute an offender's sentence to a term of years before the offender could expect to be released from prison.[63] The data showed that that power was exercised infrequently.[64] The Court contrasted South Dakota's practice with Texas's liberal parole policy, which would allow an offender like Rummel to be released within twelve years.[65]

The Supreme Court returned to the issue in *Harmelin v. Michigan*.[66] There, the offender was sentenced to a term of life in prison without benefit of parole,[67] the mandatory sentence for anyone found guilty of possession of more than 650 grams of cocaine.[68] Despite being designated as the plurality opinion, Justice Scalia's opinion represented

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Amendment.

[55] S.D. CODIFIED LAWS § 22-7-8 (Michie 1979) (amended 1981); *Solem*, 463 U.S. at 281.

[56] *Solem*, 463 U.S. at 279-81. The defendant had been convicted of third-degree burglary three times, obtaining money under false pretenses, grand larceny, and driving while intoxicated. *Id.*

[57] *Id.* at 286-88.

[58] *Id.* at 289-90.

[59] *See id.* at 290.

[60] *Id.* at 292-94.

[61] *Id.* at 297.

[62] *Id.* at 282.

[63] S.D. CONST. art. IV, § 3.

[64] *Solem*, 463 U.S. at 303 n.29.

[65] *Id.* at 301-03.

[66] 501 U.S. 957 (1991).

[67] *Id.* at 961.

[68] MICH. COMP. LAWS § 333.7403(2)(a)(i) (2001).

only his and the Chief Justice's view.[69] Scalia would have overruled *Solem v. Helm* and held that, outside the area of capital sentencing, Eighth Amendment challenges are limited to the method of punishment, not to a term of imprisonment.[70]

Justice White, who dissented in *Solem*, reversed his position in *Harmelin*.[71] In addition, Justices Marshall, Blackmun, and Stevens refused to overrule *Solem*.[72] They argued that *Solem* was controlling and that the sentence before the Court violated the Eighth Amendment.[73]

Justice Kennedy, joined by Justices O'Connor and Souter, agreed that the Court should not overrule *Solem*.[74] But they voted with Justice Scalia and the Chief Justice to find that the sentence was constitutional.[75]

Later in *Andrade*, the Ninth Circuit relied on Justice Kennedy's concurring opinion in *Harmelin* as stating the current controlling legal standard, "because it is the 'position taken by those Members who concurred in the judgment [] on the narrowest grounds. . . .'"[76] That opinion reaffirmed several legal propositions, including *Solem*'s central holding that a grossly disproportionate sentence violates the Eighth Amendment.[77] The Kennedy opinion also emphasized several principles governing review of a term of imprisonment: a court must give substantial deference to legislative determinations about proper sentences; the Eighth Amendment does not adopt any particular penological theory; differences in sentencing are inevitable in a federal system; a court must look to objective factors in determining whether a sentence is disproportionate; and a court will find an Eighth Amendment violation only if a term of imprisonment is grossly disproportionate to the crime.[78]

Justice Kennedy found that *Solem* did not require an interjurisdictional and intrajurisdictional comparison of sentences in every case.[79] Instead,

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[69] Harmelin v. Michigan, 501 U.S. 957, 961 (1991).

[70] *Id.* at 965, 979.

[71] *Id.* at 1009.

[72] *Id.* at 1009, 1021, 1027.

[73] *Id.* at 1021, 1027.

[74] *Id.* at 996 (Kennedy, O'Connor & Souter, JJ., concurring). In his dissenting opinion, Justice White maintained that Justice Kennedy modified the test in *Solem*. *Id.* at 1018-19.

[75] *Id.* at 996.

[76] Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 754 (9th Cir. 2001).

[77] *Harmelin*, 501 U.S. at 996.

[78] *Id.* at 998-1000.

[79] *Id.* at 1004-05. An interjurisdictional comparison examines punishment of the same crime within various jurisdictions, whereas an intrajurisdictional comparison looks at various punishments within the same jurisdiction.

only if a comparison of the crime committed and the sentence imposed led to an inference of gross disproportionality would a court conduct the sentence comparisons.[80] Because Harmelin's crime was so serious and posed such a high risk of harm to society, he found no need to do the additional sentence comparisons.[81] But the concurring opinion made clear that *Solem* was still good law on its facts.

In addition to *Rummel, Solem,* and *Harmelin,* the Ninth Circuit's decision in *Andrade* also rested on a short opinion written by Justice Stevens in 1999. Justice Stevens had agreed that the Supreme Court should deny certiorari in *Riggs v. California,*[82] but wrote to express his views on the use of petty theft as a third strike. Under California law, petty theft, ordinarily a misdemeanor, is elevated to a felony if the offender has a prior record.[83] In turn, once Riggs' crime became a felony, he was subject to a sentence under Three Strikes.[84]

Justice Stevens found substantial the question whether Riggs' sentence violated the Eighth Amendment's prohibition against excessive sentences.[85] He raised a number of concerns: cases involving petty theft "double count" a defendant's recidivist conduct.[86] While federal courts accord deference to legislative determinations of punishment, he questioned whether California was entitled to the traditional deference because California ordinarily characterizes petty theft as a misdemeanor.[87] He also alluded to double jeopardy[88] concerns: enhanced punishment for recidivist behavior cannot be punishment for earlier crimes. The offender has already been punished for those crimes, and additional punishment for past crimes would amount to double jeopardy.[89]

Justice Stevens also intimated that Riggs' case may be controlled by *Solem v. Helm,*[90] which found a term of life imprisonment without benefit

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[80] *Id.* at 1005.

[81] *Id.* at 1004.

[82] 525 U.S. 1114, 1114 (1999).

[83] CAL. PENAL CODE § 666 (West 2002 & Supp. 2003) (stating that when person with prior conviction of petty theft who has served term of imprisonment for that conviction is subsequently convicted of petty theft, subsequent offense may be punished as either misdemeanor or felony).

[84] *Riggs,* 525 U.S. at 1114.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] U.S. CONST. amend. V.

[89] *Riggs,* 525 U.S. at 1114.

[90] 463 U.S. 277 (1983).

of parole to be excessive.[91] There, the Court put special emphasis on Helm's crime of uttering a "no account" check, a crime that involved neither violence nor threat of violence.[92] Petty theft similarly represents no threat of personal harm. In the end, Justice Stevens voted to deny the petition because neither the California Supreme Court nor lower federal courts had yet decided the question.[93]

B. *The Cases in the Ninth Circuit:* Andrade *and* Brown

In *Andrade*, the Ninth Circuit followed Justice Stevens' suggestion and found that a term of fifty years to life imposed on a recidivist whose final felony was petty theft, violated the Eighth Amendment.[94] It also held that "the California Court of Appeal unreasonably applied clearly established United States Supreme Court precedent when it held, on Andrade's direct appeal, that his sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment."[95]

The facts in *Andrade* certainly presented a difficult challenge to the Three Strikes law. As characterized by the court, Andrade was "a longtime heroin addict with a history of convictions for nonviolent offenses."[96] His record consisted of a 1982 misdemeanor theft offense, a 1983 guilty plea to three counts of residential burglary, a 1988 federal conviction for transportation of marijuana, a 1990 conviction of petty theft, a 1990 federal conviction, again for transportation of marijuana, and finally a 1991 parole violation for escape from federal prison.[97] Thus, his prior "strikes" under California's Three Strikes law were his guilty pleas to three counts of residential burglary in 1983. Andrade's third and fourth strikes resulted from two incidents in November 1995.[98] First, he stole five videotapes from a K-Mart store, worth less than eighty-five dollars. Two weeks later, he stole four videotapes worth less than seventy dollars from another K-Mart store. Store employees caught him and recovered the videotapes in both instances.[99]

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[91] *Riggs*, 525 U.S. at 1114.
[92] *Solem*, 463 U.S. at 296.
[93] *Riggs*, 525 U.S. at 1114.
[94] Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 747 (9th Cir. 2001).
[95] *Id.*
[96] *Id.* at 748.
[97] *Id.* at 748-49.
[98] *Id.* at 749.
[99] *Id.*

California law treats petty theft as a misdemeanor.[100] But a petty theft with a prior conviction is punishable either as a misdemeanor or as a felony; hence, its characterization as a "wobbler."[101] The prosecutor charged Andrade's thefts as felonies; and because he was found guilty of both counts, he was sentenced to two twenty-five-year-to-life sentences, with the minimum terms to be served consecutively.[102] As a result, Andrade's minimum term of imprisonment for two petty thefts amounted to fifty years in prison.[103] The California courts and the lower federal court denied Andrade relief.[104]

While the Ninth Circuit followed Justice Stevens' suggestion that some Three Strikes sentences may violate the Eighth Amendment, Justice Stevens' short opinion did not mention a significant procedural difference between a case in the state supreme court and one in the federal system.[105] Enacted to shorten delay between the imposition of a death sentence and its execution, and to limit the ability of federal courts to overturn state court judgments,[106] the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that a federal court may not grant the writ of habeas corpus unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States."[107] Under the AEDPA, a defendant must establish not only that the state court was wrong as a matter of federal law, but also that the Supreme Court had established clear governing legal principles and that the state court's application of those principles was unreasonable.[108] In contrast, if review is directly from the state court system, for example, by the writ of certiorari to the state supreme court, the Supreme Court may review the merits without similar deference to

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[100] CAL. PENAL CODE §§ 487-88, 490 (West 2002 & Supp. 2003).

[101] "Prosecutors have discretion to charge petty theft with a prior as either a misdemeanor or a felony, and the trial court has reviewable discretion to reduce this charge to a misdemeanor at the time of sentencing." Andrade v. Att'y Gen. of Cal. 270 F.3d 743, 749 (9th Cir. 2001) (citing People v. Superior Court (Alvarez), 928 P.2d 1171 (Cal. 1997)).

[102] *Id.*

[103] CAL. PENAL CODE § 667(c)(6), 1170.12 (a)(6) (West 2002 & Supp. 2003); *Andrade*, 270 F.3d at 749-50.

[104] *Andrade*, 270 F.3d at 750.

[105] Riggs v. California, 525 U.S. 1114, 1114 (1999).

[106] Williams v. Taylor, 529 U.S. 362, 386 (2000) (stating "[C]ongress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law").

[107] 28 U.S.C. § 2254(d)(1) (2002).

[108] Lockyer v. Andrade, 538 U.S. 63, 70-74 (2003).

the state court decision.[109]

Because the state prisoner in *Andrade* could invoke lower federal court jurisdiction only by seeking the writ of habeas corpus, the Ninth Circuit had to find not only that Andrade's sentence was grossly disproportionate, but also that the California appellate court's decision was a clear departure from clearly established Supreme Court precedent. It did so.[110] That is, it found that the California appellate court was clearly erroneous.[111] Thus, not only did it disagree with the state court's interpretation of federal law, but it also found that the lower court's interpretation was sufficiently in error to meet the heightened standard imposed in AEDPA.

The Ninth Circuit found that Andrade's criminal history brought the case within *Solem*.[112] While the court acknowledged that a state may punish a recidivist more severely than a first-time offender, it also underscored that the punishment must be for the current offense.[113] That is so because if the sentence is further punishment for the earlier crimes, the sentence would constitute double jeopardy.[114]

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[109] Ewing v. California, 538 U.S. 11, 24-26 (2003).

[110] Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 747 (9th Cir. 2001).

[111] The Supreme Court found that the Ninth Circuit's reliance on a clearly erroneous standard was in error. *Andrade*, 538 U.S. at 75-77.

[112] *Andrade*, 270 F.3d at 758.

[113] *Id.* at 759.

[114] Witte v. United States, 515 U.S. 389, 407 (1995) (Scalia, J., concurring). Scalia argued:

> Having created a right against multiple punishments *ex nihilo*, we now allow that right to be destroyed by the technique used on the petitioner here: "We do not punish you twice for the *same* offense," says the Government, "but we punish you *twice as much* for *one* offense solely because you also committed another offense, for which other offense we will also punish you. . . ."

Id. While Justice Scalia was arguing that double jeopardy does not protect against punishing the offender a second time, his argument demonstrates the difficult line between enhancing a sentence based on past conduct that does or does not violate the Double Jeopardy Clause.

Andrade's record was analogous to Helm's.[115] The present convictions of petty theft were similar to Helm's writing a bad check: the crimes were not violent, did not threaten violence, and involved small amounts of money. That Andrade was a recidivist, while relevant, did not render his sentence constitutional: his entire record, both "qualitatively and quantitatively" was comparable to Helm's.[116] Hence, the court found an inference of gross disproportionality and conducted an intrajurisdictional and interjurisdictional comparison of Andrade's sentence.[117]

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[115] *Andrade*, 270 F.3d at 761. In his brief to the Supreme Court, counsel for Andrade argued that his case was indistinguishable from *Solem*:

> [F]actual similarities between this case and *Solem v. Helm* make that case materially indistinguishable. Both Andrade and Helm were in their mid-thirties when sentenced to life in prison. *Compare Solem*, 463 U.S. at 297 n.22 (noting that Helm was 36 at sentencing), *with Andrade*, 270 F.3d at 759 (noting that Andrade was 37 at sentencing). Both had received their first felony convictions approximately 15 years earlier, each for residential burglary. *Compare Solem*, 463 U.S. at 279, 281 n.6 (Helm's first conviction was in 1964; the life sentence was imposed in 1979), *with Andrade*, 270 F.3d at 748 (first conviction in 1983, indeterminate life sentence was imposed in 1996). Both had purely non-violent prior records, principally financial and property crimes. *Compare Solem*, 463 U.S. at 279-80 (listing "six non-violent felonies"), *with Andrade*, 270 F.3d at 761 ("all of [Andrade's prior] offenses were non-violent). Both grappled with substance abuse problems. *Compare Solem*, 461 U.S. at 297 n.22 (noting Helm's alcohol addiction), *with Andrade*, 270 F.3d at 748 (describing Andrade as "a longtime heroin addict"). Both received a life sentence under state recidivist statutes for minor offenses: Helm for uttering a no-account check worth approximately $100; Andrade for shoplifting $153 worth of videotapes.

Brief of Respondent at 36-37, *Andrade*, 538 U.S. 63 (July 15, 2002), *available at* 2002 WL 1987633.

[116] *Andrade*, 270 F.3d at 761.

[117] *Id.* at 761-66. An intrajurisdictional comparison revealed that Andrade's sentence of 50 years to life is exceeded only by first-degree murder, kidnapping, train wrecking or derailing, and unlawful explosion causing death. *Id.* at 761-62. While questioning the validity of comparing Andrade's sentence to those of other recidivists, the court did not find any other published case upholding a sentence of 50 years to life in prison for a nonviolent recidivist under the Three Strikes law. *Id.* at 758-59. The court concluded that an intrajurisdictional comparison of cases supported a conclusion of gross disproportionality. *Id.* at 761-63. The Ninth Circuit then compared Andrade's sentence to the sentences of recidivists from other states and found that the offense of petty theft with a prior could qualify for recidivist sentencing in Rhode Island, West Virginia, Texas, and Louisiana. *Id.* at 763. The Ninth Circuit found that while Andrade may have received a comparable sentence in Louisiana, that alone would not make his sentence constitutional under the Eighth Amendment. *Id.* It concluded that Andrade's sentence is "so grossly disproportionate to his crime that it violates the Eighth Amendment to the United States Constitution." *Id.* at 766.

The analogy to *Solem* seems apt but for one consideration. Unlike the sentence in *Solem*, Andrade will be parole eligible.[118] *Solem* distinguished *Rummel* on the ground that Rummel would be parole eligible within a reasonable period of time.[119] At least some authority suggested that the key difference between the two holdings is that Helm faced a true life sentence while Rummel did not.[120] That distinction is examined in more detail below.[121] For the moment, the important point is how the Ninth Circuit dealt with that argument.

Andrade was sentenced to two consecutive terms of imprisonment. As a result, he must serve a minimum of fifty years in prison before he may be paroled.[122] As the court concluded, "[t]he unavailability of parole for a half century makes Andrade's sentence substantially more severe than the life sentence at issue in *Rummel*."[123] Further, his sentence is "the functional equivalent" of a true life sentence. That is based on the court's calculation that Andrade, thirty-seven years old at the time of sentencing, would be eighty-seven years old upon his release from prison. By comparison, a thirty-seven-year old American male's life expectancy is only seventy-seven years. Consequently, Andrade would likely spend the rest of his life in prison, making his sentence a de facto life sentence.[124]

The argument is intriguing and will be considered below.[125] But even if that argument is convincing, the court extended *Andrade* to two additional cases in which the offenders' minimum sentences were only twenty-five years and in which the offenders' criminal records included crimes of violence.

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[118] CAL. PENAL CODE § 667(e)(2)(A) (West 2002 & Supp. 2003).

[119] Solem v. Helm, 463 U.S. 277, 297 (1983).

[120] *See, e.g.*, Minor v. State, 451 So. 2d 433, 434 (Ala. Crim. App. 1984) (holding that 18-year sentence was not unconstitutional and did not violate spirit of *Solem*); King v. State, 451 So. 2d 765, 769 (Miss. 1984) (stating that *Solem* held Eighth Amendment prohibits life sentence without parole for seventh nonviolent felony, but does not render unconstitutional 10-year sentence for arson by defendant with prior felony convictions for aggravated assault and assault with intent to murder); State v. Dillon, 349 N.W.2d 55 (S.D. 1984) (reiterating interpretation of *Solem* as instructing consideration of "proportionality of the sentence when a life sentence without parole is imposed.").

[121] *See infra* text accompanying notes 122-24.

[122] *Andrade*, 270 F.3d at 758; *see* discussion on interpretation of good behavior credits *infra* note 564.

[123] *Andrade*, 270 F.3d at 758.

[124] *Id.* at 759.

[125] *See infra* notes 170-76, 306 and accompanying text. Andrade's briefs in the Ninth Circuit and the Supreme Court represent advocacy at its best. That should not be surprising because Professor Erwin Chemerinsky, a prominent constitutional law scholar, served as lead counsel.

Like Andrade, defendants Brown and Bray were each found guilty of theft, in separate cases, making each eligible for sentencing under Three Strikes.[126] Unlike Andrade, each was convicted of only one count of petty theft and so sentenced to a term of twenty-five years to life in prison.[127] Also unlike Andrade, each had a criminal record that included crimes of violence.

Bray's prior offenses included three robbery convictions.[128] In one of those robberies, Bray and a codefendant stole personal property from a motorist. When the driver resisted, Bray's codefendant pointed a gun at her and threatened to kill her. Even though the driver complied, the codefendant fired three shots as they left the scene. [129] In the other offense, Bray and several codefendants demanded their victim's watch. One of Bray's codefendants hit the victim and took his watch, while another kicked him in the face and took money from him after he fell to the ground.[130]

Brown's record also included violent crimes. He had a 1976 conviction for two counts of assault with a deadly weapon, and a 1984 conviction for robbery.[131]

The *Brown* court found *Andrade* indistinguishable.[132] The obvious similarity is that all three offenders were convicted of petty theft as their final strike.[133] But *Andrade* appears to have relied on both the fact that Andrade faced a minimum of fifty years in prison before he became parole eligible and that his past criminal conduct did not include any crimes of violence.[134] Not surprisingly, therefore, much of *Brown*'s reasoning attempted to explain why those differences were not meaningful.

In response to the state's argument that *Andrade* was not controlling because the minimum term of imprisonment was half as long in the cases before the court, the Ninth Circuit responded: Andrade's minimum was really just two distinct twenty-five-year-minimum terms for two distinct crimes. That he was tried for two distinct offenses at the

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[126] Brown v. Mayle, 283 F.3d 1019, 1020 (9th Cir. 2002).

[127] *Id.*

[128] *Id.* at 1022.

[129] *Id.*

[130] *Id.*

[131] *Id.* at 1023.

[132] *Id.* at 1020.

[133] *Id.* at 1028.

[134] Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 758-61 (9th Cir. 2001).

same time was merely fortuitous.[135] Further, the court found that "Bray's and Brown's sentences are *not* half as long as Andrade's. Although their *minimum* term is half as long as Andrade's *minimum* term, Bray and Brown were sentenced to indeterminate life sentences and *could* serve as long for their single petty theft convictions as Andrade will for two."[136] The court stated that "[a] combined sentence for two entirely separate offenses cannot be grossly disproportionate if each individual sentence is not grossly disproportionate."[137]

Insofar as Andrade's fifty-year minimum term was relevant because of his age at the time of his earliest release, the court recognized that Bray and Brown would be eligible for parole at much younger ages than would Andrade. Bray would be fifty-nine years old, and Brown, sixty-seven.[138] Nonetheless, the court rejected the relevance of that difference: Eighth Amendment analysis focuses on punishment for the relevant offense, not on the offender.[139] Age at the time of release would be irrelevant to the key question under *Solem*. The key question would be the offender's culpability at the time of the offense.[140] *Brown* found that *Andrade*'s argument concerning the offender's age at the time of his release simply made no sense. On that reading, had Andrade been only nineteen years old at the time of his incarceration, the sentence would be legal, surely an irrational position.[141]

The court also dismissed the significance of Bray and Brown's criminal histories, which included crimes of violence. The court characterized the difference between Andrade's and their records as "somewhat ephemeral."[142] The *Andrade* court characterized his convictions of residential burglary as "nonviolent."[143] "Nevertheless," according to the court in *Bray*, "residential burglary carries a strong potential for violence and is treated as a violent crime for other purposes, including under federal law."[144] By contrast, Bray and Brown's robberies probably would not have been characterized as violent crimes under the relevant

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[135] *Brown*, 283 F.3d at 1028.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] The emphasis on Andrade's age created other anomalies. For instance, that argument suggests that the sentence would be legal if imposed on a woman of the same age with a longer life expectancy, assumed to outlive the term of imprisonment.

[142] *Brown*, 283 F.3d at 1034.

[143] *Id.*

[144] *Id.*

California statutes when they were committed.[145] Only Brown's conviction for assault with a deadly weapon would have been a violent offense under the relevant statute.[146]

Further, the court rejected the relevance of a history of violent crime if the current conviction is nonviolent. The court identified a problem that arises in justifying an enhanced sentence when an offender commits a second crime similar to his first crime.[147] If punishment is for an offender's conduct, what justifies treating two offenders differently, one who is found guilty for the first time, the other, for a second time? The traditional answer seems to be that a person who commits a second violent offense shows that he cannot curb his impulses and no longer deserves the benefit of the doubt about his capacity to reform.[148] Society is not punishing him for past conduct but out of a need to protect against his future violence. Hence, the punishment does not run afoul of the Double Jeopardy Clause.[149] By contrast, according to *Brown*, that justification for enhanced punishment is not available if an offender's current offense is for a nonviolent crime. Instead, the punishment appears to be for the past violent conduct.[150] Or as stated by the court, if the connection between the present crime and the past crimes "is lost, then the Double Jeopardy concerns reemerge."[151]

Thus, an attempt to distinguish *Andrade* by focusing on Bray and Brown's past criminal records reveals the double jeopardy problem. Distinguishing the cases on that basis would mean that "we would be punishing Bray and Brown as nonviolent lawbreakers who were violent in the past.... [T]he sentence would necessarily be 'an additional penalty for their earlier [violent] crimes,' for which Bray and Brown have already been punished."[152] Absent a meaningful distinction between the cases, the court concluded that *Andrade* was controlling and that Bray and Brown's sentences were disproportionate.[153]

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[145] *Id.* at 1034-35.

[146] *Id.* at 1035.

[147] *Id.*

[148] *See infra* notes 436-40 and accompanying text.

[149] *Brown*, 283 F.3d at 1035.

[150] "[L]egislators may constitutionally conclude that 'one who proves, by a second or third conviction, that the former punishment has been inefficacious in doing the work of reform for which it was designed' 'has evidenced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offence.'" *Id.* at 1035 (quoting Moore v. Missouri, 159 U.S. 673, 677 (1895)).

[151] *Id.* at 1036.

[152] *Id.* at 1037.

[153] *Id.* Finding *Brown* indistinguishable from *Andrade*, the court implicitly relies upon

C. *Overruling* Andrade *and Some Questions About* Brown

As a matter of sound penology, much of what the Ninth Circuit said in *Andrade* and *Brown* makes sense.[154] But the court was not writing on a clean slate. Under AEDPA, the court had to find that the state court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[155] The Supreme Court gave short shrift to the Ninth Circuit's opinion in *Andrade*.[156] After focusing on that opinion, this section reviews additional concerns about the Ninth Circuit opinions.[157] Examination of those decisions demonstrates the court's result-orientation.

While a narrow majority overturned the Ninth Circuit's decision in *Andrade*, the majority opinion is straightforward.[158] It disagreed with the Ninth Circuit's two-step approach, whereby the court first reviewed the state court decision de novo and then reviewed the reasonableness of the state court's application of federal law.[159] Instead, the Court decided the case "solely on whether § 2254(d) forecloses habeas relief on Andrade's Eighth Amendment claim."[160]

The Court reviewed the three holdings relied on by the Ninth Circuit and found that "this area has not been a model of clarity."[161] Given the close majorities in those three cases and the lack of a majority opinion in *Harmelin*, the Court's conclusion is not surprising: the only clearly established principle is that a sentence violates the Eighth Amendment only if it is grossly disproportionate, but that the "contours of [that principle] are unclear, applicable only in the 'exceedingly rare' and 'extreme' case."[162]

It then reviewed the state appellate court decision. It did so, not for clear error, as had the Ninth Circuit, but only to determine whether the

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the *Andrade* court's analysis of the interjurisdictional and intrajurisdictional comparisons of sentencing to find Brown and Bray's sentences grossly disproportionate.

[154] *See* discussion *infra* notes 197-205 and 431-39.

[155] 28 U.S.C. § 2254(d)(1) (2002).

[156] *See* Lockyer v. Andrade, 538 U.S. 63, 71 (2003).

[157] *See* discussion *infra* notes 168-97.

[158] As with *Rummel* and *Solem*, *Andrade* was decided by a 5-4 majority. Like *Harmelin*, *Ewing* produced no majority, but as with the other proportionality cases, the Court split 5-4 on the question of the legality of the sentence. *Andrade*, 538 U.S. at 64-66.

[159] *Id.* at 71-72.

[160] *Id.*

[161] *Id.* at 72.

[162] *Id* at 73.

state court opinion was objectively unreasonable.[163] The standard of review mattered because the Supreme Court's standard "requires the state court decision to be more than incorrect or erroneous."[164] Because the Court found that the facts in *Andrade* fell between those of *Rummel* and *Solem*, the case was "not materially indistinguishable from either."[165]

Andrade may have been sound as a matter of first impression, but it glossed over numerous questions concerning which Supreme Court precedent did not provide clear guidance. Under the AEDPA, if a case is a matter of first impression, the federal district court should not issue the writ of habeas corpus because the state court had no clearly established Supreme Court precedent to follow.[166] In a case like *Andrade*, such a result may be unfair but as long as the AEDPA is the law and

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[163] *Id.* at 74-75.

[164] *Id.*

[165] *Id.* at 74 n.1. As noted by the Court:

> Justice Souter argues that the possibility of Andrade's receiving parole in 50 years makes this case similar to the facts in *Solem v. Helm*, 463 U.S. 277 (1983). *Post*, at 1176 (dissenting opinion). Andrade's sentence, however, is also similar to the facts in *Rummel v. Estelle*, 445 U.S. 263 (1980), a case that is also "controlling." *Post*, at 1176. "Given the lack of clarity of our precedents in *Solem*, *Rummel*, and *Harmelin v. Michigan*, 501 U.S. 957 (1991), we cannot say that the state court's affirmance of two sentences of 25 years to life in prison was contrary to our clearly established precedent."

Id. The Ninth Circuit also glossed over other questions not clearly settled by the Supreme Court. The analogy between *Andrade* and *Solem* worked because Andrade's minimum sentence was 50 years, making his sentence a *de facto* life sentence. Of what relevance is the fact that his sentence consisted of two shorter minima for two unrelated crimes? For example, what if an offender committed a series of petty offenses over a several year period, resulting in a series of terms of imprisonment?

Whether a state may stack sentences in a way that violates the Constitution is an interesting question. The last time that the Supreme Court considered a similar question was in 1892. O'Neil v. Vermont, 144 U.S. 323 (1892). In *O'Neil*, the defendant was charged with 307 offenses of selling liquor illegally. *Id.* at 325. Because this was O'Neil's second offense, his sentence under the state's recidivist law required that he be fined twice as much for each offense as a single conviction would warrant and that he also be imprisoned for one month. *Id.* at 326-27. If he was unable to pay the substantial fine by the end of his one-month imprisonment, his sentence was to be more than 54 years at hard labor. *Id.* The Court declined to decide whether O'Neil's sentence violated the Eighth Amendment because it held the Eighth Amendment was inapplicable to the states. *Id.* at 331-32.

[166] "Thus, a district court evaluating a habeas petition under [the AEDPA] should 'survey the legal landscape' at the time the state court adjudicated the petitioner's claim to determine the applicable Supreme Court authority; the law is 'clearly established' if Supreme Court precedent would have compelled a particular result in the case." Neelley v. Nagle, 138 F.3d 917, 923 (11th Cir. 1998). "In the absence of a definitive, contrary Supreme Court ruling on this issue, it would appear that district courts must look directly to the law as established by the Supreme Court." Sellan v. Kuhlman, 63 F. Supp. 2d 262, 271 (E.D.N.Y. 1999).

constitutional,[167] the Ninth Circuit had to stretch to reach its result.

Brown presents a different set of problems and demonstrates the Ninth Circuit's result-orientation even more clearly than does *Andrade.* Because Brown and Bray faced only twenty-five-year-minimum sentences that would allow their release from prison within normal life expectancy, the court had to deal with *Andrade*'s emphasis on the fifty-year-minimum sentence, that would prevent the prisoner's release within his normal life expectancy. One problem arises from *Brown*'s characterization of *Andrade*'s emphasis on the fact that Andrade received a fifty-year minimum sentence. The *Brown* court insisted that the state misunderstood what the earlier panel meant when it focused on the fifty-year-minimum sentence.[168] The *Brown* court asserted that "Bray's and Brown's sentences are *not* half as long as Andrade's" because they could serve a longer period than Andrade, depending on whether they earn release after twenty-five years.[169] Release is not guaranteed. Further, the *Brown* court pointed out the anomalous result that would follow if *Andrade* had meant to focus on the offender's age at the time of his release. For example, were the offender receiving the fifty-year sentence at nineteen years old, instead of at thirty-seven, the sentence would become constitutional, an indefensible result.[170] All *Andrade* really meant, the Brown court concluded, was that fifty years for two counts of theft (or even twenty-five years for one count) is extremely long.[171]

No doubt, relying on Andrade's age at the time of his release creates difficulties for the court. Apart from the example of the nineteen-year-old felon, other examples come to mind: had a woman with Andrade's criminal record, but a longer life expectancy, received the same sentence, would her sentence be constitutional, whereas a man's would not?[172] Or would a two- or three-year sentence for an eighty-five-year-old man who could not be expected to survive the sentence be excessive?[173] While

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[167] At least one commentator has suggested that allowing district courts to follow other than circuit precedent is not constitutional. Evan Tsen Lee, *Section 2254(D) of the New Habeas Statute: An (Opinionated) User's Manual,* 51 VAND. L. REV. 103, 131-36 (1998). The constitutional soundness of this system of review has also been questioned in federal court. Lindh v. Murphy, 96 F.3d 856, 885-87 (7th Cir. 1996) (Ripple, J., dissenting).

[168] Brown v. Mayle, 283 F.3d 1019, 1028-29 (9th Cir. 2002).

[169] *Id.* at 1028.

[170] *Id.* at 1028-29.

[171] *Id.* at 1029.

[172] NATL. CTR. FOR HEALTH STATISTICS, CTR. FOR DISEASE CONTROL AND PREVENTION, 49 NAT'L VITAL STAT. REP., NO. 12 (2000) (finding women have average life expectancy of 79.5 years, whereas men have average life expectancy of 74.1 years).

[173] *See* People v. Krauss, 2001 Cal. App. Unpub. LEXIS 1246, at *37-38 (2001).

those examples suggest a problem with reliance on an offender's age upon his release, in context, the *Andrade* court did rely on the offender's age at the time of his release and needed to do so.

The *Andrade* court had to bring the case within *Solem v. Helm*, for it was the only way for the court to assert that the case came within settled precedent. To do so, the court had to show that the sentence was equivalent to that in *Solem*, a true life sentence, not just a very long sentence. *Andrade* was able to do so because of Andrade's age.[174] While *Brown*'s assertion that the earlier panel did not rely on the offender's age at the time of release makes sense,[175] it proved too much. If *Andrade* merely meant to emphasize that the offender's sentence was very long for petty theft, the court then had less, if any, settled precedent that the state court got wrong.[176]

The second problem with *Brown*'s analysis was that both Bray and Brown faced minimum terms of twenty-five years in prison.[177] The court's insistence that it could ignore the statutory minimum and focus on the possibility of longer incarceration may be sensible, but again, that position lacked clear support in the Supreme Court case law. Justice Kennedy's concurring opinion in *Harmelin* treated both *Rummel* and

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[174] Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 759 (9th Cir. 2001).

[175] *Brown*, 283 F.3d at 1028-29.

[176] Fifty years seems like a very long prison sentence for two theft offenses, especially in light of California's sentencing scheme, whereby most petty thieves are treated as misdemeanants. CAL. PENAL CODE §§ 487-488, 490 (West 2004). But that only begs another question: would the Supreme Court find that a very long sentence for relatively trivial conduct is unconstitutional because the punishment is excessive? Certainly, the Court might so hold. Except for *Weems v. United States*, 217 U.S. 349 (1910), it has never done so in a case in which the offender remained eligible for parole. *Weems* may have turned on the nature of the punishment, *cadena temporal*, not on the fact that the prisoner received a 15-year term of imprisonment for a fairly minor crime. *Id.* at 357-58. The Court insisted in *Solem v. Helm*, 463 U.S. 277 (1983), and more recently in *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring), that courts must give deference to legislative determinations concerning the length of punishment and that sentences are unconstitutional only if they are grossly disproportionate. Mere disagreement about the appropriate length of a criminal sentence does not appear to satisfy the Court's standard for finding a sentence unconstitutional. *Id.* In addition, in *Hutto v. Davis*, 454 U.S. 370 (1982), the Court summarily reversed the lower court and held that the imposition of a sentence of 40 years (two 20-year terms to run consecutively) for possession of marijuana with an intent to distribute and possession of marijuana did not violate the Eighth Amendment. The Court did cite evidence in the record that the offender was a drug dealer and supplied drugs to the wife of a fellow inmate, a woman with a small child. *Id.* at 372 n.1. But the Court upheld the sentence despite a letter from the local prosecutor arguing in favor of reducing the sentence. *Id.* at 377-78 . A court might have been able to distinguish *Hutto*, but some questions are not clearly settled by existing Supreme Court precedent.

[177] *Brown*, 283 F.3d at 1020.

Solem as good law.[178] As a result, *Brown*'s conclusion was troubling. Rummel faced a possible sentence of life in prison if he did not make parole.[179] The Court rejected speculation about the possibility that the offender would have to serve his maximum term. *Rummel* emphasized that the offender would be eligible for parole in as little as twelve years.[180] Hence, *Brown* was on weak ground when it ignored the possibility that Bray and Brown would secure early release.

In addition, once *Rummel* refused to treat the offender's sentence as a true life sentence, it also refused to find, in effect, that a term of imprisonment of twelve years was excessive for someone with Rummel's record.[181] While twenty-five years in prison for petty theft seems extreme, is twenty-five years grossly excessive for petty theft? I think so. Many of us would. But based on what clear statement of federal law? If twelve years is not excessive for a felon like Rummel, why would twenty-five years be excessive for Bray and Brown? No Supreme Court case has explained how that kind of subtle distinction could be made.[182]

Brown's analysis raised a third problem. The Ninth Circuit had to deal with two offenders whose criminal records included significant prior violent acts.[183] It tried to diminish the significant differences between Andrade's record and Bray and Brown's. It argued that Andrade's burglary might have turned violent.[184] In addition to finding that Bray and Brown's robberies were not considered violent offenses at the time

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[178] *Harmelin*, 501 U.S. 957, 996 (Kennedy, J., concurring).

[179] TEX. PENAL CODE ANN. § 12.42(d) (2004).

[180] Rummel v. Estelle, 445 U.S. 263, 280-81 (1980).

[181] The Court did not state as much explicitly, but that is obviously implicit in its holding that his sentence did not violate the Eighth Amendment. *Id.* at 285.

[182] Some courts have made those kinds of subtle discriminations. *See, e.g.*, Thomas v. State, 634 A.2d (Md. 1993) (holding that 20-year sentence imposed on husband for slapping his wife was excessive). The Supreme Court has not addressed that kind of question. On a separate point, the Ninth Circuit found that the facts of *Andrade* brought it squarely within *Solem*, and so did not need to spend much effort distinguishing the case from *Rummel*. Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 766 (9th Cir. 2001). *Rummel* might well be distinguishable from cases arising under Three Strikes. In *Rummel*, the Court relied on the fact that Texas liberally granted parole to offenders serving indeterminate life sentences. 445 U.S. 263, 281-82. By contrast, we simply do not know how California will administer Three Strikes sentences. California may routinely release Three Strikes offenders once they serve their minimum sentence. But it may not. *Cf. In re* Lynch, 503 P.2d 921 (Cal. 1972). Thus under Three Strikes, offenders may end up serving true life sentences. If that is the case, then a case like *Andrade* would come squarely within *Solem*. By the time we know how California will treat Three Strikes offenders, they may be out of procedural options: habeas corpus petitions may be untimely under the AEDPA. 28 U.S.C. § 2254(d)(1) (2002).

[183] *See supra* notes 128-31 and accompanying text.

[184] Brown v. Mayle, 283 F.3d 1019, 1034 (9th Cir. 2002).

they were committed,[185] the court had to deal with Brown's prior conviction for assault with a deadly weapon, a violent offense under any circumstances.[186] Faced with Brown's record of violence, the court focused only on the current felony and assessed whether a recidivist now found guilty of a petty theft could be sentenced to twenty-five years to life.[187] *Brown*'s treatment of Andrade's prior burglary conviction, and its treatment of prior acts of violence, pose analytical problems.

On the question of Andrade's prior conviction for burglary, the Ninth Circuit was arguing, in effect, that Supreme Court precedent overlooks an offender's past violent acts to focus on the current offense. But the court's only authority[188] was not on point. While the cited case states that burglary can be characterized as a violent offense because of its potential for violence, the cited case did not involve proportionality.[189] *Brown* ignored *Solem*'s treatment of Helm's criminal record, which included prior convictions for burglary and drunk driving. The dissent argued that four of Helm's crimes could not be considered nonviolent: "At the very least, [Helm's] burglaries and his third-offense drunk driving posed real risk of serious harm to others."[190] But the majority rejected that reasoning and insisted that Helm's record was nonviolent.[191] The Court's treatment of Helm's record is not only inconsistent with *Brown*'s assertion that a residential burglary is a crime of violence (and, therefore, Andrade's and Bray and Brown's prior records were indistinguishable); it also raises the question of whether *Solem* turned on Helm's record of committing only nonviolent offenses.

Solem did not state explicitly that its holding would apply only in an instance in which a recidivist's past felonies were nonviolent, but the Court relied on that fact in justifying its result.[192] At a minimum, whether a record of nonviolence is a necessary condition for a finding of disproportionality is an open question. *Solem* might be read as making a nonviolent record an important factor, if not a necessary condition; in either case, *Solem* suggested that an offender's violence or nonviolence is relevant to its proportionality analysis.[193] *Brown* ignored *Solem*'s

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[185] *Id.*

[186] *Id.* at 1035.

[187] *Id.*

[188] Taylor v. United States, 495 U.S. 575 (1990).

[189] *Id.* at 596-98.

[190] Solem v. Helm, 463 U.S. 277, 315-16 (1983).

[191] *Id.* at 296-97.

[192] *Id.* at 277.

[193] *Id.* at 296 (finding that "Helm's crime was 'one of the most passive felonies a person

discussion, the closest Supreme Court precedent on the relevant point, with implications directly contrary to *Brown*'s assertion.

Brown also concluded that the necessary focus is on the offender's last felony.[194] To do otherwise would run afoul of double jeopardy because of the real possibility that the enhanced sentence would be for past, violent offenses.[195] Here, the Ninth Circuit's position makes a great deal of sense and was consistent with much of the criticism of recidivist statutes.[196] But the problem again was that Supreme Court precedent did not support this position and certainly Supreme Court case law did not clearly settle the issue as the Ninth Circuit would.

Recidivist statutes that enhance punishment for a current offense based on past crimes raise analytical and ethical problems.[197] Supreme Court case law makes clear that an enhanced sentence violates double jeopardy if the punishment is for past conduct. At the same time, a state or Congress may take recidivism into consideration when determining a sentence for an offender's current offense.[198] While Justice Scalia takes a narrow view of the Double Jeopardy Clause, he has summarized the analytical problem that these two lines of cases create:

> Having created a right against multiple punishments *ex nihilo*, we now allow that right to be destroyed by the technique used on the petitioner here: "We do not punish you twice for the *same* offense," says the Government, "but we punish you *twice as much* for *one* offense solely because you also committed another offense, for which other offense we will also punish you. . . ."[199]

Justice Scalia's observations invite consideration of how a legislature might justify enhancing punishment based on an offender's past criminal record so that it is not a second punishment for the earlier offense.

Brown suggests some of the ways in which one might justify the enhanced punishment. For example, if an offender has committed violent crimes in the past and now commits an additional violent crime, enhanced punishment may be necessary because the offender has demonstrated that he cannot control his violent temperament. The

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could commit' [and] it involved neither violence not threat of violence to any person.").

[194] Brown v. Mayle, 283 F.3d 1019, 1036 (9th Cir. 2002).

[195] *Id.*

[196] *See infra* notes 197-205 and accompanying text.

[197] *See* discussion *infra* Part III.

[198] Witte v. United States, 515 U.S. 389, 403-04 (1995).

[199] *Id.* at 407 (Scalia, J., concurring) (arguing that double jeopardy applies only to retrial and not to sentencing twice for same offense).

longer sentence is not punitive, but necessary for the protection of society.[200] Thus, a statutory scheme may allow for a minimum sentence of five years for aggravated battery[201] and a maximum sentence of ten years. A judge may sentence the offender to five years for his first offense, showing forbearance with the hope that incarceration will deter the offender in the future.[202] The offender's second conviction for violence is a demonstration that the earlier hope was wrong, justifying the stiffened punishment today.[203] That justification no longer applies if the offender's current offense, as in *Brown*, is nonviolent.[204] The offender may well have learned his lesson about committing violent acts; and while he still is a criminal offender, he no longer represents the same serious threat to society. If his punishment for a current nonviolent offense is based on a record of past violence, the enhanced punishment starts to look like punishment for his violent past, creating double jeopardy considerations.[205]

While the Ninth Circuit's analysis finds ample support in scholarly literature critical of Three Strikes and recidivist statutes in general,[206] it lacks clear support in Supreme Court case law. That is evidenced by the cases that *Brown* cited in its discussion of this point. None is directly on point.[207] *Brown*'s citation of *Riggs* is illustrative: the citation is to Justice

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[200] Brown v. Mayle, 283 F.3d 1019, 1026 (9th Cir. 2002) (citing Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 759 (9th Cir. 2001)).

[201] For example, in California, "any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years." CAL. PENAL CODE § 245(b) (West 2002).

[202] In California, where a criminal statute sets forth three possible terms of imprisonment, the middle term is presumed unless a showing can be made to justify mitigating or enhancing that sentence. CAL. PENAL CODE § 1170(b) (West 2002). The judge may chose the lesser sentence, if the facts supporting mitigation outweigh those supporting enhancement. CAL. R. OF CT. 4.420(b) (West 2002). Factors justifying enhancement include prior convictions. *Id.* at 4.421.

[203] The Ninth Circuit's argument finds support in the scholarly literature dealing with punishment. See discussion *infra* notes 431-39.

[204] *Brown*, 283 F.3d at 1020; *see also* discussion *infra* notes 431-39.

[205] *Brown*, 283 F.3d at 1038.

[206] *See infra* notes 431-39 and accompanying text.

[207] Witte v. United States, 515 U.S. 389, 395-406 (1995) (holding that because consideration of relevant conduct in determining defendant's sentence within legislatively authorized punishment range does not constitute punishment for that conduct within meaning of Double Jeopardy Clause, prosecution did not violate prohibition against multiple punishments); Gryger v. Burke, 334 U.S. 728, 732 (1948) (explaining that enhanced sentence for recidivist is not viewed as new jeopardy or additional penalty, rather "[i]t is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." However, it is not clear whether it is necessary to view offense as aggravated one.); *Ex Parte* Lange, 85 U.S. 163, 164 (1873) (finding that Constitution

Stevens' memorandum opinion suggesting that a Three Strikes sentence, with the third strike consisting of a petty felony, *may* violate the Constitution.[208] Counting Justice Breyer who would have granted certiorari, Justice Stevens' position was the view of only four justices.[209]

Elsewhere, the Supreme Court authorized consideration of an offender's criminal past, despite its distinct holdings that punishing an offender for prior crimes is a violation of double jeopardy. Thus, in *Rummel*, the Court recognized a state interest in recidivist statutes.[210] The state has an interest in "dealing in a harsher manner with those who, by repeated criminal acts, have shown that they are simply incapable of conforming to the norms of society as established by its criminal law."[211] Unlike the Ninth Circuit, the *Rummel* Court did not focus on whether the past and present crimes were similar. The Court has emphasized that sentencing judges have wide discretion in "the sources and types of evidence used to assist [the judge] in determining the kind and extent of punishment to be imposed within limits fixed by law."[212] It upheld the authority of courts to consider "offender-specific" information in fixing individualized sentences without violating double jeopardy.[213] Those cases did not make the fine distinction relied on by the Ninth Circuit.

The Supreme Court's statements about double jeopardy and sentence enhancements are inconsistent.[214] Perhaps *Brown*'s resolution of the question, which would allow consideration of past crimes only if they are similar to the current offense, would bring greater coherence to the area of the law. But, again because of the constraints imposed by AEDPA, the Ninth Circuit was not free to resolve the case in light of its best understanding of the law. The law constrained it from deciding in favor of the prisoners unless they demonstrated that the state court decisions were in violation of clear Supreme Court precedent.[215]

This section has argued that *Andrade* and *Brown* had to resolve a number of issues that the Supreme Court has not resolved or has

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prevents offender from being punished twice for same offense, as well as being tried twice for one offense).

[208] Riggs v. California, 525 U.S. 1114 (1999) (Stevens, J., memorandum opinion respecting denial of petition for writ of certiorari).

[209] *Id.* (Breyer, J., dissenting); *see also* Durden v. California, 531 U.S. 1184 (2001) (Souter, J., dissenting) (urging Court to review constitutionality of California's Three Strikes law).

[210] Rummel v. Estelle, 445 U.S. 263, 276 (1980).

[211] *Id.*

[212] *Witte*, 515 U.S. at 397-98 (quoting Williams v. New York, 337 U.S. 241, 246 (1949)).

[213] *Id.* at 399.

[214] *Id.* at 406-07 (Scalia, J., concurring).

[215] 28 U.S.C. § 2254(d)(1) (2004).

resolved implicitly contrary to the Ninth Circuit's holdings. Hence, the Ninth Circuit went beyond existing law in reaching its decisions. Motivation for the court's decisions is not hard to find. Sentences like those in *Andrade* and *Brown* just feel wrong from many different perspectives.[216] In addition, federal courts may experience frustration with the severe limitations placed upon them by the AEDPA; the law forces them to ignore what may be an unjust result because the statute requires deference to state courts. Further, it prevents federal courts from shaping the law via the writ of habeas corpus. But that only underscores the fact that the Ninth Circuit's decisions were highly result-oriented, without clear precedent for their holdings.

II. THE CALIFORNIA SUPREME COURT'S CRUEL OR UNUSUAL PUNISHMENT CASE LAW AND THE STATE APPELLATE COURTS' VIEW OF THREE STRIKES SENTENCES

Shortly after Three Strikes became law, a number of state trial courts found that some of the more extreme Three Strikes sentences violated California's prohibition against cruel or unusual punishment.[217] But California's appellate courts have been unanimous in their hostility to claims that Three Strikes sentences are unconstitutional.[218] Whether the trial or appellate courts were correct requires review of several of those cases, followed by an examination of the leading state supreme court cases on the issue. Unlike the United States Supreme Court case law, the California Supreme Court cases are numerous and address many of the questions unresolved by the federal case law. This section concludes that the state appellate courts have not dealt fairly with controlling precedent. Like the Ninth Circuit decisions, the state appellate court decisions were result-oriented, in contravention of settled state precedent.

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[216] *See infra* notes 431-44 and accompanying text.

[217] *E.g.*, People v. Smith, 58 Cal. Rptr. 2d 9 (Ct. App. 1996); People v. Drew, 47 Cal. Rptr. 2d 319 (Ct. App. 1995); People v. Patton, 46 Cal. Rptr. 2d 702 (Ct. App. 1995); People v. Superior Court (Missamore), 45 Cal. Rptr. 2d 392 (Ct. App. 1995); People v. Gore, 44 Cal. Rptr. 2d 244 (Ct. App. 1995); People v. Bailey, 44 Cal. Rptr. 2d 205 (Ct. App. 1995).

[218] *E.g.*, *Drew*, 47 Cal. Rptr. 2d at 319; *Patton*, 46 Cal. Rptr. 2d at 702; *Missamore*, 45 Cal. Rptr. 2d at 392; *Gore*, 44 Cal. Rptr. 2d at 244; *Bailey*, 44 Cal. Rptr. 2d at 205.

A. The Cases in the State Appellate Courts

Defendants challenged their third-strike sentences in a wide variety of cases. In a few cases, defendants charged with numerous violent crimes simply made implausible claims that their sentences violated the state constitution.[219] But state appellate courts dealt with a number of cases that followed this pattern: defendant's prior strikes included residential burglary or other qualifying strikes that, because of the manner in which they were committed, led the trial court to discount the seriousness of the offense.[220] More importantly, those cases involved a third strike that was not a serious or violent felony as those crimes are defined in the Three Strikes law.[221] In some instances, the cases involved aging felons whose criminal career appeared to be winding down.[222] Despite strong arguments to the contrary, the appellate courts uniformly rejected claims that Three Strikes sentences violated the state constitutional guarantee against cruel or unusual punishment.

People v. Superior Court (Romero) made headlines when the state supreme court held that a trial court has discretion to strike prior felonies on its own motion.[223] But defendant Romero also challenged his sentence as excessive in violation of the state constitution.[224] Romero had only two qualifying strikes and both involved residential burglary, one an attempted burglary. Both convictions were from the mid-1980s. His third strike was felony possession of cocaine (.13 grams of rock cocaine).[225] The trial court found that a sentence of twenty-five years to life constituted excessive punishment and imposed the maximum sentence of three years, plus one additional year for each of his prior prison terms.[226] His record included no crimes of violence; his qualifying

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[219] People v. Cartwright, 46 Cal. Rptr. 2d 351, 357 (Ct. App. 1995) (upholding sentence of 428 years to life for rape).

[220] *Patton*, 46 Cal. Rptr. 2d at 705 (modifying Three Strikes sentence to 25 years to life when trial court sentenced Patton to more lenient nine years to life because his prior offenses did not "arouse violence"); *Gore*, 44 Cal. Rptr. 2d at 246 (reversing lower court's decision to strike prior felony conviction "in furtherance of justice"); People v. Superior Court (Romero), 37 Cal. Rptr. 2d 364, 383 (Ct. App. 1995) (reversing trial court's order to strike prior felony).

[221] CAL. PENAL CODE § 667(b) (West 2004).

[222] Brown v. Mayle, 283 F.3d 1019, 1028 (9th Cir. 2001) (receiving enhanced Three Strikes sentence at age of 34); Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 750 (9th Cir. 2001) (receiving enhanced Three Strikes sentence at age of 37); *Romero*, 37 Cal. Rptr. 2d at 380 (receiving enhanced Three Strikes sentence at age of 32).

[223] People v. Superior Court (Romero), 917 P.2d 628, 629-30 (Cal. 1996).

[224] *Romero*, 37 Cal. Rptr. 2d at 371.

[225] *Id.*

[226] *Id.*

strikes were from the previous decade; his current felony was for a relatively minor drug offense; and Romero was an aging felon, past the peak years for most felons.[227]

In addition to the drug cases, state appellate courts routinely upheld sentences like those imposed in *Andrade*. While that case is discussed in more detail above,[228] its facts are typical of another set of cases in which state appellate courts have found no violation of the state constitution. Andrade was never convicted of a crime of violence. While Andrade had other convictions, only his 1983 guilty plea to three counts of residential burglary made him eligible for a sentence of twenty-five years to life under Three Strikes.[229] Andrade, also an aging felon with a history of drug abuse, committed petty theft as his final strikes.[230]

The appellate courts' analysis has quoted selectively from *People v. Wingo*, stating that sentencing is intrinsically a legislative function and that the "validity of enactments will not be questioned 'unless their unconstitutionality clearly, positively, and unmistakably appears.'"[231] The appellate courts have also cited *In re Lynch* for the proposition that sentences are unconstitutionally disproportionate only if they shock the conscience and offend fundamental notions of human dignity.[232] In addition, they underscore that fitting a proper penalty to particular criminal conduct is "not an exact science, but a legislative skill" that involves several relevant policy considerations and consideration of popular will.

In their analyses of the facts before them, the appellate courts have consistently faulted the trial courts for focusing on the third strike, rather than on the offender's entire criminal record.[233] The courts have emphasized that California case law, in addition to *Rummel*, has held that recidivism justifies the imposition of longer sentences than would otherwise be imposed for the current offense.[234] In reliance on *Rummel*,

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[227] *Id.*

[228] *See* discussion *supra* notes 97-111.

[229] Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 749 (9th Cir. 2001).

[230] *Id.*

[231] People v. Wingo, 534 P.2d 1001, 1006 (Cal. 1975); People v. Drew, 47 Cal. Rptr. 2d 319, 322 (Ct. App. 1995); People v. Gore, 44 Cal. Rptr. 2d 244, 251 (Ct. App. 1995); People v. Bailey, 44 Cal. Rptr. 2d 205, 215 (Ct. App. 1995).

[232] *In re* Lynch, 8 Cal. 3d 410 (1972); *Drew*, 47 Cal. Rptr. 2d at 322; People v. Patton, 46 Cal. Rptr. 2d 702, 705 (Ct. App. 1995); People v. Superior Court (Missamore), 45 Cal. Rptr. 2d 392, 398 n.8 (Ct. App. 1995); *Gore*, 44 Cal. Rptr. 2d at 251; *Bailey*, 44 Cal. Rptr. 2d at 215.

[233] *Drew*, 47 Cal. Rptr. 2d at 323; *Patton*, 46 Cal. Rptr. 2d at 712; *Bailey*, 44 Cal. Rptr. 2d at 216.

[234] *Drew*, 47 Cal. Rptr. 2d at 323; *Patton*, 46 Cal. Rptr. 2d at 710; *Missamore*, 45 Cal. Rptr.

they have asserted that an offender's long sentence is based, in part, on "the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes."[235]

Typical of this line of cases is the decision of the Fourth District Court of Appeal in *Romero*: "Romero is subjected to a life sentence under the 'three strikes' legislation based on his current felony and his previous convictions for burglary and attempted residential burglary."[236] The courts have rejected litigants' efforts to reduce the seriousness of residential burglary by arguing that it is "a crime that has a tremendous potential for injury or even death."[237] In applying *Lynch*'s factors, courts have found that three strike defendants' records, even where the crimes were related to drug addiction and where the two prior strikes occurred over time, is an aggravating factor.[238] Again, the *Romero* decision is typical: "For at least the last fifteen years, Romero has continually preyed upon society. . . . He is an addict who finances his habit by theft and burglary."[239]

Some of the appellate court decisions have rejected the relevance of the second and third prongs of the *Lynch* test on the ground that they are optional if the offender cannot prevail on the first prong, which focuses on his culpability.[240] The decisions that have done the analysis under the second and third prongs found neither favor the defendant. *Romero*, for example, dismissed the second prong, the intrajurisdictional comparison, by stating that recidivism statutes have long been upheld in California. It noted that first degree murderers with a prior first or second degree murder conviction would be eligible for the death penalty.[241] Finally, in comparing the sentence under Three Strikes with recidivists in other states, the courts have concluded that "a review of statutes from other states demonstrates punishment for habitual criminals similar to that imposed by the 'three strikes' legislation is not uncommon."[242] Further,

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2d at 403.

[235] *See* cases cited *supra* note 234.

[236] People v. Superior Court (Romero), 37 Cal. Rptr. 2d 364, 379 (Ct. App. 1995).

[237] People v. Ingram, 48 Cal. Rptr. 2d 256, 267 (Ct. App. 1995); *Patton*, 46 Cal. Rptr. 2d at 712; *Romero*, 37 Cal. Rptr. 2d at 379.

[238] *Romero*, 37 Cal. Rptr. 2d at 379-81.

[239] *Id.* at 380.

[240] *Id.* at 379; People v. Young, 15 Cal. Rptr. 2d 30, 35-37 (Ct. App. 1992); People v. Weddle, 2 Cal. Rptr. 2d 714, 719-20 (Ct. App. 1991).

[241] *Romero*, 37 Cal. Rptr. 2d at 380; *see also Patton*, 46 Cal. Rptr. 2d at 713.

[242] *Romero*, 37 Cal. Rptr. 2d at 380; *see also* People v. Campos, 45 Cal. Rptr. 2d 706, 724 (Ct. App. 1995) (stating that at least 40 other jurisdictions have recidivist statutes similar to California's).

they rely on the fact that the Supreme Court upheld a life sentence for a recidivist in *Rummel*.[243] Other appellate courts have questioned whether intra- and interjurisdictional comparisons lead to objective assessment of the excessiveness of an offender's punishment.[244] Finally, according to the Fourth District Court of Appeal, California's scheme "appears to be part of a nationwide pattern of recidivist statutes calling for substantially increased sentences for habitual offenders."[245] Some courts have emphasized that Three Strikes reflects a change in penal philosophy, which now relies more heavily on deterrence and incapacitation.[246]

Shortly after the Ninth Circuit's decision in *Andrade*, but before the Supreme Court's reversal, the Fourth District Court of Appeal again rejected a claim that an offender's Three Strikes sentence was excessive.[247] It gave little attention to the challenge under California law and observed that California courts have consistently rejected such claims.[248] It found *Andrade* and *Brown* unpersuasive. The California court disagreed with the Ninth Circuit in its application of federal law and rejected what it called the Ninth Circuit's subjective determination that a life term under Three Strikes was grossly disproportionate.[249] Further, it faulted the Ninth Circuit for focusing only on the present offense, not on the total criminal record in *Andrade* and the offender's history of violence in *Brown*.[250]

Thus, the state appellate courts have relied on a number of premises in rejecting any challenge to a Three Strikes sentence. First, they have relied on black letter law (excessive sentences are ones that shock the conscience and are truly rare), while ignoring the black letter law that suggests that some Three Strikes sentences are unconstitutional; second, the twenty-five-year-to-life sentence is for an offender's entire record; third, past violent acts make a Three Strikes sentence lawful; and fourth, the change in penal philosophy weighs heavily in favor of the lawfulness of Three Strikes sentences. But as developed below, those courts have ignored strong arguments from a long line of state supreme court cases that would have justified a different result.

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[243] *Romero*, 37 Cal. Rptr. 2d at 380-81; *see also* People v. Mantanez, 119 Cal. Rptr. 2d 756, 759-60 (Ct. App. 2002); *Patton*, 46 Cal. Rptr. 2d at 713.

[244] *Romero*, 37 Cal. Rptr. 2d at 382.

[245] *Id.*

[246] *See, e.g.*, People v. Cooper, 51 Cal. Rptr. 2d 106, 111 (Ct. App. 1996).

[247] *Mantanez*, 119 Cal. Rptr. at 763-64.

[248] *Id.* at 759.

[249] *Id.* at 763-64.

[250] *Id.* at 764.

B. California Supreme Court Precedent Applied to Three Strikes Sentences

The state appellate courts have recited black letter law from relevant state supreme court cases, but have done so selectively.[251] They have also ignored the factual context in which the court has announced those rules of law.[252] Determining the correct application of precedent requires more than mere recitation of black letter law. It requires the court to ascertain the operative facts of the settled case, and then to compare these facts to the facts of the case currently before the court. This section examines each of the premises that appellate courts have relied upon in the Three Strikes cases and then explores specific supreme court precedent, suggesting a different conclusion than those drawn by the courts.

1. Exceedingly Rare Successful Challenges

Both the U.S. Supreme Court and California Supreme Court have stated that successful challenges to the length of a prison sentence will be exceedingly rare.[253] U.S. Supreme Court case law bears that out.[254] The state supreme court's case law demonstrates that it scrutinized criminal sentences far more closely than has the U.S. Supreme Court.

Beginning in 1972, the state supreme court reviewed numerous sentences and frequently found that the sentence was unconstitutional.[255] In *Lynch*, the court struck down the petitioner's indeterminate life sentence for a second offense of indecent exposure.[256] In *People v. Wingo*, now frequently cited for the view that successful proportionality challenges will be exceedingly rare, the court found it would be premature to decide whether Wingo's indeterminate sentence was unconstitutional.[257] It did indicate that because the particular offense, assault by means of force, could be committed in so many different ways of varying degrees of violence, a court must review the facts of each case

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[251] *See supra* text accompanying notes 231-46.

[252] *See supra* text accompanying notes 229-30.

[253] *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 73 (2003); Solem v. Helm, 463 U.S. 277, 289-90 (1983); Rummel v. Estelle, 445 U.S. 263, 272 (1980); *see also* People v. Mantanez, 119 Cal. Rptr. 2d 756, 760 (Ct. App. 2002); People v. Superior Court (Romero), 37 Cal. Rptr. 2d 364, 378 n.15 (Ct. App. 1995).

[254] *Andrade*, 538 U.S. at 63; Ewing v. California, 538 U.S. 11 (2003).

[255] *In re* Lynch, 503 P.2d 921, 935, 940 (Cal. 1972); *see, e.g.*, People v. Dillon, 668 P.2d 697 (Cal. 1983); *In re* Grant, 553 P.2d 590 (Cal. 1976); *In re* Rodriguez, 537 P.2d 384 (Cal. 1975); *In re* Foss, 519 P.2d 1073 (Cal. 1974).

[256] *Lynch*, 503 P.2d at 922.

[257] People v. Wingo, 534 P.2d 1001, 1013 (Cal. 1975).

to determine the constitutionality of the offender's sentence.[258] Its discussion indicated that some sentences, even for a violation of a statute prohibiting violent conduct, would be excessive.[259]

In re Rodriguez demonstrates how much more active than the U.S. Supreme Court the California Supreme Court has been in overturning terms of imprisonment.[260] In *Rodriguez*, the petitioner had served twenty-two years for child molestation.[261] The Adult Authority still had not decided how long the petitioner's sentence would be.[262] The court found first that, for all practical purposes, the failure to fix his sentence amounted to imposition of a life term. It also found that the twenty-two year sentence already served was excessive.[263] Assessing whether a particular term of years is excessive is precisely the kind of question that the U.S. Supreme Court has refused to answer.[264] While both courts state that successful challenges to criminal sentences will be extremely rare, *Rodriguez* demonstrates the California Supreme Court's willingness to make the fine judgment necessary to determine how many years in prison fit a particular kind of crime.

Two cases dealing with drug offenses further demonstrate the close scrutiny that the California Supreme Court gave to criminal sentencing.[265] *In re Foss* involved an offender who had a fourteen-year-old prior conviction for possession of heroin. Upon his current conviction of five counts of furnishing heroin, he was sentenced under a state law that required him to serve a term of ten years to life in prison, without possibility of parole for at least ten years.[266] The specific question before the court was whether "the provisions precluding parole consideration for the mandatory minimum term. . . constitute cruel or unusual punishment" under the state constitution.[267] The offender did not contend that a term of ten years to life would constitute cruel or unusual punishment, but only that the mandatory nature of the statutory minimum violated state law.[268]

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[258] *Id.* at 1008.

[259] *Id.* at 1007.

[260] *Rodriguez*, 537 P.2d at 384.

[261] *Id.* at 388.

[262] *Id.*

[263] *Id.* at 394.

[264] *See supra* notes 45-73 and accompanying text.

[265] *In re* Grant, 553 P.2d 590 (Cal. 1976); *In re* Foss, 519 P.2d 1073 (Cal. 1974).

[266] *Foss*, 519 P.2d at 1076.

[267] *Id.*

[268] *Id.* at 1077.

The court found that the mandatory minimum sentence violated the first prong of the *Lynch* test because it ignored the nature of the offender and the offense.[269] The offender was a heroin addict, in context, a fact that seemingly reduced the offender's culpability.[270] While heroin abuse represents a serious social harm and may require harsh penalties, the court considered the offender's motivation — whether for personal use or for profit — as relevant to the legality of the sentence.[271] It also considered the amount of the drug involved.[272]

The court also recognized that habitual offender statutes may lawfully increase penalties for subsequent offenses.[273] But at least in cases involving a drug addict's repetition of drug offenses that is "attributable solely to a psychological and/or physiological compulsion arising from an addiction to contraband, any increased punishment for a further offense can be attributed to the offender's status as an addict and may thus be deemed to constitute punishment for such status."[274] And while criminalizing overt acts attributable to an addiction is lawful, the court concluded that "the mandatory minimum term precluding parole consideration for ten years is thus cruel in its failure to consider the extent to which the addict's repetition of proscribed behavior is attributable to addiction."[275]

The court extended *Foss* in *In re Grant*.[276] There, the offender was not an addict, but was a repeat drug offender found guilty of selling marijuana.[277] *Grant* concluded that "preclud[ing] parole consideration for a minimum of five years or more for recidivist narcotics offenders constitute[s] both cruel and unusual punishment in violation of California constitutional proscriptions."[278] The failure of the law to allow consideration of mitigating circumstances made the law suspect.[279]

Foss and *Grant* emphasized that an assessment of proportionality must be made in light of the penological purposes for which punishment is imposed.[280] Shortly after those decisions, the legislature abandoned

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[269] *Id.* at 1079.

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.* at 1080.

[274] *Id.*

[275] *Id.* at 1081.

[276] *In re* Grant, 555 P.2d 590 (Cal. 1976).

[277] *Id.* at 592, 597.

[278] *Id.* at 594.

[279] *Id.* at 597.

[280] *Id.* at 597-99; *In re* Foss, 519 P.2d 1073, 1081-83 (Cal. 1974).

indeterminate sentencing in favor of a scheme that included specific terms of imprisonment. While that change undercuts some of the analysis in those decisions, the court has since cited those cases as good law. For example, consistent with earlier cases, both *Foss* and *Grant* focus on an offender and his offense.[281] That is, individual considerations of culpability remain relevant, even in cases where the offender is guilty of multiple related drug offenses. Habitual criminal conduct does not justify long prison sentences without examination of the offender's individual circumstances. Both cases demonstrate how closely the supreme court scrutinized criminal sentences.

One final case demonstrates the close scrutiny that the supreme court gave criminal sentences. *People v. Dillon* found that a life sentence, even one allowing for parole, constituted cruel or unusual punishment.[282] There, a particularly immature seventeen-year-old reconnoitered a plot of marijuana and eventually enlisted several friends to steal the plants.[283] The group armed themselves with weapons and other materials to complete the robbery, including rope and other items to tie up their victims.[284] Dillon knew that the two brothers who owned the land were armed; one of them had threatened to shoot Dillon during Dillon's earlier visit to the marijuana plot.[285] The youths failed in their robbery attempt, in part, because one of the coconspirators accidentally discharged his shotgun twice, alerting one of the owners.[286] In response to the misfired shots, the owner approached Dillon. Dillon shot the owner nine times, apparently in fear for his own safety.[287] The jury convicted Dillon of felony murder, a murder taking place during the commission of an attempted robbery.[288]

The California Supreme Court found that the life sentence imposed on Dillon was excessive, in violation of the California constitution.[289] *Dillon* emphasized that a court must consider the totality of the circumstances relating to the offense and the offender.[290] Examining the way in which the crime was committed, the court found that the law impermissibly

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[281] *Grant*, 555 P.2d at 596; *Foss*, 519 P.2d at 1078.

[282] People v. Dillon, 668 P.2d 697 (Cal. 1983).

[283] *Id.* at 700.

[284] *Id.*

[285] *Id.*

[286] *Id.* at 701.

[287] *Id.*

[288] *Id.* at 700.

[289] *Id.* at 727.

[290] *Id.* at 720.

treated a defendant like Dillon as it would a premeditated killer.[291] Further, the court examined Dillon's individual culpability, focusing on factors like "his age, prior criminality, personal characteristics, and state of mind."[292] The court reduced Dillon's crime to second degree murder and remanded the case for resentencing, with possible commitment to the Youth Authority.[293]

Dillon demonstrates that proportionality review remained intact after the legislature abandoned indeterminate sentencing. Further, it did so in a case involving a violent crime and an offender who would have been eligible for parole in as little as fourteen years. It also relied on *Lynch* and cited *Rodriguez, Foss,* and *Grant* with approval.[294] *Rodriguez* found that a term of twenty-two years in prison for child molestation was excessive.[295] Like *Dillon,* it made certain that parole eligibility lacked the importance that it might have under U.S. Supreme Court precedent. Further, *Lynch, Foss,* and *Grant* involved repeat offenders; while the court recognized that recidivist behavior may warrant longer sentences, it asserted that that alone does not deprive the offender of a careful assessment of his sentence.[296]

Contrary to the appellate court decisions in the Three Strikes cases,[297] the state supreme court has found specific sentences unconstitutional in a number of cases and has done so far more frequently than has the U.S. Supreme Court. In those cases, the court closely scrutinized the offender's culpability; it did so even when the crime involved violence, as in *Dillon.*[298] Drug use, youth, and other individual offender characteristics served as mitigating factors.[299]

2. Sentences Based on the Entire Record

As discussed above, the appellate courts have consistently faulted the trial courts for focusing on the third strike, rather than on the offender's entire criminal record.[300] The courts have emphasized that California

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[291] *Id.* at 726-27.

[292] *Id.* at 720.

[293] *Id.* at 727.

[294] *Id.* at 720.

[295] *See supra* text accompanying notes 260-64.

[296] *See supra* text accompanying notes 269-75.

[297] *See* discussion *supra* Part II.A.

[298] *Dillon,* 668 P.2d at 727.

[299] *See, e.g., id.* at 720-23; *In re* Grant, 555 P.2d 590, 597 (Cal. 1976); *In re* Foss, 519 P.2d 1073, 1085 (Cal. 1974).

[300] Cases cited *supra* note 234.

case law, in addition to *Rummel*, has held that recidivism justifies the imposition of longer sentences than would otherwise be imposed for the current offense.[301] In reliance on *Rummel*, they have asserted that an offender's long sentence is based, in part, on "the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes."[302]

Reliance on *Rummel* is curious. While *Rummel* is still good law, so too is *Solem v. Helm*, a case that also dealt with a recidivist. Insofar as U.S. Supreme Court case law interpreting the Eighth Amendment is relevant to the inquiry under the state constitution, reliance on *Rummel* proves little. Obviously, even if recidivism is relevant, that factor alone does not make a life sentence constitutional. *Solem* holds as much.[303]

One might try to argue that Three Strikes sentences are more similar to the sentence in *Rummel* than to the true life sentence in *Solem*.[304] In *Rummel* and with Three Strikes cases, the sentence allows for early release. Some courts have considered that distinction to be the meaningful distinction between *Rummel* and *Solem*.[305] Counsel for *Andrade* argued that that cannot be the meaningful difference: for example, if that were the operative difference, a state could incarcerate an offender like Helm for the rest of his life by imposing a ninety-nine-year term of imprisonment.[306] But resolving that dispute is not necessary to determine whether the California appellate courts have it right in the Three Strikes cases. The state supreme court case law is far more relevant to the discussion.

To start with, the state supreme court cases demonstrate that a sentence with a minimum less than life in prison may violate the state constitution. *Rodriguez* and *Dillon* both support the view that a term of years may nonetheless be an unconstitutionally excessive sentence. In *Rodriguez*, the court found that the term of twenty-two years already served was excessive.[307] In *Dillon*, the court found excessive a life sentence for a murderer who was eligible for parole in as few as fourteen

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[301] Cases cited *supra* note 234.

[302] People v. Cooper, 51 Cal. Rptr. 2d 106, 111 (Ct. App. 1996).

[303] Solem v. Helm, 463 U.S. 277 (1983) (holding that offender's sentence violated Eighth Amendment).

[304] Lockyer v. Andrade, 538 U.S. 63, 74 n.1 (2003).

[305] *See, e.g.*, Minor v. State, 451 So. 2d 433 (Ala. 1984); King v. State, 451 So. 2d 765 (Miss. 1984); State v. Dillon, 349 N.W.2d 55 (S.D. 1984).

[306] Lockyer v. Andrade, 2002 WL 31525420, 71 U.S.L.W. 3366 (Oral Argument) (Nov. 5, 2002) (No. 01-1127).

[307] *In re* Rodriguez, 537 P.2d 384, 386-87 (Cal. 1975).

years.[308]

As importantly, the state appellate courts have ignored a number of cases in which the supreme court has found sentences unlawful despite the offender's status as a recidivist. Lynch was a repeat offender, as were Grant and Foss.[309] Unlike the position of the appellate courts in Three Strikes cases, the supreme court has not made recidivism a barrier to a successful challenge to an offender's sentence.[310]

In *Foss*, the court focused on the offender's status as drug addict as a mitigating factor.[311] In *Grant*,[312] as elsewhere,[313] the court insisted that each sentence had to be assessed in light of the culpability of the offender. The inquiry was nuanced, examining each case on its own merits. Drug use, the nature of the offenses, the age of the offender, the gravity of the offense, and the risk of continued social harm were all factored into the court's assessment.[314]

By comparison, the appellate courts have uniformly dismissed challenges to Three Strikes sentences. Individual characteristics have had no bearing; the single factor — recidivism — appears sufficient to deny relief.[315]

3. The Role of Violence

In *Brown*, the offenders' records included crimes of violence.[316] The U.S. Supreme Court has never resolved whether its proportionality review turns on the fact that an offender has not been convicted of a crime of violence. *Solem* underscored that Helm had never been convicted of a crime of violence, but did not specify whether that was a necessary condition for a finding that a sentence was excessive.[317]

The state appellate courts have held, in effect, that a past act of violence without more makes the offender's Three Strikes sentence

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[308] People v. Dillon, 668 P.2d 697 (Cal. 1983).

[309] *In re* Grant, 555 P.2d 590 (Cal. 1976); *In re* Foss, 519 P.2d 1073 (Cal. 1974); *In re* Lynch, 503 P.2d 921 (Cal. 1972).

[310] *See supra* notes 255-68 and accompanying text.

[311] *Foss*, 519 P.2d at 1079.

[312] *Grant*, 555 P.2d at 596-98.

[313] *Dillon*, 668 P.2d at 702; People v. Wingo, 534 P.2d 1001, 1009-12 (Cal. 1965); *Lynch*, 503 P.2d at 931.

[314] *See supra* notes 279, 290 and accompanying text.

[315] *See supra* notes 234-39 and accompanying text.

[316] Brown v. Mayle, 283 F.3d 1019, 1034-35 (9th Cir. 2002).

[317] Solem v. Helm, 463 U.S. 277, 279-81 (1983).

lawful.[318] Even when the offender has not committed a crime of violence, for example, in cases like *Patton* where the offender's only prior strikes have been residential burglary, the courts have held that burglary is equivalent to a crime of violence, i.e., that it is a "serious prior felony conviction[s] having tremendous potential for injury or death."[319] Combined with the appellate courts' view that an offender's current sentence is for the offender's entire record, their conclusions that violence is sufficient to make a Three Strikes sentence lawful and that burglary is equivalent to a crime of violence mean that virtually all Three Strikes sentences are lawful. That is so because an offender does not qualify for a Three Strikes sentence unless the offender has committed at least two residential burglaries or crimes of violence.[320]

U.S. Supreme Court case law is far narrower than the California Supreme Court's rulings. Yet even the Supreme Court did not treat burglary as a crime of violence in *Solem*, where one of Helm's earlier felonies was burglary.[321] In *Brown*, the Ninth Circuit also treated burglary as a crime of violence in trying to justify a very different conclusion — that *Solem* assessed proportionality by focusing only on the current offense.[322] But both the state courts and the Ninth Circuit are wrong in concluding that burglary is a crime of violence. As a statistical matter, violence is a rarity in burglary cases.[323] More importantly, the California legislature treats burglary as a serious, not a violent, felony.[324]

But even if burglary is a crime of potential violence, the state appellate courts are wrong to conclude that that fact alone makes an offender's Three Strikes sentence lawful. *Wingo* and *Dillon* demonstrate that a sentence may be cruel or unusual punishment even if it is for a crime of violence. In *Wingo*, the court stated that, depending on the circumstances of the case, a sentence for an assault by means of force might be excessive.[325] *Dillon* rebuts the argument that violence alone is sufficient to make a sentence lawful: no crime is more violent than murder. Despite that, the court found the offender's sentence

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[318] *Supra* notes 235-37.

[319] People v. Patton, 46 Cal. Rptr. 2d 702, 712 (Ct. App. 1995); *see also Brown*, 283 F.3d at 1034.

[320] That is so because qualifying first and second strikes must be ones from a list of violent or serious felonies. CAL. PENAL CODE §§ 667(a)(4), 1192.7(c) (West 2003). "Burglary" is the primary serious nonviolent felony in that list. *Id.* § 1192.7(c).

[321] *Solem*, 463 U.S. at 279-81.

[322] *Brown*, 283 F.3d at 1034.

[323] MODEL PENAL CODE AND COMMENTARIES § 210.2, cmt. 38 n.96 (1980).

[324] CAL. PENAL CODE §§ 667(a)(4), 1192.7(c)(18) (West 2003).

[325] People v. Wingo, 534 P.2d 1001, 1007-08 (Cal. 1975).

excessive.[326]

4. The Change in Penal Philosophy

The state appellate courts have relied on California's change in penal philosophy to further justify upholding Three Strikes sentences.[327] Both U.S. and California Supreme Court precedent has emphasized that the Constitution does not proscribe a particular penological theory.[328] In enacting Three Strikes, California changed its philosophy with regard to recidivists. The goal is now to incapacitate repeat offenders and to deter others.[329] Deterrence and incapacitation require longer sentences than would be justified were the state's goal rehabilitation or were its goal retribution.[330]

A natural implication of that argument is that a sentence found to be excessive based on the state goal of retribution might become lawful should the legislature announce a new penal goal. That is certainly an odd result, a position that a court should not lightly adopt. Further, neither U.S. nor California Supreme Court precedent has elaborated on whether such a result would be justified. Justice Kennedy's concurring opinion in *Harmelin* states that the Constitution does not dictate any

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[326] *In re* Dillon, 668 P.2d 697, 727 (Cal. 1983).

[327] People v. Edwards, 118 Cal. Rptr. 2d 256 (Ct. App. 2002); People v. Cooper, 51 Cal. Rptr. 2d 106 (Ct. App. 1996); People v. Moenius, 49 Cal. Rptr. 2d 263 (Ct. App. 1996); People v. Patton, 46 Cal. Rptr. 2d 702 (Ct. App. 1995).

[328] Harmelin v. Michigan, 501 U.S. 957, 990-92 (1991) (Kennedy, O'Connor & Souter, JJ., concurring); *In re* Grant, 555 P.2d 590, 597-99 (Cal. 1976); *In re* Foss, 519 P.2d 1073, 1081-83 (Cal. 1974); *Cooper*, 51 Cal. Rptr. 2d at 111.

[329] The authors of *Punishment and Democracy* argue Three Strikes lacks a coherent penal theory. It is "a penal practice without a theory." ZIMRING ET AL., PUNISHMENT AND DEMOCRACY 7 (2001).

The two strikes aspect of the law is consistent with notions of just desert: under the two strikes provisions, an offender's repetition of similar criminal conduct leads to a heightened punishment. *Id.* at 9-10. By contrast, the third strikes' provisions are entirely inconsistent with principles of proportionality and just deserts. Instead, the three strikes produce results that are inverse to the principle of proportional punishment, increasing punishment many times more for less serious felonies than for more serious felonies. For example, a person sentenced for rape may receive a six year term of imprisonment. If rape is the offender's third felony, his minimum sentence of 25 years is only about four times the length of the presumptive sentence. But if the offender commits burglary, his presumptive sentence would be only one year. If that is his third strike, his minimum term of 25 years is 25 times the presumptive sentence. *Id.* at 112-21. Three Strikes proponents argued originally that the goal of Three Strikes was to incapacitate repeat offenders. After the law's passage, when its proponents wanted to explain the perceived downturn in crime as a result of the law, but before incapacitation could explain the downturn, its proponents explained the law as one intended to benefit society through deterrence. *Id.* at 91.

[330] *Cooper*, 51 Cal. Rptr. 2d at 111.

particular penal philosophy. In context, he seems to suggest that federal courts should not engage in close scrutiny of individual sentences to see if they serve a particular goal. This suggests that changing the stated policy would not make an excessive sentence lawful.[331]

As in other aspects of proportionality analysis, California Supreme Court case law has discussed the significance of penal philosophy in more detail than has the U.S. Supreme Court.[332] But its discussions do not support the appellate courts' view that the change in penal philosophy makes Three Strikes sentences constitutional.

Foss and *Grant* emphasized that an assessment of proportionality must be made in light of the penological purposes for which punishment is imposed.[333] Decided when rehabilitation remained the stated predominate goal of punishment, both cases assessed whether the mandatory minimum term served to rehabilitate the offenders.[334] The court relied on the view of experts that sentences of less than five years in prison are optimal for rehabilitation of all but the most seriously criminal or disturbed offenders.[335] Those cases also recognized that punishment is justified by other legitimate goals, namely isolation of the offender from society and deterrence, but found that a ten-year minimum period before the offender became eligible for parole did not advance either of those goals.[336]

The appellate courts have cited the state supreme court for the proposition that it is the defendant's burden to show that his sentence is grossly disproportionate.[337] In *Foss* and *Grant*, the court seemed to abandon that proposition to some extent. Specifically, the court stated: "Where, on the basis of injury to victim or to society in general, discernible gradations of culpability exist among prior offenses which trigger an enhanced period of parole ineligibility, such penalty will be suspect to the extent that it fails to recognize those gradations."[338] That is, the court will scrutinize the statute closely if the relevant statute lumps a wide array of conduct within its prohibitions.

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[331] In context, Justice Kennedy's statement that the Constitution does not compel a particular penological theory supports his conclusion that only grossly disproportionate sentences violate the Constitution. *Harmelin*, 501 U.S. at 1001 (Kennedy, O'Connor & Souter, JJ., concurring).

[332] *Grant*, 555 P.2d at 597-99; *Foss*, 519 P.2d at 1081-83.

[333] Cases cited *supra* note 332.

[334] Cases cited *supra* note 332.

[335] *Grant*, 555 P.2d at 597-98; *Foss*, 519 P.2d at 1080-82.

[336] Cases cited *supra* note 335.

[337] *See, e.g.*, People v. Patton, 46 Cal. Rptr. 2d 702, 711-12 (Ct. App. 1995).

[338] *Grant*, 555 P.2d at 596; *see also Foss*, 519 P.2d at 1073, 1078, 1085.

None of the state appellate court decisions dealing with Three Strikes has focused on that aspect of *Foss* and *Grant*.[339] None has asked whether the relevant goals of incapacitation and deterrence are served by Three Strikes sentences. Nor have they considered how California Supreme Court case law would treat Three Strikes sentences: as both empirical data[340] and the statutory provisions themselves demonstrate,[341] Three Strikes encompasses wide "gradations of culpability." Nonetheless, the state appellate courts have not treated the sentences as "suspect."

5. Putting It All Together

When Jesus Romero was charged with his third strike, he was an aging felon with only two strikes: a burglary and an attempted burglary.[342] Leonardo Andrade, a thirty-seven-year-old heroin addict, had a similar criminal record.[343] Their cases are not atypical.[344] Above, I discussed how the appellate courts disposed of these two defendants' proportionality challenges.[345] In this section, I argue that the state appellate courts have not followed established California Supreme Court precedent.

Despite black letter law stating that successful proportionality challenges will be exceedingly rare, the appellate courts should have done a case-by-case assessment of Three Strikes sentences.[346] Like the crimes in *Wingo* and *Foss*, Three Strikes crimes can be committed in many different ways, involving many levels of culpability.[347] Further,

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[339] Many of the appellate courts ignore *Foss* and *Grant*. *See, e.g.*, People v. Byrd, 108 Cal. Rptr. 2d 243 (Ct. App. 2001); People v. Bailey, 53 Cal. Rptr. 2d 120 (Ct. App. 1995). Those that cite it do not discuss this issue. *See, e.g.*, People v. Campos, 45 Cal. Rptr. 2d 706, 724-25 (Ct. App. 1995).

[340] *See* ZIMRING, *supra* note 329, at 59 (finding that third-strike felons do not account for their proportionate share of violent crimes). Because of the inclusion of residential burglary as a strike and the provision that any felony counts as a third strike, the law does not target particularly dangerous defendants. *Id.* at 60.

[341] CAL. PENAL CODE §§ 667(e)(2)(A), 1170.12(c)(2)(A) (West 2004). Because the law makes any felony a third strike, the law will apply to many offenders who are not particularly dangerous or violent. *See* ZIMRING, *supra* note 329, at 59-60.

[342] People v. Superior Court (Romero), 917 P.2d 628, 631 (Cal. 1996).

[343] Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 748-49 (9th Cir. 2001).

[344] *See, e.g.*, People v. Barrera, 82 Cal. Rptr. 2d 755, 757 (Ct. App. 1999); People v. Drew, 47 Cal. Rptr. 2d 319, 320-21 (Ct. App. 1995); People v. Patton, 46 Cal. Rptr. 2d 702, 704 (Ct. App. 1995); *Campos*, 45 Cal. Rptr. 2d at 708; People v. Superior Court (Missamore), 45 Cal. Rptr. 2d 392, 393 (Ct. App. 1995); People v. Gore, 44 Cal. Rptr. 2d 244, 246 (Ct. App. 1995).

[345] *See supra* Part II.A.

[346] *See supra* Part II.B.1.

[347] *Supra* notes 340-41.

the availability of parole eligibility in as few as twenty-five years does not make the sentence lawful. A term of twenty-two years for child molestation was excessive.[348] Romero's twenty-five-year minimum and Andrade's fifty-year minimum certainly raise proportionality questions.

Those sentences do not become lawful simply because they are imposed on a recidivist. The court must assess the individual culpability of the offender.[349] In addition, addiction is a mitigating circumstance.[350] Hence, Andrade's drug history, like Foss's, would be relevant to the proportionality of his sentence. So too would the nature of the offense in Andrade and Romero's cases: the court found relevant that, even though Foss sold heroin, he did not do so for profit.[351] By comparison, Andrade's theft, related to his need to acquire heroin,[352] or Romero's possession of a small amount of cocaine,[353] seem like minor crimes. Their criminal histories involved other drug-related criminal activity,[354] analogous to Foss's criminal history. The lack of violence in either criminal's history would also militate in favor of a finding of proportionality.[355]

As discussed above, the California Supreme Court found the state's penal philosophy relevant.[356] The court looked to expert opinion on the appropriateness of a criminal sentence, in light of rehabilitation, deterrence and incapacitation.[357] On the assumption that the legislative goals of Three Strikes were incapacitation and deterrence,[358] what would experts say about the extent to which terms of twenty-five years to life are necessary to serve those goals? Consistent with *Foss* and *Grant*, that inquiry must be case-specific.[359]

With regard to incapacitation, are sentences of twenty-five or fifty years necessary to limit Romero and Andrade's conduct? Both are aging felons with substance abuse problems. One obvious alternative might

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[348] *In re* Rodriguez, 537 P.2d 384, 386-87 (Cal. 1975).

[349] *Supra* note 281.

[350] *See, e.g., In re* Foss, 519 P.2d 1073, 1079-80 (Cal. 1974).

[351] *Id.*

[352] Lockyer v. Andrade, 538 U.S. 63, 67 (2003).

[353] People v. Superior Court (Romero), 917 P.2d 628, 631 (Cal. 1996).

[354] *Andrade*, 538 U.S. at 66-67; People v. Superior Court (Romero), 37 Cal. Rptr. 2d 364, 379-81 (Ct. App. 1995).

[355] *See supra* Part II.B.3.

[356] *See supra* Part II.B.4.

[357] *In re* Grant, 555 P.2d 590, 598 (Cal. 1976); *In re* Foss, 519 P.2d 1073, 1082-83 (Cal. 1974).

[358] *See supra* note 329 and accompanying text.

[359] *Grant*, 555 P.2d at 594; *Foss*, 519 P.2d at 1078.

have been drug rehabilitation.[360] Further, expert opinion supports the view that both are likely to stop committing violent or serious crimes,[361] the kinds of crimes that the voters were concerned about when they enacted Three Strikes.[362]

Not only are Three Strikes sentences unnecessarily long for the purpose of crime prevention through incapacitation, they are unnecessary for the purpose of deterrence. As considered in more detail below, Three Strikes provides marginal deterrence at best.[363]

Consistent with *Lynch*, once a court finds that the severity of the punishment far outweighs the offender's culpability and the harm to society, the court should consider intra- and interjurisdictional comparisons.[364] While at least one recent appellate court opinion suggested that such comparisons are highly subjective,[365] the state supreme court held that those comparisons are relevant to the proportionality analysis.[366] As noted above, the Ninth Circuit made those comparisons and argued convincingly that they provided strong support for the finding that the specific Three Strikes sentences were unconstitutional.[367] Despite one court of appeal's assertion that other states allow similar sentences,[368] the data cry out to the contrary: California's Three Strikes law is the toughest in the nation.[369]

I have little doubt about why California appellate courts have turned a deaf ear to challenges to Three Strikes sentences: the law passed with overwhelming voter support.[370] That has led some courts to argue that Three Strikes sentences do not shock the conscience, given the law's

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[360] KEVIN R. REITZ, MODEL PENAL CODE, SENTENCING 16-17 (Plan for Revision, Jan. 24, 2002).

[361] Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 437-38 (1997).

[362] Michael Vitiello, *"Three Strikes" and the* Romero *Case: The Supreme Court Restores Democracy*, 30 LOY. L.A. L. REV. 1643, 1684 (1997).

[363] *See infra* notes 573-74 and accompanying text.

[364] *In re* Lynch, 503 P.2d 921, 931 (Cal. 1972).

[365] People v. Mantanez, 119 Cal. Rptr. 2d 756, 760 (Ct. App. 2002).

[366] *Lynch*, 503 P.2d at 931; *see, e.g., In re* Foss, 519 P.2d 1073, 1079 (Cal. 1974).

[367] Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 761-66 (9th Cir. 2001).

[368] *See e.g.* People v. Superior Court (Romero), 37 Cal. Rptr. 2d 364, 377-79 (Ct. App. 1995).

[369] California dwarfs other states in their use of Three Strikes laws. For example, while California's population is six times that of Washington, its use of its Three Strikes law is 33 times that of Washington. ZIMRING, *supra* note 329, at 19. For additional data, see *id.* at 21 fig.2.2.

[370] People v. Ingram, 48 Cal. Rptr. 2d 256, 268-69 (Ct. App. 1995).

wide support.[371] But ample evidence demonstrates widespread confusion about the scope of Three Strikes. Indeed, the law would not have passed but for the kidnapping and murder of Polly Klaas.[372] Passions ran so high in favor of the law that no one seemed to notice that the Klaas family withdrew their support for the law because they found it too extreme.[373] Further, it is exactly that kind of law, one enacted in the passion of the moment, that may trigger the need for judicial review.[374] The courts of appeal have ignored established supreme court precedent to reach what the courts of appeal regard as socially desirable results. In a word, like the Ninth Circuit, the state appellate court decisions were result-oriented.

III. THE PHILOSOPHICAL DEBATE ABOUT RECIDIVIST STATUTES AND PROPORTIONALITY

Recidivist statutes in general, and Three Strikes in particular, are hard to justify from a moral perspective.[375] That is so for a number of reasons. Although courts and commentators have changed their views on why society is justified in punishing criminal offenders, retributive justice in one of its several forms remains the predominate justification.[376] Most commentators today endorse a view that focuses on the offender's just deserts.[377] While a society may punish for reasons other than the offender's deserved punishment, desert sets an outer limit for acceptable punishment.[378] This limiting principle is not simply the currently popular justification for punishment; it has deep religious and psychological roots.[379]

Most recidivist statutes are not retributivist. Three Strikes is even less retributivist than most.[380] Few recidivist statutes tie punishment to an offender's just desert. But penalties under Three Strikes create an inverse relationship between the offender's just desert and his minimum

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[371] *Id.*

[372] *See* Vitiello, *supra* note 362, at 1655-56.

[373] *Id.* at 1659-61.

[374] Weems v. United States, 217 U.S. 349, 373 (1910) (raising concern that legislatures occasionally impose excessive sentences out of "excessive zeal").

[375] Vitiello, *supra* note 361, at 431.

[376] Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1012, 1014-18 (1991).

[377] *Id.* at 1014-16.

[378] *See generally* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

[379] *See infra* notes 405-27 and accompanying text.

[380] *See infra* notes 450-53 and accompanying text.

punishment.[381]

This part briefly reviews the principle that punishment must be tied to an offender's desert.[382] It then discusses why recidivist statutes and Three Strikes are not retributivist.[383] If justified at all, such statutes are rooted in utilitarianism.[384] A utilitarian justification is based on an empirical claim that the social benefit (lowered crime rates) outweighs the pain caused (imprisonment of an offender).[385] Therefore, the debate about whether recidivist statutes are justified begs the empirical question whether they in fact produce the claimed benefits. Part IV turns to that question.

At various times in our history, retribution has had a bad name,[386] especially during the heyday of rehabilitation in the 1950s[387] and early 1960s.[388] For example, the sentencing provisions of the Model Penal Code reflect the then current enthusiasm for rehabilitation and incapacitation, whereby judges imposed indeterminate sentences and left broad discretion to parole boards and correctional officials.[389]

For reasons that have been amply explored elsewhere, we have abandoned the rehabilitative ideal.[390] Before and after that period, courts and scholars have subscribed to one of a number of retributive theories.[391] Retribution was ascendant before the heyday of rehabilitation. And, more recently, as observed by one scholar, "retributive theory has advanced far in both application and acceptance."[392]

While many commentators reject the view of retribution as vengeance,[393] they find retributive theory more acceptable when it focuses on the debt that the criminal violator creates when he chooses to

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[381] *See infra* notes 450-53 and accompanying text.

[382] *See infra* notes 386-404 and accompanying text.

[383] *See infra* notes 431-58 and accompanying text.

[384] *See infra* notes 454-58 and accompanying text.

[385] Vitiello, *supra* note 361, at 419-20.

[386] Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall, J., concurring).

[387] *See* REITZ, *supra* note 360, at 18.

[388] Vitiello, *supra* note 376, at 1014-18.

[389] REITZ, *supra* note 360, at 10, 20. "[T]he original code made virtually no room for retribution as a basis for criminal punishment. . . ."

[390] *See generally* F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 65-66 (1981) (identifying decline of rehabilitative idea and lack of new paradigm).

[391] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16-19 (3d ed. 2001); Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968).

[392] REITZ, *supra* note 360, at 21.

[393] *See generally* DRESSLER, *supra* note 391, at 17; Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1168 (1980).

break the law.[394] Basic principles of fairness dictate that an offender pay this debt to society.[395] In addition, some retributivists emphasize that by compelling a person to pay his debt, society demonstrates its respect for the offender. Utilitarianism is vulnerable on moral grounds because it treats people as a means,[396] and rehabilitation theory is vulnerable on the ground that it treats offenders as children in need of care.[397] Retribution, in contrast, treats offenders with respect because it treats them as responsible moral agents.[398] On this view, punishment is payment for the offenders' debts and permits them to return to society, free from moral guilt.[399]

Works by H.L.A. Hart, Herbert Packer, and Norval Morris aided the comeback of at least one form of retributivism.[400] Explaining hard cases is one of the intractable problems for theorists advancing any single theory. For example, the retributivist has trouble explaining why a person who steals $5000 does not pay his debt back to society by paying a fine of $5000. That punishment takes away his unfair advantage and, presumably, pays his debt to society. Most sentencing schemes demonstrate competing justifications.[401] Hence, in the theft example, except for the most extreme retributivist, we might be tempted to sentence the thief to prison even if he is able to pay the fine, because we want to deter others and we worry that $5000 will not deter the specific offender in the future. Hart, Packer, and Morris argued that retribution

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[394] DRESSLER, *supra* note 391, at 18; Morris, *supra* note 391. Morris explains that as long as everyone follows the rules established by society, an equilibrium exists. However, if a person fails to refrain from criminal activity, he becomes a free rider at the cost of law-abiding persons. It is therefore fair to require payment of the debt in forms of punishment equal or proportional to the debt owed.

[395] DRESSLER, *supra* note 391, at 18; Morris, *supra* note 391.

[396] DRESSLER, *supra* note 391, at 19-20.

[397] *Id.* at 20-21.

[398] *Id.* at 21-22. Some United States Supreme Court decisions reflect this view. For example, an offender may not have the capacity to act as a moral agent. In some instances, the Court seems to have considered that as relevant to the deserved punishment. One example arose during the past term when the Supreme Court held that the Eighth Amendment prohibited the execution of a retarded person. Atkins v. Virginia, 563 U.S. 304 (2002).

[399] DRESSLER, *supra* note 391.

[400] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968); NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (University of Chicago Press 1974); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

[401] For a thoughtful opinion dealing with difficulties raised by competing goals of punishment, see *United States v. Bergman*, 416 F. Supp. 496 (S.D.N.Y. 1976). *See also* DRESSLER, *supra* note 391, at 50-55, for a comparison of the differences between utilitarian and retributivist views of proportionality.

works as a limiting principle.[402] Thus, utilitarian goals may suggest or compel a particular punishment. But where those goals push the sentence too high, retribution reins in the permissible punishment. That is so because punishing the offender beyond his just deserts is morally impermissible.[403] The views of Hart, Packer, and Morris remain influential today.[404]

Proportionality finds support not only in philosophy, but in religion and psychology as well. Some retributivists, unembarrassed that their position may be characterized as state-sanctioned vengeance, point to the Biblical mandate that an offender must give an eye for an eye. That deceptively simple phrase is often cited to support measure-for-measure punishment.[405] Today, only in the death penalty debate do any commentators seriously advance the literal application of the proposition.[406]

Scholars have cast doubt on the view that Jewish society ever literally applied *lex taliones*. Even a strong advocate of the death penalty like Ernest Van den Haag[407] has argued that the original Hebrew phrase, "*ayen tachat ayen*,"[408] was ambiguous.[409] The phrase may have meant the

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[402] *See* sources cited *supra* note 400.

[403] REITZ, *supra* note 360, at 21, stating:

> One of the chief benefits of retributive theory is that it suggests a proportional ordering of the severity of sanctions. Although a crude tool — because one person's moral sense of an appropriate punishment can differ enormously from another's — a theory of just deserts can at least insist that offenses and offenders can be compared with one another in an organized way when assigning levels of punishment. Moreover, this relational calculus may be performed even when there is no useful information about an offender's prospects for rehabilitation, the deterrence value of potential punishments, or the likely incapacitative payoffs of one prison term as opposed to another. Because such information deficits are the norm rather than the exception, a retributive scale can supply a default algorithm for punishment decisions.

[404] *Id.* The Model Penal Code has been extremely influential in the reform of state criminal law; 40 states have adopted criminal codes based at least in part on the original Model Penal Code. *Id.* at 8. The Plan for Revision states that the revisions to the sentencing provisions of the code "should sketch the general outlines of a program such as Morris's limiting retributivism. . . ." *Id.* at 22.

[405] Irene Merke Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye For Eye" and the Death Penalty*, 1998 UTAH L. REV. 505, 508 (1998).

[406] DRESSLER, *supra* note 391, at 52-58.

[407] *See, e.g.*, ERNEST VAN DEN HAAG & J.P. CONRAD, THE DEATH PENALTY: A DEBATE (1983).

[408] Rosenberg & Rosenberg, *supra* note 405, at 526.

[409] Ernest van den Haag, *The 'Lex Talionis' Before and After Criminal Law*, 11 CRIM. JUST. ETHICS 2, 2-3 (1992); Rosenberg & Rosenberg, *supra* note 405, at 526-27.

equivalent of an eye for an eye.[410] That is, even early proponents of *lex taliones* did not take it literally.[411] This approach is certainly more consistent with the way in which modern civilized societies would apply the principle.[412]

Some scholars argue that the principle was merely a rule governing compensation, not criminal law.[413] Others, who argue that it was a principle of criminal law relevant to criminal punishment, see in the principle both a moral obligation to punish and a principle of proportionality.[414] Hence, a person who takes an eye may have to give back to society the equivalent of an eye (measured in some term of money or years), but it would be immoral for society to demand more than the equivalent of an eye.

Empirical studies suggest that proportionality resonates psychologically. That is, we may be psychologically wired to believe that punishment should be proportional. Kalven and Zeisel's classic jury study supports the view that lay people adhere to the principle of proportionality.[415] The study, covering over 155 categories of crimes, involving 3,576 jury cases and 550 judges, measured disagreement between judges and juries.[416] While judges and juries agreed in about three-quarters of the cases, the reasons for their disagreement were instructive.[417] Often juries acquitted, where judges would have convicted, when the jury believed that the punishment would be too severe.[418]

Other empirical research has found popular support for proportionality. Against the backdrop of the political rhetoric of the 1990s that called for tougher prison sentences, Georgetown Professor Finkel hypothesized that the lay person's sense of justice is more

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[410] Rosenberg & Rosenberg, *supra* note 405, at 526-29.

[411] *Id.*

[412] Van den Haag, *supra* note 409, at 2.

[413] *Id.* at 2-3.

[414] *See generally* Mark Alden James, *Eighth Amendment Proportionality Analysis: The Limits of Moral Inquiry*, 26 ARIZ. L. REV. 871 (1984).

[415] HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 62 (Boston, Little, Brown 1966).

[416] *Id.* at 33-54 (discussing methodology and research design).

[417] *Id.* at 55-65 (discussing patterns of disagreement between jury and judge).

[418] *Id.* at 62. Furthermore, in Three Strikes cases, juries are not told that the offender faces a Three Strikes sentence. But they may realize that Three Strikes applies when they are asked to find that the offender has previous convictions. Some jurors have refused to make those findings because of their belief that a term of 25 years to life is unjust. *See infra* notes 419-27 and accompanying text; ZIMRING ET AL., *supra* note 329, at 201 (discussing jury attitude in choice of penalty).

nuanced than were the punishments reflected in the law.[419] He attempted to measure whether the public in fact desired longer and more severe punishments regardless of the crime committed, or whether the public favored individualized punishment.[420] His empirical work suggested the latter.[421]

Finkel designed his study to gauge mock jurors' sense of proportionality in sentencing and to measure how their attitudes changed when he introduced different variables into the mix.[422] He presented mock jurors with the facts of *Solem* and a similar made-up case that changed the nature of the offender's prior crimes.[423] He then varied six conditions, as described in the footnote below.[424] For example, in one variation, jurors were given no legal guidelines; in the next variation, they received legal guidelines and information on the typical punishment that would apply upon a finding of guilt.[425] According to Finkel, the mock jurors had a sense of proportional punishment.[426] While the mock jurors would punish a repeat offender more severely than a first-time offender, they refrained from the lengthy sentences imposed in statutes like Three Strikes.[427]

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[419] *See generally* NORMAN J. FINKEL, COMMONSENSE JUSTICE (2001).

[420] *Id.* at 146-50.

[421] *Id.* at 148-50.

[422] *Id.* at 149-50.

[423] *Id.* at 146-50.

[424] Norman J. Finkel et al., *Recidivism, Proportionalism, and Individualized Punishment*, 39 AM. BEHAVIORAL SCIENTIST 474 (1996). The six conditions controlled for different variables. In condition one, the jurors received information only on defendant's current crime and received no sentencing guidelines. In condition two, jurors received information on all seven crimes, but received no sentencing guidelines. In condition three, mock jurors had information on all seven crimes and guidelines on sentencing. In condition four, all variables used in condition three were given to mock jurors. Defendant's recidivist status was given special emphasis. In condition five, all variables used in condition three were given to mock jurors. Defendant's psychiatric disorder, however, was given special emphasis. In condition six, all variables used in condition three were given to mock jurors. However, the prosecution emphasized defendant's recidivist status, while defense emphasized psychiatric disorder.

[425] *Id.* at 480-85.

[426] *Id.*

[427] *Id.* Finkel's study has obvious methodological flaws. Most obvious is that his sample population was not randomly selected. College sophomores at a highly competitive university are hardly a representative sample. Further, the participants, students in an abnormal psychology class, are self-selected. Despite that, Finkel's results are consistent with other studies, suggesting its validity. *See* Joshua Dressler, Peter N. Thompson & Stanley Wasserman, *Effect of Legal Education Upon Perceptions of Crime Seriousness: A Response to* Rummel v. Estelle, 28 WAYNE L. REV. 1247, 1277-78 (1982) (concluding that while legal education has some effect on perceptions of tested subjects to seriousness of crime, that effect is matter of degree, not kind).

I do not want to oversimplify the debate about proportionality. Pragmatic difficulties exist in assessing whether a particular term of imprisonment is proportional to a particular crime; people may differ in their ranking of the seriousness of different criminal offenses.[428] While both utilitarians and retributivists argue in favor of proportionality, the meaning of proportional punishment is different depending on whether one is a retributivist or utilitarian.[429] Despite that, broad consensus exists that proportionality matters and is a fundamental value with religious and psychological underpinnings.[430]

Supporters have difficulty justifying recidivist statutes as being consistent with retributive principles. That is so for at least two reasons. First, recidivist statutes require that the court look to an offender's entire record.[431] But in most cases, the offender has already been punished for past offenses. Punishing him for that conduct violates double jeopardy.[432] In retributivist terms, he has already paid his debt to society and now reenters society without moral guilt or stigma.[433] If he is not being punished for past conduct, proponents have difficulty explaining why his sentence should be enhanced as severely as many recidivist statutes require or permit. Sentencing an offender to twenty-five years to life for each petty theft, as in *Andrade* or *Bray*, cannot be justified from a retributivist perspective by referring to past conduct.[434] No one would argue that a term of twenty-five years is the rough equivalent of the loss of eighty-five dollars in videotapes.[435]

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[428] DRESSLER, *supra* note 391, at 49-55; *see* REITZ, *supra* note 360.

[429] DRESSLER, *supra* note 391, at 22.

[430] Indeed, while the Supreme Court has eschewed adopting any particular penological or philosophical theory of punishment as a matter of constitutional law, *Solem* and *Harmelin* demonstrate parallels to the prevailing view of punishment that emerged during the 1970s. Under those cases, states are free to adopt relatively wide ranges of punishment to advance different goals. But punishment has outer limits; a punishment becomes grossly disproportionate when it is not tied to the culpability of the offender and the harm caused to society. That is, at some point, punishment that far exceeds the offender's just deserts is unconstitutional. MORRIS, *supra* note 400, at 73.

[431] CAL. PENAL CODE § 667 (Deering 2003); S.D. CODIFIED LAWS § 22-7-8 (Michie 2003).

[432] *See* Riggs v. California, 525 U.S. 1114 (1999).

[433] DRESSLER, *supra* note 391, at 18.

[434] Brown v. Mayle, 283 F.3d 1019, 1035 (9th Cir. 2002).

[435] Here it is important to distinguish between sentences that are immoral and those that are unconstitutional. While *Solem* and *Harmelin* seem to adopt a similar view of punishment to several moral philosophers (where an offender's culpability serves as an outer limit on his punishment), the Supreme Court's test requires gross disproportionality; and, under its approach, courts must uphold sentences that may be extreme, but are not grossly so. The difference is best explained by a number of factors. Thus, the Court's deference to legislatures' decisions about appropriate punishment is justified by federalism

Second, while a plausible claim can be made that some enhancement is justified consistent with retributivist principles, most recidivist statutes go far beyond the limited justification of enhanced sentencing. Andrew von Hirsch makes the best argument in support of enhancing criminal sentences for repeat offenders.[436] A repeat offender is more culpable when he repeats his crime: the second-time offender knows what the law is and that the law is directed at him.[437] Von Hirsch argues further that a repeat offender suffers a "progressive loss of mitigation."[438] That is, when an offender commits his first criminal act, a lesser punishment may be warranted because his crime may be uncharacteristic of his normal behavior. Repeated criminal acts suggest that an offender is not deserving of continued mitigation.[439]

Von Hirsch's argument works best when the offender commits a similar crime a second time. For example, an offender might reasonably claim that he was unaware that society viewed use or sale of marijuana particularly seriously. Upon his conviction and sentence for that offense, he is now on notice that society does regard that conduct as a crime. The argument makes less sense if the first offense is dissimilar to the second offense; for example, assume that the first crime is a serious felony like assault and the second offense is possession of marijuana. After the conviction and punishment for the first offense, the offender may be on notice that society treats violent crimes seriously. But the offender's earlier prosecution for assault does not put him on notice that society regards possession of marijuana as a serious offense.[440]

Von Hirsch's argument is most compelling, then, when the two crimes are similar in nature. But many recidivist statutes do not make the subtle distinctions reflected in von Hirsch's theory. Instead, statutes like the ones in South Dakota, Texas, and California[441] do not augment

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concerns and by concerns about exercising subjective values (where, for example, individuals can disagree about an appropriate punishment, judges are in no better position than legislators to decide on the appropriate sentence). Solem v. Helm, 463 U.S. 277, 290 n.17 (1983) (explaining federalism concerns). The effect of a decision that invites close scrutiny of criminal sentences would be to federalize virtually every state case, allowing prisoners to routinely challenge their sentences by way of habeas corpus.

[436] Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591, 597-600 (1981).

[437] *Id.* at 598.

[438] Martin Wasik, *Desert and the Role of Previous Convictions, in* PRINCIPLED SENTENCING 233, 236 (Andrew von Hirsch & Andrew Ashworth eds., 1992).

[439] *Id.*

[440] Vitiello, *supra* note 361, at 427-31.

[441] While the penalties under California's Three Strikes are not retributivist, its second-strike provisions do seem to reflect the view that punishment should be proportional to the

punishment only when an offender commits similar crimes. Helm received a true life sentence under South Dakota's law without regard to the nature of the felonies, as did Rummel.[442] In California, a third strike may be any felony,[443] even a very minor one, as *Andrade* and related cases demonstrate.[444]

Von Hirsch also argues that a repeat felon may be entitled to less mitigation as he commits additional crimes.[445] The loss of mitigation theory creates problems for retributivists. It is unclear why a retributivist would not impose the fully deserved punishment for the first offense. But assuming that the retributivist gets past that argument, a second problem arises in the structure of many recidivist statutes. What about a felon who commits serious felonies early in her career, but who comes within the scope of a recidivist statute because of a minor felony, as may happen under Three Strikes?[446] Should we say that such a person is entitled to no mitigation? In one sense, her continued criminality suggests that she has not learned to conform her conduct to the requirements of the criminal law. But the criminal law and the earlier punishments may have worked partially. The offender may have abandoned serious or violent criminal conduct in favor of less serious criminal conduct.[447]

Again, statutes like Three Strikes and many recidivist statutes do not reflect von Hirsch's loss of mitigation theory. Three Strikes doles out very long punishments without regard to the pattern of criminality. In fact, Three Strikes may work counter to von Hirsch's theory. An example developed by Professor Zimring demonstrates the point: a felon who commits a burglary, a theft, and a burglary does not qualify for a Three Strikes sentence.[448] In contrast, an offender who is convicted

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underlying conduct. CAL. PENAL CODE § 667(a)(1) (Deering 2003). Thus, a burglar who commits a second burglary and a robber who commits a second robbery both receive enhanced sentences, but they do not receive the same sentence. Instead, the sentence relates to the crime committed. That is not true of third-strike felons. CAL. PENAL CODE § 667(e)(2)(A) (Deering 2003). Professor Zimring and his coauthors have argued that Three Strikes lacks a coherent penal theory. ZIMRING ET AL., *supra* note 329, at 9.

[442] S.D. CODIFIED LAWS § 22-7-8 (Michie 2003); TEX. PENAL CODE ANN. § 12.42(d) (Vernon 2004); Solem v. Helm, 463 U.S. 277, 281 (1983).

[443] CAL. PENAL CODE § 667(e)(2)(A) (Deering 2003).

[444] Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 746-67 (9th Cir. 2001).

[445] Wasik, *supra* note 438, at 233, 236.

[446] *See, e.g.*, People v. Superior Court (Romero), 37 Cal. Rptr. 2d 364, 379-80 (Ct. App. 1995).

[447] *See* Vitiello, *supra* note 361, at 448-50.

[448] *See* Frank E. Zimring, *Populism, Democratic Government and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L.J. 243, 248-51 (1996).

of the same crimes, but is convicted of the two burglaries and then the theft, may be sentenced under Three Strikes.[449] Someone who abandons the more serious conduct of burglary for the lesser crime of theft does not seem to abandon all claim for mitigation.

In *Punishment and Democracy*, Zimring and his coauthors have argued that Three Strikes punishes inversely to an offender's desert.[450] The authors compare an offender's minimum sentence under Three Strikes with his presumptive sentence were he convicted of different felonies without the Three Strikes sentence.[451] Thus, an offender would receive a presumptive middle term of six years in prison were he sentenced for rape; if rape were his third strike, his minimum term of imprisonment would be twenty-five years, or about four times greater than his sentence under the rape statute.[452] By comparison, a person whose final felony was burglary would have his minimum sentence increased twenty-five times his presumptive sentence under the burglary statute.[453]

Proponents of laws like Three Strikes must concede that the justification for long prison terms is not retribution.[454] If Three Strikes sentences are justified, the explanation must be found elsewhere. Indeed, proponents advance utilitarian arguments. They suggest that recidivist statutes are "forwarding looking" laws that attempt to use the offender's past criminal record as a predictor of future criminal conduct.[455] Grounded in the idea that a small number of all felons commit a disproportionately large percentage of all crime,[456] recidivist laws promote selective incapacitation, which reduces crime by targeting those most likely to commit a disproportionate number of crimes.[457] Further, Three Strikes laws are intended to deter others from committing

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[449] *Id.*

[450] *See* ZIMRING ET AL., *supra* note 329, at 120-21.

[451] *Id.* at 120.

[452] *Id.*

[453] *Id.*

[454] *Id.* at 9.

[455] Radin, *supra* note 393, at 1167 n.83; Vitiello, *supra* note 361, at 422-23.

[456] *See* FRANKLIN F. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 14-15 (1995) (reviewing debate surrounding incapacitation); *see also* ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 31 (1985) (arguing that prospective considerations are incompatible with theory of desert); Jacqueline Cohen, *Selective Incapacitation: An Assessment*, 1984 U. ILL. L. REV. 253, 253 (making same argument).

[457] *See, e.g.*, James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 12-15 (2000); Bill Jones, *Why the Three Strikes Law is Working in California*, 11 STAN. L. & POL'Y REV. 23, 24 (1999).

crimes.[458]

Whether any particular prison sentences deter or reduce crime through incapacitation is an empirical proposition that can be tested. Hence, even if one accepts an entirely utilitarian justification for punishment, particular sentences are warranted only if they work as a factual matter.[459] The next section explores that question.

IV. THREE STRIKES AND THE DROP IN THE CRIME RATE

A. *Proponents' Arguments*

Three Strikes proponents argue that the law successfully targets high-rate offenders who commit a disproportionate number of crimes.[460] As observed by one Three Strikes proponent, the law identifies "through past behavior those who have demonstrated a clear disposition to engage in serious criminal acts and whose conduct has not been deterred by conventional concepts of punishment."[461] Imposing long sentences on those offenders causes a sharp drop in crime rates because they are no longer on the streets committing crimes.

There are serious questions about whether Three Strikes targets the right offenders.[462] When crime seemed to decline after passage of Three Strikes, the law's supporters acknowledged that the effect of longer incapacitation could not explain the decline in the crime rates.[463] Three Strikes sentences would not have had time to work. For example, Three Strikes might have increased an offender's sentence to a minimum of twenty-five years in prison, from a term of six years. A decline in the crime rate that occurs before the Three Strikes enhancement kicks in cannot be a result of Three Strikes sentences.[464] The law's supporters

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[458] ZIMRING ET AL., *supra* note 329, at 94-97 (discussing deterrence as penological justification through process of elimination).

[459] Empirical research can provide a powerful assessment of qualitative assertions limited by assumptions employed in research strategy and time constraints. For a more detailed discussion of limits, *see* ZIMRING ET AL., *supra* note 329, at 101.

[460] Ardaiz, *supra* note 457, at 3; Jones, *supra* note 457, at 24.

[461] Ardaiz, *supra* note 457, at 8.

[462] ZIMRING ET AL., *supra* note 329, at 68 (questioning effect of selective incapacitation); Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 113-18 (1998).

[463] ZIMRING ET AL., *supra* note 329, at 91-94; Linda S. Beres & Thomas Griffith, *Did "Three Strikes" Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report*, 32 LOY. L.A. L. REV. 101, 106-08 (1998).

[464] Beres & Griffith, *supra* note 463, at 118-20.

shifted their explanation for the decline in the crime rate from incapacitation to deterrence.[465]

In either case, Three Strikes supporters have touted the law as an unqualified success because of sharp declines in California's crime rate. For example, in 1999, Governor Gray Davis, a Three Strikes supporter, vetoed a bill that would have authorized a study of California's Three Strikes law.[466] His veto message declared that "[a]n additional study is unlikely to produce much, if any useful information that is not already available."[467] No doubt, he had in mind reports like the 1998 study prepared by then Attorney General Dan Lungren's office, attributing most, if not all, of the decline in crime to Three Strikes. The report claimed that "[s]ince the passage of 'Three Strikes'... the violent crime rate in California has dropped 26.9% with a 30.8% drop in the six major crime categories."[468] According to the report, that is California's "largest overall drop in crime in any four-year period in history with double digit drops in every major crime category between 1994 and 1997."[469]

Other Three Strikes supporters have echoed the view that Three Strikes is the reason for decreased crime in California. Justice Ardaiz, who gave early counsel to Three Strikes prime mover Mike Reynolds, has argued that the dramatic decline in crime since 1993 is best explained by Three Strikes: "[w]here there are a number of explanations for a given result, the simplest explanation is usually correct. The Three Strikes Law *is* that explanation."[470] Secretary of State Bill Jones, who sponsored the original Three Strikes bill in the Assembly, finds additional statistical support for Three Strikes' effectiveness by comparing California's declining crime rate with crime rates elsewhere in the country. He contends that California's 4.9% decline in 1994, compared to a nationwide decline of only 2%, and its 7% decline in the first half of 1995, compared to a 1% drop nationwide, are attributable to

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[465] *See, e.g.*, Jones, *supra* note 457, at 24. Other law enforcement officials cite deterrence as a reason for supporting Three Strikes law. For example, a study conducted by an FBI agent in Los Angeles found a majority of juvenile offenders in a survey said they would not commit a serious or violent felony if they knew "that they would receive 25 years to life in prison." Jon Matthews, *Benefit of the Three Strikes Disputed*, THE FRESNO BEE, Nov. 9, 1999, at A11.

[466] Governor Davis's Veto Message of S.B. 873, 1999-2000 Leg., Reg. Sess. (Cal. 2000).

[467] *Id.*

[468] Off. of the Atty. Gen., Cal. Dept. of J. "Three Strikes and You're Out" — Its Impact on the California Criminal Justice System After Four Years (1998), *available at* http://www.threestrikes.org/cag98_pgthree.html [hereinafter Attorney General's Report].

[469] *Id.*

[470] Jones, *supra* note 457, at 24.

Three Strikes.[471]

B. Studies Critical of Three Strikes' Success

Three Strikes' opponents have pointed to reasons, in theory, why they doubt that Three Strikes would cause all or most of the decline in the crime rate.[472] Even if the picture portrayed by the law's supporters were correct, social scientists might demand stronger evidence of a causal link between the passage of Three Strikes and the decline in crime.[473] Shortly after Lungren's office published its report, two scholars demonstrated that not only might the data be explained by other causes, but also that the report had the data wrong.[474] For example, the Attorney General's report compared crime data for 1990-1993 with that of 1994-1997 (the three years preceding and following the passage of Three Strikes) and concluded that the overall crime rate[475] dropped by only 2.4% in the pre-Three Strikes years and by 30.8% immediately after its passage.[476]

Viewed in that light, "the dramatic change" did take place right after passage of Three Strikes. But aggregating the data for 1990-1993 creates a misleading picture. As argued by Professors Beres and Griffith, "[t]he violent crime rate rose sharply in 1989 and 1990 and rose by lesser amounts in 1991 and 1992. The pattern reversed in 1993, one year before Three Strikes, when the violent crime rate declined by 4.1%.... The AGR [Attorney General's report] conceals the fact that the violent crime rate began to fall the year before Three Strikes was adopted by lumping the year 1993 with the years 1990-1992 when the violent crime rate rose."[477]

The authors examined other data relied on by the Attorney General's report and cast doubt on its conclusions. For example, they examined

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[471] *Id.*

[472] Beres & Griffith, *supra* note 462; Vitiello, *supra* note 361.

[473] ZIMRING ET AL., *supra* note 329, at 33-35, 88.

[474] Beres & Griffith, *supra* note 463, at 106-07; DARYL A. HELLMAN & NEIL O. ALPER, ECONOMICS OF CRIME (4th ed. 1997) (noting that differences in crime rates may be due to changes in number of agencies reporting such crimes or willingness of victims to report offenses to police).

[475] Beres & Griffith, *supra* note 463, at 104-06. Beres explains the different indices available for measuring crime activity. The index most commonly used is the FBI Crime Index. However, official statistics on crime in California were measured using the California Crime Index, which omits property crimes of arson and larceny theft.

[476] Attorney General's Report, *supra* note 468, at 3.

[477] Beres & Griffith, *supra* note 463, at 109; Attorney General's Report, *supra* note 468, at 13.

the crime data for felony theft.[478] Theft does not qualify as a first or second strike; but, as is readily apparent from a review of cases like *Andrade*, it may qualify as a third strike. If Three Strikes deterred crime, the post-enactment decline in theft should have been most dramatic among older felons with two strikes.[479] But the data showed a steeper decline among young felons than among older ones.[480]

Beres and Griffith also considered the Attorney General's report's assertion that California's crime rates had declined more dramatically than did the crime rates in other states.[481] Again, the Attorney General's use of data was misleading. During the mid-1990s, "the drop in violent crime. . . was greatest among urban minority youth."[482] That pattern was typical throughout the nation.[483] Hence, states with significant numbers of minority youth living in large cities experienced the largest declines in their crime rates.[484] California's Three Strikes law cannot be the reason for declines in crime rates in New York and Massachusetts, where the decline in crime was not attributable to laws like California's Three Strikes.[485]

Other statistical studies have cast doubt on the claims of Three Strikes proponents. For example, Mike Males and Dan Macallair examined data from two different perspectives.[486] First, they examined the impact on African Americans.[487] Second, they compared crime data from different counties in the state.[488]

The authors examined declining crime rates among African Americans. They hypothesized that the greatest decline in crime should occur among men in the age group between thirty and forty years old.[489] This age group would be the most likely to have accumulated two

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[478] Beres & Griffith, *supra* note 463, at 107.

[479] *Id.* at 120-22.

[480] *Id.* at 121-22, 124-25.

[481] *Id.* at 127-30.

[482] *Id.* at 127.

[483] *Id.*

[484] *Id.* at 127-30.

[485] Beres and Griffith explain that Boston experienced a crime drop through methods other than implementing similar three-strike laws. For example, the city aggressively targeted violent gang leaders for prosecution, patrolled gang hang-outs and vacant lots, and also worked with community leaders. The approach was copied nationwide. *Id.*

[486] Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 STAN. L. & POL'Y REV. 65, 67 (2000).

[487] *Id.* at 67.

[488] *Id.* at 67-68.

[489] *Id.* at 66-67.

strikes.[490] If the law deters, men in that age group should be the most susceptible to its deterrent effect. But the most dramatic reduction in crime was among those under twenty years old, not among those between thirty and forty years old.[491] The authors also noted that adult crime rates were declining before Three Strikes became law, again suggesting that much of the decline was not caused by the law.[492]

The authors' second significant finding was that counties where the law was most vigorously enforced did not necessarily experience the sharpest decline in the crime rate.[493] For example, Sacramento and Los Angeles counties applied the law approximately seven times more frequently than did Alameda and San Francisco counties. The level of enforcement did not correlate with the decline in crime in those counties. While Sacramento County's homicide rate declined 23% and violent crime declined 10%, San Francisco experienced declines of 35% and 33% in those categories.[494]

Frank Zimring, Gordon Hawkins, and Sam Kamin have conducted the most ambitious study to date.[495] Their results were first published in a monograph in 1999[496] and in a longer book in 2001.[497] Their findings are consistent with other empirical studies that suggest that Three Strikes simply does not account for a significant part of the decline in California's crime rate.

Their study attempted to answer a number of questions. They asked how much crime one- and two-strike offenders commit.[498] They also asked whether Three Strikes' penalties are being enforced and what possible deterrent effect the law may have had.[499] Rather than relying on

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[490] *Id.* at 67.

[491] *Id.*

[492] *Id.*

[493] *Id.* at 67-68.

[494] *Id. See also* David Schultz, *No Joy in Mudville Tonight*, 9 CORNELL J.L. & PUB. POL'Y 557 (2000) (offering alternative explanations for mid to late 1990's crime rate drop).

[495] ZIMRING ET AL., *supra* note 329.

[496] FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, CRIME AND PUNISHMENT IN CALIFORNIA: THE IMPACT OF THREE STRIKES AND YOU'RE OUT (1999); ZIMRING ET AL., *supra* note 329, at vi.

[497] ZIMRING ET AL., *supra* note 329.

[498] The authors asked the question because, if those offenders committed as much crime as Three Strikes proponents contend, then incarcerating those offenders should make a large difference in the decline of crime rates. If that were the case, incapacitation should yield significant benefits. By contrast, if those offenders are not responsible for a large percentage of crime committed, their incarceration cannot explain the large drop in the crime rate. ZIMRING ET AL., *supra* note 329, at 33-35.

[499] Michael Vitiello, *Book Review: Punishment and Democracy: A Hard Look at Three*

aggregate crime data, the authors examined arrest records of no-, one - and two-strike felons to see who was committing what kinds of crimes.[500] They also sought data from three different cities with distinct reputations for their enforcement of Three Strikes.[501]

Several of the authors' findings contradict the claim that Three Strikes caused the decline in California's crime rates. For example, the amount of crime actually committed by those targeted by Three Strikes is quite small, slightly over 10.5% for one- and two-strike defendants, only 3.3% for two-strike offenders.[502] As a result, incarcerating both classes of Three Strikes offenders does not account for a large amount of crime committed by other offenders who do not fall within the provisions of the law. Also contrary to claims of the law's proponents, Three Strikes offenders did not account for their proportionate share of violent offenses.[503] Incarcerating Three Strikes offenders simply cannot explain the significant drop in the crime rate.

Similar to the Beres-Griffith study, Zimring and his coauthors found that the Attorney General's report's claims did not withstand close scrutiny.[504] Unlike the report's assertions, California did not experience a sharp decline in crime rates upon the enactment of Three Strikes. The downward trend started before Three Strikes was enacted, and the slope of the downward trend did not change when the law took effect.[505] The downward trend in California also paralleled the downward trend elsewhere in the United States.[506]

The coauthors recognized that the pre-Three Strikes downward trend might have stopped but for Three Strikes.[507] To determine whether that was the case, they explored additional data.[508] They concluded that incapacitation did not explain the downward trend for the reasons

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Strikes' Overblown Promises, 90 CAL. L. REV. 257, 272 (2002) (reviewing FRANKLIN E. ZIMRING, GORDON HAWKINS, & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001)).

[500] Methodology involved collecting arrest data for a large number of offenders both before and after passage of Three Strikes from three California cities: San Diego, Los Angeles and San Francisco. *Id.*

[501] *Id.*

[502] ZIMRING ET AL., *supra* note 329, at 59.

[503] *Id.* at 43-46, 59 (explaining that in 1993, third-strike felons, group most obviously targeted by Three Strikes, committed only one felony in 30).

[504] *Id.* at 31-35.

[505] *Id.* at 88.

[506] *Id.* at 88-89.

[507] *Id.*

[508] *Id.* at 91-94.

discussed above:[509] offenders sentenced shortly after Three Strikes would have been in prison anyway.[510] Three Strikes also did not result in a significant increase in the prison population, which might otherwise explain the continued drop in the crime rates.[511]

The authors also considered whether Three Strikes might have led to significant decreases in the crime rate through its deterrent effect.[512] They made a number of assumptions in analyzing relevant data. For example, they assumed that non-Three Strikes offenders would not be deterred at the same rate as would offenders facing second- and third-strike sentences.[513] The authors collected pre- and post-Three Strikes data for the three groups, those not facing sentencing under Three Strikes, those facing sentencing under the law's two-strikes provisions, and those facing third-strike sentences.[514] The percentage of the total amount of crime committed by each group remained constant.[515] Surely, if Three Strikes were a major deterrent, the steepest declines in crime rates should have been among those facing third-strike sentences of a minimum of twenty-five years to life. That simply was not the case. Using additional analytical measurement, the authors left open the possibility that, at most, their data support a finding of a "trace" amount of general deterrence, far less than the amounts claimed by the law's proponents.[516]

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[509] Beres & Griffith, *supra* note 463, at 119-20.

[510] ZIMRING ET AL., *supra* note 329, at 91.

[511] *Id.* at 102. Zimring and his coauthors argue that we should recognize that society will receive "some further marginal incapacitation" in future years when Three Strikes offenders remain in prison past the dates when they would otherwise have been released. However, they also suggest that the kind of benefits promised by Three Strikes proponents will not occur because the law has not resulted in incarceration of repeat offenders whom the law purported to target.

[512] *Id.* at 94-95.

[513] ZIMRING ET AL., *supra* note 329, at 95-96; Vitiello, *supra* note 499, at 277.

[514] ZIMRING ET AL., *supra* note 329, at 95-101.

[515] *Id.* at 100.

[516] *Id.* at 105. The authors first published the results of their studies in 1999, before they expanded the study into a book. *Id.* at vi. Two political scientists challenged the 1999 study's methodology. *See generally* Brian P. Janiskee & Edward J. Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law*, 39 DUQ. L. REV. 43 (2000). I have described their criticisms elsewhere and discussed Zimring and Kamin's response as well. Vitiello, *supra* note 499, at 275-77. I recommend Zimring's published response to the criticism of his coauthored study. *See generally* Michael Vitiello, *Rebuttal Somewhat Frantic: A Brief Response to Crime, Punishment, and Romero*, 40 DUQ. L. REV. 615 (2002). Two of Janiskee and Erler's criticisms are relevant here. First is that the study done by Zimring and his colleagues was methodologically flawed because of statistical conflation of arrest and crimes. That is, they contended that the study's authors were wrong to assume that the three groups of offenders faced the same chance of arrest.

C. *Shepherd's Economic Model*

More recently, economist Joanna M. Shepherd has argued that Three Strikes has, in fact, deterred a significant amount of crime.[517] Her central thesis was that prior research, including the study by Zimring, Hawkins, and Kamin, ignored the full deterrent effect of the law by focusing only on the third strike.[518] She argued that because repeat offenders commit only 10% of the crime, focusing on the last strike ignores 90% of all crime.[519] Based on her econometric models, she concluded that criminals actively avoid an offense that would qualify as a first strike.[520] As a result, Three Strikes has deterred far more crime than prior studies indicate.[521]

Shepherd expanded on traditional economic analysis of crime. In her attempt to account for the deterrent effect of Three Strikes, she used a new approach, not employed by other scholars who do economic modeling of crime.[522] Borrowed from economic models relating to financial investments, "options and investment under uncertainty"[523] refers to the idea that "an 'option' value [exists] to delay an investment decision in order to wait the arrival of new information about market conditions."[524]

Second, they contended that the study attempted to measure the law's deterrent effect too early after the law was passed. In response to the first criticism, Zimring and Kamin argue that, were their critics correct that one-and two-strike felons are more likely to have been caught than no-strike felons, the effect would be that it "would further decrease the share of crime that these special target groups commit and thus the potential crime saving of a Three Strikes program." Source on file with the author. Thus, if those eligible for 25-year-to-life sentences were twice as likely to have been caught as no-strike felons, then their share would have been only half of the total of 3.3% of the crimes that Zimring and his coauthors found to have been committed by that group of offenders.

In response to the criticism that the study measured deterrence too close to the effective date of the law, Zimring and Kamin stated, "If [Janiskee and Erler] had read into the literature on deterrence they would have found that since publicity and concern are maximum around the time of legal change, the closer the observation to the change, the greater the chance for finding a shift in general effect, that is the deterrent effect of the threat." Source on file with the author.

[517] Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two-and Three Strikes Legislation*, 31 J. LEG. STUD. 159 (2002).

[518] *Id.* at 161.

[519] *Id.* at 171.

[520] *Id.* at 200.

[521] *Id.* at 201.

[522] *Id.* at 171 n.51.

[523] *Id.*

[524] Alan Carruth, Andy Dickerson & Andrew Henley, *What Do We Know About Investment Under Uncertainty?*, 14(2) J. ECON. SURVEYS 119 (2000). *See also* AVINASH K. DIXIT & ROBERT S. PINDYCK, INVESTMENT UNDER UNCERTAINTY 144-45 (1994); Robert S. Chirinko,

In reliance on the investment analogy, Shepherd's model assumes that individuals choose to allocate their time between legitimate and illegitimate opportunities based on the expected utility from each activity.[525] An offender avoids committing a crime if delayed punishment (lengthy sentences for second and third strikes) outweighs actual and psychic income derived from committing the crime.[526] Once the offender has spent his first "strikable" offense, he no longer has that option to spend for future offenses; he is one step closer to receiving augmented punishment from his second and third strike, if convicted.[527] Without the first strike to spend for future offenses, the cost of punishment increases dramatically with the second and third strike, and the cost of crime becomes unacceptably high for the offender.[528] Reliance on the investment analogy is especially important because, without the assumption that a no-strike offender is weighing the option of waiting to commit his first strike, the general economic model of crime would predict a deterrent effect for one- and two-strike offenders only.[529] With Shepherd's assumption in place, Three Strikes is deterring or changing the behavior[530] of the vast majority of first-time offenders.[531]

Perhaps anticipating criticism of the assumption that no-strike offenders avoid certain crimes because they do not want to use up their first strike, Shepherd contended that her assumption is based on simple intuition. She analogized no-strike offenders to batters in baseball. According to her, "[a] baseball player who can make only three strikes chooses which pitches to swing at much more cautiously than a player who can make unlimited strikes."[532]

Investment Under Uncertainty: A Review Essay, 20 J. ECON. DYNAMICS & CONTROL 1801, 1803 (1996).

[525] Shepherd, *supra* note 517, at 171-72.

[526] *Id.* at 171.

[527] *Id.* at 172.

[528] *Id.* at 173.

[529] That is so because the law increases punishment only for those offenders; hence, only for those offenders is there a decreased utility. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, *in* ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 1 (Gary S. Becker & William M. Landes eds., Columbia Press 1974). In his seminal work on the economic model of crime, Becker theorizes that the optimal number of offenses to be committed is directly proportional to the probability of conviction and the severity of the punishment of the criminal actor. Thus, an increase in punishment will correspondingly decrease the number of offenses that are committed. *Id.* at 9-11.

[530] Shepherd, *supra* note 517, at 196 (hypothesizing that some criminals may substitute nonstrikable offenses such as larceny and auto theft for strikable offenses such as murder and robbery because of perceived risk of enhanced penalty).

[531] *Id.*

[532] *Id.* at 174, n.54.

Shepherd used county-specific data from 1983-1996.[533] Her article concludes that Three Strikes has had a significant deterrent effect. She found a strong negative coefficient in murder, aggravated assault, robbery and burglary.[534] For offenses that are not first strikes, such as larceny and auto theft, she found a positive relationship that suggested that Three Strikes did not deter these crimes.[535] Her explanation is that first-time offenders are shifting their activities to felony activity that does not constitute a first strike.[536]

Shepherd's study is open to a number of criticisms. An established literature challenges the general methodology that she uses.[537] For example, critics attack a basic assumption of economic analysis, that a criminal actor making a choice between legitimate and illegal activity or between different kinds of crimes has perfect information about the cost and utility of those choices.[538] That assumption is doubtful.

Critics of the economic model argue that instead of making rational, fully informed choices, people make choices based on their own reference levels.[539] Criminals in particular act on less than perfect information. Thus, many criminals discount their future and think and act primarily in terms of their present desires and needs.[540] Some

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[533] *Id.* at 182.

[534] *Id.* at 189-90.

[535] *Id.*

[536] *Id.* at 190-93.

[537] *See, e.g.*, William L. Barnes, Jr., Note, *Revenge on Utilitarianism: Renouncing a Comprehensive Economic Theory of Crime and Punishment*, 74 IND. L.J. 627 (1999) (discussing origins of economic model of criminal choice espoused by Gary Becker); Samuel Issacharoff, *Can There be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729 (1998); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CAL. L. REV. 1051 (2000) (discussing problems with applying economics to law); Thomas S. Ulen, *The Growing Pains of Behavioral Law and Economics*, 51 VAND. L. REV. 1747, 1747-48 (1998) (arguing application of economic theory to law has promising future but is currently subject to many serious and justifiable criticisms, and that "[t]he skeptics are right to be critical and skeptical, and we should be too.").

[538] Barnes, *supra* note 537, at 630 (discussing assumption that criminals make choices with perfect information).

[539] Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11, 13 (1998) (discussing several shortcomings of economic model and suggesting methods to improve model by utilizing established concepts from field of psychology). By "reference level," Rabin means that people often perceive a new situation relative to their own current situation rather than to some absolute. *Id.*

[540] *See generally* Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55, 63 (2001). The commentators discuss a criminal's discounting of the prison term:

criminals commit the "gambler's fallacy."[541] That is, like the uninformed gambler, at least some criminals believe that the fact that they have been caught in the past reduces the chances that they will be caught in the future.[542] Apart from a host of problems relating to whether we generally act consistently with the kind of rationality assumed by economists,[543] violent criminals are the least likely to act consistently with rational planning. By definition, crimes like second-degree murder and other forms of unintentional homicide do not require any planning activity.[544] Voluntary manslaughter typically occurs on the spur of the

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> Offenders are likely to discount prison time to be served in the future so that a year in prison to be served five years from now will be viewed as less of a punishment than a year to be served immediately. Thus doubling the sentence length for an offense does not double the perceived severity of the sentence.
>
> Discounting future pleasures and pains is not confined to potential offenders. Many people value immediate pleasure more than future pleasure, as illustrated by the nation's record levels of consumer debt. Moreover, even if an individual values present and future pleasure equally, he may discount prison time to be served in the future because of a belief that he may die before actually serving the time or that he might be released early because of a change in government policy.

[541] The gambler's fallacy refers to the idea that, in some instances, individuals reduce their estimate of the likelihood of a purely chance event. For example, "card players sometimes increase their bets after losing several consecutive hands because they feel they are due to win." *Id.* at 63. In addition, sometimes, "[l]ottery participants decrease the amount wagered on a particular combination of numbers after that sequence has 'hit.'" *Id.* In reality, losing several hands or a winning combination of numbers is entirely independent of a subsequent hand or combination of numbers. *Id.*; Greg Pogarsky & Alex R. Piquero, *Can Punishment Encourage Offending? Investigating the "Resetting" Effect*, 40 J. RES. CRIME & DELINQ. 95, 99-100 (2003).

[542] *Id.* at 112-15 (providing preliminary conclusion that some offenders invoke gambler's fallacy which could explain why, contrary to theory of specific deterrence, some punishment has "positive punishment effect").

[543] The economic model of criminal choice fails to account for certain well-documented decision-making biases. Human beings suffer from many systematic decision-making quirks that deviate from the rational choice model. For example, people will generally favor a "fair" decision even if that decision does not maximize their individual utility. *See* Ulen, *supra* note 537. People also systematically interpret information most favorably to their self-interests and are overly optimistic about bad things happening to them. *See* Jolls, *supra* note 537. Decisional biases that affect all people illustrate that in certain circumstances people are not maximizing utility and that deviations are not "random" as assumed by law and economics. *See* Issacharoff, *supra* note 537.

[544] *See* Ceaser v. Ault, 169 F. Supp. 2d 981, 998 (N.D. Iowa 2001). Chief Judge Bennett discussed the relevance of the criminal actor in *Ceaser*. He stated "[t]he legislature could conclude that [property crimes] are based on calculating self-interest, while crimes against persons are crimes of 'hate and passion' and that, as a result, crimes of passion are not susceptible to deterrence." *See also* Barnes, *supra* note 537 at 640-41 (discussing how some

moment when the victim provokes the defendant.[545] Further, violent criminals are often intoxicated, reducing their planning activity.[546] The kinds of crimes most susceptible to rational planning, like securities fraud or property offenses, are not the crimes that create the greatest public concern.[547]

One recent study attempted to test the economic model's fundamental assumption of the economic model, that offenders are rational and informed.[548] Economist David Anderson based his conclusions on interviews of 278 male inmates. Among his questions were, "When you committed this crime, how likely did you think it was that you would be caught?" and "When you committed the crime, did you know what the likely punishment would be if you were caught?"[549] Anderson's data show that "76 percent of active criminals and 89 percent of the most violent criminals either perceive no risk of apprehension or are incognizant of the likely punishment for their crimes."[550] The study certainly supports the general criticism of the economic model of crime.[551]

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criminal choices are irrational choices by definition).

[545] DRESSLER, *supra* note 391, at 528-32.

[546] A 1997 national survey found that 42% of those convicted of violent crimes were under the influence of alcohol at the time of their offense. U.S. DEP'T. OF JUSTICE, BUREAU OF STATISTICS, SUBSTANCE ABUSE AND TREATMENT, STATE AND FEDERAL PRISONERS, 1997, 3 (1999).

[547] Barnes, *supra* note 537, at n.151, *citing* Thomas Bak, *Does the Offense Charged Predict the Type and Frequency of Pretrial Violations?*, 24 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 65, 75 (1998) ("societal notions that crimes against property are less heinous than crimes against persons").

[548] David A. Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 AM. L. & ECON. REV. 295, 300-02 (2002).

[549] *Id.* at 300, 309. Regarding the former question, the answer choices available to participants were: (a) very likely; (b) somewhat likely; (c) possible, but not likely; (d) I did not think I would be caught; and (e) I did not think about it. The latter question had the following answer choices: (a) I knew exactly what the punishment would be; (b) I had a good idea; (c) I had some idea; (d) I had no idea, or I thought I knew but I was wrong; and (e) I didn't think about it. *Id.* at 309.

[550] *Id.* at 295. Seventy-six percent of all participants selected either (d) or (e) in either, or both of, the questions in the preceding footnote. When the pool was constrained to "deadly" criminals, the total increased to 89%. Thus, Anderson concluded that these criminal actors were either uninformed or irrational. *Id.* at 304-05. Moreover, and particularly striking, even among criminals with accurate information and the ability to make rational choices, around 70% reported that no punishment would have prevented them from participating in criminal activity. *Id.* at 305.

[551] Some limitations of Anderson's findings should be noted. First, all participants in the survey were apprehended so the results may be biased towards criminal actors that are more likely to be apprehended. Anderson argues that this bias in fact makes the results conservative. *Id.* at 301. Second, in general, survey data is subject to the honesty of the

Apart from the general criticism of her methodology, Shepherd's work is open to specific criticisms. One problem with a model like Shepherd's is that it makes a number of assumptions that are then used to explain perceived results. One of Shepherd's key assumptions is based on her analogy of no-strike felons to potential investors. That is, if no-strike felons are like potential investors, they make a cost-benefit analysis of their crimes based on whether the criminal activity in which they hope to engage will count as a first or second strike.[552] This "net option value of waiting to commit the first strike" is a variable that she includes in her mathematical calculation. As discussed above, she offers little support for her intuition, other than her analogy to the baseball player's view of his first strike.[553] The assumption is critical because traditional economic analysis would have predicted a deterrent effect only for one- and two-strike felons, not no-strike felons.[554]

As discussed above, Shepherd made assumptions about how criminals act, inserted data into her economic model, then drew conclusions from the numeric results that her model produced.[555] She found a significant negative coefficient, indicating that deterrence took place between Three

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participants. *Id.* Third, the sample size was fairly small, with only 278 participants. *Id.* at 300. A larger sample size could provide more reliable data.

[552] Shepherd, *supra* note 517, at 172.

[553] *Id.* at 174 n.54.

[554] See *supra* note 529. Even Shepherd's baseball analogy does not support her intuition. Baseball fans are aware that hitters' averages vary dramatically depending on the count. Fans are aware that on "pitchers' counts," like 0-2 or 1-2, batters' composite averages are much lower than they are on "hitters' counts," like 2-0 or 3-1. JIM ALBERT & JAY BENNETT, CURVE BALL: BASEBALL, STATISTICS, AND THE ROLE OF CHANCE IN THE GAME 87 (2001). Most batters have a much higher average on their first strike than they do on their third. *Id.* at 102 (finding that "players generally hit 158 points lower when the count is at two strikes . . . instead of being ahead in the count"). Only certain types of hitters have high averages when they have two strikes. *Id.* at 104-06 (citing as example Tony Gwynn, hitter with outstanding bat control and short stroke, who performs better in two-strike situation than Jim Thome, power hitter with long batting stroke). Thus, data show that strikes are not fungible, contrary to the assumption that is central to Shepherd's thesis. Shepherd, *supra* note 517, at 174 n.54.

Further, baseball players have a reasonably good understanding of the strike zone, even if they complain that the strike zone varies among umpires. Leonard Koppett, *The Thinking Fan: Troubles With Strike Zone Question of Size, Eyes*, SEATTLE POST-INTELLIGENCER, June 13, 2003, at C8 (arguing that sheer number of major league baseball umpires today, 71 total, leads to inconsistent strike zone). In addition, unlike criminals, batters do not discount the possibility that the rules will not apply to them during the game. Thus, as discussed in the Article above, criminals are unlike baseball players because they are often unaware of the applicable rules of law and discount the possibility that they will be caught. *Supra* notes 538-43.

[555] Shepherd, *supra* note 517, at 185-93.

Strikes legislation and the commission of particular crimes.[556] Murder, aggravated assault, robbery, and burglary had negative coefficients, whereas larceny and auto theft had positive coefficients.[557] Shepherd concluded, therefore, that the law was deterring offenses that counted as strikes, but not those offenses that did not count as strikes: "Fearing initial strikes, potential criminals commit fewer crimes that qualify as initial strikes."[558] Her observation concerning the decline in the murder rate should have raised questions: murder carries the possibility for the death penalty.[559] Shepherd fails to explain how one might not be deterred by the prospect of the death penalty, but suddenly decide not to commit murder because it would be a first strike. She may have an answer to that conundrum, but I fail to see one.[560] The decline in murder rates should have prompted a different question: what factors, *other than Three Strikes*, might explain the decline in crime?

Shepherd's article provides a good example of the general problem of overestimating the rationality of criminal offenders. She assumed that they possess an extraordinary amount of rationality and legal knowledge when she discussed their selection of criminal activities. That is, they choose to avoid felonies that constitute strikes and rationally choose nonstrikable offenses.[561] She cited no evidence to support the view that offenders know which offenses are within the list of felonies that constitute first and second strikes.[562] The list is quite comprehensive,[563] not one that felons are likely to have digested. Even some court decisions suggest that the technical requirements of Three Strikes are not easily understood.[564] Shepherd assumed a far greater familiarity with

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[556] *Id.* at 189-90.

[557] *Id.*

[558] *Id.* at 190.

[559] CAL. PENAL CODE §§ 189, 190.3 (Deering 2004).

[560] Shepherd merely points out that the murder coefficient was relatively small supporting her theory that stricter sentencing may not lead to a substantial decrease in murders as compared with other crimes. Shepherd, *supra* note 517, at 190.

[561] *Id.* at 171-81 (discussing author's model of delayed punishment).

[562] *Id.* at 171-77 (discussing model of delayed punishment and model specification). No doubt, offenders are more informed than the public at large on matters of sentencing and prosecutors' practices. Beres & Griffith, *supra* note 540, at 61 (stating "[n]ot surprisingly, offenders generally are better informed about criminal sanctions than the average citizen"). It does not follow, however, that offenders have the kind of sophisticated familiarity with the complexities of Three Strikes.

[563] CAL. PENAL CODE §§ 667.5(c), 1192.7(c) (Deering 2004) (*e.g.*, murder, mayhem, rape, forced oral copulation, forced sodomy).

[564] *E.g.*, Vitiello, *supra* note 362, at 1692-94. Another example of such technicality is section 667(c)(5), which seemingly allows a 20% reduction for good behavior credits to a

technical niceties than is likely.

Elsewhere in her article, she did not assume a similar sophistication when, to do so, would undercut her deterrence theory. Specifically, she examined data on a county-by-county basis, rather than on a statewide basis. She examined whether strict enforcement in one county merely led offenders to migrate, i.e., to commit crimes in neighboring counties. She concluded that strict enforcement in one county actually leads to a decrease in crime in neighboring counties.[565] She hypothesized that:

> In large cities, news reports or publicity about stricter sentencing practices may not specify exactly which county is imposing the stricter sentence. In addition, criminals may not be sure where the actual county lines are located. Furthermore, criminals may not be aware of exactly how the criminal justice system chooses the jurisdiction in which to prosecute the criminal: is the appropriate jurisdiction the one in which the crime took place, where the criminal lives, or where the criminal was apprehended?[566]

I am inclined to agree with Shepherd that criminals are not likely to have clear answers (or perhaps even think about) these questions. But her assumption that first-time offenders know which felonies are first strikes suggests that she is willing to change her view of how sophisticated criminals are, depending on whether her assumption is necessary to support her thesis. In addition, while she suggested that counties that strictly enforce Three Strikes experienced the deepest decline in crime rates, she did not cite specific underlying data concerning county-by-county enforcement.[567] Nor did she rebut findings in other studies that suggest no correlation (or an inverse correlation) between levels of enforcement in different counties and declining crime rates.[568]

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life sentence with a minimum of 25 years. However, the section must be viewed in conjunction with Article 2.5 of the Penal Code (beginning at section 2930), which applies only to determinate sentences. A sentence must therefore contain a determinate component to be eligible for good behavior credits reduction. A determinate sentence is not the legal equivalent of a minimum sentence: a determinate sentence has a lower and an upper limit while a minimum sentence has only a lower limit. Because life imprisonment with a minimum term of 25 years lacks a determinate component, California Penal Code § 667(c)(5) good behavior credits are not applicable. *In re* Cervera, 16 P.3d 176, 178-80 (Cal. 2001).

[565] Shepherd, *supra* note 517, at 197.

[566] *Id.* at 199-200.

[567] *Id.* at 182.

[568] *Id.* at 164 (stating, "[t]here seem to be little if any relationship between a county's population, crime rates, and the two-and Three Strikes implementation").

Zimring and his coauthors looked at crime records of specific offenders, those who had yet to commit a strike-felony, those who now qualified for a second-strike sentence, and those facing third-strike sentences.[569] As discussed above, the first- and second-strike offenders continued to commit their share of crimes, suggesting that they were not in fact deterred.[570] The authors also considered the possibility that all three groups were deterred in the same proportion and rejected that assumption as irrational.[571] Shepherd's study turns on that assumption.[572]

The study by Zimring, Hawkins, and Kamin remains the most detailed and authoritative study to date. It suggests that California may get some increased reduction in crime based on the incapacitation of offenders, after the enhanced sentence kicks in.[573] They recognize that the data may indicate a minor deterrent effect.[574]

D. The Utilitarian Perspective

Even if Three Strikes has some measurable deterrent effect and may reduce crime through incapacitation in the future, Three Strikes sentences may nonetheless be unjustified from a utilitarian perspective. As discussed above, utilitarianism claims punishment is morally justified if the social benefit (lowered crime rates) outweighs the pain caused (imprisonment of an offender).[575] A full assessment of that utilitarian calculation must focus on alternatives to imprisonment as well.[576] Thus, even if Three Strikes does deter, and may reduce crime through incapacitation, its long sentences are immoral in utilitarian terms if a less painful alternative is available.[577]

When Three Strikes proponents address alternatives at all, they tend to dismiss alternatives without serious attention to which alternatives work

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[569] ZIMRING ET AL., *supra* note 329, at 41-60.

[570] *See* discussion *supra* notes 514-16.

[571] ZIMRING ET AL., *supra* note 329, at 94-101.

[572] Shepherd, *supra* note 517, at 190-91.

[573] ZIMRING ET AL., *supra* note 329, at 101-05.

[574] *Id.*

[575] *See supra* notes 455-58 and accompanying text.

[576] Vitiello, *supra* note 361, at 432-41 (discussing flaws in estimates of impact of Three Strikes in reducing crime in California while pointing out failure of law's proponents to address such issues as high costs of building more prisons and expense of incarceration of aging prisoners).

[577] *Id.*

and which do not work.[578] In contrast, discussion of the true cost of Three Strikes must focus on a number of considerations.

First, while Three Strikes has had a less dramatic effect on the court system than some critics predicted,[579] its effect on the prison system is real and will increase significantly over time.[580] Continued incarceration of aging Three Strikes felons is hard to justify in light of the typical criminal profile. Most older offenders represent a limited risk; violent crime remains a young man's game.[581] Insofar as California is making a choice between dedicating resources to capturing and incarcerating young, violent offenders, and warehousing older felons, even those who have no history of violent crime,[582] Three Strikes compels a bad choice.

Second, some critics of the current Three Strikes law emphasize that the law does not focus on truly violent felons.[583] Data demonstrate that this concern is warranted. Many offenders now incarcerated under Three Strikes committed relatively minor felonies as their third strikes.[584] Not only is that consistent with the view that aging felons are graduating out of violent crime, it also suggests that Three Strikes, as written, casts a net so wide that it will include many offenders who are not particularly violent.[585] A utilitarian cannot justify spending many thousands of dollars to keep a petty criminal in prison when doing so costs many thousands of dollars more than the cost of the offender's crimes.[586] Insofar as the law deters, similar deterrence might be achieved by a more carefully targeted recidivist statute, one that would lead to longer sentences only for the most dangerous felons.[587] Studies suggest that alternatives to the current Three Strikes law would produce similar

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[578] *E.g.*, ATT'Y GEN. REP., *supra* note 468, at 11-13.

[579] ZIMRING ET AL., *supra* note 329, at 126.

[580] *Id.*

[581] U.S. v. Jackson, 835 F.2d 1195, 1199 (7th Cir. 1987) (Posner, J., concurring). Posner argued that crime is a young man's game: "We know that criminal careers taper off with age, although with the aging of the population and the improvements in the health of the aged the fraction of crimes committed by the elderly is rising. Crimes that involve a risk of physical injury to the criminal are especially a young man's game." *See also* JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 126-41 (1985).

[582] Vitiello, *supra* note 361, at 437-41.

[583] Lou Cannon, *A Dark Side to 3-Strike Laws*, WASH. POST, June 20, 1994, at A-15 (quoting Marc Klaas, Polly's father, when he withdrew his support for legislation, "we blindly supported the initiative in the mistaken belief that it dealt only with violent crimes").

[584] ZIMRING ET AL., *supra* note 329, at 43-46, 59.

[585] *Id.*

[586] ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 70-78 (1998).

[587] *See, e.g.*, Vitiello, *supra* note 361, at 437-39.

reductions in crime at significantly lower cost.[588]

Third, many Three Strikes felons, like Andrade and Romero, demonstrate a common pattern among repeat offenders. Both had a history of drug abuse that seemed to be connected with their criminal conduct.[589] Cases likes theirs are common; a large number of repeat offenders have drug problems.[590] Some drug treatment programs have proven effective and are far less expensive than the long prison terms required under Three Strikes.[591] Targeting the right offenders, ones susceptible to successful drug treatment or other rehabilitative programs, results in significant savings without the human loss involved with Three Strikes sentences.

Fourth, California's decline in the crime rate was not unique. Other states had similar declining crime rates without similar long terms of imprisonment.[592] Instead, states like New York and Massachusetts followed policies that were far less expensive than California's massive investment in new prisons and the costs of filling and maintaining them. New York's approach included various policing strategies, including an aggressive approach to nuisance crimes and weapons possession.[593] Boston's approach included more effective policing and various community development and prevention programs.[594] Those practices are less expensive alternatives to mass incarceration. In assessing what may have contributed to the decline in nationwide crime rates, Beres and Griffith suggested that various strategies may have all contributed to the drop in crime, including "[a] growth in community programs designed to prevent violence and to give juveniles a constructive alternative to delinquent behavior. . . . "[595] That is, an honest assessment of whether Three Strikes works must consider less expensive alternatives. Shifting resources from prison construction and maintenance to hiring more police may increase the certainty of punishment, even if the individual sentences are shortened.[596] Shifting resources from prisons to proven

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[588] *Id.* at 436-50.

[589] Andrade v. Att'y Gen. of Cal., 270 F.3d 743, 749 (9th Cir. 2001); People v. Superior Court (Romero), 917 P.2d 628, 632 (Cal. 1996).

[590] ZIMRING ET AL., *supra* note 329, at 76-80.

[591] *See* REITZ, *supra* note 360, at 16-17.

[592] Beres & Griffith, *supra* note 463, at 128-29; Vitiello, *supra* note 499, at 269-70.

[593] Beres & Griffith, *supra* note 463, at 119-20.

[594] *Id.* at 129-30.

[595] *Id.*

[596] Vitiello, *supra* note 361, at 442. While California has had a dramatic decline in its crime rate, so has New York where no three strikes law is in effect. In New York City, the police now make arrests for minor offenses, a strategy that is credited with reducing crime.

rehabilitative programs is sound policy.[597]

If recidivist statutes like Three Strikes are morally justified, it is because they reduce crime without undue cost. The emerging empirical data show that Three Strikes was ill-conceived because its benefits are uncertain and come at far too high a price. With that in mind, I want to discuss the possibility of reforming Three Strikes. Despite my conclusion that *Andrade* and *Brown* were result-oriented,[598] they may have been California's best hope at reforming Three Strikes.

V. REFORMING THREE STRIKES

One obvious response to concerns about the need to reform Three Strikes is that the California legislature or voters should correct the problem. For example, one commentator has stated that the U.S. Supreme Court's refusal to overturn Three Strikes sentences "may be a blessing in disguise. Only state legislatures can eliminate draconian recidivist laws. No Supreme Court decision would do more than nibble at their edges."[599] Yet a political solution may be chimerical.

In *Punishment and Democracy*, the authors conclude that their empirical data, showing that Three Strikes has not delivered on its overblown promises, are unlikely to influence the public debate about the law.[600] Single-issue politicians now regard Three Strikes as "iconic orthodoxy."[601] Single-issue groups on the other side of the issue are missing from the debate.[602] The law, which requires a super-majority for its amendment,[603] has the support of strong political interests, such as the California Correctional Peace Officer's Association.[604] Hence, a shift in

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The strategy has been suggested by a number of criminologists. *See, e.g.*, George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY 29, Mar. 1982, at 29 (arguing that tolerance of petty offenses leads to increased crime rates). This approach has numerous advantages over California's; not the least significant is that it comes at a lower cost.

[597] CURRIE, *supra* note 586, at 164-72; REITZ, *supra* note 360, at 17.

[598] *See supra* Part I.C.

[599] Frank O. Bowman III, Ewing v. California: *The Supreme Court Takes a Walk on "Three Strikes" Laws... And That's Fine*, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW, JURIST, Opinion, Forum, Mar. 24, 2003, *available at* http://jurist.law.pitt.edu/forum/forumnew103.php.

[600] ZIMRING ET AL., *supra* note 329, at 217-32.

[601] *Id.* at 222.

[602] *Id.* at 221-22.

[603] In the case of Three Strikes, the initiative provides that the terms of the law can be changed only by two-thirds majority of both houses of the California legislature. CAL. PENAL CODE § 667(j) (Deering 1994).

[604] Dana Wilkie, *Prop 184: 3 Strikes Already on Books, Foes Say its Passage Only Bolsters a Bad Law*, SAN DIEGO UNION-TRIB., Oct. 12, 1994, at A1. The California Correctional Peace

public opinion on the crime issue is not likely to lead to wholesale reform, because the shift would have to be substantial enough to create a super-majority.

Further, they argue that this shift in public sentiment is not likely to take place.[605] Part of Three Strikes' support comes from what the authors described as the legend about crime in California. Three Strikes is considered by many as a watershed change in penal policy.[606] Despite substantial evidence to the contrary, Three Strikes is considered the shift from soft to hard on crime, leading to a downturn in crime.[607] Empirical evidence will make little impact on the public's confidence in the law. In effect, the law "feels right."[608]

Punishment and Democracy also argues that the closer that decisions about criminal punishment are to the electorate (and the further away from decision-making by experts) the more likely it is that punishment will increase.[609] Political rhetoric has convinced voters that punishment is a "zero-sum competition between crime victims and criminal offenders."[610] Many voters believe that they are choosing between victims and offenders, and that what is bad for offenders is necessarily good for victims.[611]

The short history since passage of Three Strikes supports their thesis. A few liberal legislators have submitted legislation to modify Three Strikes.[612] None has been successful. Governor Davis vetoed even the bill that would have authorized a study of Three Strikes.[613] Perhaps, California's current budget crisis will create a coalition of fiscal

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Officers Association's (CCPOA) $51,000 contribution provided the early financial support.

[605] ZIMRING ET AL., *supra* note 329, at 178-80.

[606] *Id.*

[607] *Id.*

[608] *Id.* at 221-22.

[609] *Id.*

[610] *Id.* at 233.

[611] *Id.*

[612] For example, California Senator John Vasconcellos introduced S.B. 2048 in 1998, designed to limit the application of the Three Strikes statute to violent and serious offenses. The bill needed 27 votes to pass but received only 11 votes. S.B. 2048, 1997-98 Leg., Reg, Sess. (Cal. 1998). S.B. 1317 was a similar bill introduced in 1997 by Senator Barbara Lee. It received only 13 of the 27 necessary votes to proceed to the Assembly. S.B.1317, 1997-98 Leg., Reg. Sess. (Cal. 1997). More recently, Assembly Member Jackie Goldberg introduced a bill that would require that a current conviction be a "serious" or "violent" felony to receive a third-strike enhanced sentence. The bill was moved to the inactive file for the Assembly on June 14, 2003. *See supra* note 43.

[613] *Veto Message of S.B. 873*, 1999-2000 Leg., Reg. Sess. (Cal. 2000).

conservatives and social liberals willing to reform Three Strikes.[614] Governor Schwarzenegger has promised to appoint a commission to determine the feasibility of shutting some of California's prisons.[615] Whether the commission's agenda will include reforming Three Strikes is uncertain, but reform will be an uphill battle for reasons suggested by *Punishment and Democracy*.

Elsewhere, I have argued that one route to modest reform of Three Strikes' worst excesses would be for the California Supreme Court to hold that some of the law's more extreme sentences violate the state's prohibition against cruel or unusual punishment.[616] At the same time, I observed that "in light of the unanimity of opinions from several courts of appeal, the Supreme Court has little incentive to grant review in a case raising the issue."[617] But the court's reticence on the issue "is unfortunate because California has precedent upholding challenges brought on cruel or unusual punishment grounds."[618] As I argued above, at least some Three Strikes sentences appear to violate the court's holdings in cases like *Lynch*, *Foss*, and *Dillon*.[619]

While that line of cases remains on the books, the court's record on Three Strikes has varied. Its decision in *Romero* demonstrated fidelity to existing precedent, suggesting that the court might well follow its own cruel or unusual punishment case law.[620] But in other cases, it has read Three Strikes begrudgingly. The court limited a trial court's discretion in deciding whether to strike prior felonies in order to avoid what would otherwise be a mandatory Three Strikes sentence.[621] In another case, it held that two qualifying felonies that were part of the same transaction can be considered separate strikes, allowing imposition of a twenty-five-

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[614] Despite the current budget crisis, the Assembly once again placed an inactive status on a bill that would have placed before the voters an initiative to limit Three Strikes by requiring that the third strike be serious or violent. *See supra* note 43. The bill's proponents have argued the measure as one that would save California, suffering from a severe budget crisis, a half billion dollars a year in reduced cost of incarcerating third-strike defendants and over $1 billion in future prison construction costs. Cal. Assembly *AB 112 Analysis for Assembly Committee*, 2003-04 Reg. Sess. 1-2 (May 27, 2003) (*available at* http://www.leginfo.ca.gov/pub/bill/asm/ab_0101-0150/ab_112_cfa_20030527_175744_asm_comm.html) [hereinafter *AB 112 Analysis*].

[615] Donald E. Coleman, *Conflict in Confinement*, THE FRESNO BEE, Feb. 8, 2004, *available at* http:/www.fresnobee.com/local/r-indexlist/story/8101687p-8958147c.html.

[616] Vitiello, *supra* note 499, at 283.

[617] *Id.*

[618] *Id.*

[619] *See supra* Part II.B.

[620] People v. Superior Court (Romero), 917 P.2d 628, 638 (Cal. 1996).

[621] People v. Williams, 948 P.2d 424, 435-36 (Cal. 1998).

year-to-life sentence upon the offender's next felony conviction.[622] Elsewhere, the court had to decide whether section 667(c)(5) applies to third-strike defendants who must serve at least a minimum term of twenty-five years imprisonment. Section 667(c)(5) seems to state that a prisoner serving a Three Strikes sentence may earn up to a twenty percent reduction of his minimum term of imprisonment and so could have the minimum term of twenty-five years reduced to twenty years.[623] The court rejected that interpretation of the law.[624]

I have argued elsewhere that the court's *Romero* decision honored precedent. In deciding to follow precedent, the justices must have been aware of the potential political backlash that would result from their decision.[625] Since the mid-1980s, when a vigorous campaign against reelection of three state supreme court justices led to their ouster,[626] elected state judges must be aware that voting contrary to popular criminal justice policies is a risky business.[627] Given that the court is now dominated by justices appointed by Governors Deukmejian and Wilson, both law and order governors, one might be surprised that challenges to Three Strikes have faired as well as they have.[628] Nonetheless, since *Romero*, the supreme court has not stepped into the breach. The court does not seem willing to get California out of its Three Strikes morass.

Absent action by the state supreme court, the Assembly or a successful initiative, the Ninth Circuit may have been California's best hope. Despite a 5-4 vote, *Andrade* was not a surprising decision: the AEDPA created too high a barrier. *Ewing* was a tougher case.[629]

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[622] People v. Benson, 954 P.2d 557, 560-70 (Cal. 1998).

[623] "The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison." CAL. PENAL CODE § 667(c)(5) (Deering 2003). The sentence reduction applies only to offenders sentenced under the law's second-strike, but not third-strike provisions.

[624] *In re* Cervera, 16 P.3d 176, 178-80 (Cal. 2001).

[625] For example, one reporter noted that for the system to work, judges must be "denied the discretion to unilaterally reduce mandatory sentences in the 'amorphous interest of justice.'" He further explained that judges rarely stand for election and are "too often enthralled with the liberal paradigm equating 'judicial independence' and 'fairness' with leniency to criminals." James F. Sweeney, *Foul Ball*, NAT'L. REV., Aug 12, 1996, at 1,1.

[626] ZIMRING ET AL., *supra* note 329, at 128; Pfingst, Thompson & Lewis, *supra* note 31, at 726-27.

[627] ZIMRING ET AL., *supra* note 329, at 129.

[628] For a discussion of how the Three Strikes law faired in the California Supreme Court, see ZIMRING ET AL., *supra* note 329, at 128-29.

[629] Ewing v. California, 538 U.S. 11, 32-35 (2003). Justice Breyer's dissenting opinion offers strong arguments in favor of a finding that some Three Strikes sentences violate the Eighth Amendment. *Id.* at 35.

The facts in *Ewing* were nowhere near as persuasive as were those in *Andrade*, where counsel was able to draw a close analogy to *Solem*'s facts.[630] But *Ewing* did not have to overcome the additional procedural

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[630] *See supra* note 165. By contrast, Ewing's record included a crime of violence, was more extensive than Andrade's, and his third strike was not petty theft. As summarized by the plurality:

> On parole from a 9-year prison term, petitioner Gary Ewing walked into the pro shop of the El Segundo Golf Course in Los Angeles County on March 12, 2000. He walked out with three golf clubs, priced at $399 apiece, concealed in his pants leg. A shop employee, whose suspicions were aroused when he observed Ewing limp out of the pro shop, telephoned the police. The police apprehended Ewing in the parking lot.
>
> Ewing is no stranger to the criminal justice system. In 1984, at the age of 22, he pleaded guilty to theft. The court sentenced him to six months in jail (suspended), three years' probation, and a $300 fine. In 1988, he was convicted of felony grand theft auto and sentenced to one year in jail and three years' probation. After Ewing completed probation, however, the sentencing court reduced the crime to a misdemeanor, permitted Ewing to withdraw his guilty plea, and dismissed the case. In 1990, he was convicted of petty theft with a prior and sentenced to 60 days in the county jail and three years' probation. In 1992, Ewing was convicted of battery and sentenced to 30 days in the county jail and two years' summary probation. One month later, he was convicted of theft and sentenced to 10 days in the county jail and 12 months' probation. In January 1993, Ewing was convicted of burglary and sentenced to 60 days in the county jail and one year's summary probation. In February 1993, he was convicted of possessing drug paraphernalia and sentenced to six months in the county jail and three years' probation. In July 1993, he was convicted of appropriating lost property and sentenced to 10 days in the county jail and two years' summary probation. In September 1993, he was convicted of unlawfully possessing a firearm and trespassing and sentenced to 30 days in the county jail and one year's probation.
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> In October and November 1993, Ewing committed three burglaries and one robbery at a Long Beach, California, apartment complex over a 5-week period. He awakened one of his victims, asleep on her living room sofa, as he tried to disconnect her video cassette recorder from the television in that room. When she screamed, Ewing ran out the front door. On another occasion, Ewing accosted a victim in the mailroom of the apartment complex. Ewing claimed to have a gun and ordered the victim to hand over his wallet. When the victim resisted, Ewing produced a knife and forced the victim back to the apartment itself. While Ewing rifled through the bedroom, the victim fled the apartment screaming for help. Ewing absconded with the victim's money and credit cards.
>
> On December 9, 1993, Ewing was arrested on the premises of the apartment complex for trespassing and lying to a police officer. The knife used in the robbery and a glass cocaine pipe were later found in the back seat of the patrol car used to transport Ewing to the police station. A jury convicted Ewing of first-degree robbery and three counts of residential burglary. Sentenced to nine years and eight months in prison, Ewing was paroled in 1999.

hurdle and so could argue that, as a matter of first impression, his sentence violated the Eighth Amendment.[631]

Ewing failed to produce a majority opinion. Justices Scalia[632] and Thomas[633] argued that the Eighth Amendment does not extend to terms of imprisonment. Justice O'Connor's three-person plurality left intact proportionality review, reaffirming Justice Kennedy's approach in *Harmelin*.[634] The plurality found that Ewing's twenty-five-year-to-life sentence was lawful for several reasons. Justice O'Connor found legitimate the state's interest in increasing punishment for repeat offenders and cited traditional deference to state legislatures in making rational policy choices.[635] She underscored that Ewing's punishment was for a career of crime, not simply for this third strike.[636] But, according to the plurality, "[e]ven standing alone, Ewing's theft should not be taken lightly."[637] Nowhere does the plurality state that *Solem* turns on the fact that Helm was not eligible for parole, but the opinion analogizes Ewing's situation to that of Rummel's.[638] In context, the plurality suggests that a twenty-five-year sentence is not so long that it creates a presumption of gross disproportionality that would compel examination of intra- and interjurisdictional comparisons.[639] While the plurality opinion leaves open some questions about the scope of proportionality review,[640] it

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> Only 10 months later, Ewing stole the golf clubs at issue in this case. He was charged with, and ultimately convicted of, one count of felony grand theft of personal property in excess of $400.

Ewing, 538 U.S. at 17-19.

[631] *Ewing*, 538 U.S. at 14.

[632] *Id.* at 31.

[633] *Id.* at 32.

[634] *Id.* at 20, 23-24.

[635] *Id.* at 25.

[636] *Id.* at 28.

[637] *Id.*

[638] *Id.* at 29-30.

[639] That conclusion is implicit in the plurality's reliance on *Rummel*. Justice O'Connor's opinion does not state that the Court's proportionality review will succeed only if, at a minimum, the offender receives a true life sentence. As a result, in theory at least, some terms of imprisonment, short of true life, may be unconstitutional. *Id.*

[640] The opinion leaves open whether a sentence like Andrade's might have been unconstitutional. Because of the procedural posture of that case, the Court did not address whether, as a matter of Eighth Amendment law, his 50-year-to-life sentence was grossly disproportionate.

Another question that the plurality does not address is whether a prisoner like Ewing might successfully raise a constitutional challenge if California does not release him after he has served 25 years. During oral argument, at least some of the justices indicated

leaves little room to believe that California can rely on the judiciary to reform Three Strikes.[641]

That is unfortunate. As discussed above, voters have not been willing to reform the situation that was partly their creation.[642] The California courts had the means to avoid some of the worst results under Three Strikes by applying state precedent.[643] The courts of appeal have not done so and the supreme court has put off deciding the question.

Andrade and *Brown* were result-oriented,[644] but the Ninth Circuit served its institutional purpose. Debate exists about the precise role of federal courts. Critics focus on the fact that federal judges are not elected and serve for life, immune from the political process.[645] As a result, critics contend that federal court rulings are anti-democratic.[646] Proponents counter that federal courts serve a special role in protecting the rights of minorities and are a check against mob rule.[647] At a

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their belief that, of course, California will routinely release prisoners when they have served their minimum term. S. Ct. Off. Transcr. Oral Argument at 23, Ewing v. California, 538 U.S. 11 (2003).

Given the cost of maintaining aging felons and the limited risk that older felons present, that conclusion is plausible. That is not a foregone conclusion. Not discussed is a difficult question: at what point, short of the prisoner's death, can the prisoner show that the state intends to keep him in prison for a true life sentence? If *Rummel*, not *Solem*, controls *Ewing* because Helm had to serve a true life sentence, how will a court determine when a sentence with a statutory minimum term becomes a true life sentence? *Cf. In re* Rodriguez, 537 P.2d 384, 651-57 (Cal. 1975).

[641] One commentator suggests that a contrary holding in *Ewing* would have amounted to nibbling at the edges. *See* Bowman, *supra* note 599. That is debatable. For example, the analysis done in connection with AB 112 estimates that about 350 prisoners faced similar sentences based on a third strike of "petty theft with a prior." *AB 112 Analysis*, *supra* note 614, at 4. Had the Court adopted Judge Karlton's view, focusing on the third strike and extending *Brown* to cases not involving "wobblers," Duran v. Castro, 227 F. Supp. 2d 1121, 1127 (E.D. Cal. 2002), *Ewing* would have had a far more sweeping effect. For example, AB 112's analysis indicates that over 670 offenders are serving Three Strikes sentences for possession of controlled substances. *AB 112 Analysis*, *supra* note 614, at 4.

[642] *Supra* note 612.

[643] *See supra* Part II.B.

[644] *See supra* Part I.C.

[645] Basile J. Uddo, *The Human Life Bill: Protecting the Unborn Through Congressional Enforcement of the Fourteenth Amendment*, 27 LOY. L. REV. 1079, 1079-80 (1981) (stating that, "abortion was foisted upon the American people by an unelected, life-tenured judiciary, and not adopted by the deliberate workings of the more representative political process").

[646] *Id.*; Janiskee & Erler, *supra* note 516, at 56, 61; Vitiello, *supra* note 516, at 615-16, 622.

[647] *See* THE FEDERALIST No. 78 (Alexander Hamilton) ("[F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches; and... nothing can contribute so much to its firmness and independence as permanency in office."); *see also* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER, 50-52 (2d ed. 1990) (discussing policy favoring Article III over legislative courts).

minimum, federal courts have a special role where the political process does not serve well to protect the public good.[648]

Implicit in my analysis above is that Three Strikes is an example of a situation in which the political process does not serve the public interest.[649] That a super-majority is required to reform Three Strikes means that the democratic process may not be able to cure the law's excesses.[650] Elsewhere, I have written extensively on how the public was seriously misled during adoption of Three Strikes.[651] The campaign in favor of Three Strikes was so misleading that it left grave doubts as to whether the voters knew what they were voting for;[652] many voters have subsequently expressed surprise when they have learned that the law applies to cases like Andrade's.[653] The campaign for its passage would have been unsuccessful without Polly Klaas's highly publicized kidnapping and subsequent murder.[654] Politicians and the public acted out of blind passion in enacting Three Strikes; little rational debate occurred that would have limited the law's excesses.[655]

These kinds of circumstances justify the intervention of an independent judiciary. As explained by the California Supreme Court in *Lynch*, courts should give deference to legislative prerogative in establishing criminal punishments.[656] But the court must intervene when "isolated excessive penalties may occasionally be enacted through 'honest zeal' generated in response to transitory public emotion."[657] That language describes the passage of Three Strikes. From this perspective, the Ninth Circuit got it right in *Andrade* and *Brown*. The Ninth Circuit may have been California's best hope for a modest reform of some of Three Strikes' excesses.

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[648] REDISH, *supra* note 647.

[649] *See supra* notes 642-48 and accompanying text.

[650] CAL. PENAL CODE § 667(j) (West 2004).

[651] *See generally* Vitiello, *supra* note 362; Vitiello, *supra* note 516.

[652] Vitiello, *supra* note 513, at 619-20.

[653] *60 Minutes*, *supra* note 2; *All Things Considered*, "Three Strikes" (NPR radio broadcast, Apr. 6, 2002).

[654] Vitiello, *supra* note 361, at 409-12.

[655] *Id.*

[656] *In re* Lynch, 503 P.2d 921, 923-24 (Cal. 1972).

[657] *Id.* at 931-32 (quoting Weems v. U.S., 217 U.S. 349, 373 (1910)).

CONCLUSION

Judges may be open to criticism when their decisions are result-oriented, departing from settled law to reach a desired result.[658] I have argued that both the Ninth Circuit and the California district courts of appeal are open to that criticism in their decisions relating to Three Strikes. *Andrade* and *Brown* interpreted U.S. Supreme Court precedent expansively.[659] The court did so despite the procedural context of those cases: on review in habeas corpus cases, the court can reverse a state court judgment only when the state court unreasonably applied clearly established U.S. Supreme Court precedent.[660] Given the number of unresolved questions that the Ninth Circuit had to decide to reach its conclusion, the court had to stretch to conclude that clear precedent dictated its result.[661]

The California appellate courts' interpretation of California's prohibition against cruel or unusual punishment were similarly result-oriented.[662] Those decisions focused on the offender's status as a repeat offender and ignored state supreme court precedent that suggested contrary answers to issues resolved against the Three Strikes defendants.[663]

Given that both federal and state courts have not given a fair reading to precedent, this Article has explored whether in this case, the public was better served by the federal or the state courts. Recidivist statutes are on a questionable moral foundation to begin with.[664] At best, they are justified if they produce more social good than harm.[665] But empirical data now demonstrate that Three Strikes simply cannot deliver as promised.[666] Politicians have not backed away from their ardent support of Three Strikes; no interest group has the resources and visibility to reform Three Strikes.[667] The failure of the political process has left little hope for reform.[668] The Ninth Circuit's decisions, while fairly narrow in

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[658] Charles J. Ogletree, *Judicial Activism or Judicial Necessity: The D.C. District Court's Criminal Justice Legacy*, 90 GEO. L.J. 685, 689 n.12 (2002).

[659] *Supra* Part I.C.

[660] 28 U.S.C. § 2254(d)(1) (2003).

[661] *See supra* Part I.C.

[662] *See supra* Part II.A.

[663] *See supra* Part II.A.

[664] *See supra* Part III.

[665] *Supra* notes 454-58.

[666] *Supra* Part IV.

[667] ZIMRING ET AL., *supra* note 329, at 220-22.

[668] *Id.*

scope,[669] created the opportunity for modest reform to Three Strikes. *Ewing* and *Andrade* dashed that hope.

[669] Both *Andrade* and *Brown* involved "wobblers," cases that may be charged either as misdemeanors or felonies. The analysis seemed to focus on that fact. In addition, so too did Justice Stevens opinion in *Riggs v. California*, 525 U.S. 1114 (1999). If that fact turns out to be controlling, those decisions will be quite narrow and will not address cases like *Romero* in which the defendant's final felony was possession of narcotics or similar cases where the felon's third strike is relatively minor and does not threaten physical harm.