

**Three Strikes and You're In: The Effect of  
*Ewing v. California* and Three Strikes Legislation  
on Prison Population and Resource Management**

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## **Abstract**

*“Three strikes” laws have been a source of great debate since their inception. The recent Supreme Court decision in Ewing v. California (2003), upholding California’s three strikes laws will undoubtedly have an effect on prison management as prison populations continue to rise and correctional budgets continue to decrease. This paper examines the legal history of “three strikes” legislation and explores the impact these laws have on the criminal justice system, particularly prison populations and correctional budgets as well as the recent surge in the number of geriatric prisoners.*

## **About the Authors**

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## **Three Strikes and You're In: The Effect of *Ewing v. California* and Three Strikes Legislation on Prison Population and Resource Management.**

### **Introduction**

“Three-strikes-and-you’re-out laws” are one of America’s more controversial sentencing practices. Although the phrase is commonly used, states vary widely on what is meant by “three,” “strikes,” and “out.” (Reichel, 2001). By 1996 twenty five states had some variation of three strikes, while thirty-four states maintain some form of habitual offender laws (Dimasco and Mauer, 1995). Despite the many variations in “three strikes” legislation, some basic similarities exist. Three strikes laws authorize longer periods of incarceration for violent crimes, which could include murder, rape, arson and aggravated assault (Clark, Austin, and Henry, 1997). Some states include drug sales, escape, treason, embezzlement and bribery (Clark et al., 1997). Many states have “habitual offender” legislation, which allow persons to be incarcerated for life after a specified number of sentences. Legislations that targets repeat offenders are not new, but confinement for life for these types of offenders has spawned debate. The Supreme Court in *Ewing v. California* (2003) decided that three strikes laws are constitutional and do not violate the Eighth Amendment. This decision has a profound impact on the correctional system.

This paper examines the cases decided prior to the *Ewing v. California* (2003) decision and traces the legal history and rulings on habitual offender and three strikes laws. It then explores current legislation and examines the variations in state and federal legislation. Another focus is the effect three strikes laws have had on prison populations. Long determinate sentences created by the legislation will have an adverse impact on the prison population, financial costs, and management. The increase in the number of

geriatric inmates is an additional concern resulting from three strikes legislation. The final part of this paper will discuss the future of three strikes and implications of the *Ewing* decision.

### **Supreme Court Cases**

Since 1980 the United States Supreme Court has decided seven cases on the issue of the constitutionality of long and disproportionate prison sentences, particularly those involving life imprisonment for relatively minor offenses. These cases are based on the Eighth Amendment prohibition against cruel and unusual punishment. They generally uphold the statutes constitutionality with a few notable exceptions.

#### *Rummel v. Estelle* (1980)

In 1980 the Court decided *Rummel v. Estelle* (1980) Rummel had received a felony conviction for obtaining \$120.75 by false pretenses and received a mandatory life sentence. Believing the sentence to be disproportionate to the types of offenses committed, Rummel argued that it was a violation of the Eighth Amendment for Texas to sentence a three time offender a life sentence despite the possibility of parole. Under the Texas recidivism statute Rummel was sentenced to a lengthy prison term for a conviction of felony theft. His two prior offenses were a conviction for fraudulent use of a credit card and passing a forged check, both felony convictions. Because Texas had previously incarcerated Rummel for felony convictions the Court held that it was not unreasonable to incarcerate this individual for life, as he had proven he was unable to conduct himself under the prescribed social norms (*Rummel v. Estelle*, 1980). The *Rummel* Court also held that the proportionality of sentences can rarely be contested except in capital punishment cases. The Court held that only an extreme example, such as making

overtime parking punishable by life imprisonment would constitute a violation of the proportionality principle in non capital punishment sentences.

*Hutto v. Davis* (1982)

After *Rummel v. Estelle* (1980), the Court heard *Hutto v. Davis* (1982). In that case, law enforcement officers raided respondent's home and seized approximately nine ounces of marijuana and assorted drug paraphernalia. Several days before the raid, officers had tape-recorded a transaction in which respondent sold marijuana and other controlled substances to a police informant. With the aid of the seized evidence and the tape recording, the defendant in the case was sentenced to two consecutive twenty year terms for possession to distribute nine ounces of marijuana. At the time of respondent's conviction, Virginia law authorized fines of up to \$25,000 and prison terms of not less than 5 nor more than 40 years for each of respondent's offenses. The Court relied on *Rummel* saying that federal courts should be cautious in overturning mandatory prison sentences approved by the legislature. The Court again implied that successful challenges to the proportionality of prison sentences should be rare occurrences (*Hutto v. Davis*, 1982).

*Solem v. Helm* (1983)

The Court decided *Solem v. Helm* (1983) three years after *Rummel*. In 1979, the respondent was convicted in a South Dakota state court of uttering a "no account" check for \$100. Ordinarily the maximum punishment for that crime would have been five years' imprisonment and a \$5,000 fine. Helm was sentenced to life imprisonment without possibility of parole under South Dakota's recidivist statute because of his six prior felony convictions, three convictions for third-degree burglary and convictions for obtaining

money under false pretenses, grand larceny, and third-offense driving while intoxicated. The Court had held that the constitutional principle of proportionality has been recognized by the Court for over a century (*Solem v. Helm* 1983). Solem's sentence of life without the possibility of parole for a seventh offense was unconstitutional because the triggering offense was a "no account" check for \$100. The Court held that three factors were relevant to the determination of whether or not a sentence is constitutionally disproportionate: (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals of the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions. The main difference between *Solem* and *Rummel* was the possibility of parole. The defendant in *Rummel* could receive parole when eligible; however, the petitioner in *Solem* would serve a sentence of life without the possibility of parole, making his sentence a violation of the Eighth Amendment.

*Harmelin v. Michigan* (1991)

*Harmelin v. Michigan* (1991) differed from the previous cases in that the issue was not recidivism but sentence proportionality. Harmelin was a first time offender who was convicted of possessing almost 700 grams of cocaine. He was subsequently sentenced to life without the possibility of parole. Although the majority of the Court agreed that the sentence was not drastically disproportionate, there was disagreement as to why the petitioner's proportionality argument failed (Singletary, 1993). Justice Scalia and Chief Justice Rehnquist believed that the proportionality aspect involved capital sentences and death penalty offenses, and was not generalizable to the Eighth Amendment (*Harmelin v. Michigan*, 1991). Justice Kennedy disagreed saying that the

proportionality principle does apply to non capital sentences. Justice Kennedy discussed four principles of proportionality review: (1) the primacy of the legislature, (2) the variety of legitimate penological schemes, (3) the nature of the federal system and (4) the requirement that proportionality review be governed by objective factors (Singletary, 1993). Citing *Solem v. Helm* (1983), he stressed that, “The Eighth Amendment does not require strict proportionality between crime and sentence, rather it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime” (*Solem v. Helm*, 1983).

*People v. Romero* (1994)

In 1994 the District Attorney of San Diego County charged defendant Jesus Romero with possession of a controlled substance (.13 grams of cocaine) (*People v. Romero*, 1994). Defendant had also been charged with two prior serious felonies, burglary and attempted burglary, which made him eligible for a life sentence under California’s “Three Strikes” law. If the prior convictions did not exist the defendant’s sentence would have been from three to six years. Romero pleaded not guilty. The trial court indicated it was willing to consider striking the prior felony conviction allegations if Romero changed his plea to guilty. The prosecutor objected and argued that the court had no power to strike the prior convictions in a “Three Strikes” case unless asked to do so by the prosecutor. The defendant then changed his plea to guilty and the court struck the prior convictions. Under California statute §1385, the judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in the furtherance of justice, order an action to be dismissed. This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under §667. The district attorney argued that §1385 referred to the Three

Strikes law. The Supreme Court of California concluded that the court could act on its own accord to strike prior felony conviction allegations in cases brought under the Three Strikes law. Interestingly the court decided to make this retroactive (*People v. Belmontes* 1983). The Superior Court was also clear that the lower court is limited by the concept which requires the dismissal to be in the furtherance of justice.

*Lockyer v. Andrade* (2003)

In 2002, a California state prisoner was convicted of two counts of petty theft and sentenced under California's Career Criminal Punishment Act, which is California's three strikes law (*Lockyer v. Andrade*, 2003). In November of 1995 Andrade stole five videotapes from a Kmart and again stole four video tapes 14 days later at a different Kmart store (*Lockyer v. Andrade*, 2003). He had been in and out of state and federal prison since 1982 for burglary, twice convicted of transportation of marijuana, petty theft and escape from a federal prison. Andrade admitted that he stole the tapes to buy heroin. Under California law any felony can constitute a third strike and subject the defendant to 25 years to life in prison. Although the petty theft is not a felony under California law it is a "wobbler" when coupled with a prior conviction. A "wobbler" can either be considered a misdemeanor or felony by the prosecutor, although the trial court can reduce the charge to a misdemeanor at the time of sentencing. Andrade was subsequently sentenced to two consecutive terms of 25 years to life. After exhausting his appeals, the Andrade filed a habeas corpus petition arguing that two consecutive terms of 25 years to life for stealing video tapes worth only \$150 was grossly disproportionate to the crime and a violation of the 8<sup>th</sup> Amendment. The Court conceded that it had not clearly defined

whether or not a particular sentence for a term of years could violate the 8<sup>th</sup> Amendment (*Harmelin v. Michigan*, 1991).

The Court relied on the *Rummel v. Estelle* (1980) *Solem v. Helm* (1983) and *Harmelin v. Michigan* (1991) for its definition of “grossly disproportionate.” It held in *Solem* that the gross disproportionality principle is one rarely used and only in extreme cases. The facts of the case fell between the facts of *Rummel* and *Solem*. Andrade, unlike *Solem*, had the possibility of parole. The Court felt that the facts were not indistinguishable from either *Rummel* or *Solem*. Some Justices expressed uncertainty over the application of the proportionality principle to California’s three strikes laws, but these reservations were unpersuasive to the majority in *Lockyer (Riggs v. California)*, 1999). The majority believed that the decision by California to uphold the two consecutive terms of 25 years to life was not an unreasonable application of precedent. It also noted that age was not an important factor in the sentencing decision, as argued by the dissent (*Robinson v. California*, 1962). Two different sentences would not become legally indistinguishable based solely on the age of the offender.

*Ewing v. California* (2003)

The above cases set the stage for the decision in *Ewing v. California* (2003). Ewing was convicted of felony grand theft for stealing three golf clubs, worth \$399 apiece. As required by the three strikes law, the prosecutor formally alleged, and the trial court found, that Ewing had been convicted previously of four serious or violent felonies. In sentencing him to 25 years to life, the court refused to exercise its discretion to reduce the conviction to a misdemeanor--under a state law that permits certain offenses, known as "wobblers," to be classified as either misdemeanors or felonies--or to dismiss the

allegations of some or all of his prior relevant convictions. Three strikes laws, as explained by one of the architects of California's three strikes law, "were intended to go beyond simply making sentences tougher. They were intended to be a focused effort to create a sentencing policy that would use the judicial system to reduce serious and violent crime" (Aradiz, 2000). The Court felt that although three strikes laws are relatively new, the history of deferring to state legislatures in making and implementing policy decisions is longstanding (*Gore v. United States*, 1958). As noted by Justice Kennedy in *Harmelin v. Michigan* (1991) the Constitution does not mandate that any one penological theory be adopted. Sentences can and do have a variety of justifications such as deterrence, incapacitation, retribution, and rehabilitation (Clear and Cole, 2003). The Court believed it that state legislatures, not federal courts should determine a state's sentencing scheme. The California Legislature did not violate the Eighth Amendment when it enacted the three strikes law because it was not grossly disproportionate. The Court said that California could and should make its own judgment on protecting the public safety of its citizens. The Court also believed that recidivism was a concern to California and other states in the nation.

A recent report found that almost two-thirds of former inmates released from state prisons were charged with at least one "serious" new crime within three years of their release and the number of recidivists was increasing (Hughes and Wilson, 2002). The majority in *Ewing* also said that recidivism statutes were designed to deter repeat offenders, as noted in *Rummel*. The passage of three strikes laws in California had lowered the recidivism rate by twenty-five percent (California Department of Justice, 1998). Even though the Court acknowledged the controversial nature of three strikes

legislation it said that its role was not one of “super-legislature”, but that of an interpreter. The State of California has a reasonable basis for believing that the enhanced sentences will advance the goals of its criminal justice system. The defendant in *Ewing* had stolen three golf clubs, equating to felony grand theft in California. This was not just a minor conviction, especially when accompanied by his previous convictions for violent and serious felonies. Grand theft is one of California’s “wobblers” in which it can either be considered a misdemeanor or a felony. It can only be considered a misdemeanor if a trial court finds that the offender’s rehabilitation does not require or would be adversely affected by incarceration (*In re Anderson*, 1968). The Court said the trial judge was not in error by considering the grand theft a felony in light of Ewing’s previous felony history. Ewing’s sentence of twenty-five years to life in prison is not unreasonable and is justified by the state’s interest in incapacitating and deterring recidivist felons. Ewing had previously served nine terms of prison confinement. The Court believed the sentence in Ewing was not inappropriate and did not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.

The cases above present the current United States Supreme Court’s position on three strikes laws. Table 1 provides an overview of the decisions in these cases. The cases have some commonalities and differences. The majority of the cases upheld three strikes legislation, citing that long sentences for second or third felonies are not grossly disproportionate, particularly if offenders are eligible for parole. In *Solem* the Court held that a life sentence without the possibility of parole was disproportionate when considering the third strike offense. The Court did not feel that the sentence of life without the possibility of parole was disproportionate for the possession of 700 grams of

cocaine. The Eighth Amendment provides that a sentence cannot be grossly disproportionate but, according to the majority in *Harmelin v. Michigan* (1991), it does not require “strict proportionality.” In both *Lockyer v. Andrade* (2003) and *Ewing v. California* (2003), the Court established the validity of California’s three strikes laws, holding that states should establish their own sentencing schemes.

**Table 1. Overview of Three Strikes Law Supreme Court Decisions.**

Case and Citation	Issue	Holding	Reason
<i>Rummel v. Estelle</i> 445 US 263 (1980).	Is it a violation of the 8 <sup>th</sup> Amendment to sentence a three time felony offender to life with the possibility of parole? NO	The sentence imposed by the state of Texas was not disproportionate.	The proportionality of sentences can rarely be challenged for non capital punishment cases.
<i>Hutto v. Davis</i> 454 US 370 (1982)	Were two consecutive sentences of 20 years for drug offenses disproportionate sentences? NO	The two twenty year sentences were not disproportionate to the crimes committed	The proportionality of sentences can rarely be challenged for non capital punishment cases.
<i>Solem v. Helm</i> 463 US 277 (1983)	Was a life sentence without the possibility of parole a disproportionate sentence for a no account check of \$100? YES	The sentence of life without the possibility of parole is unconstitutional.	Because Solem was not eligible for parole the sentence was not proportionate when balanced against the crime committed.
<i>Harmelin v. Michigan</i> 501 US 597 (1991)	Was a life sentence without the possibility of parole for possession of 700 grams of cocaine disproportionate? NO	The sentence of life without the possibility of parole was not grossly disproportionate to the crime committed	The Eighth Amendment does not require strict proportionality between crime and sentence, but forbids sentences that are grossly disproportionate
<i>People v. Romero</i> (1994)	Can a court strike down prior felony convictions under California’s three strikes law? YES	The court can act of its own accord and not consider former strikes in imposing sentences on offenders who qualify for “three strikes”	California statute §1385 states that a judge or magistrate may order an action dismissed in the furtherance of justice
<i>Lockyer v. Andrade</i> 538 U.S. 63 (2003)	Was two consecutive terms of 25 years to life for a felony count of theft of stolen video tapes a disproportionate sentence? NO	It is not disproportionate to sentence an individual to two consecutive terms of 25 years to life for a “wobbler” offense.	The Court felt that the facts in Andrade were not indistinguishable from those in <i>Rummel</i> or <i>Solem</i> .
<i>Ewing v. California</i> 538 US 11 (2003)	Was California’s three strikes law unconstitutional? NO	The state statute does not violate the Eighth Amendment of the Constitution.	States should determine their own sentencing schemes and not the federal judiciary.

Source: Clark, J., J. Austin and D. A. Henry (1997). “Three Strikes and You’re Out: A Review of State Legislation,” National Institute of Justice.

A Supreme Court decision has jurisdictional effect on the entire United States, so the ruling in *Ewing* has given all states in the United States the freedom to create three strikes legislation without fear of reversal. Of particular concern is what effect this will have on current legislatures. Will the upholding of three strikes legislation in *Ewing* have a profound impact on correctional systems and penological treatment?

**Current Legislation**

Twenty-four states currently have three strikes laws. Many of these states vary on their definitions of “three strikes,” as some require only two strikes such as Montana or Arkansas while Maryland and Florida have “four strikes” (Vitello, 1997). Table II presents an overview of three strikes legislation in the United States.

**Table 2. Variations in State Strike Laws (Clark and Henry, 1997)**

State	Strike Zone	Strikes needed to be out	Meaning of Out	Number of people in prison under three strikes
Arkansas	Murder, kidnapping, robbery, rape, terrorist act	Two	Not less than 40 years, no parole	
	Fist degree battery Firing gun from vehicle Use of prohibited weapon Conspiracy to commit murder, kidnapping, robbery, rape, first degree battery, or first degree sexual abuse	Three	Range of no parole sentences	5
California	Murder, rape, lewd act on a child, robbery, attempted murder, assault with a deadly weapon on peace officer, assault with intent to rape or rob, arson causing bodily injury, carjacking, kidnapping, mayhem, arson, burglary of occupied dwelling, drug sales to minors, any felony with deadly weapon, any felony with a firearm used	Two	Mandatory sentence of twice the term for the offense involved	42,322
	Any felony if two prior felony convictions from list of strikeable offenses	Three	Mandatory indeterminate life sentence, with no parole for 25 years	

Colorado	Any Class 1 or 2 felony or any Class 3 felony that is violent	Three	Mandatory life in prison with no parole eligibility for 40 years	4
Connecticut	Murder, attempted murder Assault with intent to kill	Two	Up to 40 years in prison  Up to life in prison	1
	Manslaughter, arson, Kidnapping, aggravated sexual assault, robbery, first degree assault	Three		
Florida	Any forcible felony, aggravated stalking, aggravated child abuse, lewd or indecent conduct, escape	Three	Life if third strike involves first degree felony, 30-40 years if second degree felony, 10-15 years if third-degree felony	1,628
Georgia	Murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, aggravated sexual battery	Two	Mandatory life without parole	7,631
Indiana	Murder, rape, sexual battery with weapon, child molestation, arson, robbery, burglary with weapon or resulting in serious injury, drug dealing	Three	Mandatory life without possibility of parole	
Kansas	Any felony against a person	Two	Court may double term specified in sentence guidelines	38 N/A
Louisiana	Murder, attempted murder, manslaughter, rape, armed robbery, kidnapping, any drug offense punishable by more than 5 years, any felony punishable by more than 12 years	Three	Mandatory life in prison with no parole eligibility	330 (Approx.)
Maryland	Any four felony convictions if at least one was on the above list Murder, rape, robbery, first or second degree sexual offense, arson, burglary, kidnapping, carjacking, manslaughter, use of firearm in felony, assault with intent to murder, rape, rob, or commit sexual offense	Four Four, with separate prison terms served for first three strikes	Mandatory life in prison with no parole eligibility Mandatory life in prison with no parole eligibility	0

Montana	Deliberate homicide, aggravated kidnapping, sexual intercourse without consent, ritual abuse of a minor	Two	Mandatory life in prison with no parole eligibility	304
Nevada	Murder, robbery, kidnapping, battery, abuse of a child, arson, home invasion	Three	Court has option to sentence one of the following: life without possibility of parole; life with parole possibility after 10 years, or 25 years with parole possible after 10 years	10
New Jersey	Murder, robbery, carjacking	Three	Mandatory life in prison with no parole eligibility	0
New Mexico	Murder, shooting at or from vehicle and causing harm, kidnapping, criminal sexual penetration, armed robbery resulting in harm	Three	Mandatory life in prison with no parole eligibility	22
North Carolina	47 violent felonies, separate indictment is required with finding that offender is "violent habitual offender"	Two	Mandatory life in prison with no parole eligibility	10
North Dakota	Any Class A, B, or C felony	Two	If second strike is for Class A, court may impose up to life; if Class B felony, up to 20 years; if Class C felony, up to 10 years	50 (Approx.)
Pennsylvania	Murder, voluntary manslaughter, rape, involuntary deviate sexual intercourse, arson, kidnapping, robbery, aggravated sexual assault	Two	Enhanced sentence of up to ten years	14
	Same offenses	Three	Enhanced sentence of up to 25 years	
South Carolina	Murder, voluntary manslaughter, homicide by child abuse, rape, kidnapping, armed robbery, drug trafficking, embezzlement, bribery, certain accessory and attempt offenses	Two	Mandatory life in prison with no parole eligibility	14
Tennessee	Murder, especially aggravated kidnapping, especially aggravated robbery, aggravated rape, rape of a child, aggravated arson	Two, if prison term served for first strike	Mandatory life in prison with no parole eligibility	N/A
	Same as above, plus rape, aggravated sexual battery, aggravated robbery, especially	Three, if	Mandatory life in prison with no parole eligibility	

	aggravated burglary, especially aggravated child abuse, aggravates sexual exploitation of a child	Three	separate prison terms served for first two strikes	
Utah	Any first or second degree felony	Three	Court may sentence from 5 years up to life	16
Vermont	Murder, manslaughter, arson causing death, assault and robbery with a weapon or causing bodily injury, aggravated assault, kidnapping, maiming, aggravated sexual assault, aggravated domestic assault, lewd conduct with a child	Three	Court may sentence up to life in prison	328
Virginia	Murder, kidnapping, robbery, carjacking, sexual assault, conspiracy to commit any of the above	Three	Mandatory life in prison with no parole eligibility	209
Washington	Murder, Controlled substance homicide, homicide by abuse, manslaughter, rape, child molestation, incest of child, robbery, attempted murder, extortion, vehicular assault, arson, burglary, any felony with deadly weapon, possession of prohibited explosive device, treason, promoting prostitution, leading organized crime	Three	Mandatory life in prison with no parole eligibility	9
Wisconsin	Murder, manslaughter, vehicular homicide, aggravated battery, abuse of a child, robbery, sexual assault, taking hostages, kidnapping, arson, burglary	Three	Mandatory life in prison with no parole eligibility	

Source: Clark, J., J. Austin and D. A. Henry (1997). "Three Strikes and You're Out: A Review of State Legislation," National Institute of Justice.

Each state defines what it believes is an appropriate offense to count as a strike. Most states include such offenses as rape, robbery, arson, aggravated assault, and carjacking. Some states add other charges. In Louisiana any drug offense that is punishable by more than five years is a "strike." Maryland and Tennessee also require that the prior offenses had a sentence of incarceration (Vitello, 1997). Confusion exists as wide variation occurs

from state to state on what constitutes the strike zone. Additionally, each state varies on the amount of strikes needed for an “out.” There is great variation from state to state and to classify all of these statutes as “three strikes legislation” would be misleading. Crimes that are considered strikes in one state are not classified as a strikeable offense in another state. The Court, regardless of state definitions of strikes, has ruled that this type of legislation is constitutional.

### **Does Three Strikes Legislation Achieve Its Intended Purpose**

#### *Financial Impact*

Proponents of three strikes argue that although enforcing three strikes is financially expensive, it cannot be compared with the saved costs associated with crime victimization. It is difficult to attach a monetary value to costs associated with crime victimization, (such as quality of life, pain, suffering, and fear), neither is it clear that three strikes laws are significantly decreasing victimization costs. Correctional and criminal justice budgets continue to soar (Associated Press, 2003) with bed space in many state correctional agencies exceeding over 100 percent (Royse, 2003).

RAND corporation has estimated that California’ three strikes legislation would cost about 5.5 billion dollars over the next twenty-five years, or 300 dollars per taxpayer (Greenwood, Model, Rydell, and Chisea , 1996). Most of this money would be used to build and operate new correctional institutions, increasing the correctional budget by 120%. Estimates are that these costs would soon consume the budget for higher education in California (O’Connell, 1995). In 2003 California increased tuition costs for the third year in a row at the state's three systems of public higher education, California Community Colleges, California State University and University of California that

officials blamed on the state budget crisis (Maitree, 2003). This California budget crisis has also created layoffs for state workers including California Department of Corrections staff (Chorneau, 2003). The state of Washington has reported a variety of costly problems with three strikes, including many overblown trial costs and prison expansion greater than any other state in the country. Delaware reported similar results and found the laws had little effect on drug crimes as the economic benefit of drug sales outweighed the costs of long prison confinement (Chorneau, 2003).

### *Intended Targets*

One of the major arguments for three strikes and habitual offender laws was their potential to reduce crime by getting repeat offenders off the streets. It has also been noted that three strikes laws function more as a specific deterrent rather than a general deterrent, although still beneficial to crime control (Schicor and Sechrist, 1996). A report by the Attorney General of California (Lungren, 1996), notes that since the inception of three strikes legislation the California has experienced the following:

- The largest one year drop in state history in the rate and number of crimes
- The largest two year decline in number of crimes
- The first two year drop in all major categories of crime (homicide, rape, robbery, aggravated assault, burglary, and motor vehicle theft
- The largest drop in the number of violent crimes
- The largest one year drop in the rate and number of property crimes
- The largest one year drop in number of burglaries

Although the above numbers might be accurate it is difficult to attribute these to California's three strikes legislation alone, because of other possible factors.

### *Decrease in Crime Rate*

In California the crime rate had been declining for two years prior to the passage of the three strikes legislation (Mauer, 1996). National trends also showed that most states between 1994 and 1995 had seen a decrease in both violent crime and overall crime. It is also interesting to note that states without three strikes laws had greater decreases in crime rates than those with three strikes laws (Associate Press, 1997). One study concluded that the California three strikes law had little or no effect on crime rates given the preexisting trends in the state (Solzenberg and D'Alessio, 1997). One of the other major claims of three strikes supporters is that it targets violent habitual offenders, citing cases involving serial murderers or rapists that have been paroled only to commit future heinous crimes. Statistically, however, California's three strikes laws have been predominantly used in drug related offenses. In the first eight months of California's three strikes law, 70% of those sentenced under it were for nonviolent and drug related offenses, and 41% of those subject to three strikes were there because of a property related offense. Only 17% of those who faced a three strike conviction had committed a second strike felony offense (Vitello, 1997). (See Table 3.) It has also been argued that the structure of California's three strikes law makes it difficult to target the dangerous offenders (California Senate Commission on Public Safety, 1994). Only one in thirty-three third strike felons committed a crime of violence, while one in twenty-three one or no strike felons were arrested for a violent crime. Research has not proven that three strikes has a significant deterrent effect on crime rates and may be exacerbating budgetary issues in states that are in a monetary crisis (Vitello, 2002). The next section of this paper will examine the correctional resource costs of three strikes.

**Table 3. Change in Crime Rates in Strike and Non-Strike States 1993-2002**

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	Crime Index	Violent crime	Property crime	Homicide
<b>Three-Strikes States</b>	-26.8%	-33.0%	-25.9%	-38.2%
<b>Non-Strike States</b>	-22.3%	-34.3%	-20.4%	-43.9%

Source: Vitello, M. (2002). "Punishment and Democracy: A Hard Look at Three Strikes Overblown Promises." *California Law Review* 90: 257-289.

### *Racial Impact*

California's use of three strikes demonstrates that racial minorities are more likely to feel the impact of three strikes than non-minorities. African Americans comprise only 7 percent of California's total population and 20 percent of those individuals arrested for felony offenses. African Americans, however, constituted 43 percent of all offenders sentenced under the three strikes law (Campaign for an Effective Crime Policy, 2002). Whites, on the other hand, comprised over 53 percent of the California total population, 33 percent of the felony population, but constituted less than 25 percent of those sentenced under three strikes (Campaign for an Effective Crime Policy, 2002). A study of cases in Los Angeles found that African American men were overrepresented in the charging phase of three strikes cases; another California study concluded that blacks were thirteen times more likely than whites to be sent to prison under the three strikes provision (Mauer, 1996). It would be unpersuasive to argue that three strikes alone is the cause of racially disparate treatment of minorities as the war on drugs and racial profiling are also important issues to consider. The Supreme Court is unlikely to accept a challenge of three strikes on equal protection grounds (Schultz, 2000). The Supreme Court has rejected equal protection claims on death penalty sentencing and in the use of prosecutorial discretion to charge individuals (*United States v. Armstrong*, 1996). The

Supreme Court desired more than a statistical demonstration but a particular and exact showing of discrimination. Although it is highly unlikely that the Court will intervene in racial disparities, particularly in light of the holding in *Ewing v. California* (2003).

### *Social Savings*

The overall decrease in crime was supposed to produce significant social savings. California estimated that it would save over 23 billion dollars by the year 2000 as a result of three strikes legislation decreasing security costs and expenses to crime victims (Schultz, 2000). It would be speculative to attribute any social savings to three strikes. No conclusive evidence exists that three strikes decreases crime rates, which makes assessing victim's expense and security savings unmanageable at best. No studies have shown that insurance rates, security expenses or victim compensation have decreased (Schultz, 2000). These social savings might have also been offset additional expenses in implementing these laws, including trial costs, legal fees and costs of incarceration (Schultz, 2000). One could maintain that the racial disparity inherent within the application of three strikes is a social cost that far outweighs the social savings (Schicor and Sechrist, 1996). Additionally, the Campaign for an Effective Crime Policy (2002) found that police officers were more likely to be assaulted as a result of offenders trying to escape arrest for a "third strike." Studies from Fresno, California, and Seattle, Washington, suggest that increased violence against police officers was motivated by three strikes (Campaign for an Effective Crime Policy, 2002)

Thus far, the intended impact of three strikes legislation has failed to materialize in the form of in crime control and reduction and social savings. Does three strikes legislation have any impact on the correctional systems in the United States?

## **Impact of Three Strikes Legislation on Correctional Agencies**

### *Prison Population*

A 1994 study predicted that prison costs would skyrocket due to the need for additional housing space (Vitello, 2002). Prison populations across the United States are rising, but it is unclear if this is due directly to three strikes legislation or a tightening of parole and truth in sentencing laws (Allen and Simonsen, 2001). It has been argued that tightened parole or truth in sentencing laws will in fact have a greater impact on prison capacity than three strikes legislation (Austin, 1997). Jail and pre-trial detention numbers have increased as a result of three strikes legislation. Since most three strikers are unable or ineligible to make bail and more of them are demanding trials, local jails and detention facilities have become more crowded. California has seen an increase of 11 percent in pretrial detention as a result of three strikes (Parent, 1993). As three strikes are still a relatively recent legislative change it is difficult to determine if three strikes has significantly increased the size of correctional populations.

### *Elderly Offenders*

The elderly prison population is growing at an alarming rate, and many opponents to three strikes laws believe that they will only serve to intensify the growth of elderly inmates in correctional institutions (Gilliard and Beck, 1998). What effect would three strikes legislation have on the ongoing problem of geriatric prisoners?

One author notes that correctional facilities are designed and operated around the younger offender (Curran, 2000). Outside of prison the elderly have access to services which are specifically designed to help them with their unique problems. These services include health care aides, home meal delivery, specialized transportation, sidewalks with

wheelchair accessibility, mental health programs, recreational services and Medicare. Inside of the prison, the elderly offender poses many issues that prison administrators are unable or unwilling to handle (Curran, 2000). Prisons in general are not equipped to handle the elderly inmate and very few correctional systems have created special housing facilities or programs for the geriatric prisoner (Goetting, 1983). Elderly inmates are also an easy target for younger offenders to hustle or extort payments from for protection, which can lead to mental and physical anguish as well as violence. Of particular concern is mental and physical illness of the geriatric offender.

Prison can be a difficult environment and often inmates are in need of some form of mental health treatment. Offenders may often have “institutional neurosis” which is caused by “the physical environment of the prison itself when older inmates are locked up and subjected to unusually high levels of environmental regimentation, rigid discipline, pressure, and stress” (Adams, 1995). For someone who may already have a decrease in mental capacity due to age, this could be a problem for the offender and prison staff. Medical costs for correctional environments are increasing at a disturbing rate and are slated to increase due to hepatitis, AIDS, and an increase in the number of elderly offenders needing long term medical care (Lamb-Mechanick and Nelson, 2000). The monetary costs for incarcerating elderly offenders has become astronomical. A sixty-two year old inmate in Louisiana on dialysis costs the taxpayers an additional 39,000 dollars a year(National Center for Institutions and Alternatives, 2005). The same report noted that the confinement of inmates over 55 cost state and federal governments 2.1 billion annually (National Center for Institutions and Alternatives, 2005).

Other estimates calculate that incarcerating the elderly costs an average of 69,000 dollars a year compared with 22,000 dollars for younger inmates (Adams, 1995). If three strikes legislation is constitutional, as the Court has decided in *Ewing v. California* (2003) there will be more and more offenders serving life sentences with no possibility of parole. It is not implausible to imagine correctional institutions as gigantic pseudo-nursing homes. Geriatric offenders also increase the need for additional medical staff. There is a general shortage of medical staff and many nurses and doctors are not interested in working for a prison system that pays less and involves dealing with convicted felons (Adams, 1995). The Court has stated that medical treatment to inmates is a constitutional right and that “deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain...proscribed by the Eighth Amendment” (*Estelle v. Gamble*, 1976). This “deliberate indifference” standard was difficult to show and required that the inmate show that mistreatment was intentional. In 1990 the Americans with Disabilities Act became law and applied to disabled law abiding citizens as well as disabled prisoners (Robbins, 1996). Some states disputed this, but the Supreme Court ruled that, “the ADA plainly covers state institutions without any exception that could cast the coverage of prisons in doubt” (*Pennsylvania Department of Corrections v. Yeskey*, 1998). This application of the ADA coupled with the increase in geriatric inmates has compounded the correctional budgetary crisis. Determinate sentencing will undoubtedly cause persons to be incarcerated for longer periods at an outrageous medical and social cost.

One additional consequence of longer periods of incarceration is the creation of geriatric prison units. Although they have yet to become a national trend, many states are

turning to geriatric prison units as a way of cutting down on security costs and ensuring that older offenders receive specialized care (Curran, 2000). The saved security costs will undoubtedly fail to offset the cost of providing for the specialized medical treatment. If the number of elderly inmates continues to rise geriatric prison units will be a necessary way of dealing with an aging prison population. Many of the states with three strikes legislation have included that the sentence be without the possibility of parole. This will affect correctional systems by creating an increasing need to deal with geriatric inmates as well as decrease the potential for compassionate release and parole of inmates who are no longer a threat to society.

The Sentencing Project reports that the prison population has significantly aged since the inception of the three strikes laws in California in 1994 (King and Mauer, 2001). A recent article noted that while there are many laws that effect the aging prison population the effect of three strikes legislation is hard to miss (Vitello and Kelso, 2004).

#### *Compassionate Release and Parole*

The National Center for Institutions and Alternatives (NCIA) (2005) has concluded that if non-violent offenders who pose a minimal threat to society were released it would save taxpayers 900 million dollars the first year, and 175 million dollars would be saved if elderly prisoners sixty-five and over were released . The NCIA (2005) felt that four prerequisites should be met before a person is eligible for supervised release: (1) be at least 65 years of age, (2) have committed a non-violent offense, (3) have served at least one-third of their sentence, and (4) pose a minimal risk to society. The term “compassionate release” refers to all forms of release available to terminally ill prisoners or elderly offenders with chronic ailments and has also been called: medical parole,

medical furlough, executive clemency, medical pardon, medical reprieve, medical release, parole for humanitarian reasons, parole of dying prisoners, community furlough, and compassionate leave (Russell, 1994). Of the eighteen states who have compassionate release programs, most require that the inmate be terminally ill and not expect to live past six months. The potential parolee must not have been convicted of a violent offense as well as have ties to the community and a place to live upon release (Russell, 1994). Three strikes would put an end to these practices and not allow inmates who are a medical and financial burden the opportunity to spend their remaining days at home. Although this is often noted as the humanitarian response it is a great monetary savings to correctional institutions. Regardless of its purpose, it would no longer exist if three strikes laws mandate life without the possibility of parole regardless of extenuating health or age related circumstances.

Even as prison populations continue to rise, the current attitude in the United States is to make sentencing even harsher and to have inmates serve out as much as their prison term as possible (Bonzcar and Glaze, 1998). In 1993 more than 70 percent of offenders had been released on parole, but due to the truth in sentencing movement the percentage fell to 62 in 1998 (Bonzcar and Glaze, 1998). The movement away from the treatment model in corrections to a more “just desserts” model has clouded the entire community supervision model and brought doubts as to the future of its effectiveness. Parole has often been used as a type of “release valve” for correctional systems that were overcrowded and had no additional bed space.

Parole is also an incentive for good behavior as inmates have the possibility of earning “good time” credits if they have a clear disciplinary record and work history

while incarcerated. Inmates with true life sentences now have no motivation to abide by prison rules and may in fact go to extreme measures to gain release, including taking hostages, escaping, and rioting (Wright, 2000). The correctional officers and staff could now be placed at an even greater personal risk. It is not inconceivable that an inmate with nothing to gain by adhering to prison rules would become disruptive, uncooperative and even a danger to other inmates and staff members. Disruptive inmates are then placed in segregation cells which would soon become filled with “lifers”. If this were to occur correctional agencies would then be burdened with the expense of building additional segregation and high-security prison units (Gonring, 1995). The effect of no parole possibility will affect the inmates, prison staff and the taxpayer who will have to pay for more correctional officers and more segregation space.

### **A Tentative Assessment**

The effect of three strikes is as yet difficult to quantitatively measure because these laws have only been in effect since the early 1990s. Disagreement exists in criminal justice and legal circles as to whether “three strikes” is a practical sentencing option. Crime is a serious problem and the American public is searching for an answer to reduce it. In 1994, 74 percent of Americans supported three strikes legislation believing it would reduce crime rates and keep violent offenders locked away for good (Vitello, 1997). Ironically, the crime rate was already decreasing when the legislation was enacted. Research has shown that three strikes may have little or no effect in crime reduction and may only be costing the taxpayer additional money. Since the Supreme Court has upheld three strikes as a constitutional sentencing option, most states will continue to keep these laws on the books (Ehlers, Schiraldi, and Ziedenberg, 2003). It

will be easier to analyze the effect of three strikes in another decade after more offenders will have been sentenced under three strikes. Meanwhile, the possibility of correctional institutions facing less bed space, increased violent inmates with true life sentences, large numbers of geriatric offenders, and budgetary crises as a result of three strikes and determinate sentencing is real. Studies show that three strikes are placing a burden on correctional institutions but not as fully as forecasted (Vitello and Kelso, 2004).

Predictions by RAND and the Department of Corrections did not materialize because the three strikes law in California has not been applied as expected. Judges and prosecutors in California have used their discretion to dismiss prior strikes, and the voters passed Proposition 36, the Substance Abuse and Crime Prevention Act, in the 2000 election. Prop. 36 required drug possession offenders, including three-Strikes-eligible offenders who have been out of prison for five years, to be eligible for drug treatment instead of being incarcerated. These two factors have slowed the pace of incarceration under the law. While there may not be as many “strikers” in the prison population as originally projected, the law has still resulted in more people serving much longer sentences (Ehlers et al., 2003). While a number of studies have looked into and examined three strikes and its possible consequences immediately after its enactment in California, few recent studies have been conducted to examine its impact ten years later.

There is little or no evidence to suggest that three strikes have produced the social savings and decrease in violence it promised (Sze, 1995). In fact, three strikes may be doing more harm than good by not allowing more effective crime policies to be enacted. The public seeks a criminal justice system that provides a way to incarcerate violent offenders and not allow violent repeat offenders to be released. Three strikes has not

achieved this goal by targeting drug offenses and property crimes as strikes, more than violent felonies such as rape or murder (Marvell and Moody, 2001). Why has three strikes not had the impact on crime that its proponents thought it would? It has been argued that strikers account for relatively little crime, violent or otherwise. Zimring and his colleagues found that even if all offenders arrested who met the criteria under the Three Strikes law “were to disappear from the earth without a trace,” only a little over ten percent of felony crimes would be avoided (Zimring et al., 2001). One of the key policy questions regarding the impact of the Three Strikes law is, has the law disproportionately incarcerated people for non-violent crimes? In fact, people sentenced under the Three Strikes law are more likely to be serving a sentence under the law for non-violent offenses than violent ones. According to a report by the Justice Policy Institute as of September 2003:

- For 57 percent of third strikers, the offense which triggered their 25-years-to-life in prison was a non-violent[x] offense;
- nearly two-thirds (64.5%) of second and third strikers were serving time in prison for a non-violent offense;
- there were over ten times as many third strikers serving life sentences for drug possession (672) as second-degree murder (62);
- there were more third strikers serving 25-years-to-life for drug possession (672) than third strikers in prison for second-degree murder (62), assault with a deadly weapon (379), and rape (119) combined;

In view of the fact that the citizens in these states supported the legislation, it may take educating the public about three strikes ineffectiveness to bring about legislative changes, which would in fact, rather than in theory, reduce crime and violent offenses.

### **Conclusion**

Three strikes legislation were originally passed for a variety of reasons including crime reduction and more public safety. Almost a decade and a half later, these expectations appear unfulfilled. It may be too early to pass final judgments on its effectiveness and wisdom. What is needed, however, are more careful studies to determine if this approach to sentencing can live up to its promises. Someone once said that the field of corrections is littered with fleeting fads and fashions that come and do and are soon discarded. Three strikes laws are too significant an effort not to be taken or studied seriously. Perhaps it is here to stay. If it is, society deserves more convincing proof that it works and lives up to its promises.

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