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A Town Hall Meeting on Three Strikes and You're Out

The Hon. William J. Cahill, Moderator

A Town Hall Meeting

on Three Strikes and You're Out

A Community Discussion of the New Law • The Initiative • Alternatives to Prison

Moderator:

The Honorable William J. Cahill
San Francisco Superior Court

PART I

Perspectives on the Three Strikes Proposals

Prof. Jerome H. Skolnick
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President, American Society of Criminology

Thomas J. Orloff
Chief Assistant District Attorney, Alameda County

Joe Klaas
Polly Klaas Foundation

Assembly Member Bill Jones
Co-Author, AB971

James F. Campbell
Campbell & Demetrick
Chair, Criminal Justice Section

PART II

Alternatives to Prison: Do They Work?

Mimi Silbert
President, Delancey Street Foundation

Michael Hennessey
Sheriff, San Francisco

Sid Smith
OMI Neighbors in Action

Mitchell Salazar
Real Alternatives Program

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Tuesday, April 19, 1994 • 4:00 PM to 6:00 PM
Golden Gate University • 536 Mission Street • Second Floor Auditorium • San Francisco

PRESIDENT'S REPORT

Three Strikes and You're Out?

by Raymond C. Marshall

In baseball it's, "three strikes and you're out!" This relatively simple concept is understood by the most casual observer of America's national pastime. If Californians have their way, however, this same slogan will be used to formulate a criminal justice policy mandating that three-time convicted felons be sentenced for life. In the rush to address the public's fears about crime, few have paused long enough to ask whether this policy makes sense.

Let's examine the facts. Americans everywhere are concerned about crime. According to news polls conducted in January by the New York Times, CBS and Time magazine, it is the single most important problem facing the country, surpassing our fears about lack of morals and values, the economy, unemployment, and the budget deficit. And no wonder. On a daily basis we are bombarded with news reports of senseless and random acts of violence. These range from the more celebrated cases like Polly Klaas and 101 California to the more routine incidents of petty theft, armed robbery, assaults and murder committed in our neighborhoods, schools and public streets. As a result, Americans of all racial, ethnic, economic and class standing are saying that they are "mad as hell and aren't going to take it any more!"

Responding to the legitimate fears, angers and frustrations of their constituents, at least 30 states, including California, New York, Florida, New Jersey, Ohio, Kansas, and North and South Carolina, are proposing some form of "three-strikes-you're-out" measure. Politicians in both major parties and at all levels are falling over themselves to out-tough each other on the issue of crime. National leaders as philosophically diverse as Governor Wilson, Governor Cuomo, Senator Dole and President Clinton have all sensed the public's outrage and come out in favor of more prisons, boot camps, minimum and mandatory sentences, and now — mandatory life sentences for certain repeat felons.

In California alone, there are five versions of the "three-strikes-you're-out" bill currently under consideration by the state legislature. And with little public debate on the merits of the proposed law, Californians in June will be asked to vote on a ballot initiative which, if passed, will:

- double the sentence of felons with one prior conviction for a serious or violent felony;
- restrict time off for good behavior;
- mandate that convictions for violent crimes committed by juveniles age 16 and older be considered as prior convictions;
- and send to jail for life anyone convicted of two prior serious or violent felony charges.

It would also eliminate plea bargaining in some cases, double prison sentences for the second felony conviction and, if a person is convicted of a second felony and his prior conviction was for a violent or serious felony, then regardless of age or circumstances, the person is sentenced to consecutive, not concurrent prison terms, with no possibility of probation.

According to a January poll conducted by Marvin Field, an overwhelming 84 percent of registered California voters favor the ballot initiative, with 9 percent opposed and 7 percent undecided. This is not surprising. Fueled by a belief that the criminal justice system is not working and that lawyers, judges and politicians have no answers to the questions posed by the state's current crime rates, Californians understandably feel compelled to take matters into their own hands. Therein lies the seed of the "three-strikes-you're-out" initiative. It is clearly a tough law. It is far less clear, however, whether it is a law that makes sense. Public sentiment to the contrary, a growing number of criminal experts, including Philip Heymann, the former Deputy U.S. Attorney General, are saying that the initiative is a bad idea.

A convincing argument can be made that the measure will do little or nothing to reduce violent crime. This is because the "three-strikes" initiative responds to crimes only after they have been committed. This back-door solution does nothing, however, to address many of the conditions which lead to crimes being committed in the first place, such as poverty, drug addiction, unemployment and the breakdown of families. Equally disturbing is that the initiative provides nothing in the way of rehabilita-

As this issue goes to press, we are in the midst of a flurry of activity on "Three Strikes."

The Jones Bill has already been passed by both legislative houses and signed by the governor. In addition to provisions that eliminate suspension, probation and diversion and doubling the prescribed prison term for any felony for second offenders , the law counts as "strikes" offenses committed by 16 and 17 year olds as well as for non-violent felonies.

Some groups, including the Klaas family, are urging the Governor to consider other less costly measures, like the Rainey Bill, that do not penalize non-violent felons as severely and are tougher on the likes of Richard Allen Davis. The passage of any of the four other bills would cancel out the new law.

Lawyers all over the state are gearing up for a constitutional battle .

Supporters of The "Three Strikes" initiative that has already qualified for voter approval are proceeding to see that the issue is placed on the November ballot.

Although we have a "Three Strike" law now own the books, the debate may be only beginning. Please join the Bar Association on April 19 for a Town Hall meeting and add your voice to the discussion.

Editor

tion for those introduced to the penal system, either in the form of drug therapy, job training or psychological counseling.

The initiative is also criticized as being prohibitively expensive. By some estimates, close to a fifth of all crime is committed by children younger than 18. In addition, according to the Time survey, most felons are not convicted a third time until late in their criminal career, which peaks between the ages of 18 and 23. What this means is that at a time when local, state and federal dollars are at a minimum, we will be forced to house, feed and support an aging population of men and women who will be far beyond the age to represent any serious threat to public safety. For example, in a recent appearance on ABC's "Nightline," Mr. Heymann estimated that it will cost up to $700,000 to keep one person in prison for life after age 50, when the data shows that propensity for recidivism in criminals of that age is on the decline. Similarly, John Jacobs, the political editor for the McClatchy News Service, points out in a recent column that it currently costs taxpayers $21,000 a year to warehouse non-violent criminals in state prisons and that "the true costs of enforcement — including construction of new prisons and hiring of new prison guards at $55,000 a year in salary and benefits — could eventually amount to one-third of the entire state budget." And finally, closer to home, it is reported that jail overcrowding has forced the City to spend $7.75 million in fiscal year 1993-1994 to rent jail space in Alameda County and that the cost of penalties for violating a court order to reduce jail overcrowding in San Francisco has cost the City $1.486 million in penalties from November 1992 to October 1993.

By all accounts, the mandatory life sentence provision of the initiative would have an impact on few individuals. Again, the Time survey reports that 80 percent of all crimes are committed by about 20 percent of the criminals. Thus, in Washington state, which recently passed a "three-strikes" bill, only about 70 felons are expected to be covered by the law. In New York state, the estimate is 286 prisoners. While no estimates have been made for California, there is no reason to believe that the impact would be significantly different. And although we can all agree that it is critically important to prevent even one criminal from repeating a second heinous crime, the benefits of a "three-strikes " initiative should not be oversold to a frightened public.

Another failing of the initiative is that it will contribute to an already racially disparate sentencing pattern in our criminal courts. Our experience with the Federal Sentencing Guidelines is telling. Even the most casual observer would have to agree that the random way in which mandatory minimums are applied by federal prosecutors has resulted in more African-Americans and Hispanics being sentenced under these provisions than whites accused of similar crimes. Thus, it is fair to assume that the mandatory sentences provided by the initiative will only compound problems of racial discrimination in sentencing as documented by the U.S. Sentencing Commission and the U.S. General Accounting Office.

The initiative is also overbroad and loosely worded. As some prosecutors point out, the initiative does not distinguish between violent and non-violent criminals and is likely to result in more and lengthier trials. Other prosecutors are concerned that the proposed law may be in violation of the U.S. Constitution's equal protection clauses or, even if not, be so draconian that a jury would be inclined to acquit rather than convict a person and sentence them to a term disproportionate to the crime committed. Thus, like the federal sentencing guidelines, these mandatory/minimum sentences will operate to frustrate defense counsel, prosecutors, judges and ultimately, the people they were intended to serve.

The potential impact of the "three-strikes" initiative on the administration of justice in California cannot be overstated. It is a serious law with serious flaws. Yet, there has been little public discussion on the merits of the measure, either in the legal community or the City as a whole. It is for that reason that I have asked BASF's Criminal Justice Advisory Council, our Criminal Justice Section and our Equal Access Committee to sponsor a "town meeting" similar to BASF' s forum on gun control to discuss the impact of the "three strikes" initiative and the need to attain the right balance between tough law enforcement and prevention, education and treatment measures. With less than three months before the June vote, I encourage each of our members to join in the debate and help fashion a criminal justice policy which is fair and reasonable.

"THREE STRIKES" AND YOU'RE OUT...

Facts and Figures

BACKGROUND

On March 7, 1994 Governor Wilson signed California's version of "Three Strikes and You're Out" (AB 971) into law. Drafted by Assemblymembers Bill Jones (R-Fresno) and Jim Costa (D-Hanford), AB 971 significantly changes existing law.

PRIOR LAW

California Penal Code §667 continues to impose a five year sentence enhancement on "serious" felons who are convicted of another "serious" felony. "Serious" and "violent" felonies include: murder, rape, robbery, arson causing bodily harm, any felony committed using a deadly weapon, kidnapping, carjacking and others. (See Cal. Penal Code §§ 1192.7 & 667.5 (c))

"THREE STRIKES":

* Allows "serious" or "violent" felonies to be used for 1st and 2nd "strikes" (this is not really new);
* Allows ANY felony to be used as a 3rd "strike";
* Doubles the sentence for any 2nd felony "strike";
* Triples the sentence and sets a life term with a 25 year minimum for any 3rd felony "strike";
* Includes many prior juvenile adjudications as "strikes";
* Prohibits using the length of time between felonies as a factor for sentencing;
* Prohibits granting of probation for any 2nd or 3rd time felony offenders;
* Precludes commitment of 2nd or 3rd time offenders to the California Rehabilitation Center or the California Youth Authority;
* Reduces conduct credits to no more than one-fifth of the total sentence;
* Removes prosecutorial discretion by mandating "charging" of prior "strikes";
* Permits courts to dismiss "strikes" only if there is insufficient evidence to prove them;
  AND
* Forbids District Attorney's from plea bargaining in 2nd and 3rd "strike" cases.

FISCAL IMPACT OF "THREE STRIKES"

Years	Additional Inmates	Additional Costs (millions)
95-96	3,596	$ 75
96-97	15,148	$310
97-98	35,118	$707
98-99	58,518	$ 1.2 bil
99-00	81,628	$ 1.6 bil

(These prison cost estimates were prepared by the Calif. Dept. of Corrections.)

QUESTIONS RAISED BY "THREE-STRIKES"

Should courts be deprived of the discretion to strike old priors ?

Will the new statute produce sentences that amount to cruel and unusual punishment ?

Does using juvenile adjudications as "strikes" violate a defendant's Constitutional right to a jury trial ?

Should a defendant with 2 prior felony convictions face life imprisonment for: petty theft, forgery, or possession of stolen property ?

Prepared by Andrew M.Olshin on behalf of the:

JACK BERMAN ADVOCACY CENTER

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THREE STRIKES LEGISLATION
LONG RUN AND SHORT RUN IMPACTS ON THE COURTS

Although the specific costs of "three strikes" legislation cannot be identified, the following is the assessment by the staff of the Judicial Council of the likely impact of the measures being considered by the Legislature:

Many judges and court administrators expect significant short run impacts on trials and other felony proceedings, as follows:

(1) The number of felony jury trials could increase dramatically.

Although charging, pleading practices and other factors will affect the number of trials, it is anticipated that the absolute penalties in the pending legislation will cause defendants to demand jury trials in a significantly greater number of cases. Available case samples indicate that more than 15% of felony defendants would serve greatly extended terms under at least one of the measures under consideration. Since only about 3.5% of defendants now demand jury trials, courts could be faced with the need to shift more of their resources toward providing felony jury trials within the next few months.

(2) Additional judicial time and expense will be required in proceedings on priorable offenses.

The potential "three strikes" consequences attached to alleged serious and violent offenses is likely to cause more and lengthier proceedings both to protect a defendant's record and to contest priors. This may include additional motions, longer preliminary examinations and longer trials. Various factors can affect the validity of a prior, and it is expected that a substantial body of law will develop around such issues as priors become critical to sentencing. When a prior is discovered after the preliminary or plea, the progress of the case can be substantially delayed. There will be pressures to locate all priors at the outset of each case, and a great deal of system upgrading may be needed to avoid costly mistakes.

(3) The number of jury trials involving juveniles could substantially increase.

(2) Judicial resources would be depleted. An additional 1,500 jury trials would require at least 28 judge years, or close to $24 million in court resources.

(3) The need for new judges to handle an increased caseload will be more acute. Note that no new judgeships have been created since 1987.

(4) The courts will have to invest more resources in detailed records of prior convictions,

Long run impacts could be moderated.

Typically, after any major change affecting criminal cases, caseloads adjust to available resources, and to new sentencing expectations. The trend toward stiffer penalties over the past decade has actually been accompanied by a fall in the relative number of contested felony cases. Although population has risen, and criminal filings are up, felony jury trials in 1992-93 were 5,274 (of 164,583 filings), only slightly more than the 4,810 (of 67,411 filings) in 1982-83. The reason for this may be that more and more criminal defendants have been induced to enter guilty pleas rather than risking the heavier penalties which the law has permitted.

The long run questions presented by this measure are:

1. After the initial adjustment period, will a larger proportion of defendants continue to demand trials rather than pleading guilty and receiving longer sentences?

2. Will the longer sentences serve to remove enough defendants who are repeat offenders from the courts so that the number of trials for serious felonies begins to trend downward? Do defendants with serious or violent offenses in their past commit such a large proportion of offenses that the courts will reap a savings after several years, when many of them have been incarcerated for lengthy terms?

3. Will the higher penalties affect arrest and charging practices by police? Investigating and charging officers tailor their charges to the defendant to some degree; it is possible that selective application of charges would prevent overloading the system.

Constitutional questions have been raised about using prior convictions for juveniles as a basis for "three strikes" enhancements, if those juveniles were not afforded the full due process rights of adults. It is possible that jury trials will be afforded juveniles for violent and serious offenses which could be used as a prior.

(4) There will be additional costs for appellate review of "three strikes" legislation.

Like other major criminal measures, including Propositions 8 and 115, the proposed "three strikes" measures are likely to be challenged for alleged legal infirmities and ambiguities that must be resolved by the Courts of Appeal and the California Supreme Court. The assembly and senate policy committee analyses suggest some of the issues which would need to be settled in the courts of appeal; trial courts will incur delays and costs during the time the issues are unresolved.

Some cost considerations

About 38% of trial court time is spent on the felony caseload, at a cost of approximately $650 million a year. It appears that 20 to 30 percent of this time ($130-200 million) is devoted to serious and violent felonies that are the subject of the "three strike" proposals. Violent and serious cases account for the majority of trials, but only 3.5% of felony cases now go to trial. Over 96% of cases are resolved by plea. If enactment of the '3 strikes' proposal causes a 1% reduction in guilty pleas, the courts would need to try some 1500 additional cases.

Specific effects

Any significant increase in the number or length of contested violent and serious felony cases could likely have these effects:

(1) Efforts to reduce delay in both criminal and civil case dispositions could be seriously impaired.

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HOW INCARCERATING MORE FELONS WILL BENEFIT CALIFORNIA'S ECONOMY

Philip J. Romero, Chief Economist
Office of Planning and Research

Summary

- Incarcerating felons saves society more than it costs the government.

-- Each year a repeat felon is kept off the streets, he is prevented from doing between 15 and 187 crimes (excluding drug crimes). This is based on inmate surveys conducted by RAND in the early 1980s.

-- The cost to society of those crimes (including victim's direct costs, pain and suffering, and the costs society pays to reduce or compensate crime) is between $140,000 and $500,000 per criminal per year, making very conservative assumptions.

-- By contrast, operating a prison costs $20-22,000 per inmate per year.

- Reducing crime will lower medical costs, insurance premiums, police budgets, and private spending on security. Our citizens can lead more productive lives without fear about where or when they travel, work, or shop.

Costs and benefits added by "three strikes"

Year	Inmates	Corrections costs (Capital + Oper)	Social benefits
1995/6	3,580	$ 0.383 billion	$ 0.716 billion
1996/7	13,128	0.748	2.626
1997/8	24,364	1.223	4.873
1998/9	42.186	1.777	8.437
1999/00	64,079	2.331	12.816
2000/01	84,042	2.706	16.808
2027/28	272,438	6.337	54.488

- Reduced crime could stimulate billions of dollars of added economic activity. These benefits will occur if as little as 0.1% is added to the state's annual economic growth.

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HOW INCARCERATING MORE FELONS WILL BENEFIT CALIFORNIA'S ECONOMY

Philip J. Romero
Chief Economist/Chief Deputy Director
March 31, 1994

Recent debates regarding the fiscal impact of crime control strategies such as the "three strikes" plan have been highly one-sided: they discuss the *cost* of incarcerating more criminals, but not the *benefits* that can come from reduced crime.

Articles in the popular press have estimated that crime costs society literally hundreds of billions of dollars per year. Lower crime rates can mean lower medical costs, insurance premiums, police budgets, and private spending on security. It can allow our citizens to lead more productive lives without fear about where or when they travel, work, or shop.

To take just two examples:

(a) Private security spending in California exceeds $2 billion per year.
(b) Loss in tourism spending from crime fears after the L.A. riots amounted to, by very conservative estimate, $2-3 billion.

These examples omit many other benefits--from lower insurance premiums, less medical care, reduced theft losses, and higher property values among others. They demonstrate, however, that the benefits to commerce in California from reduced crime can amount to billions of dollars, more than the costs (outlined in Table 2 below) of implementing crime reduction strategies such as "three strikes."

This paper presents a highly conservative estimate of the benefits California will enjoy from incarcerating felons for longer periods, using the methods typically employed by academic criminal justice policy specialists. (The limitations of such an approach are noted below, but other ways of viewing the problem are also illustrated and produce similar conclusions.) Because the assumptions used here are at the low end of the plausible range, actual benefits could be substantially higher than this estimate.

Background

Time spent in prison is "*incapacitating*" to criminals. That is, they are unable to commit crimes while incarcerated (except against prison officials and other prisoners). Economists approach the issue of incapacitation as a cost-benefit issue: do the benefits (in terms of crimes incapacitated) outweigh the costs of incarcerating expanding prison populations?

A variety of academic studies have produced wildly varying estimates of these benefits. Two main uncertainties explain their differences: (1) the total cost to society per crime, and (2) the number of crimes a criminal would have committed per year if not incarcerated.

(1) Crime costs have at least three components: (a) the direct out-of-pocket costs victims suffer; (b) the monetary value of the pain, suffering, and lost earnings suffered by victims and their families; (c) the costs of crime prevention (public and private) that would not be needed if the crime did not occur. Estimates get progressively "softer" for each succeeding category. But to omit a category entirely because its true value is uncertain is to assume that cost is zero. The estimate below therefore reports a range, but uses the low end of the range for this paper's conclusions.

(2) Most estimates of crimes per prisoner stem from a RAND Corporation inmate survey in the early 1980s that reported between 187 and 278 *average* numbers of crimes committed per criminal per year (excluding drug-related crimes and murders). The average, of course, summarizes what is in fact a wide range: over 30% of inmates claimed to have committed less than four crimes per year, while over 15% claimed more than 300. The high-volume criminals pulled up the average significantly; the *median* number of crimes per criminal per year (the number at which half of the survey respondents fall above and half below) is only 15.[1] Furthermore, some scholars have simply divided the number of *reported* crimes (which is an acknowledged underestimate) by prison populations to yield six to ten crimes per criminal per year. Past criminal behavior may not be the best predictor of future crimes, but none better has been identified.

With such a wide range, one of the key questions policymakers must ask about any incarceration approach is: will it incapacitate high-volume, or merely typical criminals? "Three strikes" should target the upper end of the criminal distribution because it selectively incapacitates repeat felons. But to be conservative, again a range of assumptions about crimes per criminal per year will be used. The BOTEC Corporation, for example, used a range from 58.5 to 253.8 non-drug crimes per criminal per year in its 1990 study, which is one of the most thorough to date.[2]

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[1] RAND Corp., "Crime Rates and Prison Terms, A Question and Answer Fact Sheet From RAND," January 13, 1994.

[2] BOTEC Analysis Corp., "A Cost Benefit Analysis of Prison Cell Construction and Alternative Sanctions," 1990.

The mix of crimes prevented is also important, since violent crimes tend to have substantially higher costs than nonviolent property crimes. Miller, for example, estimated that the costs to victims for murder (including out-of-pocket and pain and suffering costs, but not the costs of crime prevention) at $2.4 million; for rape at $51,058; robbery and assault at $12,594 and $12,028, respectively; while motor vehicle theft cost $3,127, and burglary and larceny costs were below $1,000.[3] These estimates are in 1985 dollars and are converted to 1994 dollars in the analysis below. While an initiative such as "three strikes" should incarcerate criminals who commit a mix of crimes more costly than the average, the estimates below are again conservative by assuming only a "typical" mix.

Results

Table 1 below summarizes estimates of the social costs avoided by incarcerating additional criminals. Four estimates are shown for high and low ends of a range of assumed crimes per criminal per year (from 20 to 150), and the share of social costs actually avoided (from 25% to 75%).

The social cost range requires some elaboration. It refers to the fraction of a crime's share of social costs (mainly of crime prevention) that would actually be reduced if the crime was not committed. For example, increased incapacitation that had only a slight effect on crime would probably not induce any reduction in spending for security services at all, while the complete abolition of crime would obviate the need for such services. But what about, say, a partial reduction in crime? It would probably not lead to an equivalent cut in private security; but it is unlikely that there would be no reduction at all. The 25/75% range attempts to capture, albeit arbitrarily, plausible reductions in social costs.

Table 1. Total costs avoided per extra felon incarcerated

		Crimes per criminal	
		High(150)	Low (20)
Social costs reduced	High (75%)	$515,215	$248,868
	Low (25%)	$302,536	$137,512
Note: BOTEC high and low		*$2,824,133*	*$ 390,219*

[3] Miller, Ted R., et.al. "Victim Costs of Violent Crime and Resulting Injuries," Health Affairs, Winter 1993.

These estimates are quite conservative. They include the costs of murder under the assumption that murders are prevented only in proportion to their share of total crime (0.36%), to a maximum of an average .072 murders per criminal per year. (Even if murders were omitted, the "Low/Low" estimate in Table 1 would still exceed $31,000--more than the cost of incarcerating a prisoner for a year.) They also omit drug crimes.

Table 1 also excludes any deterrent effect of longer sentences. While there is little agreement, some academics have estimated the deterrent effect to be as large as the incapacitating effect. Such deterrence would represent a bonus over and above the crime prevention assumed here.

As a benchmark, the "BOTEC" line displays estimates by the most comprehensive study to date, by the BOTEC Corp. of Cambridge, Mass.[4] BOTEC's low estimates fall among the range of estimates in Table 1; their high estimates are roughly seven times as high.

A reasonable estimate would therefore be that increased incarceration of violent criminals will save society at least $200,000 to $300,000 per year in property losses, pain and suffering, lost wages, police and security costs, medical costs, and insurance premiums. The average of the entries in Table 1 is $301,033. For the balance of this analysis we will use $200,000 as a reasonable lower bound estimate of the social benefits of incarcerating a repeat felon per year.

Social costs and benefits

Social costs and benefits are compared in Table 2 below. These estimates pertain only to AB 971 (Jones, Costa; identical to the "three strikes" initiative).

The California Department of Corrections estimates that AB 971 will incarcerate, on average, an additional 7,899 felons per year. Using the CDC's estimates of increased inmate populations and $200,000 as a conservative estimate of the social benefits per year of incarceration per criminal, the total benefits of prevented crime are shown in Table 2.

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[4] BOTEC Analysis Corp., "A Cost Benefit Analysis of Prison Cell Construction and Alternative Sanctions," 1990.

Table 2. Corrections Costs and Benefits, various years

Year	Inmates	Corrections costs (Capital + Oper)	Social benefits
		Costs and benefits added by "three strikes"	
1995/6	3,580	$ 0.383 billion	$ 0.716 billion
1996/7	13,128	0.748	2.626
1997/8	24,364	1.223	4.873
1998/9	42,186	1.777	8.437
1999/00	64,079	2.331	12.816
2000/01	84,042	2.706	16.808
2001/02	98,385	3.071	19.677
2002/03	111,550	3.412	22.310
2003/04	126,010	3.739	25.202
2027/28	272,438	6.337	54.488

As Table 2 shows, the social benefits of the crime reductions from a "three strikes" approach vastly exceed the costs of implementation--from the first year of implementation.

Achieving benefits of this magnitude would require less than a 0.1% increase in economic growth. Given the literally billions of dollars in deadweight costs that crime imposes each year, as noted above, this does not seem implausible.

Conclusion

Under even very conservative assumptions about the social costs of crimes prevented and the ability of the initiative to target high-rate offenders, incarcerating more repeat offenders saves more than it costs per criminal per year: the lowest estimate in Table 1 is nearly $140,000, five or more times the cost of prison operation and amortized capital costs. If the felons incarcerated are at the high end of the distribution of crime rates per criminal, the social savings per criminal per year can average over $500,000.

These benefits--from reduced property losses, pain and suffering, lost wages, police and security costs, and insurance premiums--exceed "three strikes'" estimated costs immediately (by 1995).

Benefits of this magnitude seem quite plausible, since they would require less than a 0.1% increase in economic growth.

NOTES ON METHODOLOGY

Table 1: Costs per crime are derived from Zedlewski (1987); an average of $852 in victim costs and $1621 in social costs per crime. The victim estimates are well below Miller. The social cost estimates are well below BOTEC. Because society will probably not decrease their expenditures on items such as crime prevention (security services, police, etc.) in proportion with any crime reduction, Table 1 examines two less-than-proportional alternatives: 25% and 75%.

Crime rates per criminal per year are derived from RAND's inmate surveys. The low rate of 20 is near the median from the RAND surveys, but somewhat above it given the targeted nature of "three strikes." The high rate of 150 is below the mean of the RAND survey of 187. These rates do not include murder or drug crimes.

To include murder, we assumed the incapacitated inmates would commit murder only in proportion to murder's share of overall crime (0.36%). This is obviously an underestimate, given the target population. At the low end criminals are assumed to commit (20 x .0036 = .072) murders per year. To be conservative, this rate was not increased for the high estimates. Victim and social costs per murder were from Miller. As with other crimes, only 25% or 75% of social costs were included.

Tables 2: Costs include operating costs from the California Department of Corrections' cost estimate, as well as their capital cost estimates, amortized over 30 years at 6% interest. Benefits are the CDC's estimated inmate population (net of parolees) x $200,000 per inmate. The cost estimate omits possible changes in court costs (which could go up if defendants are less willing to plea bargain, and down because defendants convicted of their third strike will cease cycling through the court system). It also omits any possible reduction in inmate accessions because of deterrence.

San Francisco Public Defender's Guide to Three Strikes

By Grace Lidia Suarez
Head, Research Unit

March 10, 1994

TABLE OF CONTENTS

TEXT AND COMMENTS

With Text of Provisions Referred to by the Statute

SECTION 1. Section 667 of the Penal Code is amended to read:

667. (a)(1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of a serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

COMMENTS

This provision reads the same as section 667(a)(1) did before.

TEXT

(2) This provision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment fro t his subdivision to apply.

COMMENT

This subdivision also is unchanged.

TEXT

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

COMMENT

This reads the same as the previous subdivision (c) of section 667.

TEXT

(4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

COMMENT

This is the same as previous subdivision (d).

TEXT

(5) This subdivision shall not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

COMMENT

This reads the same as previous subdivision (e).

TEXT

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted or serious and/or violent felony offenses.

COMMENT

With subdivision (b) begins the new material enacted by AB 971.

TEXT

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

COMMENT

The "notwithstanding any other law" language would seem to control over every other statute that provides a punishment.

TEXT

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

COMMENT

I don't really understand this subdivision. I think it eliminates the term limitations of section 1170.1.

TEXT

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

COMMENT

This is a complete prohibition on probation for a second or third time offender. This controls over any other provision. In other words, a defendant convicted of any felony, who has either one or two prior serious and/or violent felonies, cannot receive probation.

TEXT

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

COMMENT

This is awkwardly phrased, but I think it means there is no wash-out period.

TEXT

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

COMMENT

This subdivision precludes any commitment to CRC or any other facility except state prison (including CYA).

TEXT

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

COMMENT

This reduces good-time and work-time credit to no more than one-fifth. I think the last portion precludes conduct credits for time spent in county jail awaiting sentencing or transportation.

I don't think this provision can apply to defendants sentenced before March 8, since the prior conviction(s) will not have been "pled and proved" in accordance with the statute.

TEXT

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

COMMENT

See subdivision (e) below for the sentencing scheme for unrelated counts.

TEXT

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

COMMENT

I can't figure paragraph (7) out. It seems to provide for a different sentencing scheme if the unrelated convictions are serious or violent felonies, but I can't figure out what the intended sentence is.

TEXT

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless provided otherwise by law.

COMMENT

I think this means that if the defendant is already serving time on another offense, the sentence imposed as a result of a conviction under this statutory scheme must be consecutive. I'm not sure what "unless provided by law" means. Does it mean that the current statutory provisions on concurrent and consecutive sentencing still apply?

TEXT

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i) inclusive, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

(A) The suspension or imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following the conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

COMMENT

I'm not sure what the drafters intended by "The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction," but I know the argument we need to make: that only convictions occurring after March 7, 1994, and which are determined to be 667(b) convictions "upon the date of that prior conviction" can constitute priors for purposes of 667(b) sentencing. I think that perhaps they were trying to say that the determination is made "as of" the date of the conviction (in other words, is unaffected by the sentence or by any subsequent reduction or expungement), but if they meant to say "as of" they should have said "as of" and not "upon."

This sentence so far strikes me as the weakest part of the statutory scheme, and one which we must exploit with all our might.

TEXT

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior

conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

COMMENT

This is so badly worded that the first sentence makes any foreign felony prior a 667(b) prior. The second sentence suggests, however, that it is limited to those felonies that would be serious/violent felonies if committed in California.

TEXT

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

COMMENT

The denial of the right to a jury trial for a juvenile must be raised as grounds for prohibiting the application of this subdivision.

I don't know what the drafters meant by the reference to "paragraph (1) or (2) as a felony."

If a juvenile prior is alleged which is not the same as one listed in section 1192.7 or 667.5(c), an equal protection argument must be made.

TEXT

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

COMMENT:

Note that the sentencing scheme below applies in addition to any other enhancement.

TEXT

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

COMMENT

Does this mean that if the defendant has a prior serious felony he gets five years consecutive under 667(a) and double the term for the current offense?

TEXT

(2) (A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 or Part 2, or any period prescribed by Section 190 or 3046.

COMMENT

This subdivision basically at triples the sentence, with a minimum of 25 years.

TEXT

(B) The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

COMMENT

I think this means that a subsequent determinate term sentence begins after the defendant would have been eligible for parole.

TEXT

(f)(1) Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) 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.

COMMENT

This subdivision makes it mandatory for the DA to charge the priors, and permits the court to dismiss the prior(s) only if there is insufficient evidence to prove it. Note that the DA may move to dismiss "in furtherance of justice" but the court may only grant the motion if there is insufficient evidence.

TEXT

(g) Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f).

COMMENT

I don't know what the first sentence means by "shall not be used in plea bargaining," but the rest is fairly clear: the DA must plead and prove all 667(b) priors, and may not strike or dismiss them unless he/she can't prove them anyway.

TEXT

(h) All references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on June 30, 1993, inclusive, are to statutes as they existed on June 30, 1993.

COMMENT

This provision "freezes" the references to the other statutes. This means, for example, that the additions of carjacking to the serious felony lists are not operative, since they went into effect October 1, 1993. I don't know why this subdivision was put it in, but it's incredibly stupid.

TEXT

(i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

COMMENT

This is a boilerplate severability clause.

TEXT OF OTHER PROVISIONS REFERRED TO BY AB 971:

Penal Code § 667.5. Enhancement of prison terms for new offenses

Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows:

...

(c) For the purpose of this section, "violent felony" shall mean any of the following:

(1) Murder or voluntary manslaughter.

(2) Mayhem.

(3) Rape as defined in paragraph (2) ofsubdivision (a) of Section 261.

(4) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(5) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(6) Lewd acts on a child under the age of 14 years as defined in Section 288.

(7) Any felony punishable by death or imprisonment in the state prison for life.

(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5 or 12022.55.

(9) Any robbery perpetrated in an inhabited dwelling house, vessel, as defined in Section 21 of the Harbors and Navigation Code, which is inhabited and designed for habitation, *an inhabited floating home as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code*, an inhabited trailer coach, as defined in the Vehicle Code, or in the inhabited portion of any other building, wherein it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of that robbery.

(10) Arson in violation of subdivision (a) of Section 451.

(11) The offense defined in subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(12) Attempted murder.

(13) A violation of Section 12308.

(14) Kidnapping in violation of subdivision (b) of Section 207.

(15) Kidnapping as punished in subdivision (b) of Section 208.

(16) Continuous sexual abuse of a child in violation of Section 288.5.

(17) Carjacking, as defined in subdivision (a) of Section 215, if it is charged and proved that the defendant personally used a dangerous or deadly weapon as provided in subdivision (b) of Section 12022 in the commission of the carjacking.

The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person.

Note: the material in italics was added by Stats 1993, chs. 162, 298, 610, 611, and did not become effective until October 1, 1993.

Penal Code § 1192.7. Limitation of plea bargaining

...

(c) As used in this section, "serious felony" means any of the following:

(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any other felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary of an inhabited dwelling house, or trailer coach as defined by the Vehicle Code, or inhabited portion of any other building; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug, as described in paragraph (2) of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines, as described in subparagraph (A) of paragraph (1) of subdivision (f) of Section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code; (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; *(27) carjacking*; any attempt to commit a crime listed in this subdivision other than an assault; *and (20) any conspiracy to commit an offense described in paragraph (24) as it applies to Section 11370.4 of the Health and Safety Code where the defendant conspirator was substantially involved in the planning, direction, or financing of the underlying offense.*

Note: the italicized provisions went into effect October 1, 1993.

Welfare & Institutions Code § 707. Determination of minor's fitness for treatment under juvenile court law; Investigation and submission of report; Criteria

...

(b) Subdivision (c) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of one of the following offenses:

(1) Murder.

(2) Arson of an inhabited building.

(3) Robbery while armed with a dangerous or deadly weapon.

(4) Rape with force or violence or threat of great bodily harm.

(5) Sodomy by force, violence, duress, menace, or threat of great bodily harm.

(6) Lewd or lascivious act as provided in subdivision (b) of Section 288 of the Penal Code.

(7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm.

(8) Any offense specified in Section 289 of the Penal Code.

(9) Kidnapping for ransom.

(10) Kidnapping for purpose of robbery.

(11) Kidnapping with bodily harm.

(12) Assault with intent to murder or attempted murder.

(13) Assault with a firearm or destructive device.

(14) Assault by any means of force likely to produce great bodily injury.

(15) Discharge of a firearm into an inhabited or occupied building.

(16) Any offense described in Section 1203.09 of the Penal Code.

(17) Any offense described in Section 12022.5 of the Penal Code.

(18) Any felony offense in which the minor personally used a weapon listed in subdivision (a) of Section 12020 of the Penal Code.

(19) Any felony offense described in Section 136.1 or 137 of the Penal Code.

(20) Manufacturing, compounding, or selling one-half ounce or more of any salt or solution of a controlled substance specified in subdivision (e) of Section 11055 of the Health and Safety Code.

(21) Any violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code, which would also constitute a felony violation of subdivision (b) of Section 186.22 of the Penal Code.

(22) Escape, by the use of force or violence, from any county juvenile hall, home, ranch, camp, or forestry camp in violation of subdivision (b) of Section 871 where great bodily injury is intentionally inflicted upon an employee of the juvenile facility during the commission of the escape.

(23) Torture as described in Sections 206 and 206.1 of the Penal Code.

(24) Aggravated mayhem as described in Section 205 of the Penal Code.

(25) Carjacking, as described in Section 215 of the Penal Code, while armed with a dangerous or deadly weapon.

Note: the italicized subdivision became effective October 1, 1993.

RETROACTIVITY

May the provisions of section 667(b) et seq. be constitutionally applied to offenses committed before March 8, 1994?[1]

No.

May the provisions be applied to prior convictions occurring before March 8, 1994, when the new offense occurs after that date?

Probably yes, but only if the appellate court rewrite a portion of the statute.

May the one-fifth credit rule be applied to convictions and/or sentences occurring before March 8?

Probably not.

DISCUSSION

The law is clear that conduct occurring before the enactment of a new law may not be punished under the terms of the new law. It is equally clear that the prior offenses need not occur before the new statute's passage. The only argument against the application of this second rule is the very strange language used in section 667 (d):

> Notwithstanding any other law and for the purposes of subdivisions (b) to (i) inclusive, a prior conviction of a felony shall be defined as:
>
> (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, **shall be made upon the date of that prior conviction** and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:
>
> ...
>
> (Emphasis added.)

---

[1] AB 971 was called into effect by the Governor on March 7, 1994 at midnight.

The term "upon the date" is unamibiguous. It needs no interpretation. It means that the determination must be made when the conviction occurs. The only way the courts can get around the use of this word is to rewrite the statute to means something like "as of."

CASES AND AUTHORITIES

When new offense occurs before enactment of statute

Witkin, *Cal. Law & Procedure*, Vol 1 Criminal Introduction to Crimes §19 Other Valid Statutes.

A law that punishes conduct committed before its enactment is unconstitutional (see 5 Summary (8th), Constitutional Law, §258); but a law that merely utilizes prior conduct to enhance the penalty for a new crime is valid. Thus, in *People v. Venegas* (1980) 10 C.A.3d 814, 89 C.R. 103, defendant was convicted of assault with a deadly weapon and of being a convicted felon in possession of a concealable firearm. The prior felony conviction had occurred in 1964; the following year P.C. 12021 (felon in possession; see infra, §1098) was amended to increase the maximum possible sentence from 5 to 15 years. Held, the amendment was properly applied. "A statute is not retroactive in operation merely because it draws upon facts antecedent to its enactment for its operation. . . . The crime for which the defendant is punished in an instance such as we have here is not the earlier felony, but the new and separate crime of which the prior felony conviction is only a constituent element. Without the defendant's commission of new and additional acts after he has notice of the new legislation, the statute passed or amended after the constituent felony conviction would not come into play." (10 C.A.3d 823.) (See also People v. Williams (1983) 140 C.A.3d 445 , 448, 180 C.R. 497 [enhancement of sentence for crime committed after effective date of P.C. 667.5(b) (see infra, Chap. IX), based on defendant's felony conviction prior to effective date of the statute, did not violate ex post facto clause]; Carter v. Municipal Court (1983) 149 C.A.3d 184, 188, 196 C.R. 751 [enhanced punishment for offense committed after effective date of Veh.C. 23165 and Veh.C. 23170, based on convictions prior to effective date of statutes, does not violate ex post facto clause].)

When Priors Occur Before Enactment of New Law

Pen. Code applies to prior convictions that occurred before the enactment of the statute. That the initiative was plainly intended to take account of antecedent crimes is shown by its inclusion of crimes that were repealed prior to its effective date. There is no constitutional bar to such an application of the statute. Moreover, the basic purpose of the statute, which is the deterrence of recidivism, would be frustrated by a construction that did not take account of prior criminal conduct, for in the context of habitual criminal statutes, increased penalties for

subsequent offenses are attributable to the defendant's status as a repeat offender and arise as an incident of the subsequent offense, rather than constituting a penalty for the prior offense. *People v Jackson* (1985) 37 Cal 3d 826, 210 Cal Rptr 623, 694 P2d 736 .

Application of Pen. Code, §667 to enhance the sentence for a crime committed after Proposition 8 because of a pre-Proposition 8 prior conviction for a serious felony does not violate U.S. Const., art. I, §9 or Cal. Const., art. I, §9, as being an ex post facto determination of criminal liability. Increased penalties for subsequent offenses are attributable to the defendant's status as a repeat offender and arise as an incident of the subsequent offense rather than constituting a penalty for the prior offense. For this reason, statutes imposing such penalties are not ex post facto laws. *People v Weaver* (1984, 1st Dist) 161 Cal App 3d 119, 207 Cal Rptr 419 .

When does a "prior" become one?

When judgment was not pronounced until two months after conviction because of defendant's intervening escape, "conviction" meant the verdict alone and not the judgment based thereon, for purposes of sentence enhancement for a prior serious felony under Pen. Code, §667, in a later prosecution for offenses committed prior to recapture. *People v Johnson* (1989, 1st Dist) 210 Cal App 3d 316, 258 Cal Rptr 347 .

Prior burglary was a previous conviction within the meaning of Pen. Code, §667, subd. (a), even though defendant was on probation for the prior when he committed the new burglary. In the prior case, defendant pleaded guilty in municipal court, and the superior court suspended proceedings and placed defendant on probation. For purposes of Pen. Code, §667, subd. (a), the defendant had been convicted at the time of the adjudication of guilt, even if judgment had not yet been pronounced or become final. Rule of construction of ambiguous penal statutes in favor of the defendant was inapplicable to the word "conviction," since that rule will not be applied to contravene a manifest legislative purpose, and the purpose of Pen. Code, §667, is to deter repetition of criminal conduct. *People v Wilson* (1991, 2nd Dist) 227 Cal App 3d 1210, 278 Cal Rptr 319 .

No Warning Needed When Prior Imposed

Trial court properly denied defendant's motion to strike the prior convictions, notwithstanding defendant's claim that the convictions were unconstitutional at the time he pleaded guilty to them in that he was not advised that they could be used to enhance his sentence in the event of a subsequent conviction. The trial court had no duty to advise defendant that in the event he committed a subsequent felony he would be subject to an enhanced punishment as a result of his plea. An enhanced sentence in a future prosecution for a yet uncommitted crime was clearly an indirect, collateral consequence of defendant's guilty plea to the earlier charges. The trial court should not be required, even before imposing sentence for one crime, to inform the defendant what the sentence may be for committing another crime. *People v Crosby* (1992, 1st Dist) 3 Cal App 4th 1352, 5 Cal Rptr 2d 159 .

Change in Credits May Not Be Applied Retroactively

A state statute which revised the formula for conduct credits and reduced the amount of "good time" deducted from the sentence, was held unconstitutional as applied to a defendant whose crime was committed prior to its enactment. (*Weaver v. Graham* (1981) 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17; see 15 Loyola L.A. L. Rev. 750; see also *Miller v. Florida* (1987) U.S. , 107 S.Ct. 2446, 96 L.Ed.2d 351.)

GUILTY PLEAS IN MUNICIPAL COURT

May a defendant plead open to a complaint in municipal court, before the prior convictions are charged, and prevent the application of section 667(b)?

Probably not, because under Penal Code section 969 1/2 the prosecution may add the priors in superior court, and although the court has the discretion to deny the amendment, denial may constitute an abuse of discretion.

DISCUSSION:

STATUTES:

Penal Code section 969 1/2 provides that:

> Whenever it shall be discovered that a pending complaint to which a plea of guilty has been made under section 859a of this code does not charge all prior felonies of which the defendant has been convicted either in this state or elsewhere, said complaint may be forthwith amended to charge such prior conviction or convictions and such amendments may and shall be made upon order of the court. The defendant shall thereupon be arraigned before the court to which the complaint has been certified and must be asked whether he has suffered such previous conviction. If he answers that he has, his answer must be entered by the clerk in the minutes of the court, and must, unless withdrawn by consent of the court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answers that he has not, his answer must be entered by the clerk in the minutes of the court, and the question whether or not he has suffered such previous conviction must be tried by a jury impanelled for that purpose, unless a jury is waived, in which case it may be tried by the court. The refusal of the defendant to answer is equivalent to a denial that he has suffered such previous conviction.

CASES:

Where, after the defendant pleaded guilty in the municipal court and the case was certified to the superior court, prior convictions were discovered, the superior court properly amended the complaint by adding charges of such prior conviction. People v Carson (1941) 45 CA2d 554, 114 P2d 619 .

Under Pen. Code, §969- 1/2 , providing that when a pending complaint to which a guilty plea has been made does not charge all prior felonies, the "complaint may be forthwith amended to charge such prior conviction or convictions and such amendments may and shall be made upon order of the court," the trial court may, in its discretion, refuse to allow the People to amend. The

language employed in §969- 1/2 , assumes the operation of the general rule stated in Pen. Code, §1009, whereby the prosecuting agency may amend its pleading without leave of court only before plea or a demurrer is sustained.

However, although the trial court had discretion to refuse to permit the amendment, it abused its discretion:

> The circumstances presented to the trial court here included the fact that Alvarado had identified himself falsely at one or the other of his arrests for sale of marijuana, that he had been placed upon probation upon his first conviction, and that he had entered a guilty plea immediately upon arraignment after his second arrest. These factors indicate a clear intent on Alvarado's part to deceive the prosecutor and the court by presenting himself as a first offender when, in truth, he was not.
>
> The trial court denied the People's request to amend the accusatory pleading because it did not want to sentence Alvarado to state prison for selling two small amounts of marijuana. Although this concern might be an appropriate consideration for sentencing purposes, it should not have entered into the trial court's ruling on the People's request to amend, even though the trial court had discretion to strike the prior conviction allegation after it had been alleged. (See People v. Ruby (1988) 204 Cal.App.3d 462, 465-466 [251 Cal.Rptr. 359].)
>
> The focus of the trial court's exercise of discretion in ruling on a motion to amend should be directed primarily to determining whether, on the facts presented, the requested amendment would prejudice Alvarado's substantial rights. Although probation ineligibility is prejudicial in the sense that Alvarado would rather it not be alleged, the allegation here does not cause prejudice to Alvarado's substantial rights. In fact, the amendment merely places Alvarado in the position he should have been in at the time of his arraignment in municipal court had he not used an alias and entered an immediate guilty plea under section 859a.
>
> Therefore, we reluctantly conclude the trial court's denial of the People's motion to amend the pleadings constituted an abuse of its discretion. *People v. Superior Court (Alvarado)* (1989) 207 Cal.App.3d 464 at 478.)

JUVENILE PRIORS

May a juvenile adjudication be used as a prior conviction under the Three Strikes statutory scheme?

Under rules of statutory interpretation, yes. On federal and state constitutional grounds, no.

DISCUSSION:

STATUTES

New Penal Code section 667 provides in relevant part:

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

...

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i) inclusive, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

(A) The suspension or imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following the conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

...

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

CASES

The cases that have dealt with the question whether a juvenile adjudication may be used for enhancement purposes focused on the use of the word "conviction" in the statute that purported to permit its use:

> Thus far, the Courts of Appeal have upheld the dictate of Welfare and Institutions Code section 203 against the contention that Proposition 8 permits the use of juvenile adjudications for enhancement or impeachment. (See *People v. West* (1984) 154 Cal.App.3d 100, 108-111 [201 Cal.Rptr. 63] [construing § 28, subd. (f) to bar the use of juvenile adjudications for any purpose, but to permit the use of felony convictions for enhancement if the accused is an adult or juvenile being tried as an adult]; *In re Anthony R.* (1984) 154 Cal.App.3d 772, 775-776 [201 Cal.Rptr. 299] [holding a juvenile adjudication not a prior conviction for habitual criminal purposes under § 666].) Although section 28, subdivision (f)'s reference to juvenile proceedings has not yet been construed by this court, the lower courts' adherence to the mandate of Welfare and Institutions Code section 203 in the face of Proposition 8 supports the premise that that statute cannot be ignored unless clear and unambiguous language directs otherwise. *People v. Weidert* (1985) 39 Cal.3d 836, 847 - 848, fn. 10 [705 P.2d 380; 218 Cal. Rptr. 57].

> A defendant's sentence was improperly enhanced for two prior serious felony convictions pursuant to Pen. Code, §667, subd. (a), where they were based

on prior juvenile adjudications of criminal misconduct. Although Cal. Const., art. I, §28, subd. (f) (Victim's Bill of Rights), provides "any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used.-.-. for enhancement of sentence.-.-.," it did not change the prior law that juvenile adjudications are not "criminal convictions." The constitutional provision applies to a minor who has been certified as unfit for treatment under the juvenile court law and who has been certified to a court of criminal jurisdiction and thereafter convicted of a felony. *People v West* (1984, 3d Dist) 154 Cal App 3d 100, 201 Cal Rptr 63 .

The language in *Weidert*, " Although section 28, subdivision (f)'s reference to juvenile proceedings has not yet been construed by this court, the lower courts' adherence to the mandate of Welfare and Institutions Code section 203 in the face of Proposition 8 supports the premise that that statute cannot be ignored unless clear and unambiguous language directs otherwise," is not particularly helpful, since I think it has to be acknowledged that section 667(d)(3) contains "clear and unambiguous language."

The question left unanswered by the Supreme Court is whether, even if the statutory language is clear and unambiguous, due process and equal protections guarantees bar the use of priors obtained in a proceeding that denies the right to a jury trial.

A Court of Appeal has answered that question in a very decisive manner. In *In re Javier A.*. (1984) 159 Cal.App.3d 913, 928 - 929 [206 Cal.Rptr. 386] the majority held itself bound by *stare decisis* to rule that juveniles were not entitled to a jury trial. It then wrote a lengthy and very scholarly opinion, authored by Justice Johnson, tracing the history of a juvenile's right to jury trial through English and American law, and concluding that juveniles <u>should</u> have such a right.

The opinion itself <u>must</u> be read: it is a gem, but too long to place in this monograph. One footnote, however, is especially applicable to the present situation:

> Proposition 8 has introduced a possible third independent and sufficient grounds for ruling juveniles are now constitutionally entitled to trial by jury in delinquency proceedings. Since June 9, 1982, Proposition 8 incorporated the following language in article I, section 28, subdivision (f) of the California Constitution: "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence ...." (Italics added.)
>
> It has not yet been finally resolved whether this new constitutional provision officially defines juvenile court proceedings as "criminal proceedings" and allows true findings in juvenile court to be used as "criminal convictions" for purposes of impeachment and enhancement. Recently two Courts of Appeal held it does not. (*People v. West* (1984) 154 Cal.App.3d 100 [201 Cal.Rptr. 63]; *In re Anthony R.*

(1984) 154 Cal.App.3d 772 [201 Cal.Rptr. 299].) Instead these courts interpreted this language to apply only to convictions of juveniles in adult criminal court after they have been found unfit for treatment in juvenile court. This construction, however, conflicts with dictum in a Supreme Court opinion. In *In re Kenneth H.*, the Supreme Court held a juvenile court must specify whether it finds the juvenile delinquent committed a felony or misdemeanor. In highlighting some of the consequences of this distinction in juvenile proceedings, Justice Kaus observed, "[T]he potential for prejudice from a finding of felony status has been increased by passage of Proposition 8, which provides that any prior felony conviction, whether adult or juvenile, 'shall ... be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding.'" (33 Cal.3d at p. 619, fn. 3, italics added.)

Since we already have identified two other persuasive grounds supporting a constitutional right to jury trial for juvenile delinquents, we will not attempt to resolve this apparent conflict between Supreme Court dictum and Court of Appeal holdings. But we do think it worthwhile to note that should the *Kenneth H.* interpretation prevail, both the federal and California Constitutions will require that juveniles be afforded the right to jury trial in delinquency proceedings.

The Proposition 8 language is the only reference to juvenile courts in the entire California Constitution. If it is construed to define delinquency cases as "criminal proceedings" resulting in "criminal convictions," this characterization would control over the statutes which speak in terms of merely "adjudging a minor to be a ward of the juvenile court." (Welf. & Inst. Code, § 602.) In 1850 England, minors clearly were entitled to trial by jury in all "criminal proceedings." And in 1984 California, no one—including juveniles—may be subjected to "criminal proceedings" or risk "criminal conviction" without having the chance to demand trial by jury. (Cf. *Tracy v. Municipal Court* (1978) 22 Cal.3d 760 [150 Cal.Rptr. 785, 587 P.2d 227] [right to jury trial attaches in simple marijuana possession prosecutions even though only fine and no loss of liberty could be imposed, because Legislature nevertheless characterized these violations as "misdemeanors"].)

Furthermore, as criminal proceedings, California juvenile delinquency cases would be controlled by Supreme Court decisions which guarantee the right to jury trial under the Sixth Amendment in any criminal proceeding where the accused can receive a sentence longer than six months. (*Duncan v. Louisiana, supra*, 391 U.S. 145.) The only reason the United States Supreme Court tolerated denial of jury trial in Pennsylvania's juvenile courts was because they were not deemed to be "criminal proceedings" which could result in "criminal convictions." (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 540, 551 [29 L.Ed.2d 647, 658, 664, 91 S.Ct. 1976].)

> The inevitability of this conclusion was recognized by the California District Attorneys' Association. In a handbook interpreting Proposition 8 prepared by that association and the Center for Criminal Justice Policy and Management, it is observed: "If the language 'whether adult or juvenile' is intended to modify 'criminal proceeding,' as it appears in section 28 (f), it must be concluded that the intent of the amendment was to redefine the terms 'conviction' and 'criminal proceeding' to include 'true finding' and 'hearing' ... and that the attending rights of a public trial and jury would be extended to juvenile 'defendants'." (Criminal Justice Policy and Management, University of San Diego School of Law, Prop. 8—the Victim's Bill of Rights (1982) p. VII-9., italics added.). (*Javier A., supra*, 159 Cal.App.3d 913, footnote 46.)

Any juvenile adjudication charged as a prior under section 667 must be challenged up to the highest court: the United States Supreme Court, and the arguments made even at the lowest level must be grounded both on the federal and state constitutions.

Adult convictions suffered by juvenile:

In a prosecution of an adult for robbery and attempted second-degree murder, the court properly enhanced defendant's sentence, pursuant to Pen. Code, §667, for a prior serious out-of-state felony conviction where, although defendant was 15 years old at the time of his prior conviction, it could still be considered a prior felony conviction, within the meaning of the Victims' Bill of Rights (Cal. Const., art. I, §28, subd. (f)), since that amendment expressly includes prior convictions "whether adult or juvenile" for enhancement purposes; this provision includes all prior felony convictions in which a juvenile is tried as an adult, even for crimes committed before the juvenile had attained California's statutory minimum age of 16. *People v Blankenship* (1985, 4th Dist) 167 Cal App 3d 840, 213 Cal Rptr 666 .

A sentence enhancement is not an added punishment for the prior serious felony conviction but instead is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one. Thus, in a prosecution for burglary, the trial court properly enhanced defendant's sentence under Pen. Code, §667, subd. (a), for a prior conviction of robbery, committed while defendant was a juvenile, even though the prior conviction had been expunged after defendant received an honorable discharge from the California Youth Authority; even without Proposition 8, providing in part that prior felony convictions are to be used without limitation for sentence enhancement in any criminal proceeding, defendant's expunged conviction could be used to enhance his sentence, since the logic of case law allowing enhanced punishment even when the defendant has received a pardon for the prior offense was applicable in defendant's case as well. *People v Jacob* (1985, 2d Dist) 174 Cal App 3d 1166, 220 Cal Rptr 520 .

PROSECUTORIAL DISCRETION AND THE SEPARATION OF POWERS DOCTRINE

May the Legislature control the prosecution's charging discretion?

I believe not. I believe that the Legislature's dictate to the prosecution to charge and prosecute all prior under the section 667 statutory scheme violates the doctrine of the separation of powers.

DISCUSSION

CASES

> **It is well established, of course, that a district attorney's enforcement authority includes the discretion either to prosecute or to decline to prosecute an individual when there is probable cause to believe he has committed a crime**. (See, *e.g.*, *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 364 [54 L.Ed.2d 604, 611, 98 S.Ct. 663]; *Daly v. Superior Court* (1977) 19 Cal.3d 132, 148 [137 Cal.Rptr. 14, 560 P.2d 1193]; *People v. Adams* (1974) 43 Cal.App.3d 697, 707 [117 Cal.Rptr. 905]. See generally Prosecutorial Discretion (Cont.Ed.Bar 1979) § 1.2, pp. 6-7.) In exercising such discretion, prosecutors have traditionally considered whether there are alternative programs in the community in which the defendant's participation would serve the interests of the administration of justice better than prosecution, and have frequently agreed to forgo prosecution on the condition that the defendant participate in such an alternative program. (See generally Note, *Pretrial Diversion from the Criminal Process* (1974) 83 Yale L.J. 827, 837-839; Annot., Pretrial Diversion (1981) 4 A.L.R 4th 147, 151; Vorenberg & Vorenberg, *Early Diversion from the Criminal Justice System*, in Prisoners in America (Ohlin ed., 1973) pp. 159-161; 1 ABA Standards for Criminal Justice, Stds. Relating to the Prosecution Function (2d ed.) std. 3-3.8 [Discretion as to Noncriminal Disposition].) Thus, a prosecutor's decision to decline to prosecute a particular defendant on condition that he participate in an alternative program — i.e., a diversion decision — has traditionally been viewed as a subset of the prosecutor's broad charging discretion. (See, e.g., *People v. Glover* (1980) 111 Cal.App.3d 914, 916-918 [169 Cal.Rptr. 12]; Prosecutorial Discretion, supra, § 1.43, pp. 44-46; id. (Cont.Ed.Bar Supp. 1983) § 1.43, p. 8.) (*Davis v. Municipal Court* (1988) 46 Cal.3d 64, 77 - 78; 249 Cal. Rptr. 300.) (Emphasis added.)

> Defendant's attempted analogy between the instant case and those referred to in the preceding paragraph ignores the fundamental difference between the type of statute there involved and section 496. All the statutes involved in the cases above cited purported to impose a limitation on a purely judicial determination which in no event could be taken until after a charge had been filed in court and a

prosecution had commenced in the judicial system. In the case before us the statute deals with the initial determination of the charge to be filed, a decision which, in its nature, occurs before an accusatory pleading is filed and thus before the jurisdiction of a court is invoked and a judicial proceeding initiated. It involves a purely prosecutorial function and does not condition judicial power in any way. **The function thereby conferred relates only to what is clearly the province historically of the public prosecutor, i.e., the discretion whether or not to prosecute**. (See *People v. Vatelli* (1971) 15 Cal.App.3d 54, 58 [92 Cal.Rptr. 763]; *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752, 757 [6 Cal.Rptr. 813]; *Taliaferro v. City of San Pablo* (1960) 187 Cal.App.2d 153, 154 [9 Cal.Rptr. 445].) The action of a district attorney in filing an information is not in any way an exercise of a judicial power or function. (*People v. Bird* (1931) 212 Cal. 632, 641 [300 P. 23].) *People v. Glover* (1980) 111 Cal.App.3d 914, 918 - 919 [169 Cal.Rptr. 12] [169 Cal.Rptr. 12]. (Emphasis added.)

The prosecutor may freely exercise discretion to determine what, if any, criminal charges should be brought against particular individuals and it is improper for the courts to interfere with the exercise of that discretion (*Daly v. Superior Court* (1977) 19 Cal.3d 132, 148-149 [137 Cal.Rptr. 14, 560 P.2d 1193].

The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution. (Cal. Constitution, Article III, § 3. Separation of powers.)

With the matter thus in proper perspective, we turn to the Attorney General's contention that section 11361.5, subdivision (b) (A.B. 3050), impermissibly impinges on the powers vested in the executive branch of government by the California Constitution. On its face, of course, the constitutional statement of the doctrine of the separation of powers (art. III, § 3) protects the executive branch from encroachment no less than the judicial branch. But the executive has invoked such protection less frequently than the courts, and the law on the topic remains sparse.*Younger v. Superior Court* (1978) 21 Cal.3d 102, 115 - 116.)

ANALYSIS AND PRACTICE NOTES

The "discretion whether or not to prosecute," which of course implies the discretion to decide how to charge, appears to have not only deep historical common law roots but also federal and state constitutional foundations.

This issue should be raised. I think that it can be raised by a defendant by demurrer to the charging instrument, on the grounds that the priors fail to state a public offense in that they are unconstitutionally charged in violation of the separation of powers. In order to set up the case, it is important to not enter a plea of not guilty, or if a plea is entered, to reserve the right to demur.

Wild Pitch

'Three Strikes, You're Out' And Other Bad Calls on Crime

Jerome H. Skolnick

According to the pundits, the polls, and the politicians, violent crime is now America's number one problem. If the problem were properly defined and the lessons of past efforts were fully absorbed, this could be an opportunity to set national crime policy on a positive course. Instead, it is a dangerous moment. Intuition is driving the country toward desperate and ineffectual responses that will drive up prison costs, divert tax dollars from other vital purposes, and leave the public as insecure and dissatisfied as ever.

The pressures pushing federal and state politicians to vie for the distinction of being toughest on crime do not come only from apprehensive voters and the tabloid press. Some of the leading organs of elite opinion, notably the *Wall Street Journal*, have celebrated gut-level, impulsive reactions. In one *Journal* column ("Crime Solution: Lock 'em Up"), Ben J. Wattenberg writes that criminologists don't know what works. What works is what everyone intuitively knows: "A thug in prison cannot shoot your sister." In another *Journal* column ("The People Want Revenge"), the conservative intellectual Paul Johnson argues that government is failing ordinary people by ignoring their retributive wishes. Ordinary people, he writes, want neither to understand criminals nor to reform them. "They want them punished as severely and cheaply as possible."

Johnson is partly right and mostly wrong. Ordinary people want more than anything to walk the streets safely and to protect their families and their homes. Intuitively, like Wattenberg, many believe that more prisons and longer sentences offer safety along with punishment. But, especially in dealing with crime, intuition isn't always a sound basis for judgment.

The United States already has the highest rate of imprisonment of any major nation. The prisons have expanded enormously in recent years in part because of get-tough measures sending low-level drug offenders to jail. Intuitions were wrong: the available evidence does not suggest that imprisoning those offenders has made the public safer.

The current symbol of the intuitive lock-'em-up response is "three strikes and you're out"—life sentences for criminals convicted of three violent or serious felonies. The catchy slogan appears to have mesmerized politicians from one coast to the other and across party lines. Three-strikes fever began in the fall of 1993 in the wake of the intense media coverage of the abduction and murder of a 12-year-old California girl, Polly Klaas, who was the victim, according to

police, of a criminal with a long and violent record. California's Republican Governor Pete Wilson took up the call for three strikes, and on March 7 the California legislature overwhelmingly approved the proposal. Even New York Governor Mario Cuomo endorsed a three strikes measure. The U.S. Senate has passed a crime bill that adopts three strikes as well as a major expansion of the federal role in financing state prisons and stiffening state sentencing policy. In his 1994 State of the Union address, President Clinton singled out the Senate legislation and three strikes for praise.

But will three strikes work? Teenagers and young men in their twenties commit the vast majority of violent offenses. The National Youth Survey, conducted by Colorado criminologist Delbert S. Elliott, found that serious violent offenses (aggravated assault, rape, and robbery involving some injury or weapon) peak at age 17. The rate is half as much at age 24 and declines significantly as offenders mature into their thirties.

If we impose life sentences on serious violent offenders on their third conviction—after they have served two sentences—we will generally do so in the twilight of their criminal careers. Three-strikes laws will eventually fill our prisons with geriatric offenders, whose care will be increasingly expensive when their propensities to commit crime are at the lowest.

Take the case of "Albert," described in the *New York Times* not long ago by Mimi Silbert, president of the Delancey Street Foundation in San Francisco. At age 10, Albert was the youngest member of a barrio gang. By the time he was sent to San Quentin at the age of 19, he had committed 27 armed robberies and fathered two children. Now 36, he is a plumber and substitute teacher who has for years been crime-free, drug-free, and violence-free. According to Silbert, the Delancey Street program has turned around the lives of more than 10,000 Alberts in the past 23 years.

To imprison the Alberts of the world for life makes sense if the purpose is retribution. But if life imprisonment is supposed to increase public safety, we will be disappointed with the results. To achieve that purpose, we need to focus on preventing violent crimes committed by high-risk youths. That is where the real problem lies.

The best that can be said of some three-strikes proposals is that they would be drawn so narrowly that they would have little effect. The impact depends on which felonies count as strikes. Richard H. Girgenti, director of the New York State Division of Criminal Justice Services, says that the measure supported by Governor Cuomo would affect only 300 people a year and be coupled with the release of nonviolent prisoners. President Clinton is also supporting a version of three strikes that is more narrowly drawn than California's. Proposals like California's, however, will result in incarcerating thousands of convicts into middle and old age.

Regressing to the Mean

Before Governor Wilson signed the most draconian of the three-strikes bill introduced in the legislature, district attorneys across the state assailed the measure, arguing that it would clog courts, cost too much money, and result in disproportionate sentences for nonviolent offenders. So potent is the political crime panic in California that the pleas of the prosecutors were rebuffed.

The prospect in California is ominous. Even without three-strikes legislation, California is already the nation's biggest jailer, with one out of eight American prisoners occupying its cells. During the past 16 years, its prison population has grown 600 percent, while violent crime in the state has increased 40 percent. As Franklin E. Zimring and Gordon Hawkins demonstrate in a recent issue of the *British Journal of Criminology*, correctional growth in California was "in a class by itself" during the 1980s. The three next largest state prison systems (New York, Texas, and Florida) experienced half the growth of California, and western European systems about a quarter.

To pay for a five-fold increase in the corrections budget since 1980, Californians have had to sacrifice other services. Education especially has suffered. Ten years ago, California devoted 14 percent of its state budget to higher education and 4 percent to prisons. Today it devotes 9 percent to both.

The balance is now expected to shift sharply in favor of prisons. To pay for three strikes, California expects to spend $10.5 billion by the year 2001. The California Department of Corrections has estimated that three strikes will require the state to add 20 more prisons to the existing 28 and the 12 already on the drawing board. By 2001, there will be 109,000 more prisoners behind bars serving life sentences. A total of 275,621 more people are expected to be imprisoned over the next 30 years—the equivalent of building an electric fence around the city of Anaheim. By the year 2027 the cost of housing extra inmates is projected to hit $5.7 billion a year.

But will California be better off in 2027—indeed, will it have less crime—if it has 20 more prisons for aging offenders instead of 20 more college campuses for the young?

Of course, Wilson and other politicians are worrying about the next elections, not the next century. By the time the twice-convicted get out of prison, commit a third major offense, and are convicted and sentenced to life terms, Wilson and the others supporting three strikes will be out—that is,

out of office, leaving future generations a legacy of an ineffectual and costly crime policy. To avoid that result, political leaders need to stop trying to out-tough one another and start trying to out-reason each other.

The Limits of Intuition

H.L.A. Hart, the noted legal philosopher, once observed that the Enlightenment made the form and severity of punishment "a matter to be *thought* about, to be *reasoned* about, and *argued*, and not merely a matter to be left to feelings and sentiment." Those aspirations ought still to be our guide.

The current push to enact three strikes proposals is reminiscent of the movement in the 1970s to enact mandatory sentencing laws, another effort to get tough, reduce judicial discretion, and appease the public furies. But mandatory sentencing has not yielded any discernible reduction in crime. Indeed, the result has been mainly to shift discretionary decision-making upstream in the criminal justice system since the laws have continued to allow great latitude in bringing charges and plea bargaining.

Ironically, mandatory sentencing allowed the serial freedom of Richard Allen Davis, the accused murderer of Polly Klaas. Before 1977, California had a system of indeterminate prison sentencing for felony offenders. For such felonies as second-degree murder, robbery, rape, and kidnapping, a convict might receive a sentence of 1 to 25 years, or even one year to life. The objective was to tailor sentences to behavior, to confine the most dangerous convicts longer, and to provide incentives for self-improvement. However, in 1977, declaring that the goal of imprisonment was punishment rather than rehabilitation, the state adopted supposedly tougher mandatory sentences. Richard Allen Davis benefited from two mandated sentence reductions, despite the prescient pre-sentencing report of a county probation officer who warned of Davis's "accelerating potential for violence" after his second major conviction. Under indeterminate sentencing, someone with Davis's personality and criminal history would likely have been imprisoned far longer than the mandated six years for his first set of offenses.

Most criminologists and policy analysts do not support the reliance on expanded prisons and the rigidities of habitual offender laws. Some, like David Rothman, have apologized for their naiveté joining the movement to establish determinate sentencing in the 1970s and now recognize that it has been a failure.

Others, like John J. DiIulio, Jr., take a harder line, although the hardness of DiIulio's line seems to depend on his forum. In a January 1994 column appearing—where else?—in the *Wall Street Journal*, DiIulio supported the superficially toughest provisions of the Senate crime bill. (The *Journal*'s headline writers called the column "Let 'em Rot," a title that DiIulio later protested, though his own text was scarcely less draconian.) But writing in *The American Prospect* in the fall of 1990 ("Getting Prisons Straight") and with Anne Morrison Piehl in the fall of 1991 for the *Brookings Review*, DiIulio's message was more tempered.

The Brookings article reviews the debate over the cost-effectiveness of prisons. Imprisonment costs between $20,000 to $50,000 per prisoner per year. But is that price worth the benefit of limiting the crimes that could have been committed by prisoners if they were on the street? "Based on existing statistical evidence," DiIulio and Piehl, "the relationship between crime rates and imprisonment is ambiguous." This is hardly a mandate for "letting 'em rot." DiIulio and Piehl recognize that the certainty of punishment is more effective than the length and that "even if we find that 'prison pays' at the margin, it would not mean that every convicted criminal deserves prison; it would not mean that it is cost effective to imprison every convicted felon." I agree and so do most criminologists. Does DiIulio read DiIulio?

The Rise of Imprisonment

Two trends are responsible for the increase in imprisonment. First, the courts are imposing longer sentences for such nonviolent felonies as larceny, theft, and motor vehicle theft. In 1992 these accounted for 65.9 percent of crime in America, according to the Federal Bureau of Investigation's Uniform Crime Reports.

Second, drugs have become the driving force of crime. More than half of all violent offenders are under the influence of alcohol or drugs (most often alcohol) when they commit their crimes. The National Institute of Justice has shown that in 23 American cities, the percentage of arrested and booked males testing positive for any of ten illegal drugs ranged from a low of 48 percent in Omaha to 79 percent in Philadelphia. The median cities, Fort Lauderdale and Miami, checked out at 62 percent.

There has been an explosion of arrests and convictions and increasingly longer sentences for possessing and selling drugs. A Justice Department study, completed last summer but withheld from the public until February this year, found that of the 90,000 federal prison inmates, one-fifth are low-level drug offenders with no current or prior violence or previous prison time. They are jamming the prisons.

The federal prison population, through mandated and determinate sentences, has tripled in the past decade. Under current policy, it will rise by 50 percent by the century's turn, with drug offenders accounting for 60 percent of the additional prisoners. Three-strikes legislation will doubtless solidify our already singular position as the top jailer of the civilized world.

The Fear Factor

The lock-'em-up approach plays to people's fear of crime, which is rising, while actual crime rates are stabilizing or declining. This is by no means to argue that fear of crime is unjustified. Crime has risen enormously in the United States in the last quarter-century, but it is no more serious in 1994 than it was in 1991. The FBI's crime index declined 4 percent from 1991 to 1992.

In California, a legislative report released in January indicates that the overall crime rate per 100,000 people declined slightly from 1991 to 1992, dropping from 3,503.3 to 3,491.5. Violent crimes—homicide, forcible rape, robbery, and aggravated assault—rose slightly, from 1,079.8 to 1,103.9. Early figures for 1993 show a small decline.

On the other coast, New York City reported a slight decline in homicides, 1,960 in 1993, compared with 1,995 in 1992, and they are clustered in 12 of the city's 75 police districts, places like East New York and the South Bronx. "On the east side of Manhattan," writes Matthew Purdy in the *New York Times*, "in the neighborhood of United Nations diplomats and quiet streets of exclusive apartments, the gunfire might as well be in a distant city."

So why, when crime rates are flat, has crime become America's number one problem in the polls? Part of the answer is that fear of crime rises with publicity, especially on television. Polly Klaas's murder, the killing of tourists in Florida, the roadside murder of the father of former basketball star Michael Jordan, and the killing of commuters on a Long Island Railroad train sent a scary message to the majority of Americans who do not reside in the inner cities. The message seemed to be that random violence is everywhere and you are no longer safe—not in your suburban home, commuter train, or automobile—and the police and the courts cannot or will not protect you.

A recent and as yet unpublished study by Zimring and Hawkins argues that America's problem is not crime per se but random violence. They compare Los Angeles and Sydney, Australia. Both cities have a population of 3.6 million, and both are multicultural (although Sydney is less so). Crime in Sydney is a serious annoyance but not a major threat. My wife and I, like other tourists, walked through Sydney at

night last spring with no fear of being assaulted.

Sydney's crime pattern explains the difference. Its burglary rate is actually 10 percent higher than L.A.'s, and its theft rate is 73 percent of L.A.'s. But its robbery and homicide rates are strikingly lower, with only 12.5 percent of L.A.'s robbery rate and only 7.3 percent of L.A.'s homicide rate.

Americans and Australians don't like any kind of crime, but most auto thefts and many burglaries are annoying rather than terrifying. It is random violent crime, like a shooting in a fast-food restaurant, that is driving fear.

Violent crime, as I suggested earlier, is chiefly the work of young men between the ages of 15 and 24. The magnitude of teenage male involvement in violent crime is frightening. "At the peak age (17)," Delbert Elliott writes, "36 percent of African-American (black) males and 25 percent of non-Hispanic (white) males report one or more serious violent offenses." Nor are young women free of violence. One in five African-American females and one in ten white females report having committed a serious violent offense.

Blacks are more likely than whites to continue their violence into their adult years. Elliott considers this finding to be an important insight into the high arrest and incarceration rates of young adult black males. As teenagers, black and white males are roughly comparable in their disposition to violence. "Yet," Elliott writes, "once involved in a lifestyle that includes serious forms of violence, theft, and substance use, persons from disadvantaged families and neighborhoods find it very difficult to escape. They have fewer opportunities for conventional adult roles, and they are more deeply embedded in and dependent upon the gangs and the illicit economy that flourish in their neighborhoods."

The key to reformation, Elliott argues, is the capacity to make the transition into conventional adult work and family roles. His data show that those who successfully make the change "give up their involvement in violence." Confinement in what will surely be overcrowded prisons can scarcely facilitate that transition, while community-based programs like Delancey Street have proven successful.

Just as violent crime is concentrated among the young, so is drug use. Drug treatment must be a key feature of crime prevention both in prisons and outside. There is some good news here. In early 1994, President Clinton and a half-dozen cabinet members visited a Maryland prison that boasts a model drug-treatment program to announce a national drug strategy that sharply increases spending for drug treatment and rehabilitation. Although the major share of the anti-drug budget, 59 percent, is still allocated to law enforcement, the change is in the right direction. A number of jurisdictions across the country have developed promising court-ordered rehabilitation programs that seem to be succeeding in reducing both drug use and the criminality of drug-using offenders.

Drugs are one area where get-tough policies to disrupt supply have been a signal failure, both internationally and domestically. Interdiction and efforts to suppress drug agriculture and manufacture within such countries as Peru and Columbia have run up against what I have called "the Darwinian Trafficker Dilemma." Such efforts undercut the marginally efficient traffickers, while the fittest—the most efficient, the best organized, the most ruthless, the most corrupting of police and judges—survive. Cocaine prices, the best measure of success or failure, dropped precipitously in the late 1980s. They have recovered somewhat, but likely more from monopolistic pricing than government interference.

Domestically, get-tough intuitions have inspired us to threaten drug kingpins with long prison terms or death. Partly, we wish to punish and incapacitate them, but mostly we wish to deter others from following in their felonious paths. Unfortunately, such policies are undermined by the "Felix

Mitchell Dilemma," which I named in honor of the West Coast's once notorious kingpin, who received a life sentence in the 1980s, albeit a short one since he was murdered in federal prison. Mitchell's sentence and early demise did not deter drug sellers in the Bay Area. On the contrary, drug sales continued and, with Mitchell's monopolistic pricing eliminated, competition reduced the price of crack. The main effect of Mitchell's imprisonment was to destabilize the market, lower drug prices, and increase violence as rival gang members challenged each other for market share. Drug-related drive-by shootings, street homicides, and felonious assaults increased.

Recently, two of Mitchell's successors, Timothy Bluitt and Marvin Johnson, were arrested and sent to prison. So will peace finally come to the streets? "When a guy like Bluitt goes down, someone takes his place and gets an even bigger slice of the pie," an anonymous federal agent told the *San Francisco Chronicle* this past January. "The whole process is about consolidating turf and power."

Youngsters who sell drugs in Oakland, Denver, Detroit, South Central Los Angeles, Atlanta, and New York are part of generations who have learned to see crime as economic opportunity. This does not excuse their behavior, but it does intensify our need to break the cycle of poverty, abuse, and violence that dominates their lives. Prisons do not deter criminals partly because the Mitchells and Bluitts do not rationally calculate choices with the same points of reference that legislators employ. Drug dealers already face the death penalty on the streets.

History reminds us that gang violence is not novel, but it has not always been so lethal. The benchmark sociological study of the urban gang is Frederick Thrasher's research on 1,313 Chicago gangs published in 1927. The disorder and violence of these gangs appalled Thrasher, who observed that they were beyond the ordinary controls of police and other social agencies. He described gang youth, of which only 7.2 percent were "Negro," as "lawless, godless, wild." Why didn't more of them kill each other? They fought with fists and knives, not assault weapons.

Preventing Violent Crime

If violent crime prevention is our strategic aim, we need to test tactics. We need to go beyond the Brady Bill and introduce a tight regulatory system on weapons and ammunition, and we need more research and analysis to figure out what control system would be most effective. Successful gun and ammunition control would do far more to stem the tide of life-threatening violence than expensive prisons with mandated sentences.

The Senate crime bill, however, promises to increase the nation's rate of imprisonment. Besides its three strikes provisions, the legislation incorporates Senator Robert Byrd's $3 billion regional prison proposal. If enacted, states can apply to house their prisoners in 10 regional prisons, each with a capacity of 2,500 inmates.

To qualify, states must adopt "truth in sentencing" laws mandating that offenders convicted of violent crimes serve "at least 85 percent of the sentence ordered," the current average served by federal offenders. They also must approve pretrial detention laws similar to those in the federal system. And the states must ensure that four categories of crime—murder, firearms offenses resulting in death or serious bodily injury, sex offenses broadly defined, and child abuse—are punished as severely as they are under federal law. In effect, the Senate crime bill federalizes sentencing policy.

According to H. Scott Wallace of the National Legal Aid and Defender's Association, the mandate will add about 12,000 prisoners to the average state's correctional population but will offer only about 3 percent of the space needed to house them.

The most costly provision of the Senate crime bill—$9 billion worth—is its proposal for 100,000 more police, a measure endorsed by the administration. Its potential

value in reducing crime is unclear. We need more research on constructive policing, including community policing, which can be either an effective approach or merely a fashionable buzzword. We need to address the deficiencies of police culture revealed in the corruption uncovered by New York City's Mollen Commission and the excessive force revealed on the Rodney King beating videotape. More police may help in some places but not much in others. And they are very expensive.

A leading police researcher, David H. Bayley, has explained the ten-for-one rule of police visibility: ten cops must be hired to put one officer on the street. Only about two-thirds of police are uniformed patrol officers. They work three shifts, take vacation and sick leave, and require periodic retraining. Consequently, 100,000 new officers will mean only about 10,000 on the street for any one shift for the entire United States.

Even if we were to have more and better police, there is no guarantee they will deter crime. Criminologists have found no marginal effect on crime rates from putting more cops on the street. Indeed, Congress and the president need look no farther than down their own streets to discover that simply increasing police doesn't necessarily make the streets safe. Washington, D.C., boasts the highest police-per-resident ratio in the nation with one cop for every 150 civilians. It is also America's homicide capital.

We might get more bang for the patrolling buck by investing in para-police, or the police corps, or private police, rather than by paying for more fully sworn and expensive officers. Under the leadership of former Chief Raymond Davis, Santa Ana, California, had the most effective community-oriented policing department in the nation. Davis, who faced a weak police union, could innovate with community- and service-oriented civilians who wore blue uniforms but carried no guns—a new and cost-effective blue line.

The crime bill allocates approximately $3 billion for boot camps, another get-tough favorite. Criminologist Doris MacKenzie has found, contrary to intuition, no significant difference between camp graduates and former prison inmates in the rate at which they return to prison. Similarly, a General Accounting Office report concluded that there is no evidence that boot camps reduce recidivism.

If the public wants boot camps primarily for retribution, it doesn't matter whether they work. Under the Eighth Amendment's bar on cruel and unusual punishment, we're not permitted to impose corporal punishment with whips and clubs. In boot camps, however, we can require painful exercises and hard and demeaning labor to teach these miscreant youth a message of retribution. But if correctional boot camps are intended to resocialize youth and to prepare for them noncriminal civilian life, the camps are inadequate.

We need to experiment with boot camps plus—the "plus" including skills training, education, jobs, community reconstruction. Conservatives who stress moral revitalization and family values as an antidote to youth crime have the right idea. Yet they rarely, if ever, consider how important are the structural underpinnings—education, opportunity, employment, family functioning, community support—for developing such values.

Eventually, we are going to have to choose between our retributive urges and the possibilities of crime prevention. We cannot fool ourselves into thinking they are the same. The punishment meted out by criminal law is a blunt and largely ineffectual instrument of public protection. It deters some, it incapacitates others, and it does send a limited moral message. But if we want primarily to enhance public safety by preventing crime, we need to mistrust our intuitions and adopt strategies and tactics that have been researched, tested, and critically evaluated. In short, we need to embrace the values of the enlightenment over those of the dark ages.♦

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Contra
Costa
County

Gary T. Yancey
District Attorney

February 7, 1994

Peter Gambee
Legislative Assistant
Hon. Richard K. Rainey
4015 Capital Building
Sacramento, California 95814

Dear Peter:

Enclosed is a revised version of the memorandum regarding AB 971 which Gary Yancey sent by FAX to Assemblyman Rainey last Friday. It has been revised to cite correct statutory references as they now appear in the current version of the bill.

In addition, I have deleted two parts of the previous version of the memorandum, which were found on pages 2 and 3 of the prior memorandum, because the problems they addressed have been corrected in the current version of AB 971.

Mr. Yancey has asked me to inform you that this corrected version of my memorandum is approved for your release to other appropriate persons.

Sincerely,

L. Douglas Pipes
Deputy District Attorney

cc: Greg Topten, Executive Director, CDAA

February 7, 1994

TO: GARY T. YANCEY, District Attorney

FROM: L. Douglas Pipes, Deputy District Attorney

SUBJECT: Assembly Bill 971 (Jones) "Three Strikes and You're Out"

I have carefully reviewed the provisions of the Assembly Bill 971 (Jones), the legislative version of the "Three Strikes and You're Out" Initiative. I have also discussed the provisions of this bill with Charles Nickel, Deputy District Attorney for San Diego County.

The conclusion that I have reached as the result of my review is that while the purposes of Assembly Bill 971 are laudable and entitled to our support, there are some serious problems in the drafting of AB 971. Moreover, AB 971 will produce some adverse consequences to law enforcement that I am certain are unintended by the authors of AB 971. If these drafting problems can be corrected, and the unintended adverse consequences of the bill eliminated, its passage would be a result that prosecutors could enthusiastically support.

My analysis is as follows:

I. DRAFTING AND TECHNICAL PROBLEMS.

1. AB 971 contains ambiguous terms and language.

A. Section 667(e)(1) provides that the determinate term for a defendant who has one prior felony conviction "shall be twice the term otherwise provided as punishment for the current felony conviction."

The phrase "determinate term" could mean either the "base" term, or the "principle" term (which is the base term plus enhancements). The bill does not inform us whether "determinate term" means "base term" or "principle term."

B. Section 667(e)(2)(A)(i) provides that the term for the current felony conviction of a defendant who has two or more prior felony convictions shall be life imprisonment with a minimum term that may be calculated as "three (3) times the term otherwise

provided . . . ."

The phrase "the term otherwise provided" suffers from the same ambiguity as described above for the phrase "determinate term."

C. Section 667(c)(5) provides that the "total amount of credits . . . shall not accrue until the defendant is physically placed in the State Prison."

This language may mean that the defendant does not begin to "earn" credits until he or she has reached state prison. It may also mean that the credits do not "vest" until he or she has reached prison, but that time served in county jail would then be credited against the sentence. The language "shall not accrue" needs to be rewritten to read "shall not begin to be earned."

2. AB 971 contains inconsistent terminology.

A. Section 667(d) uses the phrase "prior conviction of a felony." Sections 667(c) (e) (f) & (g) use the phrase "prior felony conviction."

These phrases clearly refer to the same item. A basic tenet of statutory drafting is to always use precisely the same language throughout a statute when referring to the same item. Use of differently worded phrases can result in litigation over the meanings of the different phrases.

B. Section 667(e)(2)(A)(iii) uses a term "underlying conviction," a term that is not used anywhere else in the bill and which is not defined in the bill.

The term "underlying conviction" probably means "current felony conviction," a term that is utilized throughout the bill. The same advice applies to this use of different terms to refer to the same item as is discussed above regarding prior felony convictions.

3. AB 971 omits necessary statutory language.

A. Section 667(f)(2) provides that the prosecutor "may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to California Penal Code Section 1385, or if there is insufficient evidence to prove the prior conviction." But the same section gives the Court the power to grant the motion to dismiss or strike only for

insufficient evidence.

B. Thus, AB 971 gives prosecutors the power to move to strike or dismiss a prior conviction in the furtherance of justice, but does not give the court the power to grant a prosecutor's motion on that basis. I am certain that this inconsistency was not intended by the authors of AB 971.

II. ADVERSE CONSEQUENCES RESULTING FROM IMPLEMENTATION OF AB 971.:

The drafting and technical problems discussed above are easily corrected with appropriate technical changes. Of far greater concern, however, are adverse consequences that implementation of AB 971 would produce to law enforcement. I am certain that these adverse consequences are not intended by the authors of AB 971. These adverse consequences are as follows:

1. AB 971 will REDUCE existing maximum sentences for habitual criminals.

   A. AB 971 appears to be based on the assumption that the its provisions increase prison terms for repeat offenders. The bill may achieve that purpose in some cases.

   B. However, because of current statutory provisions governing sentencing contained in Penal Code section 1170 et seq., which AB 971 does not change, the habitual offender sentence provisions of the bill will actually reduce existing maximum sentences for many habitual criminals. The reduction will occur in this manner:

      1. Section 667(f)(1) requires that the sentencing provisions established by the bill be used in every case in which its provisions are applicable. "Notwithstanding any other law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d)."

      2. For a defendant who has one serious prior felony conviction, the fact of that prior felony conviction is the reason to double the defendant's sentence on the base term. [667(e)(1)].

      3. Penal Code section 1170(b), which AB 971 does not amend or eliminate, provides that a Court may not

use the same fact to increase a defendant's base sentence and also to enhance his or her sentence.

The California Supreme Court held in People v. Coleman, 48 Cal.3d 112, 163-164 (1989) that a prior felony conviction may not be used to justify imposition of an aggravated term and also to enhance the defendant's sentence. The Court further held that the same fact may not be used to impose an aggravated term and a consecutive sentence.

4. Thus, the Court must forego imposition of the five year enhancement provided by Penal Code section 667(a) for prior serious felonies in favor of a doubled base term as provided in section 667(e)(1).

This trade would commonly result in a reduced maximum sentence. As an example, consider the case of a defendant who has a serious prior felony conviction (e.g., residential burglary), who commits a new serious felony (strong-arm robbery), and there are no other aggravating facts that would justify imposition of an aggravated term for the robbery.

Under existing law the maximum sentence for this defendant is 8 years (3 year base term, and a 5 year enhancement for the prior serious felony). Under AB 971 the maximum sentence for this defendant would be 6 years (doubled base term of 6 years).

C. The effective loss of the 5 year enhancement for serious felony prior convictions will result in many maximum sentences being reduced by AB 971.

2. AB 971 will endanger our ability to prosecute a capital case on any defendant who has multiple prior felony convictions.

A. Section 667(f)(1) provides that "subdivisions (b) to (i), inclusive, [section 667] shall be applied in every case in which a defendant has a prior felony conviction . . . . ."

1. AB 971 does not exclude prosecutions under Penal Code sections 190 et seq. from the reach of Section 667(f)(1).

2. This may well mean that the maximum sentence for a defendant who is convicted of first degree murder with special circumstances and who has more than one prior felony conviction is the sentence provided in section 667(e)(2), a life sentence with a 25 year minimum (or other minimum term as provided in section 667(e)(2)(A)(i)(iii)).

3. The anomalous result of this interpretation would be that we could prosecute and receive a death sentence or a sentence of life without parole for a defendant who has no prior felony convictions or who has only one prior felony conviction, but we could not obtain a death sentence or a sentence of life without parole for a defendant who had two or more prior felony convictions.

This result, which appears to be compelled by the stautory language of AB 971, would be the most significant adverse consequence produced by AB 971. I am certain that the proponents of AB 971 would not want their bill to produce this result.

3. AB 971 would produce sentences that would be subject to serious constitutional challange.

A. The following provisions of AB 971 combine to produce potential sentences that would be cruel and unusual punishment under California Constitution, article I, section 17:

1. Prosecutors must plead and prove each prior felony conviction. [Section 667(f)(1)].

2. The Court may dismiss or strike a prior felony conviction only for insufficient evidence to prove that prior conviction. [Section 667(f)(2)].

3. There is no requirement that the prior felony convictions be "separate." Thus, a defendant may become a two-time felon eligible for life imprisonment with no parole for 25 years on his or her next felony (no matter how de minimus the felony) as a result of a single case with only two counts.

4. The prior felony convictions may consist of juvenile adjudications [Section 667(d)(3)] in which the defendant had no right to and did not receive a jury trial.

5. The prosecutor may be precluded by the language of AB 971 from exercising prosecutorial discretion to charge the new crime as a misdemeanor. Section 667(f)(1) requires that "[n]otwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in this statute." Thus, section 667(f)(1) would appear to override the prosecutor's discretion to charge wobblers as anything other than felonies when the defendant has a prior felony conviction.

6. The new felony ("current felony conviction") may be <u>any felony.</u> No felony is excluded from the reach of this statute, as long as the defendant has a prior felony conviction for a violent or serious felony.

   Thus, a defendant with two prior felony convictions would face life imprisonment with no parole for 25 years for a current felony charge as follows:

   a. Penal Code section 484-666 (Petty theft with Prior Conviction of Theft). Thus, a theft of an apple from a grocery store by a hungry man or woman would subject the defendant to life imprisonment with no parole for 25 years.

   b. Health and Safety Code section 11350 (Possession of Cocaine). Possession of only .02 grams of cocaine would subject the defendant to life imprisonment with no parole for 25 years.

   c. Penal Code section 470 (Forgery). Forgery of a $10 check would subject the defendant to life imprisonment with no parole for 25 years.

   d. Penal Code section 496 (Possession of Stolen Property). Possession of $10 of stolen property would subject the defendant to life imprisonment with no parole for 25 years.

B. The Constitutional prohibition against cruel or unusual punishment forbids punishment for crimes that is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends

fundamental notions of human dignity." In re Lynch, 8 Cal.3d 410, 424 (1972).

In In re Lynch, supra, the Supreme Court held that an indeterminate life-maximum sentence for a second-offense indecent exposure was unconstitutionally excessive.

In In re Foss, 10 Cal.3d 910 (1974), the Supreme Court held unconstitutional a law precluding parole consideration for ten years for recidivist narcotics offenders.

In In re Rodriguez, 14 Cal.3d 649 (1975), the Supreme Court held unconstitutional as cruel and unusual punishment a prison sentence that lasted 22 years for a defendant convicted of a nonviolent act of child molestation.

C. A sentencing scheme that produces life sentences with no parole for 25 years for crimes as outlined above should shock the conscience of ordinary people. In my judgment it will shock the conscience of the California Supreme Court and the federal courts. A successful constitutional challenge would invalidate convictions in thousands of cases statewide whose sentences were imposed under its provisions.

The provisions of AB 1568 (Rainey) do not suffer from the same problems I have identified in AB 971 (Jones).

It is possible to resolve the problems I have identified with AB 971 while still maintaining and furthering the laudable purposes of that bill. Deputy District Attorney Charles Nickel of the San Diego District Attorney's Office has drafted a proposed bill that incorporates the best features of AB 971 and AB 1568 in a statute whose provisions are workable and harmonious. I recommend that his draft be provided to Assemblyman Rainey for his use in attempting to reach agreement with the proponents of AB 971.

THE RAINEY SENTENCING BILL
A.B. 1568

PERSONS TARGETED BY BILL:

1. Any person who has a prior conviction for a violent felony [Penal Code section 667.5(c)], and who is charged with commission of a new violent felony; or

2. Any person who has at least two separate prior convictions for serious or violent felonies, and who is charged with commission of a new serious or violent felony; or

3. Any person who has at least two separate prior convictions for violent felonies, and who is charged with commission of a new serious felony.

CRIMES TARGETED BY BILL:

1. Any violent felony as listed in Penal Code section 667.5(c).

2. Any serious felony as listed in Penal Code section 1192.7(c), except residential burglary and grand theft - firearm.

PRIOR CONVICTIONS TARGETED BY BILL:

1. Conviction for any prior separate violent felony listed in Penal Code section 667.5(c), as amended by the bill [the bill amends six existing violent felonies and adds six new violent felonies].

2. Conviction for any prior separate serious felony listed in Penal Code section 1192.7(c), as amended by the bill [the bill adds seven new serious felonies].

SENTENCING CONSEQUENCES OF NEW VIOLENT FELONY CONVICTION BY PERSON WHO HAS NO PRIOR VIOLENT OR SERIOUS CONVICTIONS.

1. CREDITS AGAINST SENTENCE. [Penal Code section 2933(f)].

   A. No conduct credits against sentence for any person sentenced to prison for at least one violent felony.

SENTENCING CONSEQUENCES OF NEW VIOLENT FELONY CONVICTION BY TARGETED PERSON WHO HAS SERVED ONE PRIOR SEPARATE PRISON TERM FOR A VIOLENT FELONY.

1. INCREASED ENHANCEMENT FOR PRIOR PRISON TERM.

   A. Court must impose 10 year sentence on defendant for prior prison term for violent felony.. This is increase from existing 3 year sentence. [Penal Code section 667.5(a)].

   B. Sentence for prior prison term for violent felony not subject to "washout." Existing law provides a washout for 10 year period of no prison custody and no commission of new offense resulting in felony conviction.. [Penal Code section 667.5(a)].

2. CREDITS AGAINST SENTENCE. [Penal Code section 2933(f)].

   A. No conduct credits against sentence for any person sentenced to prison for at least one violent felony.

SENTENCING CONSEQUENCES OF NEW CONVICTION OF SERIOUS OR VIOLENT FELONY BY TARGETED PERSON WHO HAS TWO OR MORE VIOLENT OR SERIOUS FELONY CONVICTIONS.

1. MANDATORY IMPOSITION OF SENTENCE FOR SERIOUS OR VIOLENT PRIORS. [Penal Code section 1385(b)].

   A. A judge may not strike a prior conviction of a violent felony charged to enhance sentence under Penal Code section 667.1. [Penal Code section 1385(b)].

2. MANDATORY STATE PRISON. [Penal Code section 667.1(g)].

   A. No probation or State Prison Suspended Sentences. [Penal Code section 667.1(g)].

3. LIFE IMPRISONMENT WITH NO PAROLE FOR AT LEAST 25 YEARS WHEN:

   A. The defendant is convicted of a new <u>serious</u> felony and that defendant has:

      1. At least <u>two</u> prior separate convictions for <u>serious</u> felonies; or

      2. One prior separate conviction for a <u>serious</u> felony and one prior separate conviction for a <u>violent</u> felony. [Penal Code section 667.1(a)].

4. LIFE IMPRISONMENT WITH NO POSSIBILITY OF PAROLE WHEN:

   A. The defendant is convicted of a new violent felony and that defendant has:

      1. At least two prior separate convictions for serious or violent felonies. [Penal Code section 667.1(b)].

   B. The defendant is convicted of a new serious felony and that defendant has:

      1. At least two prior separate convictions for violent felonies. [Penal Code section 667.1(c)].

5. CREDITS AGAINST SENTENCE. [Penal Code section 2933(f)].

   A. No conduct credits against sentence for any person sentenced to prison for at least one violent felony.

"THREE STRIKES AND YOU'RE OUT"
REYNOLDS INITIATIVE

PERSONS TARGETED BY INITIATIVE:

1. Any person who has a prior conviction for a violent felony [Penal Code section 667.5(c)]; or

2. Any person who has a prior conviction for a serious felony [Penal Code section 1192.7(c)].

CRIMES TARGETED BY INITIATIVE:

1. Any felony committed by a targeted person.

PRIOR CONVICTIONS TARGETED BY INITIATIVE:

1. Conviction for any violent felony listed in Penal Code section 667.5(c), without respect to the sentence imposed for that conviction.

2. Conviction for any serious felony listed in Penal Code section 1192.7(c), without respect to the sentence imposed for that conviction.

3. Juvenile adjudication of wardship for a violent or serious felony [those listed in Penal Code sections 667.5(c) and 1192.7(c) and in Welfare and Institutions Code section 707(b)] committed by a juvenile who was at least 16 years of age at the time of the offense.

SENTENCING CONSEQUENCES OF NEW FELONY CONVICTION BY TARGETED PERSON WHO HAS ONLY ONE (1) PRIOR VIOLENT OR SERIOUS FELONY CONVICTION:

1. MANDATORY STATE PRISON. [Section 1170.12(a)(2)(4)].

   A. No probation or State Prison Suspended Sentence. [Section 1170.12(a)(2)].

   B. No diversion. [Section 1170.12(a)(4)].

   C. No CRC or Facility other than State Prison. [Section 1170.12(a)(4)].

2. NO AGGREGATE TERM LIMITATION. [Section 1170.12(a)(1)].

   A. The effect of this provision is to delete the "twice the base term" limitation of section 1170.1(g).

B. The effect of this provision is also to delete the five year cap on subordinate terms for consecutive sentences for nonviolent felonies of section 1170.1(a).

3. MANDATORY CONSECUTIVE SENTENCING. [Section 1170.12(a)(6)(7)(8)].

A. Mandatory consecutive sentencing on each count for current convictions not arising from same set of operative facts and not committed on same occasion.

B. This appears to mean that sentencing on covered counts must be consecutive to each other, and consecutive to present sentences being served.

4. DETERMINATE TERM FOR CURRENT OFFENSE IS DOUBLED. [Section 1170.12(c)(1)].

A. "[T]he determinate term . . . shall be twice the term otherwise provided as punishment for the current felony conviction."

B. QUESTION: Does this mean that all three terms (mitigated, middle & aggravated) provided as sentence choices are all doubled? If the intent is to double all three sentence choices, the bill should be redrafted to clearly say so.

C. QUESTION: Does this provision mean that only the "base" sentence is doubled? Or does it mean that the "principal" sentence (base sentence plus its enhancements - use clauses, GBI clauses, etc.) is doubled? If the intent is to double the length of the "principle" sentence, which includes sentence enhancements, the bill should be redrafted to clearly apply to the "principle" term.

5. MINIMUM TERM FOR INDETERMINATE CURRENT OFFENSE IS DOUBLED. [Section 1170.12(c)(1)].

6. CREDITS AGAINST SENTENCE. [Section 1170.12(a)(5)].

A. Credits earned under Article 2.5 shall not exceed one-fifth of the term imposed. This appears to be a lid on credits already provided by law, and not an enactment of a new credit to which everyone would be entitled.

B. Credits shall not accrue until the defendant has been physically placed in state prison.

C. QUESTION: Is the intent of this provision to prevent a prisoner from "beginning" to earn credits until he or she reaches state prison, so that no incarceration time prior to a prisoner's reaching the state prison can be counted as credit? If this is the intent, the Initiative should be redrafted to say "shall not begin to be earned until the defendant is physically placed in the State Prison."

SENTENCING CONSEQUENCES OF NEW FELONY CONVICTION BY TARGETED PERSON WHO HAS TWO OR MORE PRIOR VIOLENT OR SERIOUS FELONY CONVICTIONS:

1. MANDATORY STATE PRISON. [Section 1170.12(a)(2)(4)].

   A. No probation or State Prison Suspended Sentence. [Section 1170.12(a)(2)].

   B. No diversion. [Section 1170.12(a)(4)].

   C. No CRC or Facility other than State Prison. [Section 1170.12(a)(4)].

2. NO AGGREGATE TERM LIMITATION. [Section 1170.12(a)(1)].

   A. The effect of this provision is to delete the "twice base term" limitation of section 1170.1(g).

   B. The effect of this provision is also to delete the five year cap on subordinate terms for consecutive sentences for nonviolent felonies of section 1170.1(a).

3. MANDATORY CONSECUTIVE SENTENCING. [Section 1170.12(a)(6)(7)(8)].

   A. Mandatory consecutive sentencing on each count for current convictions not arising from same set of operative facts and not committed on same occasion.

   B. This appears to mean that sentencing on covered counts must be consecutive to each other, and consecutive to present sentences being served.

4. TERM FOR CURRENT OFFENSE IS LIFE IMPRISONMENT. [Section 1170.12(c)(2)(A)].

5. MINIMUM TERM FOR CURRENT OFFENSE IS GREATER [Sic: "greatest"] OF:

A. Triple the determinate term otherwise provided. [Section 1170.12(c)(2)(A)(i)].

1. QUESTION: Does this provision mean that all three terms (mitigated, middle & aggravated) provided as sentence choices are all tripled? If the intent is to triple all three sentence choices, the Initiative should be redrafted to clearly say so.

2. QUESTION: Does this provision mean that only the "base" sentence is tripled? Or does it mean that the "principal" sentence (base sentence plus its enhancements - use clauses, GBI clauses, etc.) is tripled? If the intent is to triple the length of the "principle" sentence, which includes sentence enhancements, the Initiative should be redrafted to clearly apply to the "principle" term.

B. Twenty Five (25) years. [Section 1170.12(c)(2)(A)(ii)].

C. The term determined by the Court under section 1170 for the "underlying" conviction, including enhancements, or any period prescribed by section 190 or section 3046. [Section 1170.12(c)(2)(A)(iii)].

1. QUESTION: Does the term "underlying conviction" mean the same thing as the "current felony conviction?" If it means the same thing, the Initiative should be redrafted to substitute the term "current felony conviction" for "underlying conviction."

6. LIFE SENTENCE BEGINS WHEN PRISONER WOULD HAVE OTHERWISE BEEN RELEASED FROM PRISON. [Section 1170.12(c)(2)(B)].

A. QUESTION: The statutory language provides: "The indeterminate term . . . shall not be merged <u>therein</u> . . . ." To what does the word "therein" refer?

B. QUESTION: Does this provision mean that the prisoner begins to serve his or her life sentence at the time that he or she would have been released on parole after serving the term provided by existing law? Or

does it mean that that the prisoner begins to serve the life sentence at the expiration of the statutory minimum term for the current offense? The Initiative needs to be redrafted to specify what it is that shall not be merged with the indeterminate term.

7. CREDITS AGAINST SENTENCE. [Section 1170.12(a)(5)].

A. Credits earned under Article 2.5 shall not exceed one-fifth of the term imposed. This appears to be a lid on credits already provided by law, and not an enactment of a new credit to which everyone would be entitled.

B. Credits shall not accrue until the defendant has been physically placed in state prison.

C. QUESTION: Is the intent to prevent a prisoner from "beginning" to earn credits until he or she reaches state prison, so that no incarceration time prior to a prisoner's reaching the state prison can be counted as credit? If this is the intent, the Initiative should be redrafted to say "shall not <u>begin to be earned</u> until the defendant is physically placed in the State Prison."

What's wrong with the Jones-Costa AB 971 and their identical 3-Strikes Initiative?

By Joe Klaas, Grandfather of Polly Klaas

1. Line one of the initiative and law reads: "We, the undersigned, registered, qualified voters of California, residents of_____County or City and County, hereby propose amendments to the Penal Code, relating to prison sentences for those who commit a felony and have been previously convicted of serious and/or violent felony offenses...." This imprudent new law and identical initiative also says: "It is the intent of the People...to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."

Strike 3 then is any felony at all. For anyone convicted of a prior felony in California, a misdemeanor becomes a felony. Anyone who qualifies for Strike 3 must be sentenced to 25-years-to-life for writing a bad check, shoplifting, or swiping a pack of gum.

2. Strike 1 of this law and initiative can be a prior juvenile adjudication of any serious felony type crime such as burglary of an unoccupied dwelling, or furnishing methamphetamines to another minor. Strike 1 can be taking

a basketball from a garage, or sharing speed with another kid at a high school party.

Twenty years later the Jones-Costa Bill, signed into law and also placed on the ballot to keep it's many flaws from being amended, gives the kid who picked up 2 strikes by stealing a basketball and sharing drugs 25-years-to-life for bouncing a check.

3. An unarmed burglary for Strike 1 gets a determinate sentence less 50% off for good time. A second unarmed burglary becomes Strike 2 which doubles the first sentence, then allows 20% off for good time. Then Strike 3 kicks in with 25-years-to-life for a misdemeanor, less 20% good time. A lawbreaker with two non-violent priors could get life for spitting on the sidewalk.

4. According to a Department of Corrections census of California's current 120,000 prison population, 70% of those who would qualify for Jones-Costa sentencing are common, non-violent burglars. Are these the dangerous criminals we want to lock up and throw away the key?

Not counting jury trial costs for such hard sentencing for soft crimes, the Department of Corrections says building new prisons alone over 24 years will be 21-billion dollars.

4. Truth-in-sentencing legislation before Congress requires not more than 15% of maximum sentences be given off, or states won't get federal funding for prison construction or for placing excess prisoners in federal penitentiaries. The flawed new Strike 3 law allows 50% off on Strike 1, and 20% off on Strikes 2 and 3. It will keep California from getting any of the proposed 10½-billion dollars for increased housing of convicts.

5. The Polly Klaas Memorial Bill(Rainey AB 1568)eliminates all unarmed, non-violent burglaries of unoccupied houses at a saving of 70%. That will save us 15-billion dollars for prison construction alone, in addition to staggering costs of jury trials for non-violent burglars and juveniles. The Polly Klaas Referendum, which we now ask the legislature to place on the ballot against the 3 Strikes Initiative, does not include non-violent juvenile crimes.

Just by eliminating non-violent burglaries alone, the Polly Klaas Referendum will cut prison construction from 21-billion dollars down to 6.3-billion dollars, a saving in tax

dollars of nearly 15-billion dollars.

The Polly Klaas Referendum deals only with violent crimes such as mayhem, maiming, murder, armed robbery, sexual assault on children, kidnapping, forcible rape, attempted murder, threat of force, and murder. It allows no time off for good behavior or work credits.

For a defendant with no priors:

Robbery with a gun with 50% good time off under Jones-Costa gets 5 years.
Under the Polly Klaas Referendum, it gets 10 years.

Forcible rape under Jones-Costa gets 4 years.
Under the Polly Klaas Referendum, the time served is 8 years with no time off.

Under Jones-Costa's Strike 2, the armed robber gets 16 years after 20% off for good time.
Under the Polly Klaas Referendum, actual term served is 20 years with no time off.

Time served for forcible rape under Jones-Costa Strike 2 will be 12.8 years.

Under the Polly Klaas Referendum, the rapist serves 18 years.

For a defendant with two priors:

Jones-Costa sentences robbery with a gun to 25 years to life, with 20 years served after 20% off for good time. Polly Klaas gives the armed robber life without parole.

The forcible rapist on Strike 3 under Jones-Costa serves 20 or 25 years to life, with or without 20% good time off. Polly Klaas gives the same rapist life without parole.

6. The Jones-Costa law and initiative are harder on burglars and softer on all violent criminals than the Polly Klaas referendum.

7. The Polly Klaas bill does not give 3 Strikes to those who commit sexual assault on children, nor to kidnappers of children for that purpose. It protects children by putting such predators away for life without parole on the second conviction. Strike 2 and they're out. We throw away the key.
Jones-Costa gives sex criminals against children a third chance, and lets them loose to do it again after 20 years

with 5 years off for good time.

There are more not-too-fine differences which make the Polly Klaas Referendum, at a savings of 70%, the strongest anti-violent-crime measure being offered to California tax-payers. It's a lot harder on violent crime than Jones-Costa at a whole lot less cost to us all.

Perhaps the strangest flaw in the Jones-Costa law and initiative is that it eliminates the death penalty for 2nd and 3rd serious or violent felony murderers. In its mandatory sentences for 2nd and 3rd time offenders, the death sentence is simply not included. Whoever wrote the penalty requirements apparently forgot to include the sentence of death.
Since sentencing requirements of Jones-Costa don't kick in until Strike 2, apparently a 1st-degree murderer can get the death penalty only if he or she has never before been found guilty of a serious or violent crime.

Arguing that the intent was to include death by execution doesn't impress me. My degrees aren't in law, they're in English. In plain English, there's no hint of death in the required sentences for Strikes 2 and 3 of the Jones-Costa law and initiative.

The Richard Rainey-Polly Klaas Memorial Referendum includes the death penalty for 1st-degree murder, and life without parole on Strike 2 for sexual predators of children. With her referendum, Polly Klaas will save a lot of taxpayers' money, and a lot of our childrens' lives.

The Jones-Costa law and initiative, endorsed by Mike Reynolds, Mike Huffington, Dan Lungren, the California Rifle and Pistol Association, the Gun Owners of America, and the National Rifle Association, is too expensive, too hard on soft crime, and too soft on hard crime to suit the sponsors of the Rainey-Polly Klaas Memorial Referendum, which is supported by the California District Attorney's Association, the California State Sheriff's Association, the Peace Officer's Research Association of California, the Parents of Murdered Children, the Polly Klaas family, and the Polly Klaas Foundation.

Senators Joe Biden and Orin Hatch of the U.S. Senate Judiciary Committee hope to make the Polly Klaas Law the model for federal sentencing, and the example for other states to follow. So let's pass it in California.

Joe Klaas

Box 222614

Carmel, CA 93922

(408)626 1960

INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY TO THE VOTERS

The Attorney General of California has prepared the following title and summary of the chief purposes and points of the proposed measure:

SENTENCE ENHANCEMENT. REPEAT OFFENDERS. INITIATIVE STATUTE.

Provides increased sentences for convicted felons who have previously been convicted of violent or serious felonies such as murder, mayhem or rape. Convicted felons with one prior conviction would receive twice the normal sentence for the new offense. Convicted felons with two or more prior convictions would receive three times the normal sentence for the new offense or 25 years to life, whichever is greater. Includes as prior convictions certain felonies committed by juveniles over 16 years of age. Reduces sentence reduction credit which may be earned by these convicted felons. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: Annual and one time costs to the state of several billions of dollars would be incurred as a result of additional and longer state prison commitments; some savings to local government in an unknown amount would result from the shifting of sentenced offenders from local to state responsibility and fewer prosecutions of repeat offenders.

To the Honorable Secretary of State of California:

We, the undersigned, registered, qualified voters of California, residents of _____ County or City and County, hereby propose amendments to the Penal Code, relating to prison sentences for those who commit a felony and have been previously convicted of serious and/or violent felony offenses, and petition the Secretary of State to submit the same to the voters of California for their adoption or rejection at the next succeeding general election or at any special statewide election held prior to the general election or otherwise provided by law. The proposed statutory amendments read as follows:

It is the intent of the People of the State of California in enacting this measure to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

SECTION 1. Section 1170.12 is added to the Penal Code, to read:

1170.12 (a) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in [proposed] California Penal Code Section 1170.12 (b), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than State Prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with *Section 3050*) *of Chapter 1 of Division 3* of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth (1/5) of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the State Prison.

(6) If there is a current conviction for more than one (1) felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in 1170.12(a)(6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:

(1) Any offense defined in California Penal Code Section 667.5(c) as a violent felony or any offense defined in California Penal Code Section 1192.7(c) as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from State Prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in State Prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in California Penal Code Section 667.5(c) or California Penal Code Section 1192.7(c).

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was sixteen (16) years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in Section 1170.12(b) as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2) *(A)* If a defendant has two (2) or more prior felony convictions as defined in Penal Code Section 1170.12(b)(1) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three (3) times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five (25) years, or

(iii) the term determined by the court pursuant to California Penal Code Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with California Penal Code Section 1170) of Title 7 of Part 2, or any period prescribed by California Penal Code Section 190 or 3046.

(B) The indeterminate term described in Penal Code Section 1170.12(c)(2)*(A)* shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in Penal Code 1170.12(c) (2) *(A)* shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d) (1) Notwithstanding any other law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this statute. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to California Penal Code 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.

(e) Prior felony convictions shall not be used in plea bargaining as defined in California Penal Code Section 1192.7(b). The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in Section 1170.12(d) (2).

SECTION 2. All references to existing statutes are to statutes as they existed on June 30, 1993.

SECTION 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 4. The provisions of this measure shall not be amended by the Legislature except by statute passed in each house by roll call vote entered in the journal, two-thirds (2/3) of the membership concurring, or by a statute that becomes effective only when approved by the electors.

INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY TO THE VOTERS

The Attorney General Of California has prepared the following title and summary of the chief purposes and points of the proposed measure:

SENTENCE ENHANCEMENT. REPEAT OFFENDERS. INITIATIVE STATUTE. Provides increased sentences for convicted felons who have previously been convicted of violent or serious felonies such as murder, mayhem or rape. Convicted felons with one prior conviction would receive twice the normal sentence for the new offense. Convicted felons with two or more prior convictions would receive three times the normal sentence for the new offense or 25 years to life, whichever is greater. Includes as prior convictions certain felonies committed by juveniles over 16 years of age. Reduces sentence reduction credit which may be earned by these convicted felons. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: Annual and one time costs to the state of several billions of dollars would be incurred as a result of additional and longer state prison commitments; some savings to local government in an unknown amount would result from the shifting of sentenced offenders from local to state responsibility and fewer prosecutions of repeat offenders.

NOTICE TO THE PUBLIC

THIS PETITION MAY BE CIRCULATED BY A PAID SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE THE RIGHT TO ASK.

IMPORTANT: All areas in red must be completed and signed in ink in your own hand writing.

This column for official use only.

1.	Print Your Name:	Residence Address ONLY:		
	Your Signature as Registered to Vote:	City:	Zip:	
2.	Print Your Name:	Residence Address ONLY:		
	Your Signature as Registered to Vote:	City:	Zip:	
3.	Print Your Name	Residence Address ONLY:		
	Your Signature as Registered to Vote:	City:	Zip:	
4.	Print Your Name:	Residence Address ONLY:		
	Your Signature as Registered to Vote:	City:	Zip:	
5.	Print Your Name:	Residence Address ONLY:		
	Your Signature as Registered to Vote:	City:	Zip:	

DECLARATION OF CIRCULATOR

(to be completed after above signatures have been obtained)

I, _____ *(Print Name)* am registered to vote in the County (or City and County) of _____

My residence address is _____ *(Address, city, state, zip)*

I circulated this section of the petition and saw each of the appended signatures being written. Each signature on this petition is to the best of my information and belief, the genuine signature of the person whose name it purports to be. All signatures on this document were obtained between the dates of _____ *(Month, day, year)* and _____ *(Month, day, year)*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on _____ *(Month & day)* 19____ at _____ *(City & state)*

URGENT: All signatures invalid if you fail to sign as circulator! _____ *(Complete Signature of Circulator)*

State of California

OFFICE OF THE SECRETARY OF STATE

April 6, 1994

TO: All County Clerks/Registrars of Voters (94089)

Pursuant to Section 3523 of the Elections Code, I hereby certify that on April 6, 1994 the certificates received from the County Clerks or Registrars of Voters by the Secretary of State established that the Initiative Statute, SENTENCE ENHANCEMENT. REPEAT OFFENDERS has been signed by the requisite number of qualified electors needed to declare the petition sufficient. The SENTENCE ENHANCEMENT. REPEAT OFFENDERS. INITIATIVE STATUTE is, therefore, qualified for the November 8, 1994 General Election.

SENTENCE ENHANCEMENT. REPEAT OFFENDERS. INITIATIVE STATUTE. Provides increased sentences for convicted felons who have previously been convicted of violent or serious felonies such as murder, mayhem or rape. Convicted felons with one prior conviction would receive twice the normal sentence for the new offense. Convicted felons with two or more prior convictions would receive three times the normal sentence for the new offense or 25 years to life, whichever is greater. Includes as prior convictions certain felonies committed by juveniles over 16 years of age. Reduces sentence reduction credit which may be earned by these convicted felons. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: Annual and one time costs to the state of several billions of dollars would be incurred as a result of additional and longer state prison commitments; some savings to local government in an unknown amount would result from the shifting of sentenced offenders from local to state responsibility and fewer prosecutions of repeat offenders.

IN WITNESS WHEREOF, I hereunto set my hand and affix the Great Seal of the State of California this 6th day of April, 1994.

Tony Miller

TONY MILLER
Acting Secretary of State

Office of the Secretary of State
March Fong Eu

1230 J Street
Sacramento, California 95814

ELECTIONS DIVISION
(916) 445-0820

For Hearing and Speech Impaired Only:
(800) 833-8683

#604

October 7, 1993

TO ALL REGISTRARS OF VOTERS, OR COUNTY CLERKS, AND PROPONENT (93106)

Pursuant to Section 3513 of the Elections Code, we transmit herewith a copy of the Title and Summary prepared by the Attorney General on a proposed Initiative Measure entitled:

SENTENCE ENHANCEMENT. REPEAT OFFENDERS.
INITIATIVE STATUTE.

Circulating and Filing Schedule

1. Minimum number of signatures required 384,974
   Cal. Const., Art. II, Sec. 8(b).

2. Official Summary Date ..... Thursday, 10/07/93
   Elec. C., Sec. 3513.

3. Petition Sections:

   a. First day Proponent can circulate Sections for signatures ..... Thursday, 10/07/93
      Elec. C., Sec. 3513.

   b. Last day Proponent can circulate and file with the county. All sections are to be filed at the same time within each county ..... Monday, 03/07/94*
      Elec. C., Secs. 3513, 3520(a)

   c. Last day for county to determine total number of signatures affixed to petition and to transmit total to the Secretary of State ..... Thursday, 03/17/94

(If the Proponent files the petition with the county on a date prior to 03/07/94, the county has eight working days from the filing of the petition to determine the total number of signatures affixed to the petition and to transmit the total to the Secretary of State.) Elec. C., Sec. 3520(b).

* Date adjusted for official deadline which falls on Saturday. Elec. C., Sec. 60.

d. Secretary of State determines whether the total number of signatures filed with all county clerks meets the minimum number of required signatures, and notifies the counties . . . . . Saturday, 03/26/94**

e. Last day for county to determine total number of qualified voters who signed the petition, and to transmit certificate with a blank copy of the petition to the Secretary of State . . . . . Friday, 05/06/94

(If the Secretary of State notifies the county to determine the number of qualified voters who signed the petition on a date other than 03/26/94, the last day is no later than the thirtieth day after the county's receipt of notification.)
Elec. C., Sec. 3520(d), (e).

f. If the signature count is more than 423,472 or less than 365,726 then the Secretary of State certifies the petition has qualified or failed, and notifies the counties. If the signature count is between 365,726 and 423,472 inclusive, then the Secretary of State notifies the counties using the random sampling technique to determine the validity of all signatures . . Monday, 05/16/94**

g. Last day for county to determine actual number of all qualified voters who signed the petition, and to transmit certificate with a blank copy of the petition to the Secretary of State . . . . . Tuesday, 06/28/94

(If the Secretary of State notifies the county to determine the number of qualified voters who have signed the petition on a date other than 05/16/94, the last day is no later than the thirtieth working day after county's receipt of notification.)
Elec. C., Sec. 3521(b), (c).

h. Secretary of State certifies whether the petition has been signed by the number of qualified voters required to declare the petition sufficient . . . . . Saturday, 07/02/94*

* Date adjusted for official deadline which falls on Saturday. Elec. C., Sec. 60.
** Date varies based on receipt of county certification.

4. The Proponent of the above-named measure is:

Mike Reynolds
305 E. Harvard
Fresno, CA 93704
(209) 222-1044

5. Important Points:

(a) California law prohibits the use of signatures, names and addresses gathered on initiative petitions for any purpose other than to qualify the initiative measure for the ballot. This means that the petitions cannot be used to create or add to mailing lists or similar lists for any purpose, including fund raising or requests for support. Any such misuse constitutes a crime under California law. Elections Code section 29770; Bilofsky v. Deukmejian (1981) 123 Cal.App. 3d 825, 177 Cal.Rptr. 621; 63 Ops. Cal.Atty.Gen. 37 (1980).

(b) Please refer to Elections Code sections 41, 41.5, 44, 3501, 3507, 3508, 3517, and 3519 for appropriate format and type consideration in printing, typing, and otherwise preparing your initiative petition for circulation and signatures. Please send a copy of the petition after you have it printed. This copy is not for our review or approval, but to supplement our file.

(c) Your attention is directed to the campaign disclosure requirements of the Political Reform Act of 1974, Government Code section 81000 et seq.

(d) When writing or calling state or county elections officials, provide the official title of the initiative which was prepared by the Attorney General. Use of this title will assist elections officials in referencing the proper file.

(e) When a petition is presented to the county elections official for filing by someone other than the proponent, the required authorization shall include the name or names of the persons filing the petition.

(f) When filing the petition with the county elections official, please provide a blank petition for elections official use.

Sincerely,

CB Mitchell
CATHY MITCHELL
INITIATIVE COORDINATOR

Attachment: POLITICAL REFORM ACT OF 1974 REQUIREMENTS

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 K STREET, SUITE 511
P.O. Box 944255
SACRAMENTO, CA 94244-2550
(916) 445-9555

(916) 324-5490

October 7, 1993

FILED
in the office of the Secretary of State
of the State of California
OCT 7 1993
MARCH FONG EU, Secretary of State
By C B Mitchell
Deputy

Honorable March Fong Eu
Secretary of State
1230 J Street
Sacramento, CA 95814

Re: Initiative Title and Summary
Subject: SENTENCE ENHANCEMENT. REPEAT OFFENDERS. INITIATIVE STATUTE.
File No: SA 93 RF 0017

Dear Mrs. Eu:

Pursuant to the provisions of sections 3503 and 3513 of the Elections Code, you are hereby notified that on this day we mailed to the proponent of the above-identified proposed initiative our title and summary.

Enclosed is a copy of our transmittal letter to the proponent, a copy of our title and summary, a declaration of mailing thereof, and a copy of the proposed measure.

According to information available in our records, the name and address of the proponent is as stated on the declaration of mailing.

Sincerely,

DANIEL E. LUNGREN
Attorney General

KATHLEEN F. DaROSA
Initiative Coordinator

KFD:ms
Enclosures

Date: October 7, 1993
File No: SA93RF0017

The Attorney General of California has prepared the following title and summary of the chief purpose and points of the proposed measure:

SENTENCE ENHANCEMENT. REPEAT OFFENDERS. INITIATIVE STATUTE.

Provides increased sentences for convicted felons who have previously been convicted of violent or serious felonies such as murder, mayhem or rape. Convicted felons with one prior conviction would receive twice the normal sentence for the new offense. Convicted felons with two or more prior convictions would receive three times the normal sentence for the new offense or 25 years to life, whichever is greater. Includes as prior convictions certain felonies committed by juveniles over 16 years of age. Reduces sentence reduction credit which may be earned by these convicted felons. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: Annual and one time costs to the state of several billions of dollars would be incurred as a result of additional and longer state prison commitments; some savings to local government in an unknown amount would result from the shifting of sentenced offenders from local to state responsibility and fewer prosecutions of repeat offenders.

Mike Reynolds
305 E. Harvard
Fresno, CA 93704
(209) 222-1044
August 4, 1993

Ms. Kathleen DeRosa
Office of the California
Attorney General
1515 K Street, Suite 511
Sacramento, CA 95814

ALSO SENT BY FAX

Dear Ms. DeRosa:

Pursuant to discussions with your office on this date, I am submitting the following information to you as the "proponent" of the ballot measure submitted to your office on July 30, 1993, to be known as the "Three Strikes and You're Out" initiative.

Name of Proponent:	Mike Reynolds
Residence of Proponent:	305 E. Harvard Avenue
City & Zip Code of Residence:	Fresno 93704
County of Residence:	Fresno

Additionally, I would ask that you drop Mr. Douglas Haaland as a published proponent of the initiative, while his good offices will have a role in this effort it was not our intention that he be listed as an official "proponent."

Thank you for your help in this matter.

Sincerely,

MIKE REYNOLDS

The People of the State of California do enact as follows:

It is the intent of the People of the State of California in enacting this measure to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

SECTION 1. Section 1170.12 is added to the Penal Code, to read:

1170.12. (a) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in [proposed] California Penal Code Section 1170.12(b), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than State Prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth (1/5) of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the State Prison.

(6) If there is a current conviction for more than one (1) felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in 1170.12(a)(6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:

(1) Any offense defined in California Penal Code Section 667.5(c) as a violent felony or any offense defined in California Penal Code Section 1192.7(c) as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from State Prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in State Prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in California Penal Code Section 667.5(c) or California Penal Code Section 1192.7(c).

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was sixteen (16) years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in Section 1170.12(b) as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two (2) or more prior felony convictions as defined in Penal Code Section 1170.12(b)(1) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three (3) times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five (25) years or

(iii) the term determined by the court pursuant to California Penal Code Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with California Penal Code Section 1170) of Title 7 of Part 2, or any period prescribed by California Penal Code Section 190 or 3046.

(B) The indeterminate term described in Penal Code Section 1170.12(c)(2)(A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in Penal Code 1170.12(c)(2)(A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d)(1) Notwithstanding any other law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this statute. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to California Penal Code 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.

(e) Prior felony convictions shall not be used in plea bargaining as defined in California Penal Code Section 1192.7(b). The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in Section 1170.12(d)(2).

SECTION 2. All references to existing statutes are to statutes as they existed on June 30, 1993.

SECTION 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 4. The provisions of this measure shall not be amended by the Legislature except by statute passed in each house by roll call vote entered in the journal, two-thirds (2/3) of the membership concurring, or by a statute that becomes effective only when approved by the electors.

Daily Journal
Wed., April 6, 1994

'3 Strikes' Proves Itself Unpredictable For Youth

■ With the ante upped for young offenders, defenders try new tactics, and the system sometimes gets the unexpected.

By Charles Finnie
Daily Journal Staff Writer

Under California's new "Three strikes and you're out" sentencing law, attorneys for juveniles accused of serious crimes are holding true to expectation: They are demanding jury trials from judges – and being refused.

But, ironically, the one judge who has said he would likely allow juries in juvenile court is not receiving such requests from defense lawyers.

This peculiarity speaks volumes about the unsettled terrain of three strikes and the novel tactics being used by lawyers anxious to protect their clients from a life behind bars as repeat adult offenders. It also presents a vivid example of how the effects of the month-old law are being felt in California's juvenile court system.

"If the law is upheld so that juvenile adjudications can be counted as strikes, we have the very real potential for kids who turn 18 looking at life in prison for the next lightweight crime," said Joseph Spaeth, a supervising San Francisco deputy public defender, commenting on how stakes have been raised for minors.

Three strikes doubles prison sentences for defendants previously convicted of a serious felony. Defendants with two serious felony convictions on their records who are then convicted of a third offense are to receive triple the usual sentence or 25 years to life, whichever is longer.

The law says that convictions by juvenile courts can be used to lengthen the sentences of adult defendants if they were found guilty of one of more than a dozen offenses for which minors can be tried as adults – namely, violent crimes, kidnapping and most offenses involving use of a firearm.

As a result, judges, prosecutors and defense attorneys from throughout California are reporting a renewed reluctance on the part of defendants to accept plea agreements involving "strike" offenses. Such caution is evident in adult cases, lawyers and judges say, but more so in juvenile matters, where deadlines are shorter for disposing of cases.

One remarkable phenomenon of the new anti-crime measure transpired in Santa Clara County in the first weeks since the law took effect March 7.

Santa Clara County Superior Court Judge Leonard Sprinkles told defense lawyers and prosecutors he was inclined to give 16- and 17-year-olds the option of a jury trial because of the provision that counts juvenile convictions as strikes.

"If you are going to give adult consequences, you should extend adult rights," Sprinkles said. "My gut reaction is juveniles accused of a serious felony are entitled to a jury trial."

The judge responded to what critics say is the

Continued on Page 7

'3 Strikes' Yields New Strategies For Youth

Continued From Page 1

law's greatest failing. Because California does not provide for jury trials within the juvenile system, critics say it is a violation of the constitutional rights to equal protection and due process to count juvenile convictions as strikes under the sentencing law.

"The interesting dilemma you are in [as a judge]," Sprinkles said, "is, 'How do I implement this statute? What do I have to do to make it withstand an appeal?' It is an interesting dilemma, but the biggest one is for the kids."

Sprinkles said he instructed defense lawyers to make their jury trial requests in writing. As of last week, however, no such motions had been filed, he said.

Meantime, Sprinkles' colleague on the Santa Clara court's juvenile division, Alden E. Danner, who refuses to allow juvenile jury trials, is nonetheless receiving such requests – with regularity.

"There is no statutory ground for juvenile trials," Danner said, a position that is also being taken by San Francisco's juvenile judges and commissioners.

So, why are Danner and naysayers in other jurisdictions being asked for jury trials while Sprinkles isn't?

Aside from happenstance, one plausible explanation, defense attorneys, prosecutors and judges say, is that lawyers for juvenile defendants are in a real bind, compelled to ask for something they may not actually want.

"Be careful of what you ask for; you just might get it," said Santa Clara Assistant District Attorney Marc Buller, characterizing the sentiment.

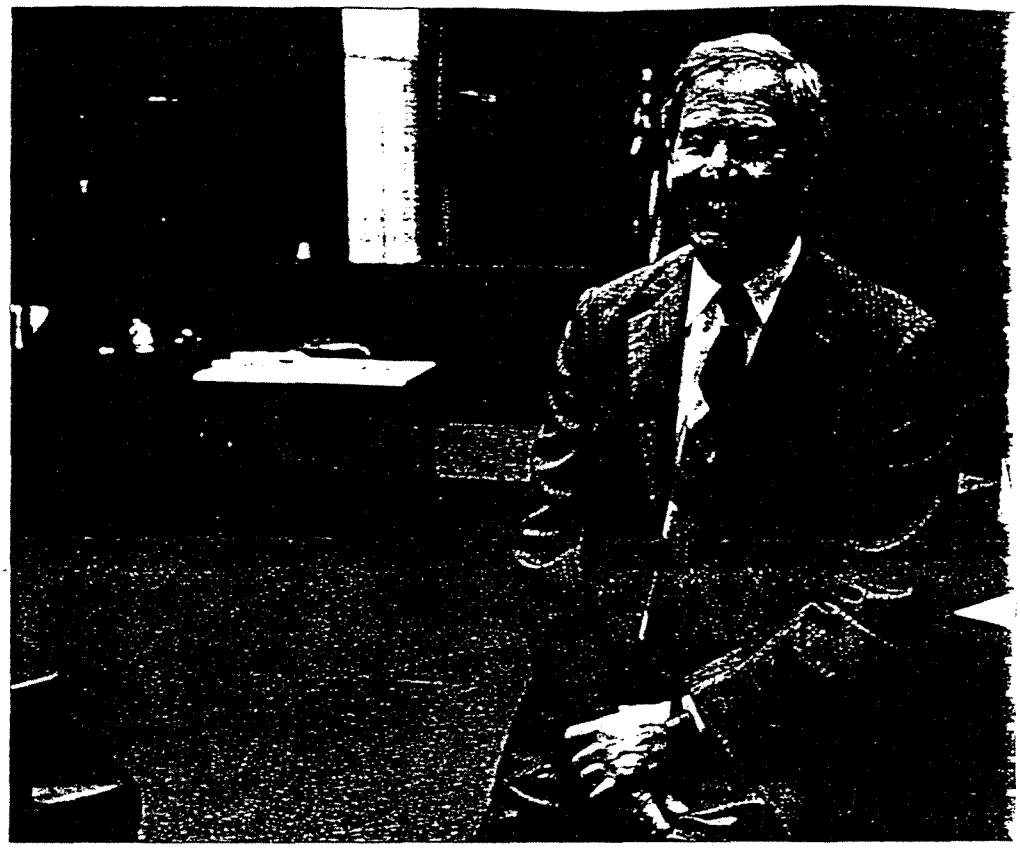
The logic runs like this: If a prosecutor attempts to use a juvenile conviction to lengthen a prison term under three strikes, the defendant has grounds to object if a jury trial was not held on the juvenile matter. To protect that avenue of appeal, some defense lawyers believe they are now obliged to request jury trials in juvenile court.

In San Francisco, deputy public defenders – as a routine matter – file motions for jury trials when their clients are charged with strike offenses, Spaeth said.

They do so even though San Francisco's juvenile bench – Superior Court Judges Donna Hitchens and Anne Bouliane and Commissioner Shelly Drake – are on record as opposing them.

In Los Angeles, the public defender appears to be headed down the same path, but more deliberately so.

Laurence Sarnoff, supervising public defender for juvenile matters in Los Angeles, said his office is in the process of crafting a written motion to request juvenile jury trials, but has not employed it. "We have not done so yet, but we intend to."



Daily Journal

ALDEN E. DANNER – "There is no statutory ground for juvenile trials."

It's a Hobson's choice, however: If the juvenile jury trial is granted – a course Sprinkles has suggested he would follow – and the defendant is convicted, the strike presumably is valid and a future avenue of appeal is lost. So, from a tactical standpoint, it may be better for the defense to lose a request for a jury trial – then use that rejection as grounds for appeal should the defendant later face new charges as an adult.

Santa Clara Public Defender Stuart Rappaport said his office has no hard and fast rules for deputies handling serious juvenile matters. He denied lawyers on his staff are reserving jury trial petitions for those judges committed to refusing them.

"You don't ask for things unless you mean it," Rappaport said. "I don't know if [the statute's juvenile provision] gets any more constitutional if there is a jury trial. It would be ironical."

However, not all defense lawyers are concerned about devising such an appeal strategy.

Alameda County Public Defender Jay Gaskill said his reading of three strikes – an analysis shared by the county district attorney's office – leaves him believing the question of whether to seek juvenile jury trial is moot.

Under three strikes, only those crimes for which juveniles may be tried as adults qualify as strikes. Gaskill said he interprets the law's subsection dealing with juvenile strikes as applying only in those rare situations when a prosecutor petitioned to have a juvenile defendant tried as an adult, but the juvenile court denied the request.

The three strikes subsection says, "Prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if . . . the juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law."

Said Gaskill: "That leaves a very small field of potential candidates."

Clearly, Gaskill is aided in his stand by District Attorney Jack Meehan and his hand-picked successor, Thomas Orloff. Both have forsworn charging prior juvenile convictions under three strikes on the ground the provision is open to broad constitutional challenge.

Other public defenders interpret the law less narrowly, however; the "juvenile strike" provision, they say, could apply in any case in which a defendant was convicted in juvenile court of a crime for which the prosecutor could have – but chose not to – transfer to adult court.

To be sure, three strikes' juvenile wrinkle is likely to be smoothed out, either by the appellate courts or passage of an alternative statute by the Legislature or voters.

On one point, however, lawyers and judges with opposing views on the statute's constitutionality agree.

Until the law is clarified, a reluctance to plead guilty to serious crimes means more cases will go to jurisdictional hearings – the juvenile equivalent of a court trial by a judge.

And that could cause calendar backups, possibly forcing more judicial resources to be devoted to these matters, and sometimes requiring releases of defendants in custody whose cases cannot be called within the legal 15-day period.

"Yes, we are going to feel the impact rather quickly," said Spaeth. He said San Francisco deputy public defenders go to jurisdictional hearings on average 12 times a month, but under three strikes they could be going to trial once a day.

"The calendars are starting to build a little," he said. "Within the next month, the cases set for hearing will double."

Danner, the Santa Clara judge refusing jury trials for juveniles, said he is already seeing a slowdown in cases disposed of by plea agreements, the age-old system of negotiating sentences and reducing charges to end cases short of trial. As of last week, no juvenile had pleaded guilty in Danner's courtroom to a crime covered by three strikes, he said.

"I am seeing a reluctance to dispose of cases containing strike allegations short of trial," he said. "I suspect this is one of the trends. There is plea bargaining; there always has been. But it is not working as it had."

Added Danner: "That is often the case with a new law; we have to feel our way along."

Staff writer Martin Berg contributed to this report.

Referendum Would Rival '3 Strikes' On Ballot

■ An assemblyman's measure, backed by prosecutors and others, may go into competition with a voters' initiative and the existing law.

By Hallye Jordan
Daily Journal Staff Writer

SACAMENTO – A key group of lawmakers, prosecutors, law enforcement officials and victims rights advocates will try to persuade Gov. Pete Wilson to allow a habitual offender referendum on the November ballot in direct competition with the "three strikes" initiative the governor supports, informed sources said Thursday.

The strategy, tentatively agreed on Thursday by supporters of AB1568 by Assemblyman Richard Rainey, R-Walnut Grove, would be presented to Wilson as a way to give voters a clear choice between the Rainey bill, which provides longer sentences to violent, habitual offenders, and the three-strikes initiative, which increases sentences for all habitual criminals, even those whose third conviction is for a nonviolent crime such as burglary.

On Wednesday, the California District Attorneys' Association's board of directors joined in the effort to get the Rainey measure, now pending in the Legislature, before voters in November.

CDAA's action in Sacramento signaled that the state's prosecutors are continuing in the unusual position of supporting a measure that has been rejected by their longtime ally Wilson, who has supported the original three-strikes initiative and who earlier this month signed into law a bill mirroring the initiative, AB971 by Assemblyman Bill Jones, R-Fresno.

The CDAA has publicly opposed three strikes , developed by Fresno photographer Mike Reynolds, and AB971, claiming the measures cast too wide a net and would result in taxpayers absorbing the costs of lengthy incarceration of burglars and other nonviolent felons rather than the violent criminals voters want behind bars for life.

The Department of Corrections has estimated AB971 and the initiative would hike prison populations by 275,000 inmates within the next 30 years, and cost the state $21 billion

Continued on Page 10

Group Seeks Alternative To '3 Strikes'

Continued From Page 1

just to build the additional 20 prisons that would be needed to house the swelling population.

Should the Rainey bill make it to the ballot, whichever measure receives the most votes would supersede the recently enacted AB971. While the ballot measure with the most votes would win over its rival, the courts most likely still would be asked to determine whether nonconflicting portions of both measures could go into effect.

Pitting the two measures against each other on the ballot would provide an interesting glimpse into whether voters trust the recommendation of prosecutors and law enforcement officials or that of Wilson, Republican Attorney General Dan Lungren and other elected state officials, many of whom are up for re-election and who support AB971 and the Reynolds initiative.

Members of victims rights groups have split on the two measures. Reynolds, who sponsored the three-strikes initiative after the murder of his daughter, is joined by other victims groups in supporting his initiative and the recently enacted AB971. Marc Klaas, father of the Petaluma 12-year-old whose kidnap and brutal murder last year sparked public interest and support of the three-strikes concept, has denounced the three-strikes initiative as too costly and not punitive enough. He supports the Rainey bill.

The proposal to place the Rainey bill on the November ballot to compete with three strikes reportedly was made by Senate President pro tem Bill Lockyer, D-Hayward, who addressed the board of governors Wednesday. Lockyer declined to comment Thursday and referred all questions to the CDAA.

During the Thursday meeting, sources said, lawmakers, legislative aides, Klaas, and lobbyists for prosecutors and law enforcement officers agreed to try to persuade the governor to support putting the Rainey bill on the ballot.

Should Wilson refuse to sign and thus allow the Rainey bill on the ballot, sources said, the alternative would be to embark on a costly campaign to draft the bill as an initiative and gather enough signatures by July to qualify the measure for the ballot.

But, as one source who attended the meeting said, "There was general agreement the concept would need the governor's approval to fly."

The flurry of activity over the Rainey bill, which has been languishing in the Senate since Wilson signed AB971 March 7, also brought to light a rift in the CDAA over the competing three-strikes proposals.

In voting to support placing the Rainey bill before voters, the 17-member board essentially rejected an effort by CDAA President Ed Hunt to follow the governor's lead in asking legislators to amend the Rainey bill so it enhances, rather than replaces, AB971 and the three-strikes initiative.

Sources said a few of the board members were unhappy that Hunt, the Fresno County district attorney, last week released a statement – without board approval – that CDAA "urges the Legislature to pass [the Rainey bill] in a form that allows it to coexist rather than conflict with or compete with AB971."

Among the amendments the press release asked lawmakers to adopt were moving AB1568 into a different section of the Penal Code so it does not conflict, and thus supersede, the recently enacted AB971; eliminating the sunset clause that wipes out the Rainey bill if the original three strikes is approved by voters in November; adding a provision mandating a life sentence for convicted sex offenders who have a prior conviction; and reducing, from 50 percent to 15 percent, the amount of time inmates convicted of serious felonies may shave off their sentences for good behavior.

Hunt earlier this week defended his actions, stating he believed he had the authority to issue the news release calling on lawmakers to amend the Rainey bill as the governor proposed.

"I thought it was our best opportunity to get [the Rainey bill] enacted," Hunt said Monday. "We're not bending to any political pressure. It was a case of analyzing the landscape and determining how you can work yourself through the mine field."

On Thursday morning, however, Hunt confirmed the CDAA board had rejected his proposal to amend the Rainey bill and decided instead to help place the measure before voters in November, "with the caveat that we will support the Rainey bill as long as the Legislature doesn't weaken it."

THREE STRIKES, TWO OPTIONS

Following is a brief summary of the two "Three Strikes" proposals. The original initiative, the brainchild of Fresno photographer Mike Reynolds, already has qualified for the November ballot. It mirrors AB971 by Assemblyman Bill Jones, R-Fresno, which went into effect March 7, immediately after Gov. Pete Wilson signed the legislation. The California District Attorneys' Association's Board of Governors and others this week agreed to support an effort to place the alternative measure, AB1568 by Assemblyman Richard Rainey, R-Walnut Creek, on the same ballot.

AB971 BY JONES*

- Mandates an indeterminate sentence of 25 years to life, or triple the 'usual' sentence, whichever is greater, for defendants convicted of any felony if they have two prior convictions for serious or violent felonies.
- Doubles sentences for serious or violent felonies if defendant has a prior conviction for a serious or violent felony.
- Cuts credits earned by inmates for good behavior from 50 percent to 20 percent for defendants with one prior serious or violent felony.
- Counts juvenile court adjudications for a Welfare and Institutions Code 707(b)felony if the juvenile was 16 years old when offense committed.

* *Jones' bill mirrors the Reynolds initiative.*

AB1568 BY RAINEY

- Mandates a sentence of life without possibility of parole for defendants convicted of a violent or serious felony, who have two prior convictions for violent or serious felonies. Specifically exempts non-violent felonies, such as residential burglary.
- Imposes an extra 10 years for a defendant convicted of a violent felony who has a prior violent felony conviction. Imposes an additional 5 years for defendants convicted of a second serious felony offense.
- Imposes a sentence of 25-years-to-life for a defendant convicted of two separate forcible sex offenses against children, or kidnapping a child with the intent to commit a forcible sex offense.
- Eliminates good time credit for all inmates convicted of a violent offenses and those with three convictions for serious crimes.
- Does not count juvenile adjudications as prior convictions for purposes of third "strike."

Contrary to Perception, Crime Rate Has Fallen

■ Overall, the number of violent incidents has declined 3.9 percent, a report shows.

By Steve Geissinger
Associated Press

SACRAMENTO – You wouldn't know it by listening to politicians and others, but crime is down in California.

The state Justice Department reported Tuesday that crime in all major categories but one declined in 1993 from the previous year.

"This is a hopeful report," with the exception of homicides, said state Attorney General Dan Lungren.

Rapes, robberies, assaults, burglaries and car thefts decreased by an average 6 percent. Murders increased by 5 percent.

The announcement came amid continuing debate over whether the state can afford new "Three strikes, you're out" anti-crime legislation and an uproar over the pending parole of convicted rapist Melvin Carter.

Lungren, releasing crime statistics at a Capitol news conference, said Californians are more concerned than usual about crime because violence has become increasingly vicious, senseless and random.

Younger people are committing more of the murders, without remorse, Lungren said.

Some Californians, who did not believe crime could happen to them, have come to the realization that they are not immune, he said.

Lungren blamed much of the murder problem on the "destruction of the family" and a culture of violence that popularizes crime.

The attorney general sidestepped reporters' questions aimed at whether television news emphasizes crime too heavily and whether the current public obsession with crime has been fostered for political reasons.

Daily Journal

DAN LUNGREN – "This is a hopeful report."

The 1993 state Justice Department statistics, based on numbers from the 63 law enforcement jurisdictions that serve populations of 100,000 or more, indicate that six major categories of crime declined 4.3 percent in 1993 compared to the previous year.

Overall, the number of violent crimes declined 3.9 percent and property crimes, by 4.5 percent.

The statistics showed:

- Homicide, up 5 percent, from 2,973 in 1992 to 3,121 in 1993.
- Forcible rape, down 8.1 percent, from 8,196 in 1992 to 7,529 in 1993.
- Robbery, down 3.7 percent, from 99,890 in 1992 to 96,213 in 1993.
- Aggravated assault, down 4 percent, from 136,558 in 1992 to 131,126 in 1993.
- Burglary, down 5.2 percent, from 266,382 in 1992 to 252,604 in 1993.
- Motor vehicle theft, down 3.6 percent, from 217,002 in 1992 to 209,137 in 1993.

The statistics listed crime totals, not rates. But once computed, rates will match the trends of the totals, officials said.

The jurisdictions included in the statistics account for about 65 percent of the crimes reported in the state.

Daily Journal
3/14/94 P1
1 of 2

'3 Strikes' Confusion

What New Crime Measure Means Depends on Who's Asked, It Seems

By Charles Finnie
Daily Journal Staff Writer

Born of a father's anger over his daughter's murder, and stoked by election-year politics and public outrage over the Polly Klaas kidnapping saga, California's "Three strikes and you're out" juggernaut debuted in courthouses throughout the state last week. The results were mixed.

At center stage were the state's elected county prosecutors. Predictably, district attorneys in Los Angeles, San Diego, Alameda, Santa Clara and other counties with high aggregate crime rates filed their first cases last week against defendants with two serious felony convictions (or "strikes"), who qualify for the law's hallmark penalty – 25-years-to-life in prison – if convicted of a third felony.

In Los Angeles County, prosecutors reported defendants were discussing the new legislation, asking one another, "How many strikes have you got?" District Attorney Gil Garcetti, one of the many prosecutors who had opposed the measure, filed three-strikes charges against a 37-year-old repeat felon accused of attacking a skid row transient for 50 cents.

But there were exceptions. In San Francisco, defendants arrested on crimes committed after the law was signed by Gov. Pete Wilson March 7 were being arraigned as usual. Prosecutors said they were evaluating the criminal histories of each defendant carefully and with an eye toward charging prior convictions covered under "three strikes," but at a later point in the process.

And there was much groping in the dark. At Oakland's highly touted "drug court," in which addicts can have drug possession charges dismissed after completing a year of closely monitored rehabilitation, the judge who presides over the program could not say how it would be affected by three strikes.

Based on the admittedly thin early results under three strikes, there were predictions that ranged all over the map.

Some authorities questioned the system's ability to cope with the large number of defendants expected to demand jury trials rather than plead guilty to offenses that could be counted against them later under the statute's severe sentence-enhancement mechanisms.

"It's going to be interesting," said Michael Arkelian of Sacramento, chairman of the California Public Defenders' Association. "My feeling is, the number of jury trials is going to blossom."

Others predicted the system would muddle through, as it has in the past. "We're like boa constrictors," said San Francisco Superior Court Judge Alfred Chiantelli, citing the justice system's enduring capacity to digest most anything thrown at it, from legal reforms to societal upheavals.

Continued on Page

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'3 Strikes' Seems to Be Puzzling

Continued From Page 1

"They said the number of looting cases after the first Rodney King trial would shut us down, but we just swallowed them," Chiantelli said. "We'll do the same with three strikes.

Under the new law, defendants convicted of felonies are to be sentenced to double the normal prison term if they've been convicted once before of a serious felony. Serious felonies, under the law, range from murder to burglary to drug sales to a minor.

Defendants with two serious felonies to their record are to receive triple the prison term, or a sentence of 25 years to life – whichever is longer – upon conviction on any new felony offense.

The law also reduces from 50 percent to 20 percent the amount of time a sentence can be shortened for good behavior in prison.

Though the new cases against two-time losers now facing possible life in prison garnered the most attention last week, prosecutors in San Francisco said a review of new arrests shows that the law's greatest effect might be seen in cases against defendants with just one serious felony on their records.

"We've seen a number of people with one strike," said San Francisco Assistant District Attorney Alfred Giannini. Giannini, who reviews new arrests to determine the charges to be filed, put the number of such cases at eight to 12 as of Friday.

Indeed it is gatekeepers like Giannini who are at the crux of applying three strikes.

As new cases come across their desks, these prosecutors not only must decide which cases to prosecute but the new law requires them to find evidence of past convictions. It's a responsibility that always went with the job, but the statute's tough penalties up the ante.

"We are trying to be very circumspect, because the results are fairly dramatic," Giannini said. "We are under the opinion this is going to be the law for a long time."

To develop a record of a defendant's criminal past, county prosecutors rely on local, state and federal criminal databases, because convictions outside California can count as strikes.

According to Giannini, prosecutors can allege prior convictions as strikes against a defendant anytime prior to sentencing.

But others said the deliberate approach of some district attorney offices appear to be taking suggests that even they were caught off guard by the speed with which three strikes became law.

"I'm hearing the district attorneys are moving as fast as they can," said David Stanley of San Francisco's First District Appellate Project and who directs educational seminars for the California Attorneys for Criminal Justice, a defense lawyers association.

Stanley said he is gathering information from local defense attorneys about how the statute is being implemented throughout the state.

"In a sense, people were unprepared in terms of the nuts and bolts of the law," he said. "I think it's going to take a few days before things really start heating up."

In Los Angeles, several prosecutors prepared a written memorandum on implementation of the law, Assistant District Attorney Dan Murphy said. And there are sure to be new versions.

"That was our first cut," Murphy said. "As the defense lawyers raise issues over the next few weeks, we'll take another look at it."

In the meantime, he added, the office is forming a committee of seven or eight veteran prosecutors to chart strategy.

In Oakland, Municipal Court Judge Gail Brewster Bereola said she won't know until later this week how the county might alter its drug court for the three-strikes environment.

Bereola said neither the court nor the district attorney's office have assessed all the legal implications.

Of most concern, she said, are cases involving a defendant arrested for drug possession who has a serious felony conviction more than 5 years old.

Under the state's drug diversion law, the defendant would be eligible to participate in the drug court rehabilitation program. But because the possession charge is a felony, three strikes says the defendant must go to prison – and for double the normal term.

"I had a case just the other day in which the defendant had an old robbery case they served six years on," the judge said. "He was one of those cases we are worrying about."

San Francisco Public Defender Jeff Brown said it is unclear after the first week how three strikes will affect the age-old system of plea bargaining.

Prosecutor Giannini insisted the law forbids authorities from disregarding previous strikes to achieve a plea bargain – even though the statute says district attorneys can strike former convictions in the "interest of justice."

"We'll be subject to criticism – and rightfully so – if we try to use that authority for managing case flow," Giannini said.

But Brown pointed out plea bargaining flourished after state voters passed Proposition 8, the 1982 initiative that was supposed to restrict the practice in serious felony cases.

"I watched Proposition 8 go into effect," he said. "It was promptly forgotten about. But, whatever the new scheme under this statute, it gives prosecutors enormous leverage."

Daily Journal staff writers Hallye Jordan and Martin Berg contributed to this report.

Daily Journal 3/14/94 P 3 2 of 2

California Fights Back

'Three Strikes' Law Sends Loud and Clear Message to Criminals

By Pete Wilson

People across our nation and throughout the world have been waiting to see whether California would continue to suffer in silence in a social environment that has grown intolerably dangerous or whether they would instead fight back against crime by enacting the most comprehensive and toughest "three strikes" law in the country.

They now have their answer, because on Monday Assembly Bill 971 – sponsored by Assemblymen Bill Jones, R-Fresno, and Jim Costa, D-Fresno – became law with my signature.

This landmark legislation mirrors the initiative launched last year by Mike Reynolds after his 18-year-old daughter, Kimber, was brutally murdered by a repeat felon.

Although too late for Kimber Reynolds and a legion of other innocent victims – men, women and children all over California – this historic legislation sends a clear and sovereign assurance to career criminals: From now on, you're going to get the prison time you deserve, and you're going to serve the time you get.

This message rings out loud and clear in the tough provisions of California's "three strikes" law, provisions that:

- Triple the prison term or impose a 25 years to life sentence, whichever is longer, on felons with two prior serious or violent felony convictions.
- Double the term for felons with one prior conviction for a serious or violent felony.
- Restore truth in sentencing by limiting the time off that an inmate can earn for good behavior and work to just 20 percent of his sentence.

Most Californians clearly understand the urgency of putting an end to revolving-door justice by cracking down on felons who repeatedly victimize law-abiding citizens. This is evidenced by the public's overwhelming support of the "three strikes, you're out" initiative.

Nonetheless, there are some who say this law won't reduce the crime and violence on our streets and others who maintain that we cannot afford to keep career criminals locked up.

I strongly disagree.

Based on a recent Department of Corrections analysis of data from the past 33 years, it's clear that incarceration works – that it does, in fact, have a positive impact on public safety.

Between 1960 and 1980, the crime rate in California increased substantially, and by 1980, it was more than 2 times as great as it was in 1960. Our imprisonment rate during this period was essentially flat.

But in 1980, the state's imprisonment rate began to climb, and it has been increasing dramatically ever since. The crime rate, in comparison, dropped sharply during the early 1980s and has remained fairly stable since then.

Simply stated, when incarceration rates were flat, the crime rate soared, but since we started locking up more criminals, the overall crime rate has leveled off. It remains unacceptably high, however, and that's why I made passage of three strikes legislation a top priority at the Crime Summit I recently held.

There's no dispute that the reforms contained in this three-strikes law will require considerable additional expense. The Department of Corrections has estimated that his law will result in more than 81,000 additional felons in our prisons by the turn of the century, and we'll have to build the prisons needed to house these criminals.

Pete Wilson is the governor of California. He wrote this commentary for the Los Angeles Daily News.

But I believe that's an expense the people of California are willing to pay. And to those who say we can't afford to pay for three strikes, I say we can't afford not to. After all, what price could we possibly put on the life of countless victims of violent crime? What about the price we all pay because crime is driving businesses and jobs out of California?

I'd rather close prisons than open them, and I don't view the estimated costs of this law as our inescapable fate. The crime prevention initiatives we've implemented and the others we are proposing will "pay off" by keeping young people from turning to crime.

In the meantime, this legislation is a necessary and significant step forward in our efforts to make California safe once again.

But let me be clear. The Jones-Costa bill is the first three-strikes measure to reach my desk, and while it represents the toughest anti-crime legislation ever enacted in California, it must be seen as the base upon which to build. We must add to it other needed protections. That's why I've insisted that the Legislature act responsibly and give me the opportunity to sign the strongest possible combination of protections contained in all the other "three strikes" proposals under consideration in a way that does not repeal the provisions in the Jones-Costa bill. And I've asked for some penalty increases not presently included in any of the proposals.

But rather than afford the public the strongest possible combination of protections, the action of the state Senate Appropriations Committee a week ago will deprive the people of needed safeguards by compelling a totally needless and artificial choice between them. As amended, only the last bill enacted can become law – and the action of the people voting to approve the Reynolds initiative would destroy the surviving bill.

This is nothing less than the most outrageous manipulation of the legislative process for the purpose of the most cynical election year gamesmanship.

Public safety is not a game. It's literally a matter of life and death. I urge readers to call or write their state senators and demand that they remove these "poison pill" amendments that will otherwise deprive the people of needed protections against vicious criminals.

The people of California need and deserve the strongest possible combination of protections, including:

- "Three strikes" for repeat felons.
- "One strike" for rapists, child molesters and aggravated arsonists.
- No sentence-reducing credits for violent offenders.
- Prosecution as an adult of a juvenile who commits a violent crime.

If it weren't for Mike Reynolds and the hundreds of crime victims who assisted him with his initiative drive, the measure I signed would never have reached my desk. It was their efforts and determination that galvanized lawmakers into action. Now we must get the other protections needed to adequately safeguard the people of California. They deserve nothing less.

(2)

Daily Journal 3/15/94 pA

Daily Journal
3-8-94
P1
1 of 2

Signature on 'Three Strikes' May Signal Start of Challenges

By Hallye Jordan
Daily Journal Staff Writer

SACRAMENTO – With the first round of political debate over "three strikes" legislation ending Monday after Gov. Pete Wilson signed the measure, prosecutors and defense attorneys now are awaiting what could be an even more intense battle: the expected constitutional challenges to the controversial bill, AB971.

With both sides questioning many of the provisions of the bill by Assemblyman Bill Jones, R-Fresno, the challenges are expected to be quick and furious.

"It's an interesting bill in that it was rushed through the Legislature and didn't get the analysis that some other measures get," said David Meyer, Los Angeles County acting public defender. "There is certainly a good deal of litigation to be done at both the trial and appellate level, and it's unfortunate for our crowded courts, but it is necessary."

Among others, provisions that allow a juvenile adjudication – the equivalent of a conviction without a jury trial – to be counted as a "strike" are likely to be challenged. Also possible is litigation contending that the measure violates the separation of powers by overly restricting judges in determining sentences.

Mirroring an initiative that has qualified for the November ballot, the bill, which seeks to increase prison sentences for career criminals, was enacted immediately after the governor signed it. The measure will affect anyone with prior felony convictions or specified juvenile adjudications who commits a new offense.

Like its companion initiative, it has been criticized by both prosecutors and defense attorneys for possible constitutional infirmities.

Continued on Page 12

3

Daily Journal
3-8-94 p.12
2 of 2

Signature on 'Three Strikes' Bill May Be a Harbinger of Challenges

Continued From Page 1

Prosecutors actively lobbied against the measure, seeking support instead for a rival bill, AB1568 by Assemblyman Richard Rainey, R-Walnut Creek.

But after making public their concerns about several sections of the Jones bill they believe contain constitutional flaws, the prosecutors now plan to sit back and let the defense bar assume the active role in challenging the legislation.

"We'll welcome appellate clarification," said Fresno County District Attorney Ed Hunt, president of the California District Attorneys' Association. "But we're prosecutors, and we prosecutors are going to take the law as it was written and run with it. If some appellate courts say we can't, fine."

Greg Thompson, Sacramento County chief deputy district attorney, praised prosecutors and the CDAA for "being straight about voicing what they believe are legal deficiencies of the Jones bill."

But now that lawmakers and the governor have completed their duties, it's time for the prosecutors to get down to business, he said.

"They make the law and we enforce it. The time for lobbying is over, and now we've got to put on our helmets and do our job," he said.

Los Angeles County Assistant District Attorney Dan Murphy said the office's appellate division already has begun reviewing the bill, approved Thursday by the Legislature. Still, he said, "Our immediate task at hand is not to worry about the constitutional issue, but make sure our 900 lawyers know what to do now that the law has gone into effect. We'll look for and anticipate legal challenges, but the main thing for us now is to just enforce the law."

Defense attorneys, meanwhile, are preparing and sharing motions for challenges.

Elisabeth Semel, president of the California Attorneys for Criminal Justice, said there are ample provisions to litigate.

The issue expected to be most hotly debated concerns whether the measure's inclusion of juvenile adjudications legally can count as prior offenses that trigger a life sentence for a third felony conviction. The law also requires the sentence for a second felony conviction to be "twice the term otherwise provided as punishment for the current felony conviction."

Under the new law, a prior juvenile adjudication would count as a prior conviction if the person was 16 or older when adjudicated for a serious or violent offense, or one listed in Welfare and Institutions Code section 707(b).

"I would think in the first case where they charge a third strike and the first two were juvenile adjudications, there would be a due process challenge," she said.

Joe Spaeth, managing attorney of the San Francisco public defender's office juvenile division, said his office already has prepared a motion requesting jury trials for juvenile cases. Although the motion has been used in the past for specific juvenile cases, he expects it to be used frequently if courts uphold the provision requiring juvenile adjudications, more informal proceedings with a judge, to be treated the same as an adult felony trial in which a jury convicts.

Critics of the provision argue juveniles will opt for costly adult jury trials rather than an adjudication by a juvenile judge when the outcome of either is counted as a prior strike.

But Spaeth said the onslaught of attorneys requesting jury trials for the young clients may not be that difficult to accommodate in San Francisco's five rooms used for juvenile proceedings.

"This place being the dinosaur it is, we actually have a courtroom with a jury box," he said.

The specter of costly jury trials at the juvenile level has attorneys on both sides of the system concerned – especially because many believe the provision counting juvenile adjudications as "strikes" is flagrantly unconstitutional.

"I'm sure [defense attorneys] will raise every constitutional issue they possibly can, but this one does raise very serious constitutional questions," said San Francisco District Attorney Arlo Smith. "I'm sure one of the first challenges will be a motion to strike or for a writ of prohibition based on that."

The juvenile adjudication provision also may play a role in the expected challenges based on the Eighth Amendment protection against cruel and unusual punishment.

Under the law, for example, a convicted burglar who had two prior juvenile adjudications against him 20 years ago still could face a life sentence and thus would be subject to unconstitutional punishment.

Semel said allegations, raised even by prosecutors, that the new law could conflict with existing death penalty provisions also is fodder for a challenge. Because the new law is silent on the death penalty, some attorneys believe a court may be forced to sentence a capital murderer with a prior felony to prison for "twice the term otherwise provided," rather than a death sentence.

"If I had a defendant facing a capital case with prior convictions, I'd move to dismiss the special circumstances and demand that my client be charged under AB971," Semel said.

Critics of the law also claim it violates the separation of powers because it restricts the ability of judges in determining sentences.

The bill allows a prosecutor to move to dismiss or strike a prior felony conviction in the furtherance of justice or if there is insufficient evidence to prove the prior conviction. But the law only allows a judge to grant that motion if the judge finds there is insufficient evidence to prove the prior offense. Judges are not granted the authority to strike a prior conviction in the furtherance of justice.

In addition, prosecutors' discretion also is curbed. Under the law, a prosecutor is required to plead and prove all prior convictions.

"Thus," concluded a Senate Judiciary Committee analysis of the bill, the new law "appears to be constitutionally infirm in that it would require cruel and unusual punishment in some cases, with no option for a lesser sentence in the interest of justice."

'3 Strikes' Is Called Indicator for More Work

By Hallye Jordan
Daily Journal Staff Writer

SACRAMENTO – A Judicial Council report suggests the number of plea bargains in serious felony cases will fall, spurring a need for more judges to handle an increase in criminal trials, if the Legislature enacts any of the so-called three strikes proposals.

The report, discussed Monday morning during a legislative hearing into the costs of a handful of bills and a proposed November ballot measure aimed at increasing prison time for habitual offenders, also warned passage of the measures would thwart trial court delay-reduction programs and civil courts most likely would grind to a halt as the focus shifted to a burgeoning criminal caseload.

The report also noted the measures "are likely to be challenged for alleged legal infirmities and ambiguities that must be resolved by the Courts of Appeal and the California Supreme Court." In addition to appellate litigation costs, "trial courts will incur delays and costs during the time the issues are unresolved," the report said.

Despite the testimony during the morning hearing with the Senate Budget and Fiscal Review Committee, the Senate Appropriations Committee signaled it would pass the four "three strikes" bills on its afternoon agenda, sending them to the full Senate. Even though prosecutors and legal scholars have voiced concerns that some of the measures are constitutionally infirm and would cost the state too much by warehousing for life older, less-dangerous felons, the Legislature is feeling public pressure during an election year and is expected to approve the measures.

The appropriations committee had not voted by press time Monday.

Representatives of superior courts, district attorney's offices and the Judicial Council told lawmakers during the joint morning hearing that the Legislature would have to increase the number of judges or allow civil courts to shut down and dismissal of less serious felony charges should the bills be enacted.

The Legislature has not increased the number of judges since 1987, even though felony filings have grown 49 percent, from 105,000 filings in 1986-87 to 156,000 in 1992-93, said Placer County Superior Court Judge Richard Couzens, who testified on behalf of the Judicial Council.

According to the council's study, about 38 percent of trial court time currently is spent on the felony caseload at a cost of about $650 million. The council estimates about 20 to 30 percent of courts' time "is devoted to serious and violent felonies that are the subject of the 'three strike' proposals." If passage of the bills causes a 1 percent reduction in guilty pleas, courts would face an additional 1,500 felony tri-

Continued on Page 7

Daily Journal
3-1-94
P 7
2 of 2

'3 Strikes' Increases Workload

Continued From Page 3

als, the report said.

Charles D. Ramey, Solano County Superior Court executive officer and clerk, testified that a 1 percent reduction in guilty pleas would cost $2.6 million in jury expenses alone, which includes jury fees, mileage and per diem.

He said it currently costs $4,800 a day to operate a criminal jury trial involving a defendant in custody. That price tag does not include the costs of the prosecution or the defense, he noted.

Alameda County District Attorney John Meehan said a review of his office's caseload indicates of the 9,000 felonies charged last year, 1,700 of them were 'serious' felonies that would fall under the purview of the three-strikes measures. Of the 1,700 cases, 200 defendants had one prior conviction and 300 had two or more prior convictions, which would qualify them for life sentences on the third conviction under the various proposals.

LA Times
3/13/94 M2
1 of 1
Commentary

Why 'Three Strikes' May Take California for a Ride

Act of fiscal recklessness may yield to the Law of Unintended Consequences

Would that complex and seemingly intractable problems like crime, welfare fraud and deteriorating schools were amenable to quick and facile solutions. A simple idea embodied by a catchy phrase, a stroke of the governor's pen, and, presto, the problem is on the road to solution. Alas, it's not so easy. But no one seems to have told our state leaders.

"Three strikes and you're out" is now law in California. Last week Gov. Pete Wilson signed the first of several bills destined for his desk, imposing life prison terms without the possibility of parole for three-time felons. The notion of incarcerating for life incorrigible criminals has enormous appeal; indeed, we support a much more precisely targeted—and fiscally responsible—version of the idea. But the bill passed by the Legislature with blinding speed—and promptly signed by the governor amid much talk about getting "tough" on crime—is anything but a reasoned, promising new tool to stop the bloodshed in our streets, homes and schools. It is, instead, an act of fiscal recklessness on the part of this state. And from first reports, it's a law already yielding to another sadly familiar law: the Law of Unintended Consequences.

The three-strikes law casts far too wide a net. The law defines as "strikes" a number of felonies, most but not all of which involve violence or attempted violence. (One of the first felons to be charged under the law is a man who allegedly wrested 50 cents from a homeless man.) Individuals who have repeatedly committed serious, but not always violent, crimes like residential burglary or selling drugs to a minor could be imprisoned for the rest of their lives. As a result, California's prison population of 120,000 inmates, already the largest of any state, easily could swell to more than double over the next 30 years.

And while there is no clear evidence that this new law will deter crime, there is plenty of reason to believe that it will gridlock the criminal justice system through more and longer trials and fiscally contort California. Wilson's own Department of Corrections, in recent weeks, estimated that "three strikes" may cost as much as $5.7 billion annually by 2030. But reliable cost estimates were unavailable, or seemingly were considered of no consequence by lawmakers, as the bill sped to passage.

The Legislature and especially the governor, who values his reputation as a tough fiscal manager, have been inexcusably vague about exactly how this financially strapped state can afford to maintain an estimated 275,000 prison inmates to their graves. Where will the billions of dollars come from? Will some college campuses, hospitals, libraries and schools be closed so new prisons can be built? Will children be denied schoolbooks or immunizations so the necessary prison guards can be hired? Will some laid-off Californians get no unemployment relief or job training in order to create the perverse welfare system this law calls for—one that, as Wilson said, will "turn career criminals into career inmates"?

The unseemly haste of the Legislature and the governor in enacting "three strikes" may be only the first act of a long-running crime-control drama this year. Other versions of "three strikes" are now moving through the Legislature, and backers of a tough "three strikes" ballot initiative seem unsatisfied with the bill Wilson signed.

Even more troubling are Wilson's plans to move well beyond the "three strikes" concept and to seek passage of bills that would put first-time rapists and child molesters in prison for life without the possibility of parole. These crimes are indisputably detestable but, apart from the truly incalculable expense such proposals would entail, would it be just or appropriate to impose such harsh punishment for a first offense? Would it be constitutional? Would it be cost-effective? Would it deter others from committing crimes?

Crime *is* a problem in California, a deadly serious one. But addressing it calls for more than forceful speeches and fist-pounding. We need carefully targeted and fiscally responsible laws that are less likely to run afoul of that infamous Unintended-Consequences Law.

(19)

In the Face of 'Three Strikes,' California's Leaders Roll Over

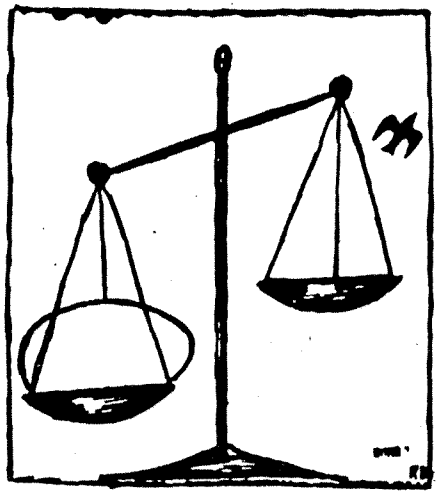
By Sherry Bebitch Jeffe

Gov. Pete Wilson's signature on "three strikes you're out" legislation won't end the potlatch politics of crime that has infected Sacramento. Don't be surprised if the last bill to hit Wilson's desk before the November election mandates *pre-trial* sentencing.

For the saga of "three strikes" is a case study of the failure of government and policy-making, and of its leaders and the citizens who elect them.

At one stage, the "three strikes" bill was lambasted by Senate President Pro Tem Bill Lockyer (D-Hayward) as "overly broad, poorly written and fiscally irresponsible." Yet, it rapidly sailed, with Lockyer in tow and with virtually no reservations, through the Legislature, the governor's office and into law.

One may argue that Sacramento's election-year capitulation is a legitimate and proper response to voter anger over violent crime. But it's one thing to make policy with an eye toward reelection; it's quite another to purposely run from economic and social reality.



ROXANNA BIKADOROFF / for The Times

That's what the governor and Legislature did on "three strikes." In doing so, they abrogated their responsibility as leaders. And by pandering to public cynicism and fear, they enlisted California voters as willing accomplices in the breakdown of the deliberative function of the legislative process.

The politics of "three strikes" also shows the pernicious effect that Proposition 140, which imposes term limits on state elected officials, can have on the legislative process. On issues like "three strikes," the proposition allows officeholders a free vote: instant political gratification whose price someone else will have to pay later. Few politicians can resist such temptation.

Not since Proposition 13 rocked the Legislature in 1978 has Sacramento been so cowed by a single idea and its advocate. That was when Howard Jarvis harnessed voter anger over skyrocketing property taxes, and legislative inaction fueled the middle-class tax revolt. This time, it was Mike Reynolds, who launched the "three strikes" initiative to overcome legislative diddling on crime bills. And this time it was the kidnaping-murder of 12-year-old Polly Klaas that galvanized middle-class fears about violent crime.

But Jarvis could not do what Reynolds has done. Jarvis provoked legislative debate. Reynolds pre-empted it.

In 1978, the threat of Jarvis and his draconian tax-cutting initiative motivated lawmakers to place a more reasonable alternative on the same ballot. This time, despite serious questions of cost and effectiveness, the Legislature bailed out.

To be sure, Reynolds has every right to be heard in the legislative process, even to challenge it. But he has not earned the right to control it.

Reynolds was unyielding in his demand that lawmakers pass the unaltered version of his ballot initiative, or face the issue—and voter anger—come November. His stubbornness short-circuited reasoned deliberation of any policy alternatives. And that still has not appeased Reynolds, who has refused to back off qualifying his initiative. "I don't want any room for squirming out of this," he said.

There is a disquieting difference between now and 1978 that does not bode well for representative government in California. In 1978, the Democratic-controlled Legislature had no credibility on the issue of cutting taxes. Nor did Democratic Gov. Edmund G. (Jerry) Brown Jr. Jarvis could easily circumvent them.

But Wilson and his attorney general, Dan Lungren, enjoy the credibility necessary to shape the debate on crime. Either could have exerted leadership to secure

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LA Times
3/13/94 M-1
Commentary
1 of 2

greater public safety without paralyzing the criminal-justice system or causing undue economic pain. Armed with a crime-fighting legitimacy that Democrats could never muster, they might have moved Reynolds and lawmakers toward a rational compromise on "three-strikes" legislation.

But election-year politics prevailed. Wilson and Lungren chose to fan voter cynicism and anger over crime rather than work to redirect public emotion toward practical solutions. Doesn't that make these two even more blameworthy than the Legislature when it comes to abrogating the public trust?

Today's legislators—and statewide officeholders—have learned the lessons of 1978: When public opinion is on the rampage, the safe strategy is to duck and take cover. After Proposition 13 passed in June, Brown became a "born-again tax-cutter." And later in November, a slew of legislators who had opposed Jarvis were defeated for reelection by conservative Republicans who embraced the rhetoric of the anti-tax movement.

By voting for "three strikes" legislation before this June's primary, lawmakers moved to inoculate themselves against

Please see CRIME, M6

Crime

Continued from M1

any such voter retribution. Even if the Reynolds initiative goes on the Nov. 2ballot, insists one Sacramento observer, the issue has been "depoliticized"; it no longer threatens incumbent legislators—and Democrats, in particular.

But hard fiscal choices will be required to implement "three strikes," as prison costs eat up a larger and larger portion of a budget already in the red. It is the height of irresponsibility for the governor and Legislature to avoid their obligation to make these choices. Or, at least, to educate voters about what making a choice will mean: Other programs will have to be cut, bonded indebtedness and taxes increased, to pay for more law enforcement.

Wilson rightly said that the bill's fiscal impact would only gradually be felt. So gradually, it turns out, that the tab for this new policy won't come due before term limits remove most of the current players from the state Capitol.

Reacting to the media-driven frenzy over crime, Sen. Lucy Killea (I-San Diego) said: "We aren't leaders. We aren't needed anymore."

A lot of voters and politicians appear to like it that way. Why, then, bother to have a Legislature? Who needs a governor? When will Californians understand that where policy and governance are concerned, there is no such thing as a free lunch? Or a no-cost prison? □

(F)

LA Times
3/13/94 M6
Commentary
2 of 2

LA Times 3/10/94 P 1

Defendants React With Shock to '3 Strikes' Law

By DEAN E. MURPHY and DAN MORAIN
TIMES STAFF WRITERS

For Charles Ernest Bentley, convicted of manslaughter and kidnaping and possessor of a 52-page rap sheet, the future may come down to 50 cents.

Prosecutors alleged Wednesday that Bentley wrestled the loose change from an elderly homeless man on Los Angeles' Skid Row late Monday night, making him one of the first convicted felons to be charged under California's new "three strikes and you're out" law.

Under the law, which took effect less than nine hours before Bentley allegedly mugged the 60-year-old transient, Bentley faces a minimum sentence of 25 years to life if convicted. The statute prescribes the sentence for anyone who has two prior serious or violent felonies and commits any felony on a third offense.

"He is very, very upset," said Deputy Public Defender Nancy Gast, who entered a not guilty plea on Bentley's behalf at his arraignment Wednesday in Downtown Los Angeles. "He didn't even know what he had been arrested for."

Bentley, 37, who would have faced a minimum sentence of 20 years under the old law, appeared briefly in the courtroom of Commissioner Kristi Lousteau. He followed moments after Donnell Albert Dorsey, 37, of Los Angeles, who also was charged under the "three strikes" law. Dorsey, arrested at 9:20 p.m. Monday, is believed to be the first felon in Los Angeles County to fall within the new law's provisions.

Police arrested Dorsey in a stolen pickup truck in Southwest Los Angeles, and prosecutors have charged him with receiving stolen property. Dressed in a green hooded sweat shirt, Dorsey held his head low and hid from television cameras behind a courtroom pillar as Gast entered a not guilty plea and the commissioner ordered him held on $100,000 bail.

With seven prior felony convictions—including one assault with a deadly weapon and two robberies—Dorsey faces a minimum sentence under the new law of 25 years to life if convicted. Prior to the law, he would have faced a minimum sentence of six years, according to the district attorney's office.

"He just kept asking me over and over again how this could be. He just didn't understand. He didn't know anything about the law," Gast said. "I had to go back and tell this man that he is potentially facing 25 years to life [for getting] caught sitting in a stolen car."

But Deputy Dist. Atty. David R. Taum described both Bentley and Dorsey as dangerous felons, and defended his office's decision to charge them under the new law. Dist. Atty. Gil Garcetti opposed the new legislation, but has said he will enforce it.

"They were crimes committed against the people of California," Taum said. "I am not going to refuse to file these allegations because maybe the case would have been a little better here or a little better there."

Loyola law school professor Laurie Levenson said the cases, despite involving rather minor crimes, make "exactly the point the proponents wanted: We don't allow you to continue to commit crimes. . . . If you win on this type of case, this law will be upheld on other more serious cases."

Levenson and UCLA law professor Peter Arenella said that chances of success are "extraordinarily unlikely" for any defense claim that a 25-year-to-life sentence for such crimes amounts to cruel and unusual punishment.

"There is no significant challenge that can be raised," Arenella said. "That doesn't mean this is wise penal policy. I think it is unwise penal policy."

In Sacramento on Wednesday, the father and grandfather of 12-year-old Polly Klaas held a news conference to attack the new "three strikes" law and urge lawmakers and the governor to pass a more narrow bill specifically aimed at locking up violent felons for life.

Marc Klaas, father of the girl whose kidnap and murder helped propel state lawmakers and Gov. Pete Wilson into passing and signing the new sentencing law, said it will cost too many billions because it will result in lengthy sentences for thousands of repeat felons who commit property crimes.

"He kept saying to me, 'You've ruined my life because of three strikes,' " one of the victims said.

Klaas is backing a bill by Assemblyman Richard K. Rainey (R-Walnut Creek) that bears his daughter's name. The Polly Klaas bill, which is stalled in the Senate, would impose sentences of life in prison without parole on people who commit three violent crimes, and on two-time offenders who prey on children.

"The Polly Klaas Foundation is 100% behind the Rainey bill because it is a tougher bill that targets the right people," said Klaas, the director of the foundation.

In an interview on Wednesday, Klaas recalled speaking to Wilson on Friday to make one final plea that Wilson not sign the "three strikes" bill into law, but rather throw his support behind the Rainey bill.

"I said, 'This is a stronger bill,' " Klaas recalled. "The governor said, 'You don't know how victims' groups feel.' I said, 'Sir, I am a victim. I know how they feel.' "

Klaas, who has been at the governor's side repeatedly during the year, said the governor made no further response.

"I think he probably knew he said the wrong thing," Klaas said. "Maybe he forgot who he was talking to."

In all, there are four other so-called "three strikes" bills stalled in the Senate. They had been moving quickly through the Legislature earlier in the year. Now that the harshest of the measures is law, some lawmakers are waiting to see how it works before again tinkering with the sentencing law. Wilson also is opposed to letting the bills move if they would water down the new law.

Defense lawyers from around the state said many of their clients have told their lawyers that they are fearful about the possibility of facing life sentences.

"The word has gotten out on the streets really fast. We've had a number of them asking us if this is in effect: 'Oh, my God, do I fall in that?' " Alameda County Public Defender Jay Gaskill said.

That was borne out in the San Francisco Bay area, when a man kidnaped three people in Santa Rosa and led police on a chase Tuesday.

The 25-year-old suspect, David C. Wesley, was shot by police in Oakland and was recovering at San Francisco General Hospital. But during the ordeal, in which he pistol-whipped his victims, the kidnaper told his victims that he had little to loose.

Murphy reported from Los Angeles, Morain from Sacramento. Contributing was Times staff writer Greg Krikorian

(7)

L.A. TIMES
3-9-94
A3

Lungren Assailed for Tying Mailer to 'Three Strikes' Measure

■ Politics: Critics say attorney general's fund-raising bid is deceptive. But campaign aides defend it as a 'win-win' situation.

By ERIC BAILEY
TIMES STAFF WRITER

SACRAMENTO—Atty. Gen. Dan Lungren was assailed Tuesday by political watchdogs and Democratic opponents for a campaign mailer that solicits support for the "three strikes" anti-crime initiative, but asks that checks be made payable to his reelection campaign.

Critics contend the mailer is an opportunistic effort by Lungren to tap broad public backing for "three strikes" in an effort to raise campaign funds.

"There's nothing illegal with what he's done, but it's troublesome," said Ruth Holton, executive director of California Common Cause, a political watchdog group. "I think it's deceptive. The average voter may not be tuned into the fact that the attorney general can use this money for his own purposes."

Lungren's recent campaign mailer included an initiative petition and a two-page letter outlining his support for the "three strikes" effort. The letter tells voters that they can help "by signing and returning the enclosed petition along with your most generous contribution." The mailer asks in small italics that all checks be made payable to Lungren for Attorney General.

Officials with the Lungren campaign said the mailer, which was distributed to 19,000 households around the state, was a straightforward pitch asking for contributions to the attorney general and signatures to qualify the "three strikes" initiative for the November ballot.

Joanne Stabler, Lungren's campaign manager, said the mailer was "absolutely clear" that contributions were going to the attorney general's campaign for reelection. She said it was effectively a joint effort between the attorney general's reelection team and "three strikes" initiative proponent Mike Reynolds, the Fresno photographer whose daughter was killed by a repeat felon in 1992.

"The whole thing is kind of a non-story," Stabler said, adding that the mailer "went to Dan Lungren's donors, his friends. It was educating them, telling them that he was trying to help the 'three strikes' people." Stabler had no estimate how much money the mailer raised but called it a "win-win situation" for both campaigns.

Although the governor signed a "three strikes" bill into law earlier this

Please see LUNGREN, A19

Continued from A3

week, Reynolds and his backers have pushed ahead with efforts to qualify their initiative for the state ballot in November. They turned in their signatures Monday, saying that the statewide vote is needed to prevent the Legislature from tampering with the measure, which puts three-time felons behind bars for a minimum of 25 years to life.

Charles Cavalier, campaign manager for the initiative drive, said Lungren was an early and ardent supporter of the proposal and has helped immensely with efforts to get signatures to qualify for the ballot. He said backers of the initiative had no expectation that money generated by the mailer would be handed over to the "three strikes" campaign.

"Given the petitions that came in as a result of that mailer, we were very pleased that he did it," Cavalier said. "As far as we were concerned, it was nice to get the petitions printed by somebody else and get those signatures in to help us qualify."

But spokesmen for the two Democrats vying to run against Lungren in November suggested that the mailer is at best misleading.

"I think it's pretty deceiving," said George Urch, campaign manager for Assemblyman Tom Umberg (D-Garden Grove), who hopes to challenge Lungren in November. "He's obviously using the measure to raise money for his own political purposes. It's definitely unethical."

A campaign spokesman for Arlo Smith, the San Francisco district attorney who lost to Lungren by a scant margin in 1990, said they plan to file a complaint about the mailer with the state Fair Political Practices Commission.

"It just stinks," said Dennis Collins, Smith's campaign manager. "Dan Lungren is the top cop in the state, the guy who is supposed to be in charge of ethics, and here he's doing something that reeks of duplicity, of not being straightforward."

L.A. TIMES
3-9-94
A 1

'3 Strikes' Law Raises Prospect of More Trials

By DAN MORAIN
TIMES STAFF WRITER

SACRAMENTO—The day after "three strikes" became law, lawyers advised adult and juvenile defendants to go to trial, raising the prospect that courts will quickly become jammed.

In Alameda County, Dist. Atty. John Meehan said he will not enforce one key provision of the tough new criminal sentencing law. Meehan said he will not count crimes committed by juveniles as "strikes" because he thinks the provision is unconstitutional.

Although the full impact of the law targeting repeat felons will not be felt for years, the earliest ripples of change were being felt Tuesday as many judges, prosecutors and defense lawyers studied the law for the first time. Prosecutors and criminal defense lawyers set up task forces and met with judges in an effort to sort out how they would handle what they assume will be an onslaught of trials and heavy sentences.

"I have been studying it all day," Stanislaus County Dist. Atty. Donald Stahl said. By day's end, he had concluded that "it's the toughest thing I've seen in 28 years. This is farther reaching certainly than the death penalty."

The new law says criminals who

Please see '3 STRIKES,' A14

(5)

'3 STRIKES': New Fears of Clogged Courts

Continued from A1

have committed two prior violent or serious felonies—there are 29 of them, ranging from murder to residential burglary—and commit any felony on a third offense will face a minimum sentence of 25 years to life. The law also doubles sentences for second convictions on serious or violent felonies.

The first defendants to face life sentences under "three strikes" are almost certainly in jail by now, but their identities may not be known until later in the week. After making an arrest, police must obtain rap sheets detailing a suspect's previous crimes, process the case and send it to prosecutors, all of which takes a day or two.

Los Angeles County public defenders began telling adult defendants that there was little reason to accept plea bargains now if it means that in later life they could be subject to additional time in prison if convicted of a new felony. Better to test prosecutors' evidence by taking more cases to trial, the lawyers said.

"I'm certain that there are people who have opted against accepting plea bargains," said Jabe Kahnke, a deputy public defender in Long Beach. "It's certainly something we discussed this morning before [the staff members] went to court."

In San Francisco, Public Defender Jeff Brown said: "People are really putting on the brakes in terms of pleas. People are being hauled aside and given time to reflect on this. The ramifications are a hell of a lot more serious today than it was [Monday]."

Brown said he is directing his deputies "to ask for a jury trial" in juvenile proceedings, rather than a less formal proceeding before a judge—"and we're going to challenge any prior [conviction] based on a juvenile adjudication if the conviction was not secured by a jury trial."

Los Angeles public defenders also were considering making such requests.

"If it's going to count as a conviction, it has to be contested," said Los Angeles County Deputy Public Defender Nina Law, who handles juvenile cases in Long Beach.

The juvenile court system is far less formal and is designed to rehabilitate rather than punish. Juvenile convictions are known as "adjudications" and are made without juries and without many of the rules of evidence in adult court.

Ventura County Dist. Atty. Michael D. Bradbury had testified in Sacramento against the new law. But he predicted Tuesday that the criminal justice system would adjust.

"The doomsday prophets have always said the system will grind to a halt and devastate us financially," Bradbury said. "But the system is flexible. It adapts well, and it will be able to process any additional trials."

When the law was moving through the Legislature, many county prosecutors echoed Bradbury's position, saying that some of its provisions may be unconstitutional. The California District Attorneys Assn. lobbied against it and tried to persuade Wilson not to sign it.

But in an electorate weary and angry over crime, the concept of imprisoning repeat felons for life has gathered huge support. Legislators in Sacramento cast aside concerns about the measure's cost, questions about constitutionality and ambiguity of some of its provisions, and approved the bill by Assemblymen Bill Jones (R-Fresno) and Jim Costa (D-Fresno) without amendment.

As it went into effect this week, most prosecutors said they intended to fully carry out the new law.

Meehan, who objected to the provision regarding juvenile offenders, is a veteran of 34 years as a prosecutor and is stepping down this year. He is a past president of the district attorneys association and often has taken stands that run counter to strict law and order prosecutors.

"I personally think there is a cloud over the juvenile cases [clause]," Meehan said.

Other prosecutors interviewed Tuesday say they will attempt to count juvenile crimes as strikes. But Meehan said, "Good luck trying to prove them." He noted that records of juvenile proceedings are sealed unless defendants are tried as adults, and most juvenile cases are disposed of in informal hearings.

In the state attorney general's office, a task force of experts on sentencing and criminal law embarked on a full analysis of the new law, formulating the state's position on key questions, and how to defend expected legal attacks.

"I knew there were going to be some big, big problems," said George Williamson, chief assistant to Atty. Gen. Dan Lungren and a major proponent of the "three strikes" law. "We were aware that there were some drafting concerns which were significant. We were also advised by line prosecutors that they perceived some problems."

Williamson said he is anticipating charges by defense lawyers that all three crimes must be committed after Monday, the day the law went into effect. But he predicted that the state would prevail on its position: A felon could have been convicted of two serious or violent felonies before Monday, be convicted of a third felony after Monday, and be subject to a sentence of 25 years to life.

There will be other challenges, including objections to the provision that serious or violent felonies committed by a juvenile age 16 or 17 can be counted as strikes, Williamson said.

On Tuesday, Kern County Dist. Atty. Ed Jagels was among county prosecutors who set up a committee of deputies to study its implications. His prosecutors quickly found a potential problem not previously considered.

Kern County has three state prisons. A prisoner who commits virtually any transgression, from assault on another inmate to possession of drugs or drug paraphernalia or a weapon, can be charged with a felony. That felony would count as a third strike for those with two strikes behind them.

"There have to be hundreds of these. Anything you do in the prison is a felony," Jagels said.

What will the repercussions be?

"I am not certain yet," Jagels said.

There is, however, one thing of which Jagels is sure. The cost must be born by the state of California. Under state law, costs incurred by local law enforcement to handle state prison-related crime must be paid for by the state.

Contributing to this story were Times staff writer Dean Murphy in Los Angeles and Times correspondent Jeff McDonald in Ventura.

Sacramento Be
3/14/94 A3

1 of 1

Judges don't like '3 strikes'

Associated Press

LOS ANGELES – Many judges object to California's new "three strikes" law, saying it removes much of their authority and makes the judicial system arbitrary.

"It strips the judges of their ability to make our courts human," said Los Angeles Superior Court Judge Florence-Marie Cooper, a member of the California Judges Association's executive board. Judges from the association say the law removes one of jurists' most important functions: discretion in imposing sentences.

The measure, signed into law by Gov. Pete Wilson, requires prison sentences of 25 years to life for people who commit a third felony when they have committed two violent or serious crimes.

Some judges also worried that suspects in "three strikes" cases will be more likely to skip out on bail since they are assured long sentences if convicted.

(2

Sac Bee
3/12/94 A.
1 of

CAPITOL

Weakness seen in '3 strikes'

Section on youth crimes vulnerable to challenge, Lungren says

By Laura Mecoy
Bee Los Angeles Bureau

HOLLYWOOD – Attorney General Dan Lungren, a staunch supporter of the "three strikes and you're out" law, said Friday there's a 50-50 chance the courts will strike down a provision that allows the use of juvenile convictions in applying the statute.

The "three strikes and you're out" statute Gov. Pete Wilson signed into law Monday allows the courts to count any conviction for a serious or violent felony – including those incurred while a juvenile – as one of the three that lead to a minimum sentence of 25 years to life.

Lungren noted that juveniles don't have the same right to a jury trial as adults. As a result, he said, the courts could decide it is unconstitutional to count juvenile convictions in applying the new law, which is aimed at repeat offenders.

Dan Lungren

The state attorney general says he will argue in favor of retaining the language on juvenile crimes.

"That will be a matter of first impression for the courts," he told reporters at a breakfast meeting. "They have never had to deal directly with that issue before. I could not ... guarantee that it's constitutional."

If the courts declared the juvenile provision unconstitutional, it would not necessarily affect the rest of the law.

Lungren said he could "intellectually argue both sides" of the juvenile issue. As the state's attorney, however, he said he will defend the "three strikes" provisions that call for counting juvenile convictions.

"Are there rough edges to (the new law)? There are," Lungren said. "Will there be problems? I am sure there will be. But overall, I think it's a movement in the right direction."

The law's opponents and even some of its supporters have already cited numerous problems, including the spiraling costs of imprisoning larger numbers of felons for longer periods of time.

Lungren said he would like to remedy part of the problem with the juvenile provisions by changing the law to allow prosecutors to try 14- and 15-year- old children as adults – with the right to jury trial – in the case of any serious felony. Currently, juveniles 14 and 15 years of age can be tried as adults in cases of murder.

He said his proposal could eliminate constitutional questions about counting juvenile convictions in applying the new law.

(4)

Sac Bee
3/10/94 #3
1 of 1

Klaas father opposes new '3 strikes' law

By Jon Matthews
Bee Capitol Bureau

Polly Klaas' father and grandfather Wednesday called on Gov. Pete Wilson and the Legislature to replace the state's new "three strikes and you're out" sentencing law with one that would be more narrowly targeted at violent criminals.

Marc Klaas, father of the slain Petaluma 12-year-old, also said it is his "perception" that Wilson signed the broad "three strikes" law with more interest in election-year politics than in getting the best law on the books.

"We feel the people of California deserve the choice as to whether or not they want to target serious and violent criminals only or if they are ready to put people who steal basketballs away for the rest of their lives," Klaas told reporters at the Capitol.

Wilson spokesman Sean Walsh promptly denied that Wilson was spurred by election-year politics when he signed the "three strikes" law on Monday.

The law provides sentences of up to life in prison for criminals convicted of two serious or violent felonies and a third felony of any type. It mirrors a proposed ballot initiative spearheaded by Fresno photographer Mike Reynolds, whose own daughter was slain by a paroled felon nearly two years ago.

But Klaas said the new law places too much emphasis on imprisoning criminals for non-violent property crimes. Klaas said the alternative bill he supports, AB 1568 by Assemblyman Richard Rainey, R-Walnut Creek, would be tougher on violent criminals and those convicted of sex offenses and kidnapping of children.

Marc Klaas

He accuses the governor of signing the broad bill because of election-year politics.

Klaas called on the Legislature and Wilson to approve the Rainey bill – letting it supersede the existing law – and allow voters to chose between keeping the Rainey measure on the books or passing the Reynolds initiative in November.

The Rainey bill is currently stalled in the state Senate.

Polly Klaas' grandfather, Joe Klaas, told reporters that the new law also has serious legal problems, including potential interference with the death penalty. Those charges have been denied by its supporters.

Wilson spokesman Walsh said the governor supports the "three strikes" law as a "base," but wants to see the Rainey bill's tougher provisions incorporated into it.

6

Police Concerned About Effect of '3 Strikes' Law

Crooks facing stiff sentence may become more violent, some say

By Thaai Walker
Chronicle Staff Writer

A week after California's tough new "three strikes and you're out" law went into effect, Bay Area police officers are worried about an unintended effect — that career criminals facing a long prison sentence might resort to desperate measures to avoid arrest.

In a series of interviews, street cops said that criminals who feel they have nothing to lose are more likely to go down with guns blazing rather than surrender for a certain prison sentence of 25 years to life.

"Officer safety is going to be a major issue, and our officers are very concerned about that," said Al Trigueiro, president of the San Francisco Police Officers Association. "Suspects on their last leg on the 'three strikes and you're out' law are going to be more difficult to deal with since they now know they will be incarcerated for a long, long time.

"Our officers are going to have to be on their toes."

The bill, signed by Governor Wilson a week ago, has been hailed by proponents as the nation's toughest anti-crime law. It calls for third-time felons to be sentenced to 25 years to life or triple the usual sentence for the offense, whichever is greater.

Some officers say that every arrest is potentially life-threatening, and they are doubtful that the three-strikes measure will raise the stakes on the street. Others, however, say that past experience makes them concerned about the future.

Voters in the state of Washington approved a "three-strikes" law in November, and police there already have reported that, in scattered cases, criminals facing a life-sentence have put up fierce resistance to arrest.

In California, some officers say the desperate attempt of David Charles Wesley to avoid arrest last week may be an ominous harbinger of things to come.

Wesley, a 26-year-old career criminal, allegedly had kidnaped three people in Santa Rosa last Sunday and raped and robbed one of his victims. He then led police on a wild chase over the Bay Bridge from Oakland to San Francisco. After allegedly pulling a pistol, he was shot several times by an Oakland police officer and then arrested.

One of his victims later told police that Wesley had referred to the three-strikes law several times during the ordeal and had said that he was "really, really mad" about it.

Some officers fear that a similar attitude — and the same violent resistance — will spread among criminals who are looking at a potential third strike.

"I do believe it will increase people's desperation," said San Francisco officer Con Johnson, the

CRIMINALS: *Page A16 Col. 5*

Chronicle
3/14/94 #16
1 of 2

Chronicle
3/19/94 AP
2 of 2

CRIMINALS: Tough New Law

From Page A15

former president of Officers for Justice who is now assigned to the Mission District Station.

"The criminal who knows he is on the verge of going back (to prison) may be much more belligerent, hostile and dangerous," Johnson said.

Officers admit that they cannot prove their suspicions — the new law has yet to be tested on the street. But they say their fears arise from lessons already learned on the street.

Johnson recalled a vicious fight with a parolee wanted for a narcotics violation.

"He fought tooth and nail, and I got into a big scuffle and actually got injured just because he didn't want to go back to the penitentiary," he said. "It became a do-or-die situation."

Trigueiro agreed.

"There have been a number of instances where we've faced desperate suspects who were on parole and who knew that violating their parole would send them back to the penitentiary," he said. "In those instances, there was a dramatic increase in officer-involved confrontation. Now, hardened criminals' reluctance to be apprehended will be increased."

Other officers say that even a traffic stop is dangerous and that "three strikes and you're out" won't add much to the risk.

Marin County Undersheriff Bob Doyle said he has "heard concerns expressed" about the possibility of two-time felons going down with guns blazing rather than surrender for a third violent crime. But, he said, the new law "should generally work in favor" of the police.

"The fact is that these people — someone who has committed a heinous crime or a man brandishing a gun — represent serious public hazards, whether they have been convicted two times or not," he said. "Arresting them is always dangerous."

Oakland homicide Sergeant John McKenna agreed that criminals with two strikes may be more dangerous. But, he said, there is no way of telling what will happen until the law has been on the books for a while.

"It's obvious that it (the law) would place more at stake," he said. "But right now, one officer might try to make a traffic stop and get blown away while another officer arrests a murderer and there is no problem. You can't always categorize."

Chronicle staff writers Glen Martin and Peter Pimrite contributed to this report.

(8)

S.F. CHRONICLE
3-9-94
A 1
1 OF 2

Lawyers Expect Legal Battle On '3 Strikes'

Courts may cut critical portions of sentencing law

By Reynolds Holding
Chronicle Legal Affairs Writer

The "three strikes and you're out" bill that breezed into state law Monday is almost certain to hit turbulence in court, where lawyers plan to argue that it violates the rights of juveniles, subjects people to cruel or unusual punishment and overrides the death penalty.

The expected challenges may seriously delay the law's enforcement, and courts may strike down crucial portions of the new law, legal experts said yesterday.

And although supporters tout "three strikes" as a tough answer to crime, prosecutors who usually welcome anti-crime measures predicted that litigation over the law will tie up criminal cases and divert the justice system's attention from more serious matters.

"We're having a meeting now in the office to think through how we're going to deal with these problems, and they're going to be terrible," said Douglas Pipes, a deputy in the Contra Costa County district attorney's office. "The people who pushed this (law) through have treated us as if we were the enemy."

The law swept through the Legislature almost without opposition before it was signed by Wilson. Under its terms, first-time felons who have committed a violent or other serious felony will have any time

'THREE STRIKES': *Page A6 Col. 1*

From Page 1

off for good behavior reduced from 50 percent to 20 percent.

Second-time offenders will get double the usual sentence. Third-time felons who have committed two previous violent or other serious crimes — or "strikes" — will be sentenced to 25 years to life in prison or triple the normal sentence, whichever is greater.

The law's most obvious flaw, say defense attorneys, is that it counts as "strikes" offenses committed by juveniles age 16 or 17.

"Because juveniles don't have the full panoply of rights that adults have, such as the right to a jury trial, their offenses don't count as convictions," said defense attorney Elisabeth Semel.

Due Process Concern

But the new law equates the offenses with adult convictions, and that is a denial of due process, according to Semel, head of the California Attorneys for Criminal Justice.

"You are either going to see lawyers in juvenile court demanding jury trials for all of their clients, or that part of the law will be struck down," she says. "It's a potent issue."

A spokesman for the bill's author concedes that juvenile adjudications could present a problem. But he says no thought was given to dropping the relevant provision.

> ***'Because juveniles don't have the full rights that adults have, their offenses don't count as convictions'***
>
> — ELISABETH SEMEL, DEFENSE ATTORNEY

"Sixteen and 17-year-olds are committing some heinous crimes out there," said Dan Evans, administrative assistant for Assemblyman Bill Jones, R-Fresno. "To wipe that slate clean is irresponsible."

The law may also violate the constitutional separation of powers by severely limiting the discretion of state judges to determine sentences, lawyers say.

Under the law, prosecutors can ask judges to ignore prior felony convictions as "strikes" if that would result in a more just sentence. But because of an apparent oversight, the law does not give judges the power to grant the request.

Semel says the constitutional argument against the provision will be "tough to make, but it's going to have to be made, because we have to look for ways to permit courts to do justice."

'Cruel or Unusual' Claim

A long-standing objection to repeat-offender measures that will almost certainly be used against California's three-strikes law is that it creates cruel or unusual punishments for relatively minor offenses.

Pipes mentions the example of a 16-year-old who is caught taking two bicycles in one afternoon. He is made a ward of the juvenile court for two counts of burglary. Ten years later, he 's caught driv-

S.F. CHRONICLE
3-9-94
2 of 2

ing from a party with a bindle of cocaine on the front seat. A judge must sentence him to 25 years to life in prison.

"In my opinion," Pipes writes in an analysis, "application of ... cruel and unusual punishment provisions will result in the nullifi-

'Application of cruel and unusual punishment provisions will result in nullification'

— DOUGLAS PIPES, CONTRA COSTA DEPUTY DISTRICT ATTORNEY

cation" of the statute.

Others, however, are skeptical.

"Legislatures are given incredible latitude in making judgments about what proportionate punishment can be for any crime," says Peter Arenella, a professor at University of California at Los Angeles School of Law and a former federal prosecutor.

Perhaps the most bizarre aspect of the three-strikes law is that it seems to nullify the state's death penalty. The law reads:

"Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions ... the court shall adhere to the following: ... There shall not be a commitment to any facility other than State Prison."

Gerald Uelmen, dean of Santa Clara University School of Law, wrote recently in the Los Angeles Times that the "notwithstanding any other law" provision "would preclude application of the death penalty law, creating the anomalous situation that ... only murderers without prior felony convictions would be eligible for the death penalty."

'Waste of Resources, Time'

The practical result of the provision, says Pipes, is that "we're going to hear in every capital case that this does away with the death penalty. That's going to waste public resources and time."

Ironically, the first person who may make the argument that "three strikes" pre-empts the death penalty will be Richard Allen Davis, the man whose confessed murder of teenager Polly Klaas spurred the three-strikes movement.

Although Davis' lawyer, deputy public defender Barry Collins, could not be reached to comment on whether he will use that defense, Semel said, "It would be irresponsible for a lawyer representing a client facing the death penalty not to make that argument ...

"The mistake could have been cleaned up easily, but the Legislature was on the bullet train to passage."

Asked to respond to these criticisms of the law, Evans said: "We didn't change it because we didn't feel it needed to be changed. We felt the objections brought up were incorrect, and it's just as simple as that."

(11)

'3 strikes' 1st week: challenges, satisfaction

Critics take aim; juvenile offenses may not be counted

BY THOMAS FARRAGHER
Mercury News Sacramento Bureau

SACRAMENTO — California's sensational push toward merciless justice for career criminals roared into overdrive this week as its "three strikes, you're out" law began snaring its first, unsuspecting victims — provoking cheers from the fed-up public who demanded it and cries of outrage from civil libertarians who vow to dismantle it.

Just days old, the measure that will send three-time felons to prison for 25 years to life has begun to rumble through the county jails and courthouses, where it will be carried out by prosecutors still unsure of its full effect or merit.

But this much is clear: Constitutional assaults on the widely popular law are almost certain; delicate efforts to tinker with it are already quietly under way in the Legislature; and the enormous cost of the lock-'em-up law

See 3 STRIKES, Back Page

■ 3 STRIKES
from Page 1A

will roll through state government until well into the 21st century.

Unapologetic, the measure's chief proponent, Fresno photographer Mike Reynolds, said the bill he pushed will accomplish what most Californians desperately desire: no-nonsense justice for three-time losers.

"Deterrents only work if they are real," Reynolds, whose daughter was killed by a repeat felon two years ago, said after Wilson signed the bill into law Monday. "Believe me, these guys are smart. If you want a real deterrent, you better have a law that really means it."

Already, however, legal scholars and public interest lawyers are taking aim at what they call a hastily-written and easily assailable new statute.

"It ranks right up there with the stupidest thing that our Legislature has ever done — and the most cowardly," said Gerald Uelman, dean of Santa Clara University School of Law. "It's the crassest kind of political grandstanding. It will certainly be challenged."

To be sure, a host of organizations are studying the three-strikes law that steamrolled through the Legislature with unprecedented momentum in recent weeks, examining it for flaws they hope will form the foundation of a legal challenge.

Juvenile convictions

"We're looking at a challenge," said Margaret Pena, a lobbyist for the American Civil Liberties Union. "We're researching it. The inclusion of juvenile convictions is very offensive and could cause problems, for sure."

Uelman and Laurie Levenson, a professor of criminal law at Loyola Law School in Los Angeles and a former federal prosecutor, said because juveniles are not entitled to jury trials, the law's inclusion of juvenile felony convictions is its chief vulnerability.

"People are just plain ol' scared by the crime in our streets and so there was this stampede to get some law into effect," Levenson said. "The question is: Did we get the right law? Are we going to be surprised by the impact on our courts and on our jails?"

Those questions are already being asked by county prosecutors and defenders who days ago began to confront the thorny issues posed by one of the strictest anti-crime measures in America.

Consider:

■ In Los Angeles County, a man charged with suspicion of possessing 0.08 grams of methamphetamine could be sent behind bars for life. He served a year for armed robbery in 1981 and he was convicted of an armed break-in in 1986.

"This is not the type of person I was interested in taking off the streets for the rest of his life," L.A. County District Attorney Gil Garcetti told the Los Angeles Daily News this week. "(But) the law is the law and I'm going to follow it."

■ In Alameda County, District Attorney Jack Meehan said flatly that he will not include crimes committed by juveniles as "strikes" under the new law because, he said, he regards that provision unlawful.

"There are some serious constitutional questions," said Tom Orloff, Meehan's chief assistant. "In juvenile cases, there are no juries."

■ And in Santa Clara County, District Attorney George Kennedy said he, too, will ignore convictions committed by juveniles, unless they were tried as adults. "They're not provable and we're not going to be able to use them," Kennedy said.

Kennedy, who said he favors a competing three-strikes bill still stalled in the Legislature, said: "I don't think the California public or the public here in Santa Clara County intended some of the consequences that the three-strikes law will have."

Those consequences, experts say, will mean a marked reduction in plea bargaining, — deals defendants make with prosecutors in which a jury trial is waived in exchange for some form of reduced sentence.

"This could close the courts down — literally," said Santa Clara County Public Defender Stuart Rappaport. "We could be engaged in a huge number of jury trials. Right now, about 3 percent of the cases go to trial. If that got to 4 or 5 percent, it would close down the courts. This law is stupid and it's unnecessary because our laws are so severe, anyway."

Overwhelming support

But that feeling is clearly not universally shared by the 80 percent of Californians who favor some form of "three strikes, you're out" law. Nor is it shared by the politicians who, while admitting its flaws — and its monumental $11 billion price tag — rushed nevertheless to support it.

"It's just really disheartening that politicians, who know that they are enacting a law with such enormous problems, will walk in and vote for it," said Uelman. "It's an insult to the electorate."

"It's just not appropriate public policy to allow the third strike to be any felony — whether it's violent or not," said state Sen. Quen-

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3/12/94 2A
2 of 2

tin Kopp, I-San Francisco, one of the few lawmakers to oppose the three-strikes law.

Kopp is now at the center of an effort to modify the law by using four existing permutations of it that await action by the state Senate.

In what he says will be a delicate minuet with Wilson — who gained uncommon national exposure Monday when he signed the anti-crime bill into law before a bank of 17 camera crews in Los Angeles — Kopp is seeking to entice voters with a competing three-strikes ballot measure identical to the one written by state Assemblyman Richard Rainey, R-Walnut Creek.

That means the battle may well move outside the state Capitol and onto the autumn ballot.

Backup ballot measure

Supporters of the new law, most notably Fresno photographer Reynolds, are placing his measure before voters this November as a sort of insurance policy so the law is not tinkered with in Sacramento.

Kopp and other lawmakers want to place Rainey's bill on the ballot, too, arguing that voters will prefer its provisions to impose life in prison without possibility of parole on people who commit three violent felonies and on those who commit crimes against children more than once.

The Rainey version is supported by Marc Klaas, father of 12-year-old Polly Klaas, whose kidnap and murder helped to galvanize this year's dramatic drive toward the three-strikes law.

Rainey, a former Contra Costa County sheriff, said he is considering joining the effort to get his bill on the November ballot as a more rational substitute to the new state law.

Negotiations on how to modify the new law and perhaps strengthen it with versions yet to get to Wilson — who wants the punitive provisions of all bills placed into effect — are expected to linger into the early summer.

"The public does not realize how much impact they do have," Rainey said. "Because of Mike Reynolds' daughter and because of Polly Klaas, the public began to demand this. Yes, it was a stampede. The public was saying: This is what we want. And because of that, we had legislators, who never would have done this before, rushing to do it."

INSTRUCTIONS ON PAGE 2A
■ Lungren says courts may pull juveniles out of three-strikes law
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S.J. MERCURY NEWS
3-9-94
7B
1 of 2
COMMENTARY

California strikes back

BY PETE WILSON

PEOPLE ACROSS our nation and throughout the world have been waiting to see whether California would continue to suffer in silence in a social environment that has grown intolerably dangerous or whether they would instead fight back against crime by enacting the most comprehensive and toughest "Three Strikes" law in the country.

They now have their answer, because Assembly Bill 971 became law Monday.

This landmark legislation mirrors the initiative launched last year by Mike Reynolds after his 18-year-old daughter, Kimber, was brutally murdered by a repeat felon.

Although too late for Kimber Reynolds and a legion of other innocent victims — men, women and children all over California — this historic legislation sends a clear and sobering assurance to career criminals: From now on, you're going to get the prison time you deserve, and you're going to serve the time you get.

This message rings out loud and clear in the tough provisions of California's "Three Strikes" law, provisions that:

- Impose triple the mandated sentence or 25-years-to-life on felons with two prior serious or violent felony convictions.
- Double the mandated term for felons with one prior conviction for a serious or violent felony.
- Restore truth in sentencing by limiting the time off that an inmate can earn for good behavior and work to just 20 percent of his sentence.

Most Californians clearly understand the urgency of putting an end to revolving-door justice by cracking down on felons who repeatedly victimize law-abiding citizens. This is evidenced by the public's overwhelming support of the "Three Strikes, You're Out" initiative.

Nonetheless, there are some who say this law won't reduce the crime and violence on our streets and others who maintain that we cannot afford to keep career criminals locked up.

I strongly disagree.

Based on a recent Department of Corrections analysis of data from the last 33 years, it's clear that incarceration works.

Between 1960 and 1980, the crime rate in California increased substantially, and by 1980, it was more than 2½ times as great as it was in 1960. Our imprisonment rate during this period was essentially flat.

But in 1980, the state's imprisonment rate began to climb, and it has been increasing dramatically ever since. The crime rate, in comparison, dropped sharply during the early 1980s and has remained fairly stable since then.

This historic legislation sends a clear and sobering assurance to career criminals: From now on, you're going to get the prison time you deserve, and you're going to serve the time you get.

Simply stated, when incarceration rates were flat, the crime rate soared, but since we started locking up more criminals, the overall crime rate has leveled off. It remains unacceptably high, however, and that's why I made passage of "Three Strikes" legislation a top priority at the crime summit I recently held.

There's no dispute that the reforms contained in this law will require considerable additional expense. The Department of Corrections has estimated that this law will result in more than 81,000 additional felons in our prisons by the turn of the century, and we'll have to build the prisons needed to house these criminals.

But I believe that's an expense the people of California are willing to pay. And to those who say we can't afford to pay for "Three Strikes," I say we can't afford not to. After all, what price could we possibly put on the life of countless victims of violent crime? What about the price we all pay because crime is driving businesses and jobs out of California?

I'd rather close prisons than open them, and I don't view the estimated costs of this law as our inescapable fate. The crime prevention initiatives we've implemented and the others we are proposing will "pay off" by keeping young people from turning to crime.

S.J MERC NEWS
3-9-94
2 of 2

In the meantime, this legislation is a necessary and significant step forward in our efforts to make California safe once again.

But let me be clear. AB 971 is the first "Three Strikes" measure to reach my desk, and while it represents the toughest anti-crime legislation ever enacted in California, it must be seen as the base upon which to build. We must add to it other needed protections. That's why I've insisted that the Legislature act responsibly and give me the opportunity to sign the strongest possible combination of protections contained in all the other "Three Strikes" proposals under consideration in a way that does not repeal the provisions in AB 971. And I've asked for some penalty increases not presently included in any of the proposals.

But rather than afford the public the strongest possible combination of protections, an action of the state Senate Appropriations Committee a week ago will deprive the people of needed safeguards by compelling a totally needless and artificial choice between them. As amended, only the last bill enacted can become law — and the action of the people voting to approve the Reynolds initiative would destroy the surviving bill.

This is nothing less than the most outrageous manipulation of the legislative process for the purpose of the most cynical election year gamesmanship.

Public safety is not a game. It's literally a matter of life and death. I urge Mercury News readers to call or write their state senators and demand that they remove these "poison pill" amendments that will otherwise deprive the people of needed protections against vicious criminals.

The people of California need and deserve the strongest possible combination of protections, including:

- "Three Strikes" for repeat felons.
- "One Strike" for rapists, child molesters and aggravated arsonists.
- No sentence-reducing credits for violent offenders.
- Prosecution as an adult of a juvenile who commits a violent crime.

If it weren't for Mike Reynolds and the hundreds of crime victims who assisted him with his initiative drive, the measure I signed would never have reached my desk. It was their efforts and determination that galvanized lawmakers into action. Now we must get the other protections needed to adequately safeguard the people of California. They deserve nothing less.

Pete Wilson is governor of California.

(5)

S.J. Mercury
News
3-1-94
12A 1 of 2

'3 strikes' cost doesn't deter Senate

BY MITCHEL BENSON
Mercury News Sacramento Bureau

SACRAMENTO — Corrections officials, prosecutors and judges Monday offered Californians a conservatively calculated but startling glimpse at how the multibillion-dollar "three strikes, you're out" initiative would reshape and swell this state's criminal justice system.

Prison numbers would more than double by 2000.

Hours later, though, a Senate panel apparently undeterred by sticker shock passed five "three-strikes" proposals on their so-far speedy legislative journey.

State corrections officials offered detailed estimates, totaling $10.8 billion, that the initiative would cost taxpayers over the next five years. That money would be spent building and operating 20 new prisons and filling them with 14,000 new correctional officers and 81,628 more inmates. Those numbers exclude

See LAW, Back Page

■ LAW

from Page 1A

previously projected inmate growth.

A nearly identical legislative proposal — but one that could take effect six months sooner — would bump that $10.8 billion price tag to more than $11 billion.

The estimates do not say how the state — already wrestling with a nearly $5 billion budget deficit for the current and next budget years combined — would propose to pay for the massive expansion program.

Fewer plea bargains

In addition, local court officials forecast the initiative would increase their costs by $24 million to $30 million a year statewide, largely because they estimated at least 1,500 more jury trials statewide each year. That estimate includes higher costs for longer trials, more judges, jurors, interpreters, trial transcripts and expert witnesses.

Those officials argued that defendants who might have agreed to a felony plea would, under "three strikes," go to trial to try to avoid the tougher sentences for repeat felony convictions.

Despite the numbers unveiled

Commentary

'Three Strikes' as a Against the Underclass

price of greater antagonism in California's

MICHAEL GIBBS

By ERIC CUMMINS

With the passage of the "Three Strikes" bills, Californians have had to watch the worst kind of political pandering. Despite the state's trend of gradually declining crime rates for rape, robbery and assault, in an election year the governor and the California Legislature have once again preferred to go beyond stern justice to exact punishments grossly disproportionate to their crimes.

Criminal Policy

We are now left to tally up the costs of once again doubling the number of our prisons by the end of the decade, housing an estimated 80,000 new inmates, and footing the bill for 14,000 new corrections guards. This not to mention the increased court costs as more and more cases are brought to trial.

The cost in human terms will be even uglier. Contemplate the justice that might emerge from the law in San Diego County that defines avocado stealing as a felony. Could a homeless person with two felony priors end up in prison for life for stealing food? Think of the implications for rights under the 14th Amendment. Should a juvenile felony really be counted as a strike despite the fact that the defendant was not entitled to a jury trial?

FEEDING THE RAGE

The three strikes miscarriage of justice will feed a rage already building inside the prisons and among California's underclass. California prisoners are already more aware than the general public of how the prisons have historically functioned as a weapon of class and race oppression.

Few who are not poor are in prison. The balance of justice is heavily weighted against the underclass. The percentage of African-Americans in California's prisons, for just one example, has for four decades been ballooning far out of proportion to their numbers in the population, from 19.1 percent in 1951, when blacks constituted 4.4 percent of the California populace, to 35.4 percent in 1980, when the black population was 7.5 percent of the state.

These numbers cannot be explained simply by the claim that black Californians have been more crime-prone than others. The disproportionate number of black males sent to California prisons is at least partially caused by racial inequities in the dispensation of justice in the state.

At every stage in the justice system — arrest, pretrial hearing, conviction, sentencing and classification hearing — California's blacks and other minorities have faced a legal system controlled by whites. More aggressive police arrests in minority neighborhoods, inequities for poor defendants in pretrial negotiations, and higher imprisonment rates for minority defendants than for whites convicted of comparable crimes, have put proportionately more California minority defendants than whites behind bars and kept them there longer.

For small-town chambers of commerce throughout the dusty hinterlands, the Department of Corrections publishes an attractive four-color brochure: 'California State Prisons: Good Neighbor, Good Employers, Good Community Partners.'

In response, no other group of prisoners has shown more rage at the persecuting machinery of the state than California's minority convicts. In the late 1960s, California's prison gang system emerged as an attempt of ethnic minority convicts to reverse the patterns of racism inside the prisons by taking control of the yard and the inmate *sub rosa* economy. Secret political study grew inside at the same time.

Large numbers of our convicts in the late 1960s and throughout the 1970s learned to read in these secret study groups, from textbooks simplified from *The Communist Manifesto* and other Marxist-Leninist texts. Consequently, many of the prison's convict class became avid disciples of the Left and students of Marxism-Leninism.

Even the hundreds of more conservative convicts who rejected Marxism and revolutionary ideology adopted limited aspects of class analysis as they came together in a system-wide convict unionization movement. These prisoners have now paroled back onto the streets; many have been recycled back into the system. They are the teachers on today's cell tiers.

California doubled the number of its prisons in the 1980s. Funding for its state prison system soared 359 percent from 1982 to 1990. In the decade from 1980-90, the percentage of the state's population in California prisons tripled.

Even before "Three Strikes," in its stern resolve to put all lawbreakers behind bars, California already led the nation. Even in spite of the phenomenal failure of the prisons to either deter or reform, today the state is again contemplating yet another prison construction program of gargantuan scale.

For small-town chambers of commerce throughout the dusty California hinterlands, the Department of Corrections publishes an attractive four-color brochure: "California State Prisons — Good Neighbor, Good Employers, Good Community Partners." The prisons continue to blossom everywhere, the small town's dream come true of a guarantee to full employment in these harsh times — in Corcoran, Madera, Wasco, Delano, Chowchilla — in a hundred California backwater towns, where the underclass can be put to crop and become more silenced voices in the Californian prison fold.

In 1989 the California Corrections Department unveiled its premier, "maxi-maxi" secret weapon, Pelican Bay State Prison. More "maxi-maxi" prisons are planned or under construction in California and across the nation. The centerpiece of this new prison, the Security Housing Unit, is designed to warehouse the "worst of the worst" among California inmates.

Surprisingly, this refers not to the heinousness of the inmate's original crime but rather to his disciplinary record while in prison. Though the "troublemakers" the new prison has come to house are said to be California prison gang members and those who have assaulted guards or other prisoners, the Pelican

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Preemptive Strike

Incarceration offers full employment to backwater towns at the leeply fissured social order

Bay S.H.U. population also includes jailhouse lawyers, political activists and those simply found "associating" with gang members.

Roughly 2,000 inmates sit absolutely idle in windowless cells behind thick, steel-plated doors in the S.H.U. for 22½ hours a day. Behind the thick door to his cell, the S.H.U. inmate now sits out his sentence. No human contact is allowed, no communal activities of any type are permitted. Human speech is only possible in whispers with the prisoner in an adjoining cell. No wall decoration is permitted. No work is permitted. No hobbies are allowed to pass the time away. No education, religious worship, counseling or psychiatric care is available.

Guards view the cell corridors from control booths and communicate with inmates through speakers. Doors are opened and closed by remote control. At mealtimes a tray of food is passed through the cell door. Once a day the prisoner is strip-searched, handcuffed and bellycuffed, then escorted by two guards to the "dog walk," a bare concrete yard without sports equipment, toilet or water, where he may exercise alone. What is the intent of this cruel new imprisonment? Pelican Bay Prison's S.H.U. cells are places of pure psychological destruction.

The California Department of Corrections claims Pelican Bay is reducing violence in the prisons. There are early indications that the prison may actually be having exactly the opposite effect. Inside the prisons, violence continues and at times appears to have grown worse. Though the official CDC figure on assaults on staff shows a drop of 6 percent from 1988-1990, inmate-to-inmate fighting has not abated. This stands to reason. What can be left of a prisoner after such treatment?

From inmates who parole from Pelican Bay's S.H.U. and future prisons like it, we can expect only an increase in violent, irrational crimes. Among those who are condemned to California prisons for life, we can expect a dramatic increase in yard violence. Inmates in the S.H.U. are already understandably developing severe psychiatric problems. After a visit to the prison, interviewers from the Pelican Bay Information Project report that some prisoners had smeared themselves with their own feces. Others had mutilated themselves or went on crying and shouting for hours. Some talked nonsensically.

Ethnic minority inmates, primarily black and Hispanic convicts, inside the prisons have attempted to control the prison yard and covert prison education inside. This has made the state prisons minority-dominated enclaves and universities of the poor.

What can we expect from California's cruel new prisons after "Three Strikes?" We should remain aware of two facts. First, since the early 1960s, California's ethnic minority inmates, primarily black and Hispanic convicts, inside the prisons have moved to reverse the race-domination pattern of the American culture at large by attempting themselves to control the prison yard and also, crucially, by coming to control covert prison education inside. This has made the state prisons minority-dominated enclaves and universities of the poor.

Political organizing and gang activity apparently continue today to be possible among inmates even at the highest security levels of these prisons, even at Pelican Bay. Second, we should take it as a principle that the crueler California prisons get, the more violent the prison yard will likely become and the more violent prisoners will be when they are finally released to the public streets. At present, about 30 percent of our convict population is in prison for non-violent crimes. For these inmates especially, the California prison yard will become more and more a school for violence.

We can expect California's next boom of prison construction and her skyrocketing rate of incarceration to produce, even in the high-tech "maxi-maxi" prisons, more, not less, covert political and gang education and organizing among her ethnic minority underclasses. "Three strikes" will simply add fuel to this fire.

The tremendous expansion of the use of imprisonment in California is likely to bring more, not less, class antagonism into an already deeply fissured California social order, and more violence on the streets. As the fires spread outward from our prisons into California's ghettos, will Californians finally have the compassion and the common sense to seek real, lasting reforms in their prison and criminal justice systems? The goal of lasting prison reform still eludes us. "Three Strikes" is proof of that.

A Tale of Ideals Lost in Violence

The failure of both rhetoric and best intentions trace the history of reforming California prisons

By ARTHUR R. GEORGE

The simple and declarative title of Eric Cummins' book *The Rise and Fall of California's Prison Movement* (Stanford University Press, 1994) signifies to the reader that Cummins is writing about a historical period that is both past and finished. Ironically, this history of a defunct prison movement emerges just as California's Legislature has voted to use "Three Strikes" to create more prisoners.

THE ANACHRONISMS OF RECENT HISTORY

Cummins' book traces the full circle that circumscribes prison reform efforts. His story begins with the "bibliotherapy" of San Quentin librarian Herman Spector, who sought to raise prisoners' educational and awareness levels through reading pro-

Review

grams leading up to Great Books discussion groups. Dedicated to changing prisoners' lives, Spector was chief librarian for almost three decades starting in 1947. Spector worked within Department of Corrections guidelines to stop any writing that was libelous, pornographic, or critical of law enforcement, glorified crime or drug use, or might be offensive to any race, religion, or ethnic group; books, Spector himself wrote, could be used within "the her-

Arthur R. George is an attorney and editor of The Recorder's commentary pages.

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Cummins' book [illegible] names that now too [illegible] artifacts: Caryl Ch[illegible] services Cleaver, Huey Newton [illegible] He traces the Liberation Army. [illegible] reading that had been at encounter these names [illegible] of "bibliotherapy:" Reading the realization that they [illegible] was curtailed; the San Quentin library fell from 36,000 volumes to 8,903 from 1974 to 1990.

By the end of the book, the treatment era has passed and been judged a failure. Cummins writes that when it became obvious that librarian Herman Spector's eternal truths were not the truths that the imprisoned underclass held sacred, the iron gag had to be reapplied. Harsh censorship was reintroduced. And television and video watching was engineered to supplant inmate reading. Cummins uses San Quentin as a constant example. By the 1970s, he writes, the prison chose to turn away from even the pretense of rehabilitation and to merely repress.

With more prisoners now being brought under lock and key but with little movement on behalf of their interests, Cummins is not hopeful about the future for prisons, prisoners or society. He sees prisons as a breeding ground for more violence, training facilities not so much for political organization as for gang indoctrination among the ethnic minority underclasses. The effect is to foment chaotic and unfocused antagonism between classes into only violence, not social change.

The lesson of revolutionary rhetoric, he concludes, is that it is dangerous to characterize street crime as revolutionary politics, and street criminals as anti-state revolutionaries. He cautions too, that criminals who characterize themselves as leaders of an underclass uprising will be the first to become victims, as such uprisings are quelled by force.

The Recorder
3-1-94
p 2
1 of 2

TUESDAY, MARCH 1, 1994

'3 Strikes' Could Flood Courts, Cost $3 Billion

By BILL AINSWORTH

SACRAMENTO — A member of the Judicial Council warned a Senate committee on Monday that the "Three Strikes" initiative to lock up repeat violent felons could trigger an avalanche of jury trials that might overwhelm the system.

At the same hearing, a representative from the Department of Corrections provided the first detailed look at the measure's fiscal toll, estimating that it would double the state's prison budget, by adding another $3 billion a year in costs.

Judicial council member J. Richard Couzens, a Placer County Superior Court judge, told the Senate Appropriations Committee that the initiative could double or triple the number of jury trials, increase the length of preliminary hearings and freeze out civil cases from the justice system.

According to a Judicial Council estimate, 3.5 percent of felony defendants currently choose jury trials. Under the strictest version of five bills being considered, at least 15 percent of felony defendants would face greatly extended terms. Couzens said most of those will opt for a jury trial. "They'll go in kicking and screaming," he said.

Alameda County District Attorney John Meehan estimated that "Three Strikes" could triple the number of criminal jury trials. In 1993, there were 141 criminal jury trials in Alameda County; an additional 300 defendants who had two prior convictions for serious and violent felonies pled guilty to a felony. Meehan estimated that those 300, who would face long prison terms under "Three Strikes," would seek jury trials.

"The presiding judge would have to shut down most of the civil courts to handle that," Meehan testified.

Meehan and Couzen's comments were directed at the most extreme version of the five "Three Strikes and You're Out" bills being considered by the appropriations committee on Monday. That bill, AB 971, mirrors an initiative being circulated by Mike Reynolds, the father of a murder victim. The committee, which hadn't voted by early evening, was expected to send all five versions to the Senate floor.

Yet despite the problems highlighted, the Judicial Council has not taken a position on the bill. When pressed by one committee member, Couzens said that he opposed AB 971 and favored an alternative sponsored by Assemblyman Richard Rainey, R-Walnut Creek.

Rainey's bill, which is more narrowly aimed at violent felons, is favored by prosecutors and most law enforcement officials. Under his bill, a third offense has to be violent or serious.

According to the study by the corrections department, the extra prison terms specified by the most extreme bill would add 58,518 prisoners to the system, costing the state $3 billion a year: $1.2 billion to operate prisons and $1.8 billion to build new prisons. Those costs would increase each year. Currently, the state spends $3 billion a year operating prisons that house 115,000 inmates.

The estimate does not count the costs to counties of more jury trials.

Couzens said that criminal defendants

See '3 STRIKES' page 12

The Recorder
3-1-94
P. 12
2 of 2

'3 Strikes' Could Flood Courts

Continued from page 2

may compound the courts' problems by insisting on their right to a speedy trial. If that were to happen, he predicted that the courts would have to dismiss lesser criminal charges to make room for the additional trials. "A dismissal of a serious felony is one strike against the legal system," he said.

Currently, the right to a jury trial is routinely waived by defendants in hopes of aiding their defense.

Under AB 971, the prison term for a felon convicted of a second serious or violent offense would be doubled. Any felon with two priors would face a 25 year to life sentence, no matter whether the third felony was for writing a bad check or for rape.

Craig Brown, the deputy secretary of the Department of Corrections, said that despite the high cost of AB 971, Gov. Wilson still supports that version. Wilson is likely to have the final say because the Legislature has so far passed all five bills.

Commentary

CALIFORNIA COMMENTARY

Oops! 3 Strikes, Death Penalty Out

A bonehead drafting error demonstrates (again) that making law by ballot initiative isn't always smart.

By GERALD F. UELMEN

Isn't it rich? . . . Isn't it grand? . . . Before our very eyes, the Three Strikes and You're Out Initiative of 1994 is transformed to the Death Penalty Repeal Initiative of 1994. Welcome to the annual visit of the California Initiative Circus, a grand extravaganza in which legislators do back flips, governors do pirouettes on horseback and judges can be dunked for 10 cents a throw. *Send in the clowns. . . .*

In the first of the three rings under the big top, we have the disappearing drafters. This routine is usually timed for three to four months after the process of collecting signatures begins. That's when somebody who will be charged with implementing an initiative sits down and reads it for the first time. This time, it was a prosecutor in the Contra Costa County district attorney's office. He saw the problem in the first sentence of the draft initiative (it's working title is "Sentence Enhancement. Career Criminals"):

"Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, . . . the court shall adhere to the following: . . . There shall not be a commitment to any facility other than State Prison."

The "notwithstanding any other law" would preclude application of the death penalty law, creating the anomalous situation that a murderer with a prior felony would have to be sentenced to prison under the "three strikes" initiative; only murderers without prior felony convictions would be eligible for the death penalty.

When this kind of bonehead drafting mistake is exposed, the first thing everyone asks is, "Who the hell wrote this?" (Remember the governor's embarrassment when it was revealed that Proposition 165, his 1992 welfare reform initiative, inadvertently eliminated the power of the Legislature to override a veto?) The answer is remarkably consistent: No one wrote it. A committee drafted it, but no one on the committee was responsible for this blunder. That's the nice thing about initiatives: The drafters show up to take credit only after their brainchild wins at the polls. At that point, there are usually five drafters for each word in the measure.

Once the process of collecting signatures has begun, a drafting error can't be corrected. Unlike a legislative proposal which can be amended, the language of initiatives is cast in concrete.

'A classification scheme that orders prison for those with felony records while reserving the death penalty for those without prior convictions couldn't pass even the minimum rationality test of the equal protection clause of the U.S. Constitution.'

Moving on to the second ring, we encounter the aerial endorsers. Aspirants for high office maintain balance for their trek across the high wire by selecting the right combination of initiative measures that they will publicly support. "Three strikes" was a no-brainer for three of this year's gubernatorial candidates once polls started showing 80% of the electorate in favor of it.

The aerial endorsers sit down and read the measure for the first time only after the drafting gaffe is exposed. To avoid the embarrassment of admitting that the only thing they read before they endorsed it were the public opinion polls, they confidently announce that the error was unintended and the courts can be counted on to clean up the mess by interpreting the language consistent with the intentions of the endorsers.

In the third ring of our circus, we find the judicial gymnasts and their white elephants. The gyrations they achieve to avoid striking down a popular initiative are awesome. "And" becomes "or." Regulatory protections are created out of thin air. Then the black-robed acrobats proudly lead the elephants, with such names as 13, 103 and 115, around and around the ring, trampling into the dust the predictability of how law is applied in California.

Three strikes will present a special challenge. A classification scheme that orders prison for those with felony records while reserving the death penalty for those without prior convictions couldn't pass even the minimum rationality test of the equal protection clause of the U.S. Constitution. So the plain, unambiguous language will have to be distorted to read: "Notwithstanding any other law (EXCEPT the death penalty law, which we know nobody really wanted to repeal). . . ."

I hereby claim the role of the spoiler by publicly supporting the three-strikes initiative because it will repeal the death penalty law. That could save enough money to pay for some of the new prisons we'll have to build. It just might be the first rational thing we've done to achieve criminal-law reform since the circus began.

The circus will be back every year until Californians wake up and realize that initiatives just aren't a very satisfactory way to solve complex social problems.

But where are the clowns? . . . Don't bother, they're here.

Gerald F. Uelmen is dean and professor of law at Santa Clara University School of Law.