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The "Spirit" Of The Three Strikes Law: From The Romero Myth To The Hopeful Implications Of Andrade

Rebecca Gross

COMMENT

THE "SPIRIT" OF THE THREE STRIKES LAW: FROM THE *ROMERO* MYTH TO THE HOPEFUL IMPLICATIONS OF *ANDRADE*

INTRODUCTION

We watch enthralled as television news programs sensationalize some of the saddest moments of our reality. We are shocked by the violence and brutality of those who prey on the innocent and vulnerable. We become both enraged and frightened as we realize that there are people among us who have no regard for human life. In the wake of tragedy, we furiously search for answers, we seek ways to avoid suffering the same pain in the future and, often, we sacrifice the rights of many, believing that such a sacrifice is necessary and justified. A prime example of this reaction is California's anti-recidivist legislation known colloquially as "three strikes and you're out."

This comment tracks an occurrence of this vicious cycle in California. Part I explains how the fear of crime as well as frustration with repeat offenders and the revolving door of the criminal justice system rose to an all-time high and contributed to the development of California's Three Strikes Law.[1] This section also explores how the California Supreme Court has interpreted and attempted to refine the Three Strikes Law and specifically how the Court addressed the issue of judicial discretion in sentencing under the Three Strikes Law.[2] Additionally, this section addresses the United States Supreme

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1 *See infra* notes 8–40 and accompanying text.

2 *See infra* notes 41–79 and accompanying text.

Court's analysis of what type of sentence violates a defendant's constitutional rights.[3]

Part II describes how California's lower courts have refused to employ judicial discretion.[4] Part III shows why the application of the law, even with court-attempted refinement, is constitutionally flawed and may also be ineffective as a measure to prevent violent crime.[5]

Part IV explores the latest rulings from the Ninth Circuit Court of Appeal regarding the constitutionality of California's Three Strikes Law. [6] This Part also suggests a solution to balance the citizens' desire for a workable recidivist statute with the need to keep criminal punishment in California both fair and constitutional.[7]

I. EXTREME CASES SPUR ENACTMENT OF THE THREE STRIKES LAW

On October 1, 1993 Richard Davis abducted twelve-year-old Polly Klaas from her home at knifepoint.[8] He strangled her and left her body at an abandoned lumber mill.[9] Davis was a repeat offender.[10] In 1975, he served a year in prison for burglary.[11] Seven weeks after his release, the police arrested him for sexually assaulting a woman at a Hayward, California train station.[12] He remained in prison for that crime until 1982.[13] Three years after his release he returned to prison for abducting a woman and forcing her to withdraw money from her bank account.[14] Davis was paroled three months before Polly Klaas's abduction.[15] An intense campaign that focused on

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[3] *See infra* notes 80–105 and accompanying text.

[4] *See infra* notes 111–153 and accompanying text.

[5] *See infra* notes 154–185 and accompanying text.

[6] *See infra* notes 186–248 and accompanying text.

[7] *See infra* notes 249–269 and accompanying text.

[8] Ken Hoover, *Polly's Killer Guilty on All Counts / Death Penalty Possible for Murder, Kidnapping*, S.F. CHRON., June 19, 1996, at A1.

[9] Ron Sonenshine, *Polly's Dad Forms Foundation: Marc Klaas' Group to Focus on Crimes Against Children*, S.F. CHRON., Sept. 23, 1994, at B4.

[10] Hoover, *supra* note 8, at A1.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Hoover, *supra* note 8, at A1.

preventing tragedies such as the Polly Klaas murder fueled California's Three Strikes Initiative in 1994.[16]

Similarly, a recidivist murdered Kimber Reynolds. Kimber was shot when she tried to prevent a thief from stealing her purse.[17] Both of these tragedies seemed to highlight significant problems with California's criminal justice system. Recidivism,[18] and a greater societal belief that those who commit crimes are incapable of rehabilitation, led segments of the community to call for tougher sentencing for violent crimes. Families of both Polly and Kimber spearheaded the Three Strikes campaign; a number of politicians joined the cause fearing the political demise of being labeled as soft on crime.[19]

Several months before Three Strikes appeared as an initiative on the California ballot, politicians attempted to answer the community's call for change. The legislature enacted a habitual criminals sentencing enhancement under Section 667 of the California Penal Code.[20] Section 667 provides a sentencing enhancement, which lengthens the prison term, for anyone convicted of any felony with a prior violent[21] or serious felony conviction. [22] The punishment for a

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[16] Greg Lucas, *Voters Get Their Chance at Bat On '3 Strikes You're Out' Law*, S.F. CHRON., Oct. 15, 1994, at A2.

[17] *Id.*

[18] Recidivism is defined as follows: "[a] tendency to relapse into a habit of criminal activity or behavior." BLACK'S LAW DICTIONARY 1276 (7th ed. 1999).

[19] Harriet Chiang, *Davis' Legacy: California Three Strikes Law/ Outcry Led to Long Sentences for Thousands of Convicts*, S.F. CHRON., Aug. 6, 1996, at A11. *See also* Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 4-6 (1998). (Explaining "state politicians were afraid to question the 'anti-crime fervor', which gripped the public following the Klaas murder [and] state legislators were apprehensive to openly discuss the merits of Three Strikes, and those that did and dared to oppose the measure were publicly derided and vilified." *Id.*)

[20] *See generally* CAL. PEN. CODE § 667(a)(1) (West, 2001), which provides in relevant part, "any person convicted of a serious felony who previously has been convicted of a serious felony in this state or any offense committed in another jurisdiction which includes all the elements of any 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."; CAL. PEN. CODE § 667 (c)(2)(A): "[i]f a defendant has two or more prior ["violent or serious"] felony convictions . . . that have been pled and proved, the 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. . ."

[21] CAL. PEN. CODE § 667.5 (West 2001): "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) or (6) of subdivision (a) of Section 261 or paragraph (1) or
(4) of subdivision (a) of Section 262.
(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.
(10) Arson, in violation of subdivision (a) or (b) 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, 12309, or 12310.
(14) Kidnapping.
(15) Assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220.
(16) Continuous sexual abuse of a child, in violation of Section 288.5.
(17) Carjacking, as defined in subdivision (a) of Section 215 .
(18) A violation of Section 264.1.
(19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code.
(20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code.
(21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.
(22) Any violation of Section 12022.53.
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.

Id.

[22] CAL. PEN. CODE § 667 (a) (4) (West 2001) provides: "As used in this subdivision, 'serious felony' means a serious felony listed in subdivision (c) of Section 1192.7." CAL. PEN. CODE § 1192.7 (West 2001) provides:

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 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

defendant convicted of a felony is a five-year enhancement for each prior serious felony conviction.[23] Additionally, the normal prison term for the crime is doubled if the defendant has any prior "violent or serious" felony convictions.[24] A person, with two prior convictions for violent or serious felonies, convicted of any subsequent felony is charged with a third strike and the punishment is an indeterminate life sentence.[25] Under this scheme, the third felony need not be violent or serious. Indeed, a court may be required to elevate a charge that is normally a misdemeanor, such as petty theft when the defendant has a

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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 bodily injury, great bodily injury, or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) any burglary of the first degree; (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; (28) any felony offense, which would also constitute a felony violation of Section 186.22; (29) assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220; (30) throwing acid or flammable substances, in violation of Section 244; (31) assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245; (32) assault with a deadly weapon against a public transit employee, custodial officer, or school employee, in violation of Sections 245.2, 245.3, or 245.5; (33) discharge of a firearm at an inhabited dwelling, vehicle, or aircraft, in violation of Section 246; (34) commission of rape or penetration by a foreign object in concert with another person, in violation of Section 264.1; (35) continuous sexual abuse of a child, in violation of Section 288.5; (36) shooting from a vehicle, in violation of subdivision (c) or (d) of Section 12034; (37) intimidation of victims or witnesses, in violation of Section 136.1; (38) terrorist threats, in violation Section 422; (39) any attempt to commit a crime listed in this subdivision other than an assault; (40) any violation of Section 12022.53; and (41) any conspiracy to commit an offense described in this subdivision.

Id.

[23] CAL. PEN. CODE § 667(a)(1) (West 2001).

[24] CAL. PEN. CODE § 667(e)(1) (West 2001).

[25] CAL. PEN. CODE § 667 (e)(2)(A)(i)-(iii) (West 2001).

prior petty theft conviction, to a felony and sentence the defendant to serve twenty-five years to life.[26]

The Three Strikes Initiative, eventually codified as California Penal Code Section 1170.12, requires that anyone convicted of *any* felony that has previously been convicted of a "violent or serious felony" must be sentenced to twice the number of years generally proscribed for the current felony.[27] Anyone convicted of *any* third felony must be given an indeterminate sentence of twenty-five years to life. [28] The ballot initiative required the first two strikes be given for violent or serious felonies, but permitted the third strike upon conviction of *any* felony, which would send a three time offender to prison for a term of twenty-five years to life regardless of whether the final offense was neither serious nor violent.[29] This initiative basically mirrored the provision already enacted by the legislature.[30] While the enactment of a

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[26] *See* 1 WITKIN CRIM. LAW, INTRODUCTION TO CRIMES § 72 (e) (3) (3rd ed. 2000) (describing how certain crimes such as petty theft with a prior are "wobblers" and are technically felonies, but may be reduced to misdemeanors).

[27] CAL. PEN. CODE § 1170.12 (West 2001).

[28] CAL. PEN. CODE § 1170.12(c)(2)(A) (West 2001) providing in relevant part, "[i]f a defendant has two or more prior [violent or serious] felony convictions . . . the term for the current felony conviction shall be an indeterminate term of life imprisonment . . ."

[29] *See* CAL. PEN. CODE § 1170.12(a) (West 2001), which provides: "Notwithstanding any other provision of 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 (b), the court shall adhere to each of the following . . . ." Section 1170.12 (b) in relevant part provides, "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 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 . . . ." Section 1170.12 (c) in relevant part provides:

> 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 or more felony convictions, as defined in paragraph (1) of subdivision (b) that have been pled and proved, the term for the current felony conviction shall be an 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, or (ii) twenty-five years or (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 of Part 2, or any period prescribed by Section 190 or 3406 . . . .

Id.

[30] Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1,

nearly identical initiative may seem superfluous, some believed that placing the initiative on the ballot would send a clear and strong message to the legislature that the community was serious about creating a tougher criminal justice system.[31] Additionally, the legislature may only change initiatives by a two-thirds majority vote and thus, proponents of Three Strikes used the initiative to safeguard the Three Strikes Law from the possibility of future legislative changes.[32]

Before the 1994 election in which Three Strikes was placed on the ballot, members of Polly's family including her grandfather Joe Klaas, explained that he and many of the Polly Klaas Foundation volunteers had collected signatures for the bill without having read it.[33] Joe Klaas spoke at Golden Gate University as a representative of the Polly Klaas foundation to inform people that the law as written, unfairly punishes residential burglary as harshly as assault, rape or severely violent crimes, as each of these offenses result in life sentences after three convictions.[34]

In fact, Polly's father, Marc Klaas, removed his name from support of the 1994 ballot initiative because he believed that only convictions of violent or serious felonies should count as strikes.[35] The Klaas family immediately pulled its support from the campaign and began an anti-initiative campaign in the hopes of educating Californians regarding the actual consequences of the initiative.[36] Instead, they lent their support to a revised version of the recidivist statute named the Polly Klaas Memorial Bill.[37] Unfortunately, the Three Strikes initiative had already garnered strong support from the public.[38] The California Correctional Peace Officers Association, a strong prison guard union, contributed $100,000 to place the initiative on the 1994 ballot.[39] As a result, the

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9 (1998).

[31] *Id.*

[32] *Id. at* 9-10.

[33] Stephen Schwartz, *Joe Klaas Regrets Backing '3 Strikes' Measure*, S.F. CHRON., Apr. 20, 1994, at A17.

[34] *Id.*

[35] Robert B. Gunnison, *State Tops Nation in Imprisonment Rate: Three Strikes Opponents Cite Steep Costs*, S.F. CHRON., July 15, 1994, at A20.

[36] Sonenshine, *supra* note 9, at B4.

[37] Schwartz, *supra* note 33, at A17.

[38] Chiang, *supra* note 19, at A1.

[39] Lucas, *supra* note16, at A2.

Three Strikes Initiative easily passed in the 1994 election with seventy-two percent approval from California voters.[40]

After the Three Strikes Law was enacted, California courts began to confront many issues that were not explicitly addressed in the statute. One of those issues was whether judicial discretion in sentencing would survive the required sentencing enhancement and guidelines of the Three Strikes Law.[41]

A. JUDICIAL DISCRETION AS DEFINED BY ROMERO AND WILLIAMS

1. The Romero Decision

In 1996, the California Supreme Court confronted the Three Strikes controversy, deciding whether a trial court may strike a prior felony conviction under certain circumstances to avoid overly harsh sentences. Jesus Romero was charged with possession of .13 grams of cocaine base in 1994.[42] Romero was previously convicted of first and second-degree burglary, attempted burglary and possession of a controlled substance between the years of 1980 and 1993.[43] At trial, the court permitted Romero to enter a guilty plea in exchange for striking his prior felony convictions.[44] Thus, the court sentenced him to six years in prison rather than twenty-five years to life.[45]

The court calculated Romero's six-year sentence by imposing the greatest term permitted for possession and by adding "three consecutive one-year enhancements for [the] prior felony convictions."[46] The district attorney petitioned for a writ of mandate and the Court of Appeal concluded that the trial court had no power in a Three Strikes case to vacate a

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[40] Bill Jones, *Why the Three Strikes Law is Working in California*, 11 STAN. L. & POL'Y REV. 23, 24 (Winter 1999).

[41] *See* CAL. PEN. CODE § 1170.2(d)(2) (West 2001), referring to the prosecutor's power to "dismiss or strike a prior felony conviction allegation in the furtherance of justice," but making no mention of the same power in the judiciary.

[42] People v. Romero, 13 Cal 4th 497, 506 (1996).

[43] *Id.*

[44] *Id at* 507.

[45] *Id.*

[46] *Id.*

defendant's prior strikes on its own motion.[47] Romero appealed his case to the California Supreme Court.[48]

California Supreme Court Justice Werdegar's majority opinion held that nothing in the Three Strikes Law prohibits a trial judge from employing the judicial discretion granted to them under California Penal Code Section 1385(a).[49] Section 1385(a) permits a judge to "either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."[50] The legislative version of the Three Strikes Law, California Penal Code Section 667, specifically refers to dismissal under Section 1385(a) and does not explicitly overrule the judicial discretion created therein.[51]

The *Romero* Court thus found that it would be unconstitutional to permit the prosecutor to dismiss strikes, but prohibit the court from doing so, unless the legislature had explicitly stripped the court of its discretionary power.[52] Although Section 1385(a) on its face does not grant the court discretionary power in enhancement cases under Section 667, the Three Strikes Law refers to such discretion and thus, the court reasoned, the legislative intent was not to eliminate it.[53] In doing so, the Court held that "although the legislature may withdraw the statutory power to dismiss in furtherance of justice, we conclude it has not done so in the Three Strikes Law."[54]

After the *Romero* decision was handed down, California's legal and political communities voiced both relief and concern. While district attorneys feared that the Three Strikes Law would no longer be applied with as much fervor, public

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[47] *Id.*

[48] *Id.*

[49] *Id. at* 529-30.

[50] CAL. PEN. CODE § 1385(a) (West 2001).

[51] *See* CAL. PEN. CODE § 667(f)(2) (West 2001), which provides:

> [t]he 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 felony conviction. If upon the satisfaction of the court there is insufficient evidence to prove the prior felony conviction, the court mat dismiss or strike the allegation.

Id.

[52] *Romero*, 13 Cal 4th at 512, 529-30.

[53] *Id. at* 519-20.

[54] *Id. at* 504.

defenders and others concerned about the draconian effects of the law celebrated the decision as a step in the right direction.[55]

2. *The Williams Decision*

Although *Romero* authorized a certain degree of power to judges to avoid unnecessarily harsh sentences, this power was severely limited by the California Supreme Court two years later.[56] Eugene Williams was convicted of driving under the influence of phencyclidine (PCP) in 1995.[57] This crime is known as a "wobbler," which means that it may be charged as a misdemeanor or a felony depending on whether the defendant has prior convictions of the same offense.[58] The prosecutor chose to charge Williams with a felony and additionally alleged that Williams had previously been convicted of three "violent or serious" felonies, including rape and two convictions for being a felon in possession of a firearm.[59]

Williams requested that the superior court either declare his current offense a misdemeanor or strike one of his previous "violent or serious" felonies pursuant to California Penal Code Section 1385(a).[60] The trial court ruled that it would not categorize his current offense as a misdemeanor, but would consider striking a prior felony conviction so as to treat Williams as a two strike case, rather than a three strike case.[61] The court explained that this action was proper because Williams' prior serious and violent felonies occurred thirteen years ago, when he was twenty years old, and because Williams had not committed any crimes involving violence since then.[62] Thereafter, Williams changed his plea to guilty, the superior court vacated the prior strike for attempted robbery, and sentenced him to nine years in prison.[63]

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55 Chiang, *supra* note 19, at A1.
56 People v. Williams, 17 Cal. 4th 148 (1998).
57 *Id. at* 152.
58 *Id.*
59 *Id.*
60 *Id. at* 155.
61 *Williams*, 17 Cal 4th at 155-56.
62 *Id.* at 156.
63 *Id. at* 156-57.

On appeal, the superior court's decision to vacate one of Williams's strikes was reviewed for abuse of discretion.[64] The Court of Appeal held that the superior court had indeed abused its discretion, "in light of Williams's 'extraordinary record of prior criminality.'"[65] The Court of Appeal further ordered the superior court to sentence Williams under Three Strikes to a term of twenty-eight years-to-life.[66]

Williams petitioned the California Supreme Court and was granted review.[67] The California Supreme Court attempted to delineate the boundaries of *Romero* by explicating how and when a court should employ judicial discretion to vacate a prior strike.[68] First, the Court attempted to define the broad concepts expressed in Section 1385(a).[69] It explained that there is no statutory definition of the phrase "in the furtherance of justice" and thus its interpretation must be guided by precedent case law.[70] Accordingly, a court must balance "the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be dismissal."[71]

The Court decided that the definition of "justice" must be found within the scheme of the Three Strikes Law.[72] Therefore, a court's determination to vacate a prior strike:

> must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.[73]

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64 *Id. at* 157.
65 *Id.*
66 *Williams*, 17 Cal 4th at 158.
67 *Id.*
68 *Id.* at 158-65.
69 *Id.* at 159.
70 *Id.*
71 *Williams*, 17 Cal. 4th at 159.
72 *Id.* at 160.
73 *Id.* at 161.

Additionally, a court that decides a defendant is not within the spirit of the Three Strikes Law must record its reasons for such a finding.[74]

Applying this standard to Williams, the Court found nothing encouraging in his "background, character and prospects."[75] The Court emphasized that Williams had four convictions for driving under the influence and had been consistently involved in other criminal activity.[76] Additionally, his convictions between age twenty and thirty-two involved not only driving under the influence and being a felon in possession of a firearm, but also a misdemeanor charge of spousal battery.[77] The Court concluded, "[i]n view of the foregoing, the superior court's order fell outside the bounds of reason under the applicable law and the relevant facts."[78]

3. The Implications of Williams and Romero

Williams instructed California judges that while *Romero* discretion exists, it is not limitless. By addressing amorphous concepts such as "in the furtherance of justice," the California Supreme Court seemingly hoped to reign in judges from limitlessly exercising sentencing discretion. Williams's criminal history was, however, arguably excessive as it included violent crimes and crimes involving firearms. Also, the "wobbler" that was charged as a felony, driving while intoxicated, is one which society has a great interest in deterring.[79] Therefore, questions still remained after *Williams*.

For example, is a court acting in a legislative capacity when it attempts to distinguish between those defendants who fall within the spirit of Three Strikes and those that are deserving of another chance? And how will judges define the "spirit" of Three Strikes when they are confronted with defendants who do not clearly fit within either of those categories? One of the great concerns that remained after

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[74] *Id.*.

[75] *Id.* at 163.

[76] *Williams*, 17 Cal. 4th at 163.

[77] *Id.*

[78] *Id.* at 164.

[79] *Id.* at 153. Although Williams was arrested before an accident occurred, he was so incapacitated by phencyclidine (PCP) that the officer had to ask him for his license eight times and each time Williams responded, "[h]ow are you doing sir?" *Id.*.

Romero and *Williams* was whether judicial discretion would be applied to avoid extremely long sentences that many believed violated the defendants' constitutional rights.

B. EIGHTH AMENDMENT PROHIBITION OF DISPROPORTIONATE SENTENCES AS A CHALLENGE TO "THREE STRIKES"

The Eighth Amendment to the United States Constitution provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[80] The United States Supreme Court has interpreted the prohibition against cruel and unusual punishment as a bar to sentences that are disproportionate to a defendant's conviction.[81]

In *Solem v. Helm*, the defendant was convicted of passing a bad $100 check.[82] He had previously been convicted six times for nonviolent felonies.[83] None of Helm's previous convictions were crimes against persons and intoxication was a contributing factor in each offense.[84] The felonies included obtaining money under false pretenses, third degree burglary, and driving while intoxicated.[85] Although the typical punishment for passing a bad check was five years in prison and a $5,000 fine, Helm was sentenced under South Dakota's recidivist statute to life imprisonment without the possibility of parole.[86] To no avail, Helm argued to the South Dakota Supreme Court that the sentence constituted cruel and unusual punishment and thus violated his Eighth Amendment rights.[87]

The United States Supreme Court granted certiorari to consider Helm's Eighth Amendment claim.[88] The Supreme Court found that the Eighth Amendment requires that a defendant's sentence be proportionate to the crime

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80 U.S. CONST. amend. VIII § 1.
81 Solem v. Helm, 463 U.S. 277 (1983).
82 *Id.* at 281.
83 *Id.* at 279.
84 *Id.* at 280.
85 *Id.* at 279-80.
86 *Solem*, 463 U.S. at 281-83.
87 *Id.* at 283.
88 *Id.* at 284.

committed.[89] The Court agreed that a certain amount of deference must be shown to a state legislature's decisions regarding punishment, but such deference does not concede that any "penalty is per se constitutional."[90] The Court concluded "[i]n sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[91]

In Helm's case, the Supreme Court identified his conviction as "one of the most passive felonies a person could commit."[92] While the Supreme Court recognized that Helm was punished more severely because of his recidivist status, it also demanded that such a status be carefully analyzed.[93] The Court emphasized that none of Helm's past offenses involved violence against people.[94] The Supreme Court concluded that Helm received a harsher sentence for his nonviolent crime than most offenders receive for violent crimes against persons, such as rape.[95] The Court also emphasized that Helm received a tougher sentence under South Dakota's recidivist statute than he would have received in any other state, with one possible exception.[96] The Supreme Court concluded that Helm's "sentence is significantly disproportionate to his crime and is therefore, prohibited by the Eighth Amendment."[97]

Members of the Supreme Court slightly revised the *Solem* analysis in *Harmelin v. Michigan*.[98] In *Harmelin*, the defendant was convicted of cocaine possession and sentenced to life without the possibility of parole.[99] The Supreme Court granted review of Harmelin's claims.[100] The Supreme Court affirmed his sentence, but the Justices disagreed about how the

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89 *Id.*
90 *Id.* at 290.
91 *Solem*, 463 U.S. at 292.
92 *Id.* at 296 (*quoting* State v. Helm, 287 N.W. 2d 497, 501 (S.D. 1980)).
93 *Solem*, 463 U.S. at 297-97.
94 *Id.* at 297.
95 *Id.* at 298.
96 *Id.* at 299-300.
97 *Id.* at 303.
98 501 U.S. 957 (1991).
99 *Id.* at 961.
100 *Id.*

Court should apply the Eighth Amendment proportionality analysis.[101] Seven Justices held that the Eighth Amendment requires that a defendant's sentence be proportionate to the crime.[102] Justice White's opinion, joined by three other Justices, argued that the Court should continue to apply the *Solem* analysis.[103] Justices Kennedy, O'Connor and Souter opined that the court should adopt a modified test where the second and third objective *Solem* factors would only be reached in cases where an initial comparison of the punishment and the crime leads one to believe that the sentence is indeed grossly disproportionate.[104] Since *Harmelin*, courts have variously employed the *Solem* analysis as well as Justice Kennedy's modified *Solem* test.[105]

The proportionality analysis has been applied to habitual offender statutes, such as California's Three Strikes Law.[106] Recidivist statutes are not necessarily unconstitutional solely because they provide an increased punishment for certain crimes.[107] It is possible, however, to prove a constitutional violation on a case-by-case basis by showing that the sentence is disproportionate to the present offense, or that the previous offenses are nonviolent.[108]

The Ninth Circuit agrees that "the Eighth Amendment prohibits punishments that are soundly rejected by the "'evolving standards of decency that mark the progress of a maturing society.'"[109] Thus, "a criminal sentence is unconstitutional under the Eighth Amendment if it is 'extreme and grossly disproportionate'" to the crime committed.[110] Opponents of Three Strikes argued that the law clearly violated the Eighth Amendment proportionality requirement. Still, convictions under Three Strikes and the length of defendants' sentences continued to increase. California courts continued to uphold exceedingly long sentences for lesser

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101 *Id.* at 996.
102 21A AM. JUR. 2d *Criminal Law* § 954 (1998).
103 *Harmelin*, 501 U.S. at 1009-1027 .
104 *Id.* at 996-1009
105 21A AM. JUR. 2d *Criminal Law* § 954 (1998).
106 39 AM. JUR. 2d *Habitual Criminals and Subsequent Offenders* § 14 (1998).
107 *Id.*
108 *Id.*
109 Belgrade v. State of Mont., 123 F.3d 1210, 1215 (9th Cir. 1997) *quoting* Harris v. Wright, 93 F.3d 581, 583 (9th Cir.1996).
110 *Id.*

crimes using the "spirit" of Three Strikes and the punishment of recidivism as justification.

II. HOW CALIFORNIA COURTS HAVE INTERPRETED THREE STRIKES SINCE *ROMERO* AND *SOLEM*

After *Romero* and *Williams* were decided, California courts continued to struggle with the notion of judicial discretion and the constitutionality of the Three Strikes Law. In 1995, Kevin Weber, a homeless alcoholic, was sentenced under California's Three Strikes Law to 25 years to life for stealing four cookies from a restaurant.[111] He appealed the sentence on the ground that it constituted cruel and unusual punishment.[112] By the time Weber's case was on appeal, the California Supreme Court decided in *Romero* that judges have a certain amount of discretion to strike a previous felony conviction in order to avoid an overly harsh sentence and thereby avoid any Eighth Amendment claim.

In Weber's case, however, the California Court of Appeal declined to use its *Romero* discretion and affirmed the trial court's sentence.[113] The court emphasized Weber's criminal history including previous convictions for burglary, assault with a firearm and receiving stolen goods.[114] Yet the court seemed to unfairly use his recidivist status to justify a harsh sentence and to prophesize that the gravity of the harm of Weber's current offense would have been worse had Weber not been apprehended. In a unanimous decision, Justice Sills wrote, "[a] safecracker who cracks an empty safe is nonetheless a safecracker."[115] The court believed that Weber would have stolen more than four cookies had the restaurant's alarm not sounded.[116]

In another case, the Court of Appeal reversed a lower court's decision to strike Ralph Aguilar Carrion's previous felony and sentence him to eight years rather than the

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[111] Stuart Pfeifer & Jack Leonard, *Court Upholds 3-Strikes Term for Cookie Thief Ruling*, L.A. TIMES, June 19, 2001, at B7.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] Stuart Pfeifer & Jack Leonard, *Court Upholds 3-Strikes Term for Cookie Thief Ruling*, L.A. TIMES, June 19, 2001, at B7.

mandatory twenty-five to life that he would have received under the Three Strikes Law.[117] The Court opined that the trial court had abused its discretion and did not give "appropriate weight to Carrion's record of recidivism."[118] Carrion's prior convictions included second-degree burglary as a teenager, burglary as an adult in 1989, and possession of fifteen dollars worth of heroin in 1998.[119]

The trial court found that Carrion's problem was severe drug addiction and described his third offense as nonviolent.[120] Thus, the court decided that a life sentence was too extreme in this case.[121] The Court of Appeal, however, overruled the trial court decision, reasoning that "Carrion is clearly within the *spirit* of the three-strikes law . . . there is no evidence that he will modify his conduct in the future."[122]

Recently the Court of Appeal again upheld the trial court's refusal to use its discretion to prevent a defendant from facing a life sentence for petty theft.[123] In *People v. Murphy*, the defendant was found guilty of petty theft with three prior convictions for first-degree burglary.[124] The trial court sentenced Murphy to prison for twenty-five years to life.[125] Murphy appealed and argued that his sentence constituted cruel and unusual punishment under the Eighth Amendment.[126] The appellate court remanded the case back to the trial court to decide whether to exercise its judicial discretion and strike a previous felony conviction.[127]

On remand, Murphy argued that imposing a life sentence for petty theft would constitute cruel and unusual punishment and urged the court to exercise its *Romero* discretion.[128] The

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117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 Stuart Pfeifer & Jack Leonard, *Court Upholds 3-Strikes Term for Cookie Thief Ruling*, L.A. TIMES, June 19, 2001, at B7.
122 *Id. Emphasis added.*
123 People v. Murphy, 88 Cal. App. 4th 392 (2001).
124 *Id.* at 393.
125 *Id.*
126 *Id.* at 393-94.
127 *Id.* at 394..
128 *Murphy*, 88 Cal. App. 4th at 394.

court refused to recognize either of his arguments.[129] Murphy appealed again.[130]

The Court of Appeal addressed three issues: (1) whether the trial court abused its discretion by refusing to erase one of Murphy's previous strikes, (2) whether Murphy's sentence constituted cruel and unusual punishment, and (3) whether Murphy was precluded from challenging his sentence in any respect other than his original argument due to the nature of the appellate court's limited remand.[131] The court held that, as it had previously affirmed the sentence and only remanded to allow the trial court to determine whether or not it wanted to exercise *Romero* discretion, Murphy was precluded from arguing that the elevation of petty theft to a felony to invoke the Three Strikes Law violated constitutional due process and double jeopardy principles.[132] In addition, the *Murphy* court concluded that, "the [trial] court did not abuse its discretion under *Romero* by refusing to vacate the strike findings, and that Murphy's sentence is not cruel or unusual." [133] Unfortunately, due to the nature of the limited remand, the court did not offer any justification for its belief that Murphy's sentence complied with the Eighth Amendment.

In another case involving *Romero* discretion, Bradford Strong was charged with selling $10 worth of a substance that he led an undercover officer to believe was cocaine.[134] Tests later revealed that the rock-like substance did not contain any illicit narcotics.[135] At the preliminary hearing the district attorney moved to amend the complaint and add a strike.[136] In 1996, Strong had been convicted of assault with a deadly

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129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.* at 396.

133 *Murphy*, 88 Cal. App. 4th at 394. (The Court did not discuss either of these issues and instead analyzed why Murphy was prohibited from raising new arguments on appeal regarding his sentence, as the appellate court had not reversed it. Therefore, it is impossible to evaluate why the court did not believe that the trial court abused its discretion or that 25 years to life in prison does not constitute cruel or unusual punishment.)

134 People v. Strong, 87 Cal App 4th 328, 332 (2001).

135 *Id.*

136 *Id.*

weapon causing great bodily injury.[137] The trial court denied the motion to amend as "unreasonable."[138]

Instead, the judge informed Strong that "if he wished to plead guilty to the current offense and admit the prior conviction, the court would sentence him to the lower term of the offense and dismiss the strike."[139] The district attorney argued that Strong had a long criminal history and attempted to convince the court that Strong's current offense posed a threat of violence because, "[p]eople get assaulted, stabbed, and even killed for selling bunk when prospective buyers discover they have been cheated."[140]

The trial court judge rejected the district attorney's argument, dismissed Strong's strike, denied him parole because of his long record and current narcotics charge and sentenced him to 16 months in prison.[141] The judge explained that the strike should be dismissed for numerous reasons. First, the current offense was "relatively non-threatening" because Strong was not actually selling a narcotic substance.[142] Also, Strong had statistically become a reduced risk to society because of his middle age.[143] In addition, Strong's record, was "devoid of violence or threat of violence except for the strike, which did not involve a firearm" and had no prior conviction for use or possession of a firearm. [144] Finally, Strong's record only amounted to a number of "petty acquisitive offenses and substance abuse [and sentencing him under the three strikes law] . . . would be inconsistent with the spirit of the Three Strikes law as explicated by *People v. Williams*."[145]

The Court of Appeal, however, found that none of the trial court's reasons for vacating Strong's prior strike reasonably constituted extraordinary circumstances that would remove him from within the *spirit* of the Three Strikes Law.[146] In doing so, the Court of Appeal declared that, "[a]lthough the

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137 *Id.*
138 *Id.*
139 *Strong*, 87 Cal App 4th at 333.
140 *Id.* at 334.
141 *Id.*
142 *Id.*
143 *Id.*
144 *Strong*, 87 Cal. App. 4th at 334.
145 *Id.*
146 *Id.* at 331-32.

trial court reasoned that defendant's violent strike was 'out of character,' a defendant who falls squarely within the law's letter does not take himself outside its spirit by the additional commission of a virtually uninterrupted series of nonviolent felonies and misdemeanors over a lengthy period."[147]

The appellate court reasoned that one discerns the spirit of the Three Strikes Law by analyzing the statutory intent.[148] The court explained that "the Three Strikes Law expressly declares that its purpose is 'to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent offenses.' "[149]

The court's interpretation, however, is founded on California cases where the spirit of Three Strikes was applied to the "revolving door defendant."[150] Absent is a discussion of the law's goal of preventing certain violent or serious felonies. Instead the court claimed that a mere history of multiple offenses, whether violent or not, validates the application of the Three Strikes Law.[151]

This line of post-*Romero* cases indicates that while *Romero* is still considered good law in California, the discretion it affords to the judiciary is viewed in the narrowest light.[152] The holdings represent how limited judicial discretion remains in Three Strikes cases.[153] California courts do not seem to view life sentences as extreme for minor offenses, such as petty theft, when those offenses are combined with a long criminal history regardless of whether this history is based on poverty or drug addiction.

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147 *Id.* at 331.

148 *Id.* at 336-37.

149 *Strong*, 87 Cal. App. 4th at 337. (*citing* § 667, subdivision (b); Ballot Pamphlet, text of Proposition 184, General Election at 64 (Nov. 8, 1994).

150 *Strong*, 87 Cal. App. 4th at 338.

151 *Id.*

152 *See Strong*, 87 Cal. App. 4th at 338; *Murphy*, 88 Cal. App. 4th at 394.

153 *The"Three Strikes and You're Out" Law: An Update*, Legislative Analyst's Office, 1997. According to a 1997 study conducted by the Legislative Analyst's Office, there was little change in the numbers of second and third strike offenders imprisoned between 1995 and 1997, the year before and after *Romero*, respectively.

III. WHY THE THREE STRIKES LAW IN CALIFORNIA VIOLATES CONSTITUTIONAL PRINCIPLES AND IS AN INADEQUATE VIOLENT CRIME PREVENTATIVE

A. THE UNITED STATES SUPREME COURT HINTS AT THE CONSTITUTIONAL VIOLATIONS OF THREE STRIKES

In 1999, the United States Supreme Court voiced concerns over the application of the "third strike" in California Three Strikes cases. In *Riggs v. California*, a homeless man stole a bottle of vitamins from a supermarket.[154] Although the California Court of Appeal described the offense as "a petty theft motivated by homelessness and hunger," it held that the Three Strikes Law authorized the court to treat the offense as a felony and sentence Riggs to a minimum of twenty-five years to life imprisonment.[155] Even though the United States Supreme Court denied certiorari to Riggs' Eighth Amendment claim that his sentence was grossly disproportionate to his crime, Justice Stevens wrote "[t]his question is obviously substantial, particularly since California appears to be the only state in which a misdemeanor could receive such a severe sentence."[156]

Further, "while this court has traditionally accorded to state legislatures considerable (but not unlimited) deference to determine the length of sentences 'for crimes concededly classified and classifiable as felonies,' petty theft does not appear to fall into that category."[157] Justice Stevens does admit that a recidivist statute, which punishes a defendant more heavily for his or her recidivism, is justified, but distinguishes this from a statute that in effect includes additional punishment for earlier crimes.[158] The United States Supreme Court declined to grant certiorari because, "neither the California Supreme Court nor any federal tribunal has yet addressed the question."[159]

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154 525 U.S. 1114 (1999).

155 *Id.*

156 *Id.*

157 *Riggs*, 525 U.S. at 1114, *citing* Rummel v. Estelle, 445 U.S. 263, 274 (1980).

158 *Riggs*, 525 U.S. at 1114.

159 *Id.* (Justice Stevens's opinion denying certiorari was joined by Justices Souter and Ginsburg.)

Justice Breyer's dissent on the other hand, believed the issue of applying the Three Strikes Law to a petty offense raised serious questions and thus argued the issue was ripe.[160] Therefore, while *Riggs* is clearly not precedent, at the very least it is an indication that the United States Supreme Court seriously questions the constitutionality of California's Three Strikes Law.

In 2001, the United States Supreme Court again grappled with the Three Strikes Law.[161] In *Durden v. California*, the defendant appealed his sentence to the state court of appeal and was denied review.[162] The United States Supreme Court also denied certiorari.[163] In this case, however, both Justices Souter and Breyer would have granted certiorari.[164] Justice Souter explained that while in *Riggs* he had wished to wait and see the outcome of state decisions on the issue, he believed that this reason no longer justified denying certiorari.[165] He expressed concern that, "two years after *Riggs*, the Supreme Court of California has not taken up the issue."[166] More importantly, "some 319 California prisoners are now serving sentences of twenty-five years to life for what would otherwise be misdemeanor theft under the California scheme."[167] Justice Souter concluded that, "[o]n these facts, I would wait no longer. The issue is serious, the state courts have had adequate opportunity to consider it, and the stakes are substantial."[168] Therefore, though continuing to deny certiorari to review Eighth Amendment claims, some members of the United States Supreme Court have clearly expressed concern about the application of Three Strikes in California.

While some argue that the "Three Strikes [Law] is a much more defensible law after *Romero*'s construction,"[169] it is nevertheless difficult to see why in light of the cases that

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160 *Riggs*, 525 U.S. at 1114.
161 Durden v. California, 531 U.S. 1184 (2001).
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.*
166 *Durden*, 531 U.S. 1184.
167 *Id.*
168 *Id.*
169 Brian P. Janiskee & Edward J. Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law* 39 DUQ. L. REV. 43, 65 (2000).

followed. If judges are refusing to employ their discretion, even in the most extreme cases like Weber's, while others are being overturned for abuse of discretion, it is not clear that *Romero* discretion truly exists. *Romero* remains an elusive power seldom exercised and the "spirit" of Three Strikes remains an expansive justification for longer prison terms given to nonviolent offenders.

B. THREE STRIKES LAW: AN INEFFECTIVE DETERRENT

In 1997, the Department of Justice conducted a study comparing California's Three Strikes Law to the State of Washington's recidivist statute. The study indicated that while the majority of offenders in California were sentenced under the Three Strikes Law for nonviolent crimes, in Washington, all but one person was sentenced under its recidivist statute for crimes against persons.[170]

Another study of the Three Strikes Law published by the Stanford Law and Policy Review indicates that the California law as written is ineffective and overbroad.[171] Although proponents of recidivist statutes claim that the institution of harsher sentencing has resulted in lowering crime rates, there has been a steady decline in crime for the past decade including the years before the Three Strikes Law was enacted.[172] Additionally, in comparing states with recidivist statutes and those without any Three Strikes legislation there is no discernable difference between the declining crime rates.[173]

The Stanford study also argues that since Three Strikes is partially justified as a deterrent, it would be proven successful only if crime rates were dropping in groups targeted by the Three Strikes Law.[174] For example, Three Strikes was enacted to deter career criminals from committing any further criminal activity.[175] The age group most likely targeted by such a statute would be those over thirty as an older offender is more

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[170] Jeremy Travis, *Three Strikes and You're Out: A Review of State Legislation*, NAT'L INST. OF JUST., 3 (1997)

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

[172] *Id.* at 65, 66.

[173] *Id.* at 65.

[174] *Id.*

[175] *Id.*

likely to have previous felony offenses.[176] Indeed "California crime statistics reveal that felony offenders in their 30s and 40s are eight and ten times, respectively, more likely to be sentenced under Three Strikes than felons in their early 20s."[177] Therefore, if Three Strikes Law is an effective deterrent, one would expect to see the greatest decline in crime in the above thirty age group.[178] However, "in the categories of violent and property index offenses, offenders over age 30 accounted for almost 84 percent of California's arrest growth over the last two decades."[179] Thus, it seems that Three Strikes is not effectively deterring those over age thirty from committing crimes.

The Stanford study further argues that the Three Strikes Law is applied differently in the various counties of California.[180] Arguably, the counties that apply the Three Strikes Law more leniently should see the lowest decrease in felony crimes. On the contrary, "San Francisco County, which had the lowest rate of Three Strikes commitments, experienced a 35 percent decline in homicides, a 33 percent decline in all violent crimes, and a 28 percent decline in all index crimes."[181] In comparison, counties that used the legislation more extensively did not see such a dramatic drop in crime rates.[182]

Finally, the study indicates that an analysis of what felonies constitute offenders' third and final strike show that only three percent involve murder and only thirty-six percent involve other types of violent offenses.[183] As a result the vast majority of third strikes are given for nonviolent offenses, such as property crimes and drug offenses and "[m]any of the Third Strikes appear to be misdemeanors, which, under probation guidelines, are bumped up to felonies."[184]

These studies indicate that California's Three Strikes Law is ineffective. Three Strikes is unsuccessful because there is no

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

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.* at 65, 67.

181 Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes" and You're Out Law*, 11 STAN. L. & POL'Y REV. 65, 68 (2000).

182 *Id.*

183 *Id.*

184 *Id.*

proof that the law is a deterrent. Further, statistics show that the Three Strikes Law is not targeting dangerous and violent career criminals as it was created to do. Instead, non-violent offenders have been incarcerated at alarming rates.[185]

IV. RECONCILING THE SPIRIT OF THE THREE STRIKES LAW WITH THE SPIRIT OF THE CONSTITUTION

A. A NEW INTERPRETATION BRINGS NEW HOPE

On November 2, 2001, the Ninth Circuit Court of Appeals held for the first time that sentencing a defendant under Three Strikes to twenty-five years to life, where the triggering offense is a misdemeanor petty theft, may violate the Eighth Amendment to the constitution.[186] While the court refused to hold that Three Strikes is generally unconstitutional, it did find that the law violated Leandro Andrade's rights because his sentence was grossly disproportionate to his crime.[187]

The Ninth Circuit, referring to the pre-sentencing report, explained that Andrade is a long-time drug addict who has been convicted of five felonies and two misdemeanors, all of which were nonviolent.[188] In November of 1995, Andrade was arrested twice for shoplifting videos from Kmart, which totaled $153.94 in value.[189] Both of these offenses were clearly nonviolent and constituted a petty theft, which is generally charged as a misdemeanor.[190] Since Andrade had a previous theft-related conviction, the current petty thefts were counted as "wobblers."[191] A wobbler, such as petty theft with a prior

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185 *See Legislative Analyst's Office Study, The "Three Strikes and You're Out" Law: An Update,* 1997. According to a 1997 study conducted by the Legislative Analyst's Office, less than one quarter of second strike offenders were imprisoned for a violent or serious offense. In fact, the most common offenses designated as second strikes were possession of a controlled substance, petty theft with a prior petty theft conviction and second-degree burglary.

186 Andrade v. Att'y Gen. of California, 270 F.3d 743 (9th Cir. 2001).

187 *Id.* at 747.

188 *Id.* at 748. (Andrade's convictions include: a misdemeanor theft in 1982; a plea of guilty to a consolidated preceding of three counts of residential burglary in 1983; transportation of marijuana in 1988; petty theft in 1990 and later the same year transportation of marijuana; and parole violation for escape from federal prison in 1991.)

189 *Id.* at 749.

190 *Id.*

191 *Andrade*, 270 F.3d at 749.

petty theft, may be charged as a misdemeanor or a felony under the prosecutor's discretion.[192] The prosecutor in this case chose to count the two petty thefts with a prior as felonies.[193] Andrade's burglary convictions constituted his first two strikes and the current petty thefts with a prior counted as his third and fourth strike.[194] Andrade was found guilty on all counts and sentenced to twenty-five years to life for each current petty theft.[195] The Ninth Circuit calculated that under the Three Strikes Law, Andrade would be required to serve the two twenty-five year sentences consecutively and thus, he would not be eligible for parole until 2046 when he reached the age of eighty-seven years old.[196]

Andrade appealed his case through the state system to the California Supreme Court, which denied his petition for review.[197] Thereafter, Andrade filed a writ of habeas corpus in a federal district court claiming constitutional violations, including an argument that the sentence violated his Eighth Amendment rights, which the district court quickly dismissed.[198] The Ninth Circuit, however, granted a hearing regarding the Eighth Amendment claim.[199]

In its analysis of Andrade's claim, the court recounted the case law surrounding disproportionate sentencing.[200] In conclusion of its review of the *Solem-Harmelin* line of cases, the court applied the revised three-factor test of *Harmelin* to Andrade.[201] Here, the court found that an initial comparison of Andrade's crime and sentence led to an "inference of gross disproportionality."[202] Considering Andrade's age, life expectancy and the fact that Three Strikes requires sentences to run consecutively and does not give good time credit, the court found that his sentence was functionally equivalent to life without the possibility of parole, which is the second harshest

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192 *Id.*
193 *Id.*
194 *Id.*
195 *Id.*
196 *Andrade*, 270 F.3d at 750.
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.* at 753-58.
201 *Andrade*, 270 F.3d at 758.
202 *Id.*

sentence only after capital punishment.[203] This extreme punishment was compared to his conviction of petty theft, which the court found did not cause grave harm to society and was generally charged as a misdemeanor.[204] Finding that his sentence was grossly disproportionate to his crime and was not dissipated by his prior criminal record, which included only nonviolent crimes, the court went on to examine the other objective factors first set out in *Solem*.[205]

First, the court performed an intrajurisdictional comparison of Andrade's sentence to other defendants' sentences in the same jurisdiction.[206] Andrade's sentence of fifty years to life is generally exceeded only by a sentence for first-degree murder and a few other violent crimes such as train wrecking.[207] The court explained that even crimes of extreme violence like second-degree murder, rape and sexual assault on a minor are given much shorter sentences.[208]

Additionally, the court calculated that petty theft without a prior record would justify a sentence of up to six months in county jail and up to a $1000 fine.[209] Petty theft with one prior theft offense could receive up to three years in prison and thus, Andrade could have received a maximum of 6 years for his two current offenses.[210]

Although the State argued that Andrade's sentence must only be compared to other recidivists with prior felony offenses, the court explained that such an analysis would beg the question of whether these sentences are unconstitutional.[211] Even if the court were convinced that such an analysis was proper, it found Andrade's sentence was twice as long as any non-violent recidivist punished under the Three Strikes Law.[212] The court concluded that the intrajurisdictional comparison established that Andrade's sentence was significantly longer than the sentences for most violent crimes and greatly

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203 *Id.* at 758-59.
204 *Id.* at 759-60.
205 *Id.* at 750, 760-61.
206 *Andrade*, 270 F.3d at 761-62.
207 *Id.*
208 *Id.*
209 *Id.* at 761.
210 *Id.*
211 *Andrade*, 270 F.3d at 762.
212 *Id.*

exceeded the sentences of nonviolent recidivists sentenced under Three Strikes in California.[213]

Next the court performed an interjurisdictional comparison between California's Three Strikes Law and recidivist statutes in Rhode Island, West Virginia, Texas and Louisiana.[214] The court chose these states because they were the only four places where petty theft with a prior could be a triggering offense for sentencing under a recidivist statute.[215] The court found that "[e]ven in these four states, however, Andrade could not receive a sentence nearly as severe as he did under California's Three Strikes law on the basis of his two prior strikes for residential burglary."[216]

Based on this three-part objective factor test, the Ninth Circuit decided to "disagree with the California Court of Appeal and conclude that Andrade's sentence is so grossly disproportionate to his crime that it violates the Eighth Amendment to the Constitution."[217]

While this is the first time that any court has held California's Three Strikes Law violated the Constitution, it is important to remember how narrowly the Ninth Circuit drafted this decision. The Three Strikes Law is in no way overturned and this opinion may only give hope to a small number of those sentenced under the law. Had Andrade's sentence been *one* life sentence it is possible that the Ninth Circuit would have upheld it since his sentence would then be closer to other defendants and thus, the result of the intrajurisdictional analysis would have been different. Still, the holding may remind California courts of the seemingly forgotten *Romero* discretion.

Perhaps such careful analysis that balances the "spirit" of Three Strikes and the Eighth Amendment requirements of *Solem* and *Harmelin* will lead California courts to achieve a greater degree of fairness in sentencing. Perhaps this level of fairness will remind the public and the legislature that the spirit of the Constitution must be protected even in the wake of unthinkable tragedy.

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213 *Id.*
214 *Id.* at 762-67.
215 *Id.* at 762.
216 *Andrade*, 270 F.3d at 765.
217 *Id.* at 765-66.

B. THE NINTH CIRCUIT REVERSES TWO MORE THREE STRIKES SENTENCES

In *Brown v. Mayle*, a decision handed down by the Ninth Circuit on February 7, 2002, two more sentences required by the Three Strikes Law were reversed as violations of the defendants' Eighth Amendment rights.[218] The two defendants, Earnest Bray, Jr. and Richard Napolean Brown, had both been convicted of petty thefts with a prior, had previous felony convictions, were given third strikes and were ultimately sentenced to twenty-five years to life.[219] Bray's final offense was attempting to steal three videotapes and Brown's triggering offense was attempted theft of a $25 steering wheel alarm from a drugstore.[220] The two defendants filed habeas corpus petitions and were denied.[221] Both filed appeals arguing that their sentences constituted cruel and unusual punishment.[222]

After the *Andrade* decision, the Ninth Circuit consolidated Bray's and Brown's cases, appointed counsel, as they had previously filed pro se motions, and required the parties to submit briefing on whether *Andrade* would affect either defendant.[223]

Citing its own previous opinion, the Ninth Circuit proceeded to apply the same in depth analysis employed in *Andrade* to the question of whether these defendants' sentences were constitutional.[224] The *Andrade* analysis led the Ninth Circuit to conclude that Bray's and Brown's cases were very similar to Andrade's as all three defendants were convicted of shoplifting small amounts of inexpensive merchandise and had received indeterminate life sentences.[225]

There were, however, several differences between the cases that the Ninth Circuit addressed within its constitutionality analysis. For example, Bray and Brown had each received one twenty-five to life sentence while Andrade had received two

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218 Brown v. Mayle, 2002 WL 187415 (9th Cir. Feb. 7, 2002).
219 *Id.* at *1.
220 *Id.* at *2 -*3.
221 *Id.* at *3.
222 *Id.* at *4.
223 *Brown*, 2002 WL 187415, at *4.
224 *Id.* at *4 -*18.
225 *Id.* at *7 -*8.

such sentences.[226] Although the State argued that this dissimilarity resulted in a very different analysis of the gross disproportionality of the sentences to the offenses, the Court disagreed.[227] The Ninth Circuit explained, "[I]f Andrade's 50-year-to-life sentence for *two* petty theft convictions was grossly disproportionate, it follows that a 25-year-to-life sentence is grossly disproportionate to *one* petty theft conviction."[228]

The Ninth Circuit further explained that the length of Bray's or Brown's sentence did not alter the intrajurisdictional analysis of *Andrade*.[229] The State argued, as it did in *Andrade*, that since about one hundred other defendants received indeterminate life sentences for petty thefts with priors under Three Strikes, the interjurisdictional analysis leans in favor of upholding Bray's and Brown's sentences.[230] The court, however, explained that *Andrade* held that it is impossible to argue a statute is constitutional by showing evidence of other similar applications of the statute.[231] The Ninth Circuit graphically analogized that, "[i]f, for example, the state decided to chop off the hands of everyone convicted of speeding, the likely conclusion that such a sentence is cruel and unusual would not change because the state inflicted it on many people."[232]

In performing the interjurisdictional analysis, the court found that the four states used as comparison in *Andrade* were still the only four places where petty theft with a prior could constitute a triggering offense for a recidivist statute sentence.[233] The court concluded that neither defendant would have received such a harsh sentence in Rhode Island, Texas or West Virginia.[234] Additionally, the court commented that Louisiana had recently amended its recidivist statute and that neither defendant would have received twenty-five years to life without the possibility of parole under current Louisiana law

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226 *Id.* at *8.
227 *Id.*
228 *Brown*, 2002 WL 187415, at *8.
229 *Id.* at *9.
230 *Id.*
231 *Id.*
232 *Id.*
233 *Brown*, 2002 WL 187415, at *10.
234 *Id.*

as they did in California.[235] The court emphasized that, "[r]ecent rejection of a higher sentence by the only state that perhaps would have allowed it in narrow circumstances signals a considered national legislative judgment based on actual experience that California's sentence is indeed disproportionate to the crime."[236]

The final difference between Andrade, Bray and Brown, which the court discussed, was the presence of previous violent crimes in both Bray's and Brown's past.[237] Bray had three previous robbery convictions.[238] Brown had been convicted of five serious or violent offenses including two counts of second-degree burglary, two counts of assault with a deadly weapon and one count of robbery.[239] Both defendants were convicted of several other misdemeanor crimes as well.[240] The court indicated that this difference does not dictate a different outcome than the one in *Andrade* for several reasons.[241]

First, the court explained that the "violent" crimes that Bray and Brown were convicted of were not considered violent at the time of their convictions.[242] Second, the court held that conviction of previous violent offenses is only significant when the current offense is violent as well.[243] The court explained that when an offender commits a violent crime, and it is established that he has committed previous violent offenses, his proclivity towards violence justifies sentencing him under a severe recidivist statute.[244] The court stated that there is no similar justification for punishing a nonviolent offender for past violent offenses.[245] The Ninth Circuit concluded, "[a]fter *Andrade,* for all the reasons already surveyed, an indeterminate life sentence for a defendant convicted of felony petty theft with a prior who has at least two prior *serious*

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235 *Id.* at 12.
236 *Id.* at *13.
237 *Id.* at *13 -*16.
238 *Brown*, 2002 WL 187415, at *2.
239 *Id.* at *3.
240 *Id.* at *3 -*4.
241 *Id.* at *13.
242 *Id.* (All forms of robbery were not considered violent crimes until the amendment of Cal. Penal Code 667.5(c)(9) in 2000). *Id.*
243 *Brown*, 2002 WL 187415, at *15.
244 *Id.*
245 *Id.* at *14.

felony convictions . . . violates the Eighth Amendment's prohibition against cruel and unusual punishment."[246]

Once again, the court did not overturn Three Strikes and it did not find every application of California's recidivist statute unconstitutional. The Ninth Circuit did hold, however, that the application of Three Strikes to defendants whose triggering offense is petty theft and the resulting imposition of twenty-five years to life without the possibility of parole is cruel and unusual punishment.[247] The California court was thus ordered to resentence Bray and Brown in light of this decision.[248]

C. PROPOSALS TO AMEND CALIFORNIA'S THREE STRIKES LAW

1. Current Trends in the Movement to Revamp the Three Strikes Law

On February 23, 2001, Assemblywoman Jackie Goldberg introduced an act to amend California Penal Code Sections 667 and 1170.12.[249] The Goldberg bill seeks to change several aspects of the sentencing guidelines under the Three Strikes Law.[250] Currently the length of time between the prior and current felony conviction does not affect the sentence. The bill seeks to change this.[251] Additionally, it seeks to change the prohibition on using diversion programs such as commitment to the California Rehabilitation Center.[252] The bill "would delete the provisions providing that the length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of the sentence."[253] It would "make these provisions inapplicable to cases where more than 10 years have elapsed since the maximum sentence or sentences of the previous conviction."[254] The bill would also "permit commitment to a facility outside of the state and the

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246 *Id.* at *15.
247 *Id.* at *18.
248 *Brown*, 2002 WL 187415, at *18.
249 A.B. 1652, 2001 Gen. Assem., Reg. Sess. (Ca. 2001).
250 *Id.*
251 *Id.*
252 *Id.*
253 *Id.*
254 A.B. 1652 , 2001 Gen. Assem., Reg. Sess. (Ca. 2001).

granting of diversion or commitment to the California Rehabilitation Center.[255]

Assemblywoman Goldberg made this reform effort a two-year bill, which means that it will be held over until 2002's legislative session as opposed to being voted on in 2001.[256] One commentator argues that this means that Goldberg did not think she would have enough votes to pass the bill this year.[257] The need for votes is severely felt within the Three Strikes revision forum because, as a codified initiative, a two-thirds majority is needed to make any modification to the existing legislation. [258]

Goldberg's bill takes several steps towards a more sensible and fairer recidivist statute. By demanding that a defendant's prior and current felony be within a limited time span, the proposed bill eliminates the focus on individuals who do not truly qualify as career criminals. In addition, by providing for diversion programs, the bill limits the affect on those defendants suffering from drug or alcohol addiction. Even these changes, however, do not address the need to amend the Three Strikes Law to avoid violations of the Eighth Amendment and insure that the law is effectively targeting the crimes it was enacted to prevent.

2. Legislative Proposals

In addition to the alterations proposed by Assemblywoman Goldberg, there are several basic changes to the Three Strikes Law that the legislature could make in order to limit the law's scope to those crimes which society has the greatest interest in preventing.[259] First, the legislature should revise the list of felonies included within the "violent or serious" definitions.[260] If the Three Strikes initiative was voted for and enacted to quell Californians' concern over violent crimes against persons then perhaps the statute should address this fear directly

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[255] *Id.*

[256] *See* Alan Block, *"Three Strikes" Reform: A Small But Determined Group of Activists Works to Change the Law*, ORANGE COUNTY REG., July 29, 2001, *at cover.*

[257] *Id.*

[258] Luna, *supra* note 30 at 9.

[259] *See supra* notes 170-185 and accompanying text.

[260] *See supra* notes 21-22 and accompanying text.

without ensnaring lesser offenders under its overreaching list of qualifying offenses.

Specifically, all offenses that are not crimes against persons should be excluded from the list. For instance, burglary should be excluded unless the homeowner is in the house *and* is either threatened or assaulted by the offender in order to commit the crime. This exclusion is extremely important especially in California where the Penal Code defines burglary as the entrance of any structure with the intent to commit a felony therein.[261] Under this scheme, a person who steals a bike from an attached garage can be convicted of burglary and charged with a strike even if he never entered the house and no actual violence against a person was used in the commission of the crime.

Moreover, the selling of certain drugs to minors should not be considered a strike in all cases. Under the current incarnation, an eighteen-year-old who sells his seventeen-year-old friend heroin will receive a strike, but if the transaction went in the opposite direction the Three Strikes Law would not be implicated.[262] Therefore, the present system seems unreasonably arbitrary.

The most important change, however, that the legislature should make to conform the Three Strikes Law to the Eighth Amendment pursuant to the *Solem* and *Harmelin* mandates is to require that all three strikes be given for violent or serious felonies only. Nonviolent felonies such as drug possession must be expressly excluded from counting as a third strike.

Currently, any third felony, whether violent or serious will result in an indeterminate life sentence.[263] Therefore, a third

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[261] *See* CAL. PEN. CODE § 459 (West 2001) providing:

> [e]very person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, 'inhabited' means currently being used for dwelling purposes, whether occupied or not.

Id.

[262] *See supra* note 22 and accompanying text.

[263] *See supra* note 28 and accompanying text.

strike can be charged for theft, drug sales and even drug possession. An individual, who has a criminal history and has tallied up two strikes, will spend the next twenty-five years of his life in prison even if his current offense is possession of marijuana. It is easy to see how without strong drug rehabilitation programs, job training or employment opportunities, California has turned its back on the notion of rehabilitating individuals to re-enter society after committing an offense.

Instead, as a community we have decided to allow the Three Strikes Law and mass incarceration conceal societal problems such as unemployment and drug abuse from our sight. Unfortunately, this method does nothing to solve these problems, and as stated previously, has not deterred them either.[264]

Finally, the legislature should amend the Three Strikes Law so that prosecutors are precluded from elevating a misdemeanor such as petty theft to a felony for the purposes of charging a strike as in order to sentence a defendant to an indeterminate life sentence.[265] Instead of hoping that the courts will be able to weigh each case individually and determine when an offender falls within the spirit of Three Strikes, the law should clearly indicate that its purpose is to prevent any further commissions of violent or serious felonies. By prohibiting prosecutors from charging individuals with a third strike for crimes that are otherwise considered misdemeanors the law would more efficiently target those individuals who have spent time in prison for violent or serious crimes and were not deterred from continuing such anti social behavior.

3. Policy and Judicial Proposals

While legislative action is most desirable because it would clearly indicate when strikes may be charged, such a strong legislative action seems unlikely considering the number of votes necessary to make a change.[266] Additionally, the current political climate continues to thrive on a get tough on crime

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[264] *See supra* notes 170-185 and accompanying text.
[265] *See supra* note 26 and accompanying text.
[266] *See supra* note 32 and accompanying text.

approach.[267] Therefore, considering current movements to reform the Three Strikes Law and the recent Ninth Circuit decisions, California courts should reconsider the power of judicial discretion and the ability to strike prior felonies in certain cases under section 1325(a).[268]

Although judicial discretion is understandably a power that judges strive not to abuse, trial court judges should be given greater latitude to determine whether a defendant falls with the 'spirit' of the Three Strikes Law. The concern for a degree of uniformity in sentencing, however, has driven many to consider the restriction on judges' subjective decision-making of the utmost importance. Unfortunately, these restrictions have been implemented at the cost of the humanity of our criminal justice system. After all, we continue to invest a great amount of respect in judges and choose those individuals to act as the scales of justice.

While limitations on judicial discretion and sentencing guidelines may seemingly result in identical sentencing for criminal activity, these laws divest from judges their ability to consider all the factors of an individual's background in order to determine whether that individual indeed falls within the spirit of the Three Strikes Law. Therefore, *Andrade* and *Bray* should be read and applied broadly enough to include all nonviolent offenders who have been sentenced to life in prison. Judges should realize the power granted them through Section 1325(a), *Romero*, and *Andrade*, and use that power to limit the unfair and unconstitutional effects of the California Three Strikes Law.

CONCLUSION

The United States has become an extremely violent society. The press bombards us with stories of tragedy and death due to unfathomable acts by people against innocent victims. It makes sense that as a society we have turned to the law as an avenue to curb this violence and stem the tide of the incomprehensible destruction of life that too often occurs. The legal community, however, must attempt to understand the

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[267] *See supra* note 19 and accompanying text.

[268] *See supra* notes 49-54, 187-248 and accompanying text.

anger and strong emotions that we feel as a society and deal with them rationally by creating legislation that results in a decrease of violent crime and not merely legislation that leads to mass incarceration of poverty-stricken and drug-addicted individuals. There are other solutions to these greater societal problems and we need to remember the oldest truism that the punishment ought to fit the crime.[269]

Rebecca Gross[*]

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[269] John Bartlet, *Familiar Quotations,* 7834 (10th ed. 1919), *quoting* Sir William Schwenck, *The Humane Mikado.*

[*] Golden Gate University School of Law, J.D. Candidate, 2003. Wesleyan University, B.A. The College of Letters, 1995. My sincerest thanks to my journal editor, Ignascio G. Camarena, for his tireless efforts and for reading more drafts of this Comment than I can count. A special thanks to my parents for their enduring love and support. And to Scott whose encouragement and love keeps me going.