

Three Strikes Law

A Real or Imagined Deterrent to Crime?

The 1990s were dominated by get-tough-on-crime measures, dramatically increasing the nation's prison population and the length of prison sentences. Those measures culminated with the enactment of "three strikes" legislation around the nation. Beginning with Washington State in 1993, by the end of the decade, the federal government and over half of all states had enacted some form of a "three strikes" law. Roughly contemporaneous with these measures, crime rates have declined nationwide. Advocates of severe incarceration policies have claimed that "three strikes" laws are responsible for that decline.

Nowhere in the nation are the stakes higher than in California. Called "the biggest penal experiment of its kind in modern American history," due to its distinctive provisions, California's "three strikes" law accounts for the vast majority of "three strikes" cases nationwide. Its sentence enhancements include not just the widely advertised twenty-five-year-to-life terms for third-strike felons, but also a doubling of the nominal sentence for many second-strike offenders. Further, its provisions include residential burglary as a possible qualifying strike. Finally, the third-strike, triggering the twenty-five-year-to-life term of imprisonment, may be any felony. As a result, California accounts for over 90 percent of all "three strikes" sentences nationwide.

"Three strikes" advocates in California point to dramatic declines in crime rates since its passage and claim victory. For example, former Attorney General Dan Lungren's office reported that "[s]ince the passage of 'Three Strikes,' . . . the violent crime rate in California has dropped 26.9 percent with a 30.8 percent drop in the six major crime categories." Secretary of State Bill Jones, who sponsored the "three strikes" legislation as an assemblyman, has suggested that three strikes is responsible for most, if not all, of that drop in crime. Justice James Ardaiz, who assisted in drafting the original bill, is even more explicit: "Crime in California has declined dramatically since 1993. The only things that are different are more police, tougher laws, and Three Strikes . . . [W]here there are a number of explanations for a given result, the simplest explanation is usually correct. The Three Strikes Law is that explanation." Jones points to additional support for the beneficial role of

"three strikes": while crime rates declined across the nation, the decline in California significantly outstripped that in the rest of the nation. For example, over a six-month period in 1995, crime declined only 1 percent nationwide while it dropped 7 percent in California.

While commentators disagree about whether the law is theoretically justified, much of the debate focuses on empirical data. If "three strikes" accounts for the dramatic decline in crime, theoretical objections, including moral concerns about its fairness, are not likely to move legislators or the public. And as indicated above, "three strikes" supporters argue that empirical data support their position.

However, despite the claims of "three strikes" supporters, the data on which they rely do not withstand close scrutiny. More recent empirical research supports many of the claims of "three strikes" critics that the law simply cannot deliver on its promises and insofar as it may have some marginal deterrent effect, it comes at too high a cost.

Comparing California's decline in crime with the national average, as Secretary of State Jones does when he asserts that "three strikes" accounts for California exceeding the decline in crime nationwide, cuts both ways. New York, not California, showed the sharpest decline in crime during the time in question. While some of New York's policing policies have raised serious civil rights concerns, it was not one of the states that adopted a "three strikes" law during the 1990s. Hence, its decline in crime cannot be attributed to such legislation.

A number of recently published studies also raise doubts about the true effectiveness of "three strikes" laws in lowering California's crime rate. For example, within California, counties that aggressively enforce the law "had no greater declines in crime than did counties that used it far more sparingly." One study found that crime dropped by 21.3 percent in the six most lenient "three strikes" counties, compared to a 12.7 percent drop in the toughest counties.

A recently published book, *Punishment and Democracy: Three Strikes and You're Out in California*, reports the results of the most comprehensive study of "three strikes" to date. The authors' findings suggest that, prior to "three strikes," crime rates were declining already and, after "three strikes" they continued to decline at about the same rate, suggesting that whatever effect "three strikes" had, it was small at best. The book also notes that, partly because "three strikes" casts such a broad net, the offenders arrested under its provisions were no more likely to be high-rate offenders than non-"three strikes" arrestees. Nor were they more likely to commit violent offenses.

Although its proponents originally explained that "three strikes" would work because it would incapacitate high-rate offenders, the decline in the crime rate came too early to be explained on that basis—"three strikes" is a sentence enhancement provision and the enhancements do not kick in immediately, whereas the decline in the crime rate occurred immediately. As a result, "three strikes" proponents were forced to shift their explanation—the law deterred potential offenders.

The authors of *Punishment and Democracy* attempted to measure the law's deterrent effect. In certain instances, depending on which method the

authors used, they did find a marginal deterrent effect. But the effect was extremely small and cannot explain the significant overall decline in the crime rate. *Punishment and Democracy* also addressed the claim of the law's proponents that a sharp decline in the crime rate followed passage of the law. Contrary to this claim, the authors found that the decline in the crime rate preceded passage of the law. Further, were "three strikes" the cause of a significant part of the decline, the rate of decline should have increased after its passage. Instead, the rate of decline remained constant, suggesting that the causes of the decline that were operating prior to the passage of the law continued to be the primary reason for the drop in crime rates.

Empirical studies suggest that California would have experienced virtually all of its decline in crime without "three strikes." At the same time, "three strikes" will have a significant cumulative effect on the size of the prison population, an expense that will grow over time. One effect will be to increase the number of older prisoners, a group that represents a low social risk because most offenders become less criminally active as they age. Not only are older prisoners not likely to commit crimes if set free, but they cost the state much more to keep incarcerated than younger, healthier offenders.

None of this comes as a surprise to many commentators who doubted the wisdom of "three strikes," certainly as it was enacted in California. But none of us who opposed "three strikes" can take much comfort in knowing that our concerns were borne out. The important policy question is how can we reform the law to avoid its excesses?

Few politicians were willing to oppose "three strikes" during its passage. And while most politicians in the past decade have feared being labeled as soft on crime, that fear was exacerbated during the legislation's passage. Aided by the kidnapping and murder of young Polly Klaas, Mike Reynolds, the father of a murder victim, pushed the bill through the legislature with remarkable resolve. He was unwilling to compromise or allow amendments to the bill (or to a virtually identical ballot initiative). His sway with the legislature was extraordinary, with most afraid that if they opposed him, he would portray them as soft on crime. Since the law's passage, passions have cooled somewhat. But one legacy of the charged political environment in which the law passed is that its amendment requires a supermajority. As a result, even those few politicians who are now willing to propose amendments face an uphill battle at best.

In theory, both the California and the U.S. Constitutions protect against the imposition of disproportionate criminal penalties. But outside of the death penalty context, that protection is more theoretical than real. During the 1970s and 1980s, the California Supreme Court was active in reviewing indeterminate sentences and developed a body of case law wherein it overturned numerous sentences as excessive in violation of California's protection against "cruel or unusual punishment." A number of trial courts relied on that case law in striking down some of the more extreme "three strikes" sentences shortly after the law became effective. Despite supreme court precedent and considerable sentiment among trial courts that some "three strikes" sentences were excessive, no California district court of appeal agreed. In light

of unanimity among the district courts of appeal, the California Supreme Court has shown no inclination to revisit the question.

More recently, in a denial of certiorari, four U.S. Supreme Court justices suggested that some "three strikes" sentences might violate the Eighth Amendment's prohibition against cruel and unusual punishment. *Riggs v. California*, 525 U.S. 1114 (1999). Since then, the Ninth Circuit has held in three separate cases that a "three strikes" offense violates the Eighth Amendment.

Meaningful review of "three strikes" sentences might weed out many of the cases in which twenty-five-year-to-life sentences seem excessive. But two important questions remain. First, even the Ninth Circuit's decisions may be severely limited in their scope. All three cases decided thus far have involved petty theft as the third strike offense. Under California law, petty theft is a "wobbler," an offense that may be a misdemeanor or a felony. Under the circumstances of the cases before the court, the offenders' records have led to the crime being treated as a felony. Once escalated to a felony, the crime becomes the third strike. The effect of the unique features of California's sentencing laws is that what might be a misdemeanor ends up resulting in a life sentence. If the Ninth Circuit's approach turns on that feature of the law, the impact of these cases is quite limited, perhaps to as few as 300-350 cases out of over thousands of "three strikes" cases. For example, if so limited, the Ninth Circuit's approach would offer little hope for an offender whose third strike was a minor possession of narcotics or marijuana offense.

The other important question is whether the Ninth Circuit's decisions will survive U.S. Supreme Court scrutiny. Earlier this year, the Supreme Court granted California's petition for a writ of certiorari. As indicated earlier, four justices raised concerns about "three strikes" sentences, again in the context of a theft "wobbler" case. But whether a fifth justice would agree is open to serious question.

The Supreme Court has overturned a term of imprisonment as a violation of the Eighth Amendment in only one case. In *Solem v. Helm*, 463 U.S. 277 (1983), the Court struck down a true life sentence imposed on a habitual offender whose criminal record, although extensive, did not include any crimes of violence. The offense that triggered the life sentence was for writing a bad check, an offense described by the Court as passive and nonviolent. Although a majority of the Court refused to overrule *Helm* when it next considered the question, the Court did uphold a true life sentence for possession of more than 650 grams of cocaine. In addition, prior to *Helm*, the Court upheld a parolable life sentence in *Rummel v. Estelle*, 445 U.S. 263 (1980), and a sentence of forty years for possession of marijuana in *Hutto v. Davis*, 454 U.S. 370 (1982). Were the Court to apply that case law to "three strikes," whether it would find any given sentence a violation of the Eighth Amendment is uncertain.

"Three strikes" requires a significant minimum sentence, one that can be reduced by at most 20 percent for good time. Hence, a "three strikes" offender must serve a minimum sentence of at least twenty years. That may seem significant, and in some rough sense, disproportionate to an offender's third-strike offense (for example, possession of a small amount of drugs). But

the punishment is less severe than, say, the offender in *Hutto v. Davis*, whose forty-year sentence was not unconstitutionally excessive. Instead, like *Rummel*, the offender in *Rummel v. Estelle*, the offender is not condemned to a true life sentence. Even if the long minimum sentence has the practical effect of a true life sentence—for example, when it is imposed on an older offender who as a practical matter will probably die in prison before serving his entire sentence—the case may not come within *Solem v. Helm*. While the Court struck down a sentence imposed on a habitual offender, his entire criminal record did not include a crime of violence. At least for those offenders whose earlier crimes have included crimes of violence, their earlier criminal records may be enough to take them out of *Helm*'s narrow holding. Perhaps an older offender whose minimum sentence may be the equivalent of a life sentence and whose two strikes were residential burglaries and whose third strike is a relatively minor offense, like possession of drugs, could invoke Eighth Amendment protection. But those cases may be too few to have much of an impact on the problem created by "three strikes."

The issue bears watching. Excessive punishment raises serious moral questions. Beyond the moral question, "three strikes" opponents have mounting empirical evidence that "three strikes" cannot deliver on its overblown promises. But legislative reform, difficult under normal circumstance due to politicians' fears of being labeled soft on crime, is doubly difficult because of the supermajority requirement. We are left hoping that the courts will save us from our own excesses; whether they will is very much up for grabs.

