The Three Strikes Dilemma: Crime Reduction at Any Price

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Recommended Citation
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I. INTRODUCTION

The 1993 kidnapping and murder of a twelve-year-old Petaluma girl named Polly Klaas focused the attention of California and the nation on the issue of violent crime, and in particular, on the proper treatment of violent repeat offenders.¹ In response to this well publicized crime,² the California Legislature passed a tough sentence enhancement statute popularly known as “Three Strikes You’re Out.”³ In addition, California voters passed an almost identical initiative measure in the November, 1994 election.⁴ Three strikes has the stated purpose of ensuring “longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent offenses.”⁵

¹. Stan Sinberg, Polly’s Fate Should Be the Signal for Us to Change Our Focus, CHI. TRIB., Dec. 15, 1993, at 23 (“The recent kidnapping and murder of Polly Klaas was one of those cases that from time to time hits a nationwide raw nerve and embodies all the things that are good and bad about this land.”).

². John Borland, ‘3 Strikes’ Initiative Fails the Klaas Test, CAL. J. WKLY., July 25, 1994, at 5 (“For better or worse, California’s ‘3 Strikes, You’re Out’ law owes its existence to Polly Klaas. Before the kidnapping and murder of the Petaluma girl, the sentencing proposal had little of the momentum and unquestioning support it now claims.”).

³. A.B. 971, 1994 Cal Stat. 12 (Codified at CAL. PENAL CODE § 667). The legislative three strikes measure amends Penal Code § 667(b). For the purposes of this comment, the three strikes measure passed by the California Legislature will be referred to as the “legislative measure” while the three strikes proposal passed by voter initiative will be referred to as the “initiative measure.” Because the two measures are textually identical, the new law will be referred to generally as “three strikes,” encompassing the identical provisions of both the legislative and initiative versions. Finally, all references to specific statutory provisions of three strikes will refer to the legislative version, which appears at Penal Code § 667.

⁴. Donna Alvarado, ‘Three Strikes’ Is In, but Other Propositions Out, SAN JOSE MERCURY NEWS, Nov. 9, 1994, at 8EL.

⁵. CAL. PENAL CODE § 667(b) (West Supp. 1995).
Among other things, the law provides that a defendant convicted of a felony who has been previously convicted of a serious or violent felony will serve double the normal sentence for the current offense. A defendant convicted of a current felony with two prior serious or violent felony convictions will serve twenty-five years to life in prison. The current law is generally considered one of the toughest enhancement statutes in the country, and has engendered considerable controversy. Proponents see the measure as a long overdue response to the problem of repeat offenders that will significantly reduce violent crime in California. Opponents argue that the law sweeps too broadly, incarcerating many nonviolent offenders at incredible cost to taxpayers. The law has been in effect for less than a year and has already caused substantial confusion in trial courts. With a number of appeals planned by both prosecutors and defense attorneys, the ultimate impact and scope of the three strikes controversy is certain to be resolved by the California Supreme Court.

This comment begins by examining the background of three strikes, including the atmosphere in which the law was

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6. For the purposes of this comment, a defendant's most recent offense or crime will be referred to as the "current felony," "third strike," or "triggering offense." The current offense is the crime that ultimately subjects the offender to an enhanced sentence pursuant to the three strikes law. The current offense should be distinguished from a defendant's prior convictions, also referred to as "past offenses" or "priors," which count towards the ultimate total of two or three "strikes" but do not by themselves "trigger" a three strikes sentence enhancement.

7. See supra note 6.


9. Id. § (e)(2).


12. Id.; see also RICHARD SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT (1979) (detailing the retribution theory of punishment, which serves as the philosophical foundation of the three strikes movement).


15. Bill Kisliuk, Supreme Court Not Ready to Tackle '3 Strikes', THE RECODER, July 26, 1994, at 2 ('[T]he California Supreme Court will await convictions before weighing in on the expected tide of 'three strikes' cases.'

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passed. Because both a legislative and an initiative version of three strikes have been passed, the comment explores which of the two presently governs California. After detailing the major provisions of three strikes, the background section explores what the three strikes law leaves out, and the significance of the omission. Finally, the background section examines two cases in which local trial courts struggled to interpret and solve the three strikes dilemma.

The particular problem addressed by this comment involves a cost-benefit analysis of three strikes. The analysis section demonstrates that while three strikes will, in fact, reduce violent crime, it will do so only at enormous cost. The various "costs" discussed in the analysis include the financial costs, the overly broad scope of the law, the pressure it will place on the criminal justice system, and, ultimately, the likelihood that three strikes will seriously undermine the credibility of the criminal justice system. Finally, the analysis evaluates the effectiveness of the solutions offered by the two local trial courts.

This comment concludes that three strikes is an understandable response by politicians and voters to an intolerable crime rate and a well-publicized tragedy. The perfectly legitimate objective of the law is to reduce violent crime by incarcerating violent felons until they are no longer a threat to society. Unfortunately, the law will be exorbitantly expensive and will place intolerable strains on the justice system. The challenge presented by three strikes, therefore, is to retain those provisions of the law that are effective in fighting crime while modifying or eliminating those provisions that lead to enormous expense and the ultimate erosion of the legitimacy of the criminal justice system. The purpose of this comment is to demonstrate both the strengths and weaknesses of three

16. See discussion infra part II.A.
17. See discussion infra part II.B.
18. See discussion infra part II.C.
19. See discussion infra part II.D.
20. See discussion infra part II.E.
21. See discussion infra part III.
22. See discussion infra part IV.
23. See discussion infra part IV.B.
24. See discussion infra part IV.C.
25. See discussion infra part IV.D.
26. See discussion infra part IV.E.
27. See discussion infra part IV.F.
strikes and offer proposals that could make it less costly and more effective.\textsuperscript{28}

II. BACKGROUND

A. The Atmosphere in Which Three Strikes was Passed

1. The Polly Klaas Story and the Political Response

Twelve-year-old Polly Klaas was kidnapped from her Petaluma home on October 1, 1993.\textsuperscript{29} An unprecedented volunteer search effort\textsuperscript{30} proved to be in vain when Polly’s body was discovered two months later.\textsuperscript{31} Richard Allen Davis was arrested and charged with the kidnapping and murder, and his prior criminal record\textsuperscript{32} sparked a national debate over the issue of repeat offenders.\textsuperscript{33} The tragedy coincided with the 1994 senate and gubernatorial campaigns, and public outrage, politics, and a torrent of media coverage of the tragedy converged to make violent crime a prominent campaign issue.\textsuperscript{34} The California Legislature took immediate action to implement a bill to increase sentences for violent offenders.\textsuperscript{35}

\textsuperscript{28} See discussion infra part V.

\textsuperscript{29} Ron Sonenshine, Klaas, Clinton Talk Father to Father, S.F. CHRON., Dec. 21, 1993, at A3.

\textsuperscript{30} The two month search for Polly Klaas was unprecedented in size and scope, involving thousands of volunteers. Volunteers Against Crime; for Polly’s Sake, THE ECONOMIST, Dec. 11, 1993, at 30. Millions of reward posters were sent throughout the world and composite sketches of the abductor were faxed to police forces across the country. Melinda Beck, The Sad Case of Polly Klaas, NEWSWEEK, Dec. 13, 1993, at 40.

\textsuperscript{31} Beck, supra note 30, at 40.

\textsuperscript{32} Davis began burglarizing homes at the age of twelve. Oliver Starr Jr., The Case of Richard Davis, NAT’L REV., May 30, 1994, at 34. His crimes escalated to assault, robbery, sex crimes, and kidnapping, and as an adult he was arrested seventeen times. \textit{Id}. He had twelve prior arrests before he was sent to state prison for the first time in 1975. \textit{Id}. Davis pleaded guilty to kidnapping, robbery, assault, and burglary, and was sentenced to one to twenty-five years. \textit{Id}. His sentence was recalculated and he served only five years. \textit{Id}. In 1984, Davis was sentenced to sixteen years in prison for abducting and robbing a woman. \textit{Id}. He served eight years, and, three months after his release, he allegedly strangled Polly Klaas. \textit{Id}.

\textsuperscript{33} See \textit{id}.

\textsuperscript{34} Rick Kushman, Polly’s Death Spurs Political Action, SACRAMENTO BEE, Dec. 11, 1993, at A1 ("In the aftermath of the abduction and killing of Polly Klaas, politicians in both parties have been sprinting to support anti-crime measures.").

The most readily available piece of proposed legislation was the brainchild of Mike Reynolds, a Fresno photographer whose daughter was murdered in a purse-snatching in 1992. The Reynolds plan, dubbed "Three Strikes and You're Out" after a similar Washington State measure, had received scant attention from politicians or the public prior to the Klaas case. Reynolds intended to pass the measure by initiative of the voters, but, prior to the Klaas case, had gathered only 35,000 of the 385,000 signatures needed to place the measure on the November 1994 ballot. On the Monday morning after Polly's body was found, Reynolds' headquarters was flooded with calls in support of the measure. Outside the Polly Klaas Foundation offices in Petaluma, people stood in line to sign the petition at the rate of 15,000 per day. Within weeks, over 300,000 signatures were collected. The Reynolds initiative qualified easily for the November ballot as Proposition 184.

A legislative three strikes proposal, almost identical to the Proposition 184 initiative measure, was introduced in the state assembly by Assemblyman Bill Jones as AB 971. Few politicians had the courage to criticize the proposal, and warnings that it was unworkable, expensive, and swept too broadly went unheeded. On the willingness of politicians to pass the bill, State Senator Newton Russel said, "I don't think we have any choice." The Assembly approved the bill sixty-three to nine, and on March 3, 1994, the Senate approved the bill by a vote of twenty-nine to seven. Governor Wilson signed the bill on March 7 and, as "emergency legislation," three strikes immediately became the law of the state.

38. Id. at 22.
39. Id.
40. Id. at 1.
41. Id. at 22.
42. A.B. 971, 1994 Cal. Legis. Serv. 56 (West).
43. See Franklin, supra note 35, at 25.
44. Id. at 26.
45. Id.
46. Id.
Proposition 184 remained on the November ballot and passed easily by a two to one margin. Because the Reynolds measure had already been enacted by the California Legislature, passage of the initiative merely ratified existing state law and made amendment of the law much more difficult. The Legislature can now change the statute only with a two-thirds vote of both houses.

2. An Unlikely Opponent

Ironically, Polly's father, Marc Klaas, was one of the only vocal opponents of Proposition 184. Although he initially supported the measure, Klaas changed his views after examining possible alternatives and closely scrutinizing the likely effect of three strikes. Klaas' criticism of three strikes focused on two factors. First, the law swept too broadly, requiring life sentences for essentially nonviolent criminals. Second, the law was simply too expensive, requiring either massive taxation or a shift in spending from education, rehabilitation, and law enforcement to support prison construction. In Klaas' words,

Proposition 184 is too hard on soft crime and too soft on hard crime. By focusing as much attention on nonviolent crime as it does on violent crime, Proposition 184 ignores the real issue. . . . In the depth of despair that all Californians shared with my family immediately after Polly's murder, we blindly supported the 'three strikes and you're out' initiative in the mistaken belief that it dealt only with violent crimes. Instead, three out of four of the crimes it addresses aren't violent. Either we pay for our mistake by ratifying a bad law and being taxed to our inner organs to deal out cruel and unusual punishment to nonviolent offenders, or together we correct our costly mistake.

48. Alvarado, supra note 4, at 8EL.
50. Id.
51. Borland, supra note 2, at 5.
52. Id.
54. Id.
55. Id.
56. Id.
B. What is the Law Anyway? The Tension Between the Statutory and Initiative Measures

The legislative version of three strikes passed in March, 1994 was California law from March to November, 1994. Upon passage of Proposition 184 in November, however, the voter initiative superseded and immediately replaced the legislative proposal as the law of the state. Textually, the two measures are nearly identical, as the legislative measure was modeled after the Reynolds initiative. In spite of the seemingly insignificant differences in the measures, some judges believe that distinctions exist that could be crucial in determining what treatment three strikes will receive on appeal.

First, the legislative measure added three strikes to the Penal Code as an addition to a preexisting enhancement statute, Penal Code section 667. As a result, all other provisions of the Penal Code that refer to, define, and limit section 667 would apparently apply to three strikes as well. In contrast, the initiative measure allows section 667 to remain unchanged, and instead adds an entirely new section to the Penal Code, section 1170.12. As an entirely new addition to the Penal Code, all other provisions of law that had previously applied to enhancement measures are arguably inapplicable to three strikes.

Second, as a voter initiative, the success of Proposition 184 makes three strikes much more difficult to repeal or mod-

58. Id.
59. Id.
60. See People v. Reese, No. 94-0714-7, slip op. at 15 (Super. Ct. Contra Costa County Dec. 21, 1994) (memorandum of decision to strike prior convictions).
61. CAL. PENAL CODE § 667 (West Supp. 1995). Three strikes adds Penal Code § 667(b)-(i) to § 667(a). Id. The preexisting enhancement statute, § 667(a), provided that any person convicted of a serious felony, who previously has been convicted of a serious felony, would receive a five year enhancement of sentence for each prior conviction, in addition to the sentence imposed for the current offense. CAL. PENAL CODE § 667(a) (West 1988).
64. Id. at 15.
The initiative version of three strikes can only be repealed by initiative of the voters, and can only be modified by a two-thirds vote of both houses of the legislature. In addition, any modifications by the legislature that "weakened" three strikes could be challenged in the courts as not in furtherance of the intent of the voters.

C. The Major Provisions of Three Strikes

Although three strikes can be viewed as either an entirely new and alternate sentencing scheme or as an amendment to an existing enhancement statute, the two measures are nearly identical. This section describes the major provisions of three strikes, as well as those subjects about which the statute is silent or vague, but are nonetheless destined to cause controversy and confusion in the courts.

1. Triple or Life Terms for Three Strike Defendants

Any defendant with two prior serious or violent felony convictions who is convicted of any third felony is subject to an automatic sentence of three times the sentence for the current offense or twenty-five years to life, whichever is greater. The third conviction does not need to be a serious or violent felony in order to trigger the three strikes sen-

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66. Id.
68. Id.
69. Three strikes defines a "serious felony" as one of those listed in Penal Code § 1192.7(c). CAL. PENAL CODE § 667(d)(1) (West Supp. 1995). Serious felonies listed in § 1192.7(c) include: murder or voluntary manslaughter; mayhem; rape; sodomy by force; oral copulation by force; lewd acts on a minor under 14; any felony punishable by death or life in prison; any felony in which the defendant inflicts great bodily injury or uses a firearm; attempted murder; assault with intent to rape or rob; assault with a deadly weapon on a peace officer; assault by a life prisoner on a non-inmate; assault with a deadly weapon by an inmate; arson; exploding a destructive device with intent to injure or murder; burglary of an inhabited dwelling house or trailer coach, or inhabited portion of any other building; robbery or bank robbery; kidnapping. CAL. PENAL CODE § 1192.7(c) (West Supp. 1995).
70. Three strikes defines a "violent felony" as one of those listed in Penal Code § 667.5(c). CAL. PENAL CODE § 667(d)(1) (West Supp. 1995). The violent felonies listed in § 667.5(c) are essentially the same as those listed in § 1192.7(c). See CAL. PENAL CODE § 667.5(c) (West Supp. 1995).
Thus, any felony committed by a person with two prior strikes will result in at least a twenty-five year sentence, irrespective of the nature of the third felony.73

2. Double Terms for Two Strike Defendants

Any defendant with one prior serious or violent felony conviction who is convicted of any second felony will receive double the normal sentence for the current offense. Once again, the second felony need not be serious or violent; any second felony conviction will result in double the normal sentence.74

3. No Washout Period

The length of time between the prior conviction and the current offense shall not be a factor in imposing a strike sentence.75 In the absence of a washout provision,76 a defendant with two "stale" prior convictions could receive life in prison for a third nonviolent felony after twenty years of law abiding behavior.77

4. No Diversion Programs or County Jail

The sentencing court may not commit strike defendants to any facility other than state prison.78 Nonviolent offenders with a history of drug problems may not be sentenced to drug rehabilitation.79

5. Juvenile Convictions

Certain juvenile convictions can be counted as strikes. The offense must be serious or violent, and it must have been committed when the defendant was at least sixteen years old.80

72. Id.
73. Id.
74. Id. § (e)(1).
75. Id. § (c)(3).
76. A "washout provision" is a statutory provision "that nullifies or 'washes out' the punishment effect of a prior when defendant has been 'clean' (free of prison custody and commission of a new felony) for a specified period." Harold G. Friedman & David H. Rose, Felony Sentencing, in CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE § 37.5 (Anne Harris & Alys Briggs eds., 2d ed. 1994).
78. Id. § (c)(4).
79. See id.
80. Id. § (d)(3)(A).
6. **Time Off for Good Behavior**

Current law allows most prisoners to receive a 50% reduction in sentence for good behavior.\(^8\) Three strikes provides that defendants convicted under strike law may receive a maximum of only 20% time off for good behavior.\(^8\)

7. **No Suspended Sentence or Probation**

Three strikes prevents the judge from granting probation or a suspended sentence for any two or three strike defendant.\(^8\)

8. **Plea Bargaining**

Three strikes provides that the prosecutor shall not use prior felony convictions, or strikes, in plea bargaining.\(^8\)

9. **The Judge's Ability to Strike Prior Convictions**

Three strikes allows prosecutors to move to dismiss a prior felony conviction in the interest of justice, but the court is not given the same discretion.\(^8\) The court may only dismiss a prior conviction when there is insufficient evidence to prove the prior conviction.\(^8\) As a result, the statute apparently vests the prosecutor with the sole authority to disregard prior convictions and avert a three strikes sentence.\(^8\)

D. **What Three Strikes Leaves Out: The Court's Discretion to Reduce "Wobblers"**

Under the new three strikes legislation, the current or triggering offense need not be a serious or violent felony.\(^8\) Any felony conviction is enough to trigger a two or three

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81. CAL. PENAL CODE § 2933(a) (West Supp. 1995). See generally Friedman & Rose, supra note 76, § 37.60 (describing the various statutory schemes governing state prison credits).


83. Id. § (c)(2).

84. Id. § (g).

85. Id. § (f)(2).

86. Id.

87. CAL. PENAL CODE § 667(f)(2) (West Supp. 1995). This provision is consistent with existing law. Penal Code § 1385(a) gives the judge broad authority to strike prior convictions, or dismiss actions, in the furtherance of justice. CAL. PENAL CODE § 1385(a) (West Supp. 1995). However, § 1385(b) states explicitly that the statute does not authorize a judge to strike a prior conviction charged for enhancement purposes pursuant to Penal Code § 667. Id. § 1385(b).

strike sentence when the offender has one or two prior serious or violent felony convictions. The law makes no mention, however, of wobblers, and fails to provide any exception to current law when the current offense is an alternate felony-misdemeanor crime. The significant number of crimes that qualify as wobblers, coupled with the magnitude of the sentence when current law is applied to wobblers in the three strikes scenario, makes this an issue worthy of special attention.

1. The Court's Ability to Reduce a Wobbler When the District Attorney Proceeds by Complaint in the Municipal Court

When the prosecutor proceeds by filing a complaint charging a wobbler in municipal court, the court retains

89. Id.

90. "A wobbler is a crime that may be punished either as a misdemeanor or a felony." Friedman & Rose, supra note 76, § 37.60. A felony is a crime punishable by death or imprisonment in the state prison. CAL. PENAL CODE § 17(a) (West Supp. 1995). A misdemeanor is a crime punishable by fine or imprisonment in the county jail. Id. § (b).

91. Roughly 140 violations qualify as wobblers, carrying alternate felony-misdemeanor sentences. CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, UNIFORM CRIME CHARGING MANUAL § 601 (1974). Along with a number of obscure violations such as bribery of a sporting official, grand theft: dog, eavesdropping, and destruction of telephone lines, some common wobblers include: assault with a deadly weapon, theft of a credit card, cashing a check with insufficient funds, receiving stolen property, vandalism, solicitation, petty theft with a prior conviction of petty theft or felony, and possession of marijuana. Id.

92. For a defendant with two prior strike convictions who is charged with a wobbler, the determination of whether the current offense is a felony or a misdemeanor is literally a life or death matter. See VINCENT SCHIRALDI ET AL., CENTER ON JUVENILE AND CRIMINAL JUSTICE, THREE STRIKES: THE UNINTENDED VICTIMS 25 (1994). If the defendant is convicted of a misdemeanor, he will probably serve a few months in county jail. Id. If he is convicted of a felony, he faces twenty-five years in state prison. Id. A brief example illustrates the point: Thirty-one-year-old Kendall Cooke had two strikes when he was arrested for the "wobbler" of petty theft with a prior; in Cooke's case, the theft of one can of beer. Id. Prior to three strikes, Cooke would have faced four to six months in county jail. Id. Because the District Attorney charged the wobbler as a felony, Cooke faced twenty-five years in prison. Id. The court reduced the crime to a misdemeanor and the District Attorney has appealed the reduction. Id.

93. A "complaint" is a pleading, or charging document, filed by the prosecutor in the municipal court alleging felony or misdemeanor offenses. Ruth Spear, Pleadings; Joinder and Severance, in CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE, supra note 76, § 7.1. After the complaint is filed, the defendant is apprised of the charges at the arraignment, and a preliminary hearing is scheduled in the municipal court. Herbert N.F. Gee & Hon. Judith D. Ford, Arraignment, in CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE, supra
broad discretion to reduce the crime to a misdemeanor.94 If the prosecutor charges the crime as a misdemeanor, the wobbler is deemed a misdemeanor conviction for all purposes and does not qualify as a current offense or triggering felony for strike purposes.95 If the prosecutor charges the wobbler as a felony, the court has a number of methods at its disposal to reduce the crime to a misdemeanor.96 First, the court can reduce the wobbler by sentencing the crime as a misdemeanor.97 Second, a sentencing judge who wishes to maintain some incentive for the offender to comply with the terms of probation may suspend sentencing, grant probation, and, at some time later, declare the offense to be a misdemeanor.98 Finally, the court in its discretion may, at or before the preliminary hearing, simply reduce the offense to a misdemeanor, in which case the crime is considered a misdemeanor for all purposes.99 When the defendant is charged by complaint, the prosecutor need not consent to the reduction; a wobbler can be reduced either on the court’s own motion or on motion of defense counsel.100

2. The Court’s Ability to Reduce a Wobbler When the District Attorney Proceeds by Indictment

When the prosecutor chooses to bypass municipal court and charge a wobbler by indictment before a grand jury,101

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note 76, § 6.1. The purpose of the preliminary hearing is to determine if probable cause exists to believe the defendant committed the crime. Grace Lidia Suarez, Preliminary Hearings, in CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE, supra note 76, § 22.1. The defendant, represented by counsel, may cross examine witnesses, call witnesses, and present exculpatory evidence. Id. If the municipal court finds probable cause, the defendant is “held to answer” or “bound over” to superior court, where he will stand trial. Id. Charges filed by complaint in the municipal court should be distinguished from charges filed by indictment, which bypass both the municipal court and the preliminary hearing. David H. Guthman & Jerrold M. Ladar, Grand Jury, in CALIFORNIA CRIMINAL PROCEDURE AND PRACTICE, supra note 76, § 8.7.

94. CAL. PENAL CODE § 17(b) (West Supp. 1995).
95. Id. § 17(b)(4).
96. Id. § 17(b).
97. Id. § 17(b)(1).
98. Id. § 17(b)(3).
100. Suarez, supra note 93, § 22.40.
101. A grand jury indictment is a method of charging a defendant with a crime that bypasses the municipal court and the preliminary hearing. Guthman & Ladar, supra note 93, § 8.7. When proceeding by indictment, the prosecutor presents witnesses and other evidence to a grand jury composed of
the defendant loses the right to a preliminary hearing. In *Bowens v. Superior Court*, the California Supreme Court held that “[a] defendant indicted in California is no longer entitled to, and indeed may not be afforded, a post-indictment preliminary hearing.” In addition, the court refused to fashion a post-indictment “quasi-preliminary hearing,” holding that an indicted defendant “may not receive a post indictment preliminary hearing or any other similar procedure in the courts of this state.” It remains unclear whether the *Bowens* proscription on post-indictment preliminary hearings effectively prevents indicted defendants from moving the court to reduce a wobbler to a misdemeanor.

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nineteen citizens. *Id.* § 8.1. The purpose of the grand jury is to establish probable cause to believe the defendant committed the crime charged. *Id.* If twelve or more jurors find probable cause, the defendant is held for trial in the superior court. *Id.* Grand jury proceedings are secret and neither the defendant nor counsel may be present. *Id.* § 8.7. The defendant has no opportunity to call witnesses or present evidence. *Id.*

102. *Bowens v. Superior Court*, 820 P.2d 600, 602 (Cal. 1991). The *Bowens* proscription on post-indictment preliminary hearings was a response to a prior California Supreme Court ruling and an initiative of the voters. *Id.* In 1978, the court held in *Hawkins v. Superior Court* that indicted defendants were entitled to a post-indictment preliminary hearing. *Hawkins v. Superior Court*, 586 P.2d 916 (Cal. 1978). The court noted that to deprive indicted defendants of a preliminary hearing would be to deprive them of “an impressive array of procedural rights” afforded defendants charged by complaint; among them, the right to present and cross examine witnesses, and present exculpatory evidence. *Id.* at 918.

In 1990, the voters of California passed Proposition 115, which amended the California Constitution to read, “[i]f a felony is prosecuted by indictment, there shall be no post indictment preliminary hearing.” *Cal. Const.* art. I, § 14.1.

In *Bowens*, the defendant sought a “quasi-preliminary” hearing to determine probable cause; thus, the court had no opportunity to consider the defendant’s right to move for a § 17(b) reduction of a wobbler to a misdemeanor. *Bowens v. Superior Court*, 820 P.2d 600, 606 (Cal. 1991). Faced with the obvious tension between *Hawkins* and the constitutional proscription on post-indictment preliminary hearings, the *Bowens* court overruled *Hawkins* and prohibited post-indictment preliminary hearings and quasi-preliminary hearings. *Id.* at 609.


104. *Id.* at 609.

105. See discussion *infra* part IV.F.1.
3. The Prosecutorial Response to the Disparate Treatment of Wobblers

Given the prosecutor's broad discretion in charging, and the ease with which district attorneys can avoid section 17(b) reductions in municipal court, it is not surprising that some district attorneys have chosen to make exclusive use of grand jury indictments in charging three strikes cases. If the district attorney charges by complaint in the municipal court, the defendant has the opportunity to persuade the court that, based on the particular facts of the case, a reduction is warranted. By charging three strike defendants exclusively by indictment, the prosecutor avoids the preliminary hearing and even the possibility of a section 17(b) reduction in the municipal court.

E. The Early Attempts by Trial Courts to Interpret Three Strikes

This section examines how local trial courts have attempted to resolve some of the problems created by the new three strikes law, focusing specifically on two issues that have caused considerable controversy and confusion in trial courts. First, this section discusses the court's authority to reduce a wobbler from a felony to a misdemeanor in the absence of a preliminary hearing. Next is an examination of the decision of a Contra Costa County judge that the court

106. Spear, supra note 93, § 7.12. Among other things, the district attorney decides whether to charge at all, charge prior convictions, charge by grand jury indictment, and charge wobblers as misdemeanors or felonies. Id.

107. See supra note 101 and accompanying text.


109. See supra notes 93-100 and accompanying text.

110. See supra notes 101-05 and accompanying text.

111. To date, no California appellate court has published a decision on three strikes. The two cases examined in this comment are unpublished superior court cases, and are not presented as binding on other courts. Rather, these cases are analyzed because they deal with two of the issues that have caused the most controversy in trial courts since three strikes was enacted. In addition, these cases present solutions to the three strikes dilemma that could have some influence on how higher courts respond to the new law. Finally, the contortions of trial courts faced with the unenviable task of applying three strikes illustrate some of the problems with the law.

112. See discussion infra part II.E.1.
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retains the authority to strike prior convictions in the interest of justice.  

1. People v. Miller: The Possibility of a Post-Indictment Section 17(b) Reduction

In People v. Miller, the court struggled with the viability of section 17(b) wobbler reductions in the wake of Bowens and three strikes. A number of defendants who faced two and three strike sentences, and who had been charged by indictment, moved the superior court for a post-indictment determination of whether a section 17(b) reduction was warranted based on the facts and circumstances of their respective cases. After reviewing Hawkins and Bowens, Judge Manoukian concluded that an indicted defendant is not entitled to a post-indictment preliminary hearing or to a probable cause hearing that closely resembles a preliminary hearing.

In spite of this apparent proscription of post-indictment hearings, the court concluded that "the prohibition of post-indictment preliminary hearings does not necessarily preclude a judicial determination of whether a 'wobbler' offense is a misdemeanor or a felony." The court based its decision largely on the holding of People v. Municipal Court (Kong), in which the court held that a magistrate presiding over a post-indictment preliminary hearing retained the section 17(b) authority to reduce a wobbler to a misdemeanor.

The Miller court observed that, although Bowens had eliminated the post-indictment preliminary hearing, the Kong holding is still valid "to the extent that it authorizes a section 17(b) reduction after an indictment." Thus, although an indicted

113. See discussion infra part II.E.2.
114. People v. Miller, No. 171-325, slip op. at 4 (Super. Ct. Santa Clara County June 14, 1994) (order on motion for post-indictment hearing to consider § 17(b)(5) reduction).
115. Id. at 3.
116. Id. at 4-8.
117. Id. at 8.
118. Id. at 9.
120. Kong, 175 Cal. Rptr. at 864.
121. People v. Miller, No. 171-325, slip op. at 11 (Super. Ct. Santa Clara County June 14, 1994) (order on motion for post-indictment hearing to consider § 17(b)(5) reduction). The court noted that Kong has been cited 13 times by appellate courts, and once since the passage of Proposition 115. Id.
defendant is not entitled to a preliminary hearing nor to any other procedure closely resembling a preliminary hearing, he is entitled to some kind of judicial determination of whether the particular facts of his case warrant a reduction of his felony-wobbler to a misdemeanor.\textsuperscript{122}

\textit{Miller} based the requirement of such a determination on both equal protection and separation of powers grounds.\textsuperscript{123} In short, to deny indicted defendants a section 17(b) reduction hearing would be to deny them a significant opportunity afforded defendants charged by complaint. It would also deny the court its authority to reduce a wobbler to a misdemeanor, instead vesting the prosecutor with "the sole authority to determine the status of a wobbler."\textsuperscript{124}

Finally, \textit{Miller} argued that a judicial determination of whether a wobbler should be reduced would not require a formal hearing or any other "quasi-preliminary hearing" prescribed by \textit{Bowens}.\textsuperscript{125} A superior court could simply base its decision regarding the reduction of a wobbler on evidence presented to the grand jury or developed after discovery, in addition to a favorable or unfavorable probation report.\textsuperscript{126}

2. People v. Reese: The Court's Authority to Strike Prior Convictions

In \textit{People v. Reese}, the Contra Costa County Superior Court considered a judge's authority to strike prior convictions in the wake of three strikes.\textsuperscript{127} The people argued that because section 1385 explicitly prevented the court from striking a prior conviction for section 667 enhancement purposes,\textsuperscript{128} it clearly applied to three strikes, which, in legislative form, is an amendment to section 667.\textsuperscript{129} In spite of language in three strikes that appears to allow only the prosecutor to strike prior convictions in the interest of jus-

\begin{footnotesize}
\begin{enumerate}
\item[122.] Id. at 9-10.
\item[123.] Id. at 13-15.
\item[124.] Id. at 15.
\item[125.] Id. at 15-16.
\item[126.] People v. Miller, No. 171-325, slip op. at 16-17 (Super. Ct. Santa Clara County June 14, 1994) (order on motion for post-indictment hearing to consider § 17(b)(5) reduction).
\item[127.] People v. Reese, No. 94-0714-7, slip op. at 3 (Super. Ct. Contra Costa County Dec. 21, 1994) (memorandum of decision to strike prior convictions).
\item[128.] See supra note 87 and accompanying text.
\item[129.] People v. Reese, No. 94-0714-7, slip op. at 18 (Super. Ct. Contra Costa County Dec. 21, 1994) (memorandum of decision to strike prior convictions).
\end{enumerate}
\end{footnotesize}
tice, and in spite of the explicit bar to judicial discretion contained in section 1385, Judge Arnason held that the court retained the authority to strike prior convictions.

The court began by establishing the applicable law. Although the initiative and statutory versions of three strikes are textually virtually identical, only one version can serve as the law of the state. After reviewing the intent of the voters in passing the initiative, the court concluded that the initiative version is the only applicable law. According to Judge Arnason, the voters were asked in Proposition 184 to either accept the legislative version by voting no, or to replace the legislative measure with the initiative version by voting yes. The passage of Proposition 184 sealed the initiative version as the law of the state and added section 1170.12 to the Penal Code.

Having established the relevant law, the court turned to the application of section 1385 to the initiative version. First, Judge Arnason established that the court’s section 1385 authority to dismiss an action is absolute except where

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130. CAL. PENAL CODE § 667(f)(2) (West Supp. 1995). Section (f)(2) provides: The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

Id.

131. See supra note 87 and accompanying text.


133. Id. at 3.

134. Id. at 15 (“To paraphrase Hermann Melville: There was but one captain of the Pequod, Ahab; and now there is but one version of the three strike law, the people’s version.”).

135. Id. at 5-15. The court found the initiative and statutory versions of three strikes to be “competing” rather than “complimentary” measures, in spite of what the court called “very similar language.” Id. at 15. Generally, when two initiative measures compete, the initiative receiving the most votes becomes the law of the state; when two measures are complimentary, courts will attempt to synthesize the similar or identical provisions to create a hybrid measure. Id. Because three strikes involves a statutory and initiative measure, rather than two initiative measures, the analysis is speculative. Id.

136. Id. at 15.

137. People v. Reese, No. 94-0714-7, slip op. at 10 (Super. Ct. Contra Costa County Dec. 21, 1994) (memorandum of decision to strike prior convictions).

138. Id. at 15.

139. Id.
the legislature has explicitly limited the power.\textsuperscript{140} Second, the court noted that section 1385 explicitly bars only the court's authority to strike section 667 prior convictions.\textsuperscript{141} Because section 1170.12, rather than section 667, is the applicable three strikes law of the state, the section 1385 bar on judicial discretion to strike priors is inapplicable to three strikes law.\textsuperscript{142} Finally, the court stated that section 1170.12 contains no explicit language limiting the court's section 1385 authority.\textsuperscript{143} Thus, the court held that "the initiative version of the three strike law was not intended to, nor can its plain language be construed to, abrogate or otherwise eliminate the court's 'well established statutory authority' to strike a prior conviction in furtherance of justice."\textsuperscript{144}

III. STATEMENT OF THE PROBLEM

Three strikes is the result of an understandable and well-founded public reaction to a soaring violent crime rate\textsuperscript{145} and a well-publicized tragedy. This comment does not question the sound judgment of the voters in passing three strikes,\textsuperscript{146} or argue that it is in any way unjust, cruel, or counter-productive to imprison violent career criminals for life.\textsuperscript{147} Rather, this comment addresses the three strikes dilemma by answering three questions. First, will three strikes reduce violent crime? Second, what will be the "cost" of three

\textsuperscript{140} Id. at 16.
\textsuperscript{141} Id. at 17.
\textsuperscript{142} See People v. Reese, No. 94-0714-7, slip op. at 17 (Super. Ct. Contra Costa County Dec. 21, 1994) (memorandum of decision to strike prior convictions).
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 20-21.
\textsuperscript{145} From 1966 to 1990, the rate of violent crime in the U.S. quadrupled. Ernest Van Den Haag, \textit{How to Cut Crime}, Nat'l Rev., May 30, 1994, at 30. Although crime rates have dropped 4\% in the last few years, there is currently one homicide every 42 seconds, one burglary every 11 seconds, one car theft every 20 seconds, one robbery every 40 seconds, and one reported rape every 6 minutes. Id.
\textsuperscript{146} This comment will abide by the wisdom of the commentator who advised that we "not fall prey to the elitist argument that the people do not know what is best for them and therefore need someone else to tell them." Donald S. Greenberg, \textit{The Scope of the Initiative and Referendum in California}, 54 Cal. L. Rev. 1717, 1747 (1966).
strikes to the state budget and the integrity of the justice system? Finally, how can three strikes be modified to retain those provisions of the bill that add to its effectiveness in fighting crime, while eliminating those provisions that lead to enormous expense and the erosion of the integrity of the criminal justice system?

IV. ANALYSIS

This analysis begins with a discussion of the substantial effect three strikes will have in reducing violent crime. After discussing the benefits of three strikes, this analysis examines the cost of the law, its overly broad scope, the pressure it will place on the criminal justice system, and the net result it will likely have on the courts, attorneys, and judges. Finally, this section examines the efficacy of the early trial courts' solutions to the three strikes dilemma.

A. Three Strikes Will Reduce Violent Crime

The author of the three strikes initiative, Mike Reynolds, described the philosophy behind the initiative:

The philosophy is a real simple one. About 75 percent of violent felonies are committed by about 6 percent of the felons, and they are usually between 15 and 24 years of age. After that, they rarely are a threat to society. What we are trying to do is keep those people in jail at least until they are 40.

The philosophy is, indeed, quite simple. By imprisoning career criminals until they reach the age when continued violent crime becomes unlikely, fewer career criminals will be free to prey on the public, resulting in an overall reduction in crime. Notwithstanding the excessive cost of three strikes and the arguably overly broad scope of the bill, there is considerable scholarly and statistical support for the effec-

148. See discussion infra part IV.A.
149. See discussion infra part IV.B.
150. See discussion infra part IV.C.
151. See discussion infra part IV.D.
152. See discussion infra part IV.E.
153. See discussion infra part IV.F.
155. See id.
156. See discussion infra part IV.B-C.
tiveness of the simple three strikes philosophy in reducing crime.

Numerous studies show that a small number of habitual offenders commit the majority of violent crimes.\footnote{157} In addition, the evidence suggests that those states with the highest incarceration rates experience commensurate reductions in crime.\footnote{158} Finally, many sociologists and criminologists agree that age itself is a determinative factor in violent criminal behavior, and that the propensity to commit violent crime decreases dramatically after age forty-five.\footnote{159} Criminologists, sociologists, attorneys, and judges disagree bitterly over these issues,\footnote{160} and it is not the purpose of this comment to resolve the debate. It should suffice for the purposes of this comment to point out that two recent and comprehensive

\footnote{157. See Bureau of Justice Statistics, U.S. Department of Justice, Recidivism of Prisoners Released in 1983, at 3 (1989) (demonstrating that a small group of repeat offenders commit a large percentage of violent crimes); Gross, supra note 10, at 1 ("There is a broad consensus among criminologists that a small percentage of repeat offenders are responsible for the vast majority of violent crime."); cf. Joan Petersilia et al., U.S. Department of Justice, Criminal Careers of Habitual Felons (1978) (examining the criminal careers of 49 felons using the case study method).}

\footnote{158. 8 U.S. Department of Justice, The Case for More Incarceration 4-5 (1992).}

\footnote{159. See Rudy A. Haapanen, Selective Incapacitation and the Serious Offender 45-58 (1990) (presenting data demonstrating that the propensity to commit violent crime plummets as the individual ages); James Q. Wilson, Crime and Human Nature 126-47 (1985) (arguing that criminal behavior depends more on age than on any other demographic characteristic); Van Den Haag, supra note 145, at 35 ("While prison programs seldom rehabilitate, age nearly always does. Over half of all offenders sent to prison are under age 29. Only about 4 percent are over age 45.".).}

\footnote{160. Compare Lois G. Forer, A Rage to Punish: The Unintended Consequences of Mandatory Sentencing (1994) (arguing that increased incarceration is ineffective in reducing crime and grossly unjust) with Van Den Haag, supra note 145, at 30 (arguing that increased incarceration and greater application of the death penalty is the only solution to a rising crime rate).}

Some commentators believe that three strikes will increase the incentive for career criminals to kill their victims. William Tucker, Three Strikes and You're Dead, Am. Spectator, Mar. 1994, at 22. The author notes that the average convicted murderer in the U.S. serves eleven years in prison, while the average convicted rapist serves five years. \textit{Id.} As "get tough" laws increase sentences for non-murderers, they blur the distinction between violent crime and homicide, increasing the incentive for the career criminal to kill the victim. \textit{Id.} at 24. The logic is as follows: If a felon with two strikes commits rape or robbery, he will be sentenced under the three strikes law to life in prison; if he kills the victim to prevent the victim from identifying him, he will still receive life in prison. \textit{Id.} The author's solution, once again, is to "raise the stakes" of homicide, through greater application of the death penalty. \textit{Id.}
studies support both the philosophy behind the law and its ultimate effectiveness in reducing violent crime.

A very recent study of three strikes conducted by the Santa Clara County Center for Urban Analysis supports the proposition that a relatively small number of career criminals are responsible for a disproportionate number of serious crimes.\footnote{161} The study found that the 8395 persons sentenced on felony matters in Santa Clara County in 1992 had, between them, a total of 11,715 prior felony convictions.\footnote{162} Of this group, 4880, or 58%, had no prior felony convictions.\footnote{163} In contrast to this large group of defendants with no serious criminal history, 1090 defendants, or 13%, accounted for 7180, or 61%, of the 11,715 prior felony convictions.\footnote{164} Of these 1090 serious criminals, 75% would have been sentenced under the three strikes law if it had been in effect in 1992.\footnote{165}

Another study supports both the philosophy behind three strikes and the ultimate effectiveness of the law in reducing serious crime. A 1994 RAND Corporation study of three strikes classified criminals as either “high-rate” or “low-rate” offenders.\footnote{166} The study concluded that high-rate offenders commit “almost eighteen times as many crimes as low-rate offenders,” and that “the typical high-rate offender commits seven serious crimes per year, including two violent crimes.”\footnote{167} In addition, the study supports proponents’ claims that three strikes will significantly reduce violent crime. Ultimately, the RAND study estimates that three strikes will reduce the annual number of serious crimes in California by 28% over the next twenty-five years.\footnote{168}

The three strikes concept is a simple and long-overdue solution to an appalling crime rate.\footnote{169} By identifying career criminals and incarcerating them until they are no longer
likely to commit violent crimes, the crime rate will be reduced
and tragedies like the Polly Klaas incident can be prevented.
The RAND study supports this simple solution, but also
points out the policy dilemma of three strikes: while simply
locking up more criminals will reduce the crime rate, what
will be the ultimate cost to the criminal justice system and
taxpayers?\textsuperscript{170}

B. The Cost of Three Strikes

Estimates of the cost of three strikes are rough due to the
multitude of factors that must be considered in such a com-
plex equation.\textsuperscript{171} It is certain, for instance, that the state will
require more prison space, prosecutors, public defenders, and
corrections officers.\textsuperscript{172} It is less clear, however, what savings
might result by slowing the revolving door of criminal justice
and thereby eliminating the cost of continually arresting,
processing, and incarcerating the same felons.\textsuperscript{173} The RAND
study concludes that three strikes will cost Californians an
additional $5.5 billion annually, or about $16,000 per serious
crime prevented.\textsuperscript{174} A brief examination of the 1994 distribu-
tion of California’s general fund appropriations helps put this
cost in perspective.

In 1994, prior to the passage of three strikes, state
spending was allocated as follows: 36% for K-12 education,
35% for health and welfare, 12% for higher education, 9% for
miscellaneous services such as pollution control and work-
place safety, and 9% for corrections.\textsuperscript{175} By the year 2002, the
$5.5 billion price tag of three strikes will have doubled correc-
tions costs to 18% of the state budget, requiring either a com-
mensurate 9% reduction in spending in another area, a new
bond issue to finance three strikes, or a tax increase of at
least $300 per year for the average taxpayer.\textsuperscript{176} The options

\textsuperscript{170} Greenwood et al., supra note 67, at 14.
\textsuperscript{171} Staff of Senate Comm. on Judiciary, 1993-94 Regular Sess., Staff
Materials on Three Strikes 10 (Feb. 17, 1994). The Senate Committee notes
that the ultimate impact of three strikes on future budgets is unknown. Id.
\textsuperscript{172} Id. at 11.
\textsuperscript{173} Id.
\textsuperscript{174} Greenwood et al., supra note 67, at 18. The study also projects that
paying for three strikes would require a tax increase of at least $300 per year
from the average taxpayer. Id. at 32.
\textsuperscript{175} Id. at 32-34.
\textsuperscript{176} Id.
for paying for three strikes are therefore threefold. First, the Legislature and Governor could raise taxes, an unlikely proposition given the current political climate.\textsuperscript{177} Second, the state could issue bonds in order to borrow the money, an equally unpopular scenario.\textsuperscript{178} The third, and final, option is to cut one of the other four areas of general spending: primary education, health and welfare, higher education, or miscellaneous services.\textsuperscript{179}

Spending cuts cannot come from primary education because the California Constitution sets minimum levels of funding for primary education.\textsuperscript{180} Moreover, because school enrollment will increase between 1994 and 2002, the percentage of the budget devoted to primary education is expected to increase from 36\% to 47\%.\textsuperscript{181} Spending cuts in health and welfare are equally unlikely as this portion of the budget has been growing for the past twenty-five years.\textsuperscript{182} Thus, if three strikes is implemented without a tax increase or bond issue, by the year 2002 the state will be spending 46\% of its general fund on primary education, 35\% on health and welfare, and 18\% on corrections, leaving a virtually nonexistent 1\% for the combined higher education and miscellaneous services that now consume 21\% of the state budget.\textsuperscript{183}

Although voters are assumed to know the law and understand the likely result of their vote,\textsuperscript{184} it is unlikely that the average citizen who voted in favor of three strikes understood the law's grave financial impact. While the occasional voter


\textsuperscript{178} The Governor has proposed a $2 billion prison bond measure, but has been unable to win the support of Senate Republicans. Daniel Weintraub, \textit{Wilson's Budget Slashes Welfare, Backs New Prisons}, L.A. TIMES, Jan. 8, 1994, at A1. In 1990, 12 of 14 bond proposals were rejected by voters, including measures to expand college campuses and construct prisons. Virginia Ellis, \textit{California Elections}, L.A. TIMES, May 31, 1994, at A3.

\textsuperscript{179} Gunnison, \textit{supra} note 177, at A13.

\textsuperscript{180} \textit{GREENWOOD ET AL., supra} note 67, at 33.

\textsuperscript{181} \textit{Id.}

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Id.} at 35, fig. 5.2.

\textsuperscript{184} \textit{See} Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm'n, 799 P.2d 1220, 1235 (Cal. 1990) ("[T]his court must on occasion indulge in a presumption that the voters thoroughly study and understand the content of complex initiative measures.").
may have been aware that the law would cost $5.5 billion annually, the figure is meaningless unless placed in the context of the overall state budget and juxtaposed against the programs that must be reduced or eliminated in order to afford the law. In addition, it is unlikely that voters were aware that paying the three strikes price tag would require either the total elimination of state funding for higher education or a tax increase or bond issue amounting to approximately $300 per taxpayer each year. While voters were certainly in favor of tougher penalties for career criminals, it stretches the limits of imagination to suggest that the voters who passed three strikes were consenting to a tax increase or the elimination of the state university system. Before state politicians consider either of these difficult options, they have a responsibility to modify the scope of the law so that lengthy and expensive life sentences are imposed on only those dangerous and violent felons for whom the law was designed.

C. The Scope of the Bill

Perhaps the greatest problem with three strikes stems from the overly broad scope of the law. Three strikes simply casts too wide a net, increasing both the expense of the law and the pressure on the criminal justice system by imprisoning essentially non-violent felons for twenty-five years.

1. Any Third Felony Triggers a Three Strike Sentence

Three strikes fails to make any distinction between violent and relatively innocuous offenders. The law provides that a felon with two qualifying prior felony convictions will be sentenced to twenty-five years to life for any third felony, irrespective of the nature of the third offense. A felon with two prior convictions who commits the crime of “petty theft with a prior” could automatically receive a three strike sentence of twenty-five years to life in spite of the fact that he may never have committed a violent crime. The following is an example from the Senate Committee Report on three

185. See supra notes 69-73 and accompanying text.  
186. See, e.g., Schiraldi et al., supra note 92. The authors examine the criminal careers of ten defendants facing three strikes sentences. Id. Many of the defendants have never committed a violent crime, and most received their third strike for a minor offense. Id.
strikes which illustrates the sometimes inequitable results of this provision:

[A] person who was convicted of breaking into a neighbor's attached garage on two occasions in order to steal a bicycle, and who was placed on probation for the offenses, would have two serious prior offenses. Any third felony, such as theft of $400 worth of property, would result in a life term under the provisions of this bill, regardless of whether he had ever acted violently or dangerously. 187

There are situations in which the "any third felony" provision makes sense. For example, an offender with two particularly violent prior convictions who commits assault with a deadly weapon shortly after being released from prison should receive a life sentence. It would be proper and reasonable in such a situation for the court to consider the defendant's history of violence and other aggravating factors, and, if there appears to be a threat to the community, impose a three strike sentence. Yet certainly there are differences between the two defendants; the first has committed relatively minor property offenses, while the second has committed two violent felonies and is apparently willing to engage in further acts of violence. The problem with three strikes is that the law forces the court to ignore the obvious differences between the two defendants and sentence both to life in prison at a cost of about $21,000 per prisoner per year. 188

2. The No Washout Provision Ignores Law Abiding Behavior

The second provision of three strikes that dramatically increases the scope of the bill is the absence of a washout period. 189 This provision forces a sentencing judge to ignore the particular circumstances of each defendant's life and impose a strike sentence without considering even lengthy periods of law abiding behavior. 190 As a result, an offender with two prior convictions that are twenty years old could receive a three strike sentence for a minor third felony in spite of

188. PHILIP G. ZIMBARDO, CENTER ON JUVENILE AND CRIMINAL JUSTICE, TRANSFORMING CALIFORNIA'S PRISONS INTO EXPENSIVE OLD AGE HOMES FOR FELONS 5 (1994).
189. See supra notes 75-77 and accompanying text.
190. See supra notes 75-77 and accompanying text.
twenty years of law abiding behavior. In addition to violating the most basic principles of fairness, this provision of three strikes is bound to significantly increase its cost.

The absence of a washout period violates fundamental principles of justice by preventing the sentencing judge from exercising any discretion in the imposition of life sentences. It is a basic principle of sentencing in California that the circumstances surrounding a crime do matter, and should be considered by the trial judge in sentencing.\(^\text{191}\) In the three strikes scenario, a sentencing judge is required to ignore important questions about the defendant's life since the last offense: How much time has passed since the offender committed his last crime? How old is the defendant and does his age make future serious offenses unlikely? Has the defendant managed to hold a job and support a family since his last conviction? Was the current offense a serious or violent felony, or a relatively minor offense such as passing a bad check or petty theft? The average citizen would certainly consider these important questions before imposing a life sentence on a nonviolent offender whose third strike occurred after years of responsible behavior. It is both unjust and fiscally irresponsible to deny the court the authority to consider the same questions.

In addition to violating principles of fairness, the no washout provision will greatly increase the cost of three strikes. Many of the offenders unfairly imprisoned by the no washout provision will be older offenders who no longer pose a serious threat to society, but do require a great deal of costly medical care.\(^\text{192}\) While the cost of incarcerating a younger offender in state prison for one year is about $21,000, the figure rises to $60,000 per year for inmates over fifty years of age, and $69,000 per year for inmates over sixty.\(^\text{193}\) Given the fact that age greatly reduces the propensity to commit violent crime,\(^\text{194}\) it is hard to justify the enormous expense of a life sentence for a senior citizen who commits a minor property offense after years of law abiding behavior. A flexible and discretionary washout provision in the three

\(^{191}\) CAL. PENAL CODE § 1170(b) (West Supp. 1995); CAL. PENAL CODE § 1204 (West 1982).
\(^{192}\) See Zimbardo, supra note 188, at 1-3.
\(^{193}\) Id. at 3.
\(^{194}\) See supra note 159 and accompanying text.
strikes law would allow judges to spare such defendants life in prison, and spare taxpayers the cost of turning California's prisons into "expensive old age homes for felons."\textsuperscript{195}

3. Many Nonviolent Offenders Will be Subject to Strike Sentences

Given the broad scope of three strikes, it is not surprising that many essentially nonviolent offenders will be subject to two and three strike sentences.\textsuperscript{196} One report suggests that 75\% of defendants eligible for life sentences will receive their third strike for a minor felony such as drug possession or vehicle theft.\textsuperscript{197} While many truly violent criminals will receive well deserved life sentences, there is a litany of nonviolent offenders, often drug addicts, who have been caught in the three strikes net.\textsuperscript{198} A case in point is that of Clarence Marlborough, a forty-eight year old man who could receive his third strike for stealing $80 worth of batteries from a convenience store.\textsuperscript{199} Marlborough is a drug addict who commits petty theft to support his drug habit and has no serious history of violence. If convicted under three strikes, he will receive life in prison at a cost to taxpayers of over $1,000,000.\textsuperscript{200}

In the absence of fiscal concerns, incarcerating such offenders for life raises serious questions about whether the punishment fits the crime. But when the $21,000 to $69,000 per year cost of incarcerating these nonviolent offenders is also taken into account,\textsuperscript{201} it becomes difficult to dispute the charge that "three strikes is not simply draconian, it is dangerous folly."\textsuperscript{202}

D. Pressure on the System: The Santa Clara Study

In addition to the financial ramifications of three strikes, the broad scope of the law will otherwise put tremendous strain on an already overburdened criminal justice system.

\textsuperscript{195} ZIMBARDO, supra note 188, at 1.
\textsuperscript{196} See SCHIRALDI ET AL., supra note 92, at 1-4.
\textsuperscript{197} GREENWOOD ET AL., supra note 67, at xii.
\textsuperscript{198} See generally SCHIRALDI ET AL., supra note 92.
\textsuperscript{199} Id. at 10-14.
\textsuperscript{200} Id.
\textsuperscript{201} See supra note 192-93 and accompanying text.
\textsuperscript{202} Vote No on 184: Three Strikes and We're Broke, S.F. CHRON., Oct. 9, 1994, at P1.
Immediately upon passage of three strikes, criminal justice insiders recognized that a flood of two and three strike cases could simply overwhelm the courts.\textsuperscript{203} Defendants are unlikely to plead guilty to a three strike sentence, and the law’s ban on plea bargaining\textsuperscript{204} leaves a defendant with no incentive to do so. With nothing to lose, two and three strike defendants will exercise their constitutional right to trial by jury in a record number of cases. Although there has been no comprehensive statewide study of the likely effects of three strikes on the justice system, a study of the initiative in Santa Clara County provides at least a glimpse of what can be expected statewide.

In anticipation of various challenges created by three strikes, the Santa Clara County Center for Urban Analysis undertook a study of the likely impact of the law on the Santa Clara County criminal justice system.\textsuperscript{205} The results reveal that, as anticipated, three strikes will put unprecedented pressure on the system. If 1994 is similar to 1992, roughly 8400 persons will be sentenced on felony matters in Santa Clara County, and about 2315, or 28\%, will be strike cases.\textsuperscript{206} The number of jury trials required to accommodate these strike cases will increase by 193\% from 200 to 585.\textsuperscript{207} These 385 additional jury trials will require an additional 8740 court hearings, an increase of 85\%.\textsuperscript{208}

Although these figures are only estimates of the long term effect of three strikes, Santa Clara and other counties began to feel the pressure of the new law almost immediately. San Francisco Superior Court recently began sending criminal cases to civil departments, and the San Francisco District Attorney estimates that criminal cases could soon swallow three of the city’s twenty civil departments.\textsuperscript{209} Given the tre-

\textsuperscript{203} SANTA CLARA STUDY, supra note 161, at vi.
\textsuperscript{204} See supra note 84 and accompanying text. The author of the Santa Clara Study, Bob Cushman, observed “[t]he public perception is that all these offenders are getting a Perry Mason-like trial, and they’re not. The system is dependent on guilty pleas.” Gonzales, supra note 108, at B1P.
\textsuperscript{205} SANTA CLARA STUDY, supra note 161, at vi.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
mendous stress three strikes places on an already overburdened criminal justice system, it is prudent to examine how the system will respond to the increased pressure.

E. The Net Result: The Integrity of the System

Taken in concert, the expense of three strikes, the broad scope of the law, and the pressure it places on the judicial system are likely to result in an erosion of the integrity of the criminal justice system. Defense attorneys will advise their clients to exercise their right to a speedy trial within sixty days. The district attorney's office will not have enough prosecutors to try the onslaught of strike cases. Judges will be faced with the exception to the rule, the defendant facing a three strike sentence who has never committed a violent crime, is not a threat to society, and certainly does not deserve life in prison. Finally, some victims of third or "triggering" felonies may refuse to press charges if they are aware that doing so may result in life in prison for the offender. According to Supreme Court Justice Stephen Breyer, the justice system will adapt to such a situation because, in his words, there is always "oil in the joints" of the sociological factors will greatly increase the pressure on the criminal justice system over the course of the next three decades. These factors include increased immigration, continued availability and use of firearms, and an even greater number of non-English-speaking victims and defendants. The author proposes mediation and alternative dispute resolution in criminal cases involving misdemeanors and felony wobblers.

210. See discussion supra part IV.B.
211. See discussion supra part IV.C.
212. See discussion supra part IV.D.
213. The Santa Clara County Board of Supervisors recently voted to spend $1.3 million to hire additional lawyers and court staff to handle three strike cases. More Lawyers for Santa Clara DA, S.F. CHRON., Oct. 1, 1994, at A14.
214. In a truly ironic episode, a San Francisco woman named Joan Miller became one of the first victims to refuse to testify against a three strikes defendant. Joan Miller's car was broken into by a felon with two prior strikes, making the felon eligible for a three strikes sentence of life in prison. Jim Zamora, Three Strikes Entangles S.F. Woman Twice, S.F. CHRON., Aug. 24, 1994, at A1. Three hours later, Joan Miller's son, Jed Miller, the named defendant in the case of People v. Miller discussed in this comment, was arrested for using a stolen truck to steal bicycles at Stanford University. Jed Miller has a number of prior convictions and faces a three strikes sentence. Jed Miller refused to testify against the man who tried to steal her car, and he plead guilty to second-degree burglary, receiving four years in prison rather than life. Jed Miller has taken up the rhetorical fight against three strikes from his prison cell, writing op-ed pieces about the injustice of the law. See, e.g., Jed Miller, Three Strikes and I'm Out, S.F. EXAMINER, Oct. 2, 1994, at A13.
criminal justice system.\textsuperscript{215} The oil in the joints of the justice system will allow it to respond to the cost, pressure, and scope of three strikes, but the response will be far from what the voters anticipated in passing three strikes.\textsuperscript{216}

First, prosecutors will respond by not charging or undercharging certain defendants.\textsuperscript{217} Wobblers that should probably be charged as felonies will be charged as misdemeanors to avoid a three strike jury trial. Prosecutors will be forced to strike the prior convictions of two and three strike defendants who the public would expect to receive, and who may well deserve, enhanced three strike sentences. Finally, the plea bargaining that three strikes ostensibly prohibits is likely to occur nonetheless, through some procedure that quietly circumvents the intent of the law.\textsuperscript{218}

\textsuperscript{215} Judge Stephen Breyer, Dump Mandatory Minimums, Address Before the American Bar Association (Aug. 7, 1993) in N.J. Law J., May 30, 1994, at 17. Judge Breyer criticized mandatory minimum sentencing statutes, arguing that the justice system will respond in unanticipated ways when the law requires the imposition of harsh mandatory sentences on undeserving defendants. Id. According to Judge Breyer:

\begin{quote}
[You cannot tell human beings to do things that they feel are totally unfair, and if you tell judges or lawyers or prosecutors who are human beings to do something they think is terrible, they won't do it. They'll figure a way out. And my goodness, I mean there is oil in the joints of the criminal law, always oil in the joints.]
\end{quote}

Id.

Judge Breyer argued that when faced with the defendant who deserves leniency, the prosecutor won't charge, the jury won't convict, or the judge will reduce the sentence. Id.

\textsuperscript{216} According to another commentator, "of course, [three strikes] won't be enforced as written, because such irrational mandates will always be circumvented through plea bargaining and other stratagems to avert complete collapse of the system. But the effect would still be larger, and bad." Stuart Taylor Jr., Throwing Out 'Three Strikes', The Recorder, Jan. 13, 1994, at 6.

A detailed study of how the criminal justice system responded to another "get tough on crime" measure demonstrates that the results of such proposals are rarely what proponents and voters anticipate. Candace McCoy, Politics and Plea Bargaining (1993). In 1982, the voters of California passed Proposition 8, the "Victims' Bill of Rights" which ostensibly put an end to what proponents claimed was the corrupt process of plea bargaining. Id. at 20-49. The measure prohibited all plea bargaining in cases charging serious felonies, with the intent of ensuring that all serious criminals stood trial and received maximum sentences instead of pleading guilty to a lesser charge. Id. at 29. Because the system is dependant on guilty pleas, the practical effect of the law was not to end plea bargaining in serious cases, but simply to move the plea bargaining process from superior court to municipal court, where cases could be "plead out" before they officially became "serious felonies." Id. at 89-129.

\textsuperscript{217} See supra note 215 and accompanying text.

\textsuperscript{218} Taylor, supra note 216, at 6.
Second, judges, faced with defendants who do not deserve life in prison, and who resent the erosion of judicial discretion in sentencing, will be forced to creatively spurn the law. The response is understandable and began almost immediately upon passage of three strikes, as judges across the state refused, in one way or another, to follow the clear mandate of the legislature.219

Third, parole boards and corrections officials will be under tremendous pressure to create prison space for defendants caught in the three strikes net.220 As a flood of new three strikes defendants enter the corrections system, eligible for only a 20% reduction of sentence for good time,221 corrections officials will be forced to release prisoners who are already in the system to make room for new inductees.222 Because prison officials may not base the timing of a prisoner's release on an assessment of the individual's danger to society,223 some of the prisoners released may be violent career criminals like Richard Allen Davis.224 To put it simply, as the front end of the prison pipeline becomes more crowded, the system will make room for the new inductees by releasing prisoners nearing the end of their sentences.

What is the ultimate result of such contortions of the criminal justice system? According to Justice Breyer, the re-

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219. See, e.g., People v. Miller, No. 171-325, slip op. at 4 (Super. Ct. Santa Clara County June 14, 1994) (order on motion for post-indictment hearing to consider § 17(b)(5) reduction); People v. Reese, No. 94-0714-7, slip op. at 15 (Super. Ct. Contra Costa County Dec. 21, 1994) (memorandum of decision to strike prior convictions); Scott Graham, Trial Judges Trying to Determine Their Role in Three Strikes Cases, The Recorder, Sept. 27, 1994, at 3 (reporting on a judicial conference at which most judges agreed that the law would be declared unconstitutional on a case by case basis); Ron Sonenshine, Judge’s Challenge to ‘3 Strikes’ Law, S.F. Chron., July 21, 1994, at A15 (describing a case in which a Sonoma County judge declared three strikes cruel and unusual).

220. Taylor, supra note 216, at 6.

221. See supra notes 81-82 and accompanying text.

222. See Taylor, supra note 216, at 6.

223. Friedman & Rose, supra note 76, § 37.4. In 1977, California passed the Determinate Sentencing Law providing that, with few exceptions, prison terms would be determined by the nature of the crime committed rather than by the danger of the particular offender to society. Id.

224. Taylor, supra note 216, at 6. The author argues that determinate sentencing may have led to the release of Richard Allen Davis in the first instance, noting that even if court and corrections authorities had recognized Davis' potential for violence, the determinate sentencing law and the need to make room for more prisoners would have prevented them from imprisoning him any longer. Id.
result is a diminution in the integrity of the system and a general disrespect for the law. As he stated in May of 1994,

[F]inally, what you'll discover as a result of this mess — because that's what I would describe it as, a mess — you'll discover not only unfairness, not only failure to punish where there ought to be some punishment, but you'll see everybody sweeping everything under the rug. Because you're not going to find prosecutors really saying publicly they don't prosecute or judges saying, well, I sort of cut him a little here or there, whatever it is.

Rather what grows generally is you have a law that can't really be enforced, and when you have that, you have disrespect for law. And you have the public feeling something is going wrong, but you're not quite sure what. And you have everyone acting a little bit hypocritically.

The erosion of the integrity of the criminal justice system described by Justice Breyer is greatly exacerbated by the inflexibility of three strikes. The inability of the judge to reduce wobblers or strike prior convictions eliminates the crucial screening device of judicial discretion and greatly increases both the cost of three strikes and the pressure on the judicial system. As Justice Breyer points out, there is an exception to every rule. In the three strikes scenario, the exception is the nonviolent offender who poses no serious threat to society but must be incarcerated for life nonetheless. A modification of three strikes that provides for increased judicial discretion will serve as a sort of systemic pressure release valve, allowing the judge to weed out truly nonviolent offenders and significantly reduce the cost of the law.

F. The Efficacy of the Early Decisions

Judges Manoukian and Arnason were among the first California judges forced to respond to the three strikes dilemma. In attempting to abide by the law and at the same time maintain judicial discretion to cope with the myriad complexities of three strikes, each judge developed a unique solution to the three strikes dilemma. It is almost certain

226. Id.
227. See discussion supra part II.D.
228. See discussion supra part II.C.9.
229. See supra note 215 and accompanying text.
230. See discussion supra part IV.C.3.
THREE STRIKES DILEMMA

that these cases, or similar cases, will be appealed to the California Supeme Court, which will ultimately settle three strikes law.\textsuperscript{231} This section examines the \textit{Miller} and \textit{Reese} decisions for the effectiveness of their respective solutions and the likely success of such solutions on appeal.

1. People v. Miller

In \textit{People v. Miller}, Judge Manoukian held that the court retained the authority, pursuant to section 17(b), to reduce an alternate felony-misdemeanor crime, or wobbler, from a felony to a misdemeanor.\textsuperscript{232} If upheld on appeal, the decision will provide judges with some discretion in dealing with three strikes, and will help prevent some of the inequitable and financially unsound results that can occur when prosecutors choose to charge wobblers by indictment.

The \textit{Miller} decision should be upheld on appeal in spite of the \textit{Bowens} proscription on post-indictment preliminary hearings because the defendants in the two cases were denied very different rights. In \textit{Bowens}, the defendant sought a post-indictment preliminary hearing at which the prosecutor would be required to show probable cause to hold the defendant for trial in the superior court.\textsuperscript{233} The defendant claimed he was denied equal protection because defendants prosecuted by complaint in municipal court were afforded the opportunity to challenge probable cause at the preliminary hearing.\textsuperscript{234} The crucial issue in \textit{Bowens}, therefore, was whether and how the district attorney should be required to show probable cause.\textsuperscript{235} The \textit{Bowens} court correctly denied the post-indictment preliminary hearing not because the indicted defendant had no right to a determination of probable cause, but because probable cause had \textit{already been determined} by the grand jury in handing down its indictment.\textsuperscript{236} As such, the indicted defendant and the defendant charged by complaint were both afforded a determination of probable

\begin{itemize}
\item \textsuperscript{231} Kisliuk, \textit{supra} note 15, at 2.
\item \textsuperscript{232} People v. Miller, No. 171-325, slip op. at 9 (Super. Ct. Santa Clara County June 14, 1994) (order on motion for post-indictment hearing to consider § 17(b)(5) reduction).
\item \textsuperscript{233} Bowens v. Superior Court, 820 P.2d 600, 606 (Cal. 1991).
\item \textsuperscript{234} \textit{Id}.
\item \textsuperscript{235} \textit{Id}.
\item \textsuperscript{236} \textit{Id}.
\end{itemize}
cause, albeit in different forums, and the indicted defendant was, therefore, not denied a fundamental right.\textsuperscript{237}

The situation was quite different in Miller, where, in the absence of a post-indictment judicial consideration of a section 17(b) reduction, the defendant would be denied the opportunity to present evidence to the court that the circumstances of his case warranted such a reduction.\textsuperscript{238} The distinction is crucial. Whereas in Bowens the defendant was afforded a determination of probable cause in an alternative manner,\textsuperscript{239} the indicted defendant in Miller would be denied entirely the possibility of a section 17(b) reduction.\textsuperscript{240} Although the grand jury makes a determination of probable cause, it is not a judicial body, and therefore lacks the authority to grant or even consider the reduction of a felony wobbler to a misdemeanor.\textsuperscript{241}

In addition, the Kong decision apparently survived the Bowens ruling that criminal defendants have no right to a post-indictment preliminary hearing, at least to the extent that it authorizes the court to grant a section 17(b) reduction after an indictment.\textsuperscript{242} Both Kong and Miller correctly point out that the Bowens court had no cause to consider and, indeed, never mentioned the right to a post-indictment section 17(b) reduction.\textsuperscript{243} The Bowens court proscribed post-indictment preliminary hearings to determine probable cause,\textsuperscript{244} but in Miller, the defendant asked for neither a preliminary hearing nor a determination of probable cause.\textsuperscript{245} Therefore, the Miller defendant's request for a post-indictment judicial determination of the validity of a section 17(b) reduction falls outside the scope of the Bowens decision.\textsuperscript{246}

\begin{itemize}
\item \textsuperscript{237} Id. at 607.
\item \textsuperscript{238} People v. Miller, No. 171-325, slip op. at 9 (Super. Ct. Santa Clara County June 14, 1994) (order on motion for post-indictment hearing to consider § 17(b)(5) reduction).
\item \textsuperscript{239} Bowens v. Superior Court, 820 P.2d 600, 606 (Cal. 1991).
\item \textsuperscript{240} People v. Miller, No. 171-325, slip op. at 9-10 (Super. Ct. Santa Clara County June 14, 1994) (order on motion for post-indictment hearing to consider § 17(b)(5) reduction).
\item \textsuperscript{241} See supra note 101.
\item \textsuperscript{242} See supra notes 118-22 and accompanying text.
\item \textsuperscript{243} See supra notes 118-22 and accompanying text.
\item \textsuperscript{244} See supra note 102.
\item \textsuperscript{245} See supra notes 114-15 and accompanying text.
\item \textsuperscript{246} See discussion supra part II.E.1.
\end{itemize}
Finally, Judge Manoukian outlined, but did not thoroughly detail, the nature of the judicial determination of whether a wobbler is a misdemeanor or a felony.\(^{247}\) Bowens clearly forbids a full scale preliminary hearing, a "quasi-preliminary hearing," or "any other similar procedure."\(^{248}\) The judicial determination suggested in Miller appears to be nothing like a preliminary hearing and, in fact, may not require a hearing at all.\(^{249}\) Instead, Judge Manoukian described a procedure whereby a judge reviews the transcript of the grand jury hearing, the defendant's prior criminal history, and any favorable or unfavorable probation reports.\(^{250}\) Again, because this procedure would not be a hearing, let alone a preliminary or quasi-preliminary hearing, it falls outside the scope of the Bowens decision.\(^{251}\)

The Miller decision is an intelligent and pragmatic response to one of the difficult problems\(^{252}\) created by three strikes. The judicial determination Judge Manoukian suggests would be quick and inexpensive, and it would grant indicted defendants the same opportunity for section 17(b) reductions that defendants prosecuted by complaint now enjoy. Moreover, a court that chooses to reduce a wobbler following the Miller approach would be doing so on the record in a forthright manner, preventing the kind of surreptitious evasion of the law envisioned by Justice Breyer.\(^{253}\)

2. People v. Reese

In People v. Reese, the court held that judges retained the power to strike prior convictions in furtherance of justice\(^{254}\) in spite of language to the contrary in both the initiative and statutory versions of three strikes,\(^{255}\) and in spite of an explicit bar to judicial discretion to strike prior convictions for enhancement purposes contained in section 1385(b).\(^{256}\) While the Reese rationale is an understandable attempt to

\(^{247}\) See supra notes 125-26 and accompanying text.
\(^{248}\) See supra notes 102-05 and accompanying text.
\(^{249}\) See supra notes 125-26 and accompanying text.
\(^{250}\) See supra notes 125-26 and accompanying text.
\(^{251}\) See supra notes 118-22 and accompanying text.
\(^{252}\) See supra note 92.
\(^{253}\) See supra note 226 and accompanying text.
\(^{254}\) See discussion supra part II.E.2.
\(^{255}\) See supra note 130.
\(^{256}\) See supra note 87.
cope with the diminution of judicial discretion caused by three strikes, it is unlikely to survive appeal and perhaps best serves as an example of the extent to which the judiciary chafes under three strikes.

The Reese decision relies almost entirely on the proposition that the initiative measure is the one and only three strikes law of the state. The court reached this conclusion by determining that the legislative and initiative measures were "competing," rather than "complementary" or "supplementary" measures. It is difficult to understand how the two measures could compete, given the fact that the text of the two versions is virtually identical. Furthermore, if the intent of the initiative was to compete with the statutory version, the voters who signed the initiative would have been staging a rather odd competition, a choice between whether the statutory provisions of three strikes should appear as Penal Code section 667 or as Penal Code section 1170.12. Such a choice would have been futile, and was almost certainly not the intent of the voters in passing the three strikes initiative.

Rather, the voters more likely intended to ratify the existing three strikes law. By passing the initiative even after the prior legislation, the voters made it much more difficult for the legislature to repeal or modify three strikes. If there was any "competition" between measures, it was between the existing legislative version and various other three strikes proposals pending in the legislature both before and after passage of the final statutory version. Thus, the court is only partially correct in stating "there is but one version of the three strike law, the people's version." Since the two are textually identical, there is truly only one substantive three strikes law in California. Whether "the peo-

257. See supra notes 134-38 and accompanying text.
258. See supra note 135.
259. See supra notes 57-67 and accompanying text.
260. See supra notes 61-64 and accompanying text.
261. See supra notes 65-67 and accompanying text.
262. When the legislature passed three strikes as A.B. 971, there were four other three strikes proposals pending in the legislature. STAFF OF SENATE COMM. ON JUDICIARY, 1993-94 REGULAR SESS., STAFF MATERIALS ON THREE STRIKES 9 (Feb. 17, 1994).
ple's version" will be ratified by the Supreme Court to the total exclusion of the legislative version is much more doubtful.

Because the courts are likely to consider the two versions as complementary measures, the impact of section 1385 on three strikes is unclear. Section 1385(a) gives the judge broad authority to strike prior convictions, while section 1385(b) explicitly prevents the court from striking a prior conviction charged for enhancement purposes under section 667.\textsuperscript{264} Because the legislature passed section 1385(b) with the clear intent of limiting the court's ability to strike prior convictions,\textsuperscript{265} this limitation could rationally be applied to three strikes, which has replaced section 667 as the state's primary enhancement statute.\textsuperscript{266} Furthermore, in the absence of strained statutory construction, three strikes on its face appears to give only the prosecutor the authority to strike prior convictions in the interest of justice.\textsuperscript{267} It appears, then, that the \textit{Reese} solution to the three strikes restriction on judicial authority to strike priors is not likely to survive on appeal. This is not to say, however, that the \textit{Reese} court was incorrect in seeking such discretion, or that there is no other method of granting judges the authority to strike prior convictions.

V. Proposal

There are significant problems with the current three strikes law. While the measure will have the desired effect of reducing violent crime,\textsuperscript{268} it will have other negative results that were probably not anticipated by those who drafted the measure or the voters who approved it. Most notably, three strikes will be extraordinarily expensive.\textsuperscript{269} In addition, it will ensnare many essentially nonviolent offenders in its overly broad net,\textsuperscript{270} resulting in tremendous pressure on the

\textsuperscript{264} See supra note 87.

\textsuperscript{265} The legislature declared: "It is the intent of the Legislature . . . to restrict the authority of the trial court to strike prior convictions of serious felonies when imposing an enhancement [pursuant to section 667]." 1986 Cal. Stat. ch. 85, sec. 3, at 211-12.

\textsuperscript{266} See supra notes 61-62 and accompanying text.

\textsuperscript{267} See supra note 130.

\textsuperscript{268} See discussion supra part IV.A.

\textsuperscript{269} See discussion supra part IV.B.

\textsuperscript{270} See discussion supra part IV.C.
Finally, the combined effect of three strikes will be an erosion of the integrity of the criminal justice system. The challenge then, and the object of these proposals, is to amend or interpret three strikes in a manner that preserves the elements of the law that truly strike at violent criminals, while eliminating its less desirous provisions.

A. Judicial Action

1. Wobblers and the Miller Decision

California judges will continue to find creative responses to three strikes, and an entire series of three strikes cases will eventually reach the California Supreme Court, which will ultimately settle three strikes law. When the court considers the role of wobblers in the three strikes scenario, it should adopt the solution proposed by Judge Manoukian in People v. Miller, which allows indicted defendants a judicial determination of whether a wobbler is a misdemeanor.

Opponents of post-indictment section 17(b) reductions may ask why indicted defendants should suddenly be provided with a hearing when they have been denied such hearings since 1991. The answer lies in the tendency of prosecutors to charge three strikes offenses only by indictment. In the past, defendants charged with wobblers were routinely charged by complaint, with prosecutors reserving the grand jury procedure for more serious cases. With the possibility of life in prison, every three strikes case has become a serious one, and defense attorneys are prepared to file every motion and use every tactic conceivable to protect their clients. When faced with such expensive and time-consuming preliminary hearings, it is only natural for the prosecutor to bypass

271. See discussion supra part IV.D.
272. See discussion supra part IV.E.
274. See discussion supra part II.E.1.
275. See supra note 102.
276. See supra notes 106-10 and accompanying text.
278. See California Attorneys for Criminal Justice, supra note 62, at 125. Albert J. Menaster, a defense attorney, suggests 10 ways to avoid three strikes before trial. Id.
such difficulties by charging through indictment. In the process, defendants charged by indictment are denied the opportunity for a section 17(b) reduction that is afforded those charged by complaint.

By providing indicted defendants with a post-indictment judicial determination of whether a wobbler should be reduced to a misdemeanor, the court would achieve three laudable objectives. First, the indicted defendant would be placed on equal footing with those defendants charged by complaint. Second, the trial court would have the discretion to apply the harsh three strikes sentence only to those truly violent felons to whom the law was intended to apply. Finally, selective post-indictment reductions for essentially nonviolent felons would help ease some of the pressure on the criminal justice system created by three strikes.

2. Prior Convictions and the Reese Decision

While it would be tempting for the Supreme Court to adopt the position of the Reese court by allowing judges to exercise their section 1385 authority to strike prior convictions in furtherance of justice, the court should refrain from doing so. Although section 1385(b) should be repealed to allow judges to strike prior convictions, the section should be repealed by the Legislature rather than the court.

First, adoption of the Reese approach would overrule legitimate legislation and reject the will of the voters through strained and hyper-technical statutory interpretation. Almost certainly, the intent of the voters in passing the initiative measure was to ratify the existing three strikes law embodied in the legislative version. A decision based on a legal technicality would be an unwise and somewhat dishonest exercise in judicial activism.

Second, such a decision would likely be viewed by the Legislature and voters as another example of an arrogant judiciary thumbing its nose at the electorate, resulting in even
more restrictive legislative or initiative measures. Cal.
orf. Supreme Court decisions of the 1970's and 1980's, based
on strained rationales similar to Reese, resulted in legislative
and initiative measures that greatly reduced judicial author-
ity, in addition to the ouster of three supreme court jus-
tices. It would be a mistake for the court to return to the
activism that led to the restriction on judicial discretion in
the first instance.

B. Legislative Action in Furtherance of the Intent of the
Voters

The California Legislature should take immediate steps
to reform three strikes law. Because three strikes was ap-
proved by voter initiative, any modifications must be in fur-
therance of the voters' intent in enacting the law. Accord-
ing to the text of the three strikes initiative, the intent of the
voters in passing the law was to ensure longer prison
sentences for repeat violent or serious offenders. The fol-
lowing proposals will further that intent by preserving those
elements of the law that ensure longer sentences for truly
dangerous criminals. The law would be modified, however, to
allow judges to apply three strikes based upon the particular
circumstances of each case. The result will be an efficient
and enforceable three strikes law that achieves the intent of
the voters without emptying the state treasury or bringing
the criminal justice system to its knees.

1. Allow the Court to Strike Prior Convictions in
Furtherance of Justice

Instead of waiting for the courts to determine the author-
ity of judges to strike prior convictions in three strikes cases,

It Come from and How Much Did It Do?, 23 PAC. L.J. 843 (1992). The authors
chronicle how a series of California Supreme Court decisions in the 1970's and
1980's that expanded the rights of criminal defendants alienated the electorate.
Id. at 859. The voters responded through the initiative process by passing
Proposition 8 and Proposition 115 which significantly reduced the discretion of
trial judges at sentencing. Id. at 843-44.

285. Id. at 844. After the court reversed the imposition of the death penalty
in twenty-two of twenty-four cases between 1977 and 1982, the voters re-
sponded by rejecting three supreme court justices, including Chief Justice Rose
Bird. Id.

286. See supra notes 65-67 and accompanying text.
287. See supra note 5 and accompanying text.
the Legislature should amend three strikes to explicitly grant judges such authority. In addition, the Legislature should repeal the section 1385(b) limitation on judicial discretion. An increase in judicial discretion would have the practical effect of curbing many of the problems associated with three strikes.

First, judicial discretion to strike prior convictions would promote justice by allowing judges to fairly and forthrightly sentence nonviolent offenders to something less than life in prison. Second, the reduction in the number of offenders serving life in prison would considerably reduce the cost of three strikes. Third, the exclusion of many nonviolent offenders from the scope of three strikes would reduce the number of three strikes hearings, motions, and jury trials, greatly reducing the pressure three strikes places on the judicial system. Finally, while most prosecutors will wisely strike the prior convictions of those nonviolent defendants for whom life in prison would be cruel and unjust, increased judicial discretion would serve as an important check on the occasionally overzealous district attorney.

2. Eliminate the No Washout Provision of Three Strikes

State legislators should remove the no washout provision from three strikes and explicitly allow judges to consider the length of time between the prior felony conviction and the current offense when imposing strike sentences. The Legislature should not, however, replace the no washout provision with a strict washout period of five, ten, or fifteen years.

A strict washout provision suffers the same weakness as a no washout provision, namely, that it is inflexible and prevents the judge from exercising common sense when faced with an exception to the rule. A brief hypothetical illustrates the point: a defendant is convicted of rape on two separate occasions and serves time in prison for each offense. After being released from prison on the second rape, the defendant avoids a life of crime, or at least avoids detection, for a period of eleven years. After eleven years, the defendant is con-

288. See supra note 87 and accompanying text.
289. See supra notes 75-77 and accompanying text.
victed of a third rape. If the legislature had passed a ten year washout period, the sentencing judge would be required to ignore the first two convictions. The defendant could therefore escape enhanced punishment for the prior offenses in spite of the fact that he is precisely the kind of violent criminal three strikes was designed to imprison for life. Any mandatory washout period would, in certain cases, prevent judges from imposing full life sentences on dangerous violent felons.

Instead of mandating a certain number of years after which prior convictions are "washed out," the Legislature should simply eliminate the no washout provision. This modification of three strikes would allow judges to apply three strikes selectively based on the particular facts and circumstances of each case. When the prior offenses are relatively minor, the court would be permitted to ignore prior convictions at its discretion even if there was a relatively short period of time between offenses. When the prior offenses and the current offense are violent or serious, the court would be permitted to consider the prior history of violence, irrespective of the age of the prior convictions. Such a modification would infuse three strikes with a flexible element of justice and common sense without sacrificing any of its tough crime fighting provisions. Judges could impose life sentences on violent criminals and refrain from applying the law when life in prison would be unjust.

C. Voter Initiative

Along with the Governor and the Legislature, prominent citizens who have been active in the fight against crime, people such as Marc Klaas and Mike Reynolds, should reexamine the costs of three strikes and actively support alternative crime reduction proposals. The process may already have begun, as Marc Klaas actively opposed the three strikes initiative.290

A number of alternatives have been proposed by the RAND Corporation in a report comparing the current law with possible alternatives.291 The study evaluates three strikes and the alternative proposals by comparing relative costs to effectiveness in reducing violent crime.292 The report

290. See discussion supra part II.A.2.
291. GREENWOOD ET AL., supra note 67, at 4-9.
292. Id.
indicates that certain less expensive proposals could be equally effective in combating violent crime.\textsuperscript{293}

For instance, one proposal that RAND explored is called the "Full Term" option.\textsuperscript{294} This alternative consists of only three provisions.\textsuperscript{295} First, all convictions for serious or violent felonies would result in state prison terms, regardless of whether the defendant had any prior convictions.\textsuperscript{296} Second, felons convicted of serious or violent felonies would receive no time off for good behavior, resulting in longer sentences for truly violent offenders.\textsuperscript{297} Finally, the proposal would attempt to cut in half the number of people sent to state prison for relatively minor crimes by sentencing most of such defendants to either county jail or probation.\textsuperscript{298}

The "Full Term" proposal would guarantee longer terms for violent felons by sentencing such felons to state prison after their first violent offense.\textsuperscript{299} In addition, violent felons would be kept off the streets for longer periods as a result of the no time off provision.\textsuperscript{300} RAND estimates that such a proposal would match the crime cutting effectiveness of three strikes, but would cost significantly less.\textsuperscript{301}

VI. CONCLUSION

California Legislators and voters passed three strikes legislation as a direct response to the well publicized Polly Klaas tragedy. Voters demanded greater protection from violent felons. Politicians, sensing the mood of the electorate, hastily passed the readily available three strikes proposal. Californians are correct to demand life in prison for dangerous career criminals such as Richard Allen Davis, and the law will indeed reduce violent crime. Unfortunately, the law was poorly drafted and never properly studied before being passed by the Legislature and the voters. The result is a three strikes law that sweeps too broadly, incarcerating many essentially nonviolent offenders at enormous cost to

\begin{itemize}
  \item \textsuperscript{293} Id. at xiii.
  \item \textsuperscript{294} Id. at 9.
  \item \textsuperscript{295} Id.
  \item \textsuperscript{296} GREENWOOD ET AL., supra note 67, at 9.
  \item \textsuperscript{297} Id.
  \item \textsuperscript{298} Id.
  \item \textsuperscript{299} Id. at 27.
  \item \textsuperscript{300} Id.
  \item \textsuperscript{301} GREENWOOD ET AL., supra note 67, at 27-29.
\end{itemize}
taxpayers. By its overly broad scope, the law will place an unbearable strain on the criminal justice system, resulting in an eventual reduction in the integrity of the process.

Trial courts immediately responded to the three strikes dilemma by claiming considerable judicial discretion in applying the law. The California Supreme Court should endorse the movement for greater judicial discretion by allowing trial judges to reduce wobblers to misdemeanors. In addition, the Legislature should modify three strikes to allow judges to strike prior convictions in the interest of justice and provide for a flexible washout provision that allows judges to consider or disregard prior convictions as the circumstances demand.

These modifications would streamline three strikes and eliminate undue expense and pressure on the judicial system without compromising the effectiveness of the law in reducing violent crime. In the absence of these or similar modifications, the state is faced with the unsavory choice of either a massive tax increase, or a three strikes law and criminal justice system that simply cannot deliver what the voters demand and deserve.

Loren L. Barr