California's Three Strikes Law (TSL): A Review of the Literature, Policy Implications, and a Proposal for Dismantling TSL Legislation

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On July 30, 1994, Jerry Dewayne Williams stole a slice of pizza from four children in Redondo Beach, CA (Dillow, 1994; Kieso, 2005: 14). As this theft occurred four months after the passage of California's three strikes law, this crime and William's conviction triggered an automatic sentence of 25 years to life for Williams, who had several prior violent felony convictions.

Williams, who became known as "Pizza Man" in prison and who once shared a cell with a murderer sentenced to less time than he was (Leonard, 2010), became an early key example in the debate over California's harsh three strikes law (TSL). Proponents of the law, including then-governor Pete Wilson, argued that "'[b]ecause of his prison record…[Williams] deserve[d] a substantial prison sentence'" (Dillow, 1994). On the other hand, critics of the new measure speculated, among other reasons to oppose the prosecution, that "'the police would have treated the matter differently'" (Dillow, 1994) had Williams not been a young Black man. In any event, Williams' case went forward and he was sentenced to 25 years to life under the new law.

A couple of years later, the California Supreme Court ruled that judges could overlook prior convictions in the interest of justice, thereby not triggering a third strike (Vitiello, 1997; Janiskee and Erler, 2000). As a result of this decision, the judge who originally sentenced Williams reduced his sentence in 1997, and Williams was released in October 1999—about five years after he was initially arrested.

More than a decade after his release, individuals on both sides of the debate surrounding California's three strikes law continued to point to "Pizza Man" as an example illustrating their case. Those who agree with the law use Williams' arrest, release, and subsequent clean record in their argument that three strikes deters crime, while those against the law point to Williams as an individual whose punishment was gravely out of proportion with his crime (Leonard, 2010), as evidenced by his resentencing. Williams himself sees his release

and subsequent clean record as a repudiation of three strikes, stating, "'If I go back to jail, it proves three strikes right—that this is where I belong'" (Leonard, 2010).

While Williams' case is perhaps especially interesting, it is not by any means unique. In the almost thirty years since the passage of California's TSL, tens of thousands of individuals have been sentenced under its provisions, for everything from the commission of serious violent felonies to the cultivation of seven marijuana plants (Kieso, 2005: 13). The high cost of California's three strikes law—financially to the state and local governments, as well as the human cost of imprisoning so many individuals for so long (Chen, 2014)—makes the issue of the law's efficacy an important one that has been extensively explored. This issue of efficacy, together with an analysis of TSL reform efforts and a proposal for further reform in the form of dismantling the TSL entirely, is the focus of this work.

Literature Review

I. History and implementation of three strikes law in California

While California's TSL emerges as the most draconian (Kieso, 2005: 1; Vitiello, 1996: 397) adopted in the United States in the 1990s, it is by no means the only or even the first. In November 1993, voters in the state of Washington passed the first three strikes law, which garnered national attention and was limited to only "violent and serious offenders, as would be the case in the vast majority of other states that enacted 'strikes' laws in the 1990s" (Kieso, 2005: 3; see also Zimring, 1996). The passage of Washington's three strikes law took place almost a year and a half after the murder of Kimber Reynolds, and just a month after the kidnapping of Polly Klaas, both of which occurred in California. Relatives of these two young women took note of Washington's success in passing the law and worked to replicate that success in California (citation).

Mike Reynolds, father of murder victim Kimber Reynolds, had been unsuccessfully campaigning to gain enough signatures to put a three-strikes initiative on the ballot since the death of his daughter in June 1992. It was not until the abduction of twelve-year-old Polly Klaas in October 1993 and the subsequent discovery of her remains in December of the same year that Reynolds' campaign began to gain steam. Polly was abducted and murdered by Richard Allen Davis, a man with a long record of serious prior felonies. For many, it seemed inconceivable that a man with such a history would be free to commit this act (Kieso, 2005: 1-5).

The discovery of Polly Klaas' body catapulted Reynolds' TSL initiative into the mainstream. Reynolds planned to use California's initiative system (Zimring, 1996; 1999) whereby any citizen can introduce a piece of legislation to the general election ballot provided enough signatures are collected first, to bring the issue to a vote in the November 1994 election. Crucially, Reynolds' proposal was different from others in that the crime that triggered an offender's third strike—and thereby triggered the mandatory 25 years to life sentence—could be *any* felony, not just a violent offense. Additionally, the law doubled the previous time for a second strike and reduced possible good-time credits for second strikes from 50 percent to 20 percent (e.g., whereas inmates could previously be released after completing only 50 percent of their sentence, inmates under the new law must complete at minimum 80 percent of their sentence to be released) (Stolzenberg and D'Alessio, 1997).

While Reynolds' initiative gained enough signatures, was included on the November 1994 ballot, and was passed into law as Proposition 184 with a 72 percent approval (LaFree, 2002), the governor and state legislature had already passed AB-971 in March 1994, which directly implemented Reynolds' three strikes law. Governor Pete Wilson, an unpopular governor up for reelection in November 1994 (Kieso, 2005: 9), saw the mounting support for Reynolds' initiative early on and became a vocal proponent, stating that he wanted to pass three strikes into law immediately. The democrat-controlled legislature, also perceiving the growing support

for three strikes and hoping that working with Governor Wilson early on would help keep the issue from becoming an election issue come November, agreed to pass into law whichever proposal Wilson chose. Therefore, in March 1994, Wilson signaled his support for Reynolds' initiative, by then the most well-known and popular three strikes option in California, forcing democrats to approve his choice despite there being four other, less stringent bill options available at the time (Kieso, 2005: 12).

The passage of AB-971 in March 1994 and the subsequent "exclamation point" (Kieso, 2005: 1) provided by the passage of Proposition 184 in November of the same year is remarkable for two reasons. First, it was ratified by both the governor and state legislature with no edits made. In effect, this makes California's TSL quite literally a crowdsourced piece of legislation with little intervention from legal experts or policymakers (Zimring, 1996; 2001). Additionally, the fact that the choice and passage of this especially stringent three strikes law in California rests almost solely on the abduction and murder of Polly Klaas is particularly astonishing.

II. Early Studies and Emergent Schools of Thought

With the passage of AB-971 and Proposition 184, which are known collectively and interchangeably as California's three strikes law, came a flood of scholarly interest in the efficacy of the law. One of the first studies attempting to measure the impact of California's TSL was undertaken in the same year of the law's passage. This study was a projection analysis commissioned by the RAND Corporation and resulted in a promising estimate that "a fully implemented three-strikes law would reduce serious felonies between 22% and 34% and that about one third of this reduction would be for violent crimes such as murder, rape, or aggravated assault" (Stolzenberg and D'Alessio, 1997: 459; see also Greenwood et al., 1994).

Almost at the same time, legal scholar Franklin Zimring (1996) published an article criticizing the new law. In it, he limits his comments to the process under which the law was created, rather than commenting on the substance of the law. Zimring details California's initiative process and asserts that the stringent California law is a result both of too much direct citizen involvement in lawmaking and of the resultant decline in reliance on expertise (Zimring, 1996: 253). This early criticism led to one of the most influential—and most often criticized—studies of California's TSL, also conducted by Zimring in partnership with colleagues Gordon Hawkins and Sam Kamin in 2001. This study, entitled *Punishment and democracy: three strikes and you're out in California,* looks at cases in Los Angeles, San Diego, and San Francisco counties. Zimring et al. (2001) draw one sample of incarcerated individuals before the implementation of three strikes in California and two samples post-implementation (one in April 1994 and one in April 1995). The results of their analyses support Zimring's earlier assertions and provide support for the hypothesis that the three strikes law has no significant impact on crime rates. Thus, the negligible effects of the TSL on crime are not worth the high costs of imprisoning exponential amounts of individuals.

These results are supported as well by Stolzenberg's and D'Alessio's 1997 study of crime data from 10 major cities in California. This study presented the first major time-series analysis using empirical evidence to test whether the introduction of the three strikes law reduced serious crime "below the level expected on the basis of pre-existing trends" (Stolzenberg and D'Alessio, 1997: 457). Using autoregressive integrative moving average (ARIMA) models (Stolzenberg and D'Alessio, 1997), the researchers determine that the introduction of the three strikes law had no significant impact on crime rates in 9 of 10 cities studied.

Subsequent researchers have been critical of Zimring et al. (2001) and Stolzenberg and D'Alessio (1997). A common criticism among researchers is the idea that these two studies

simply do not have enough data to draw reliable conclusions. Neither Zimring et al. nor Stolzenberg and D'Alessio allow enough time for the incapacitative effects of the three strikes law to be measured (Janiskee and Erler, 2000; LaFree, 2003; Ramirez and Crano, 2003). Researchers point out that for a vast majority of crimes, convicted individuals would expect to still be in prison during the time in which samples were drawn for these two studies, regardless of the passage of the TSL. In other words, most crimes that would be impacted by the three strikes law have sentences that are longer than the two-year period during which Zimring et al. (2001) and Stolzenberg and D'Alessio (1997) drew their samples, and therefore their studies cannot account for any incapacitative effects the three strikes law may have (Datta, 2017). Subsequent studies did find significant crime-reducing effects when taking the "lag effect" (Janiskee and Erler, 2000: 47) into account (Janiskee and Erler, 2000; Ramirez and Crano, 2003; Datta, 2017). For example, Janiskee and Erler (2000) find that the pre-three strikes decline in crime rate was 2.35 percent, while after the law's passage the rate jumped to 8.39 percent, a rate which they found to be significant (Janiskee and Erler, 2000: 52).

The early studies by Zimring et al. (2001) and Stolzenberg and D'Alessio (1997) and the subsequent criticism of these studies signal divergent schools of thought that have persisted in more recent scholarship on California's TSL. Fundamentally, researchers are divided, and whether they will find significant crime-reducing effects depends on when exactly and for how long data is drawn, as well as the method of analysis. For example, in a study replicating and extending that of Stolzenberg and D'Alessio, Ramirez and Crano (2003) first use ARIMA modelling as the previous study did and find no significant crime-reducing effects. However, after interpreting the data using less-restrictive multiple regression models (Ramirez and Crano, 2003: 131), Ramirez and Crano found a significant crime-reducing effects for all crimes except drug-related crimes, including those that do not trigger a third strike.

Researchers in the remainder of the early 2000s continued to produce studies finding mixed support for the hypothesis that the California's three strikes law has significant crime-reducing effects. As researchers diversified their methods, study findings became more nuanced. For example, unlike researchers before them, Helland and Tabarrok chose to study a subset of criminals for the duration of their entire criminal records through 1997, or three years after the passage of three strikes in California (Helland and Tabarrok, 2007: 2). Their study design allowed for the isolation and measurement of possible deterrent effects of three strikes independent of any possible incapacitation effects. Doing so produced findings different from those of earlier studies thought to measure the deterrence of three strikes only (e.g. Stolzenberg and D'Alessio, 1997; Zimring et al., 2001), further lending weight to the idea that the method of analysis will significantly impact researchers' results. Specifically, this study allowed Helland and Tabarrok to "estimate that the threat of a third strike reduces arrest rates by 17.2 percent" (Helland and Tabarrok, 2007: 8-9).

Similarly, a 2008 study by Chen further complicates our understanding of the possible effects of California's three strikes law. This study uses state-level data to analyze the impact of three strikes in California and in the United States more broadly. Through cross-sectional time-series analyses of her data, Chen finds that California's three strikes law "is associated with accelerated rates of decline for robbery, burglary, larceny-theft, and motor vehicle theft" (Chen, 2008a: 27) but not for more serious felonies like murder. In comparing data from California with data from other states, Chen determined that California's especially harsh TSL is not "dramatically more effective at controlling crime" (Chen, 2008a: 26) than three strikes laws in other states, which reserve TSLs for more serious offenders and offenses.

Further, in 2012 and with the benefit of added hindsight, Parker determined that crime trends in states with three strikes laws are "almost identical" (Parker, 2012: 209) to those in states that do not have three strikes laws. This in and of itself suggests that crime decline in

California is more strongly associated with some other variable or variables than it is with three strikes. Parker himself asserts that a more important variable may be the rate of alcohol consumption (Parker, 2012: 221-22).

Finally, further complicating the landscape, Fiber-Ostrow and Tucker studied the application of the three strikes law at the county level, and found "disparities in the application of the law" that "appeared to depend on geography among the 58 California jurisdictions" (Fiber-Ostrow and Tucker, 2013: 168). This may suggest that the generalizability of earlier studies is compromised; even within the state of California, the application of three strikes is not uniform (Fiber-Ostrow and Tucker, 2013: 178).

III. Proposition 36 and Studies of California's Three Strikes Law Today

Critics of California's three strikes have challenged the law in court and campaigned for it to be repealed since its introduction, and were ultimately successful in November 2012. The 2012 election cycle saw the electorate voting to amend California's three strikes, a proposal that had been rejected once in 2004 (Fiber-Ostrow and Tucker, 2013: 170). As Chen (2014) points out, under the new law, an offender with two strikes "would be sentenced to 25 years to life if and only if the offender commits an additional felony of a serious or violent nature" (Chen, 2014: 552). Again, this is much more lenient than California's original TSL, under which *any* felony could trigger a third strike.

There have been far fewer studies of California's three strikes law since the implementation of Proposition 36. Perhaps this is because Prop 36 blunts California's TSL so that it is much more similar to that of other states, for which extensive research has already been produced. However, one existing study looks at the effects of Prop 36 on disparities in the ethnic and racial demographics of third strikers (Chen et al., 2020). Preliminary work with the statistics available "suggests that, prior to the passage of Proposition 36, Black offenders were

disproportionately more likely than whites to receive a third-strike sentence for non-serious, non-violent offense" (Chen et al., 2020: 2).

While scholarship of California's three strikes law may be decreasing, there are still areas of interest to explore, such as those addressed by Chen et al. (2020). Additionally, as illustrated in this literature review, results produced by studies of the TSL are mixed and inconclusive. At the same time, however, the passage of Proposition 36 with overwhelming support signals that Californians are ready to shift to a less punitive application of the TSL.

Reform Efforts Since the Passage of Proposition 36

Two years after the passage of Proposition 36, Californians once again made major reforms to the criminal justice system in the form of Proposition 47, also known as the Safe Neighborhood and Schools Act (Judicial Branch of California). Prop 47, while not aimed directly at the TSL, nonetheless greatly impacted the application of the law with its three key provisions. First, by reclassifying certain theft and drug offenses from felonies to misdemeanors, Prop 47 greatly reduced the amount of potential crimes that would trigger a strike. Additionally, Prop 47 made this reclassification retroactive, adding provisions for individuals incarcerated on these reclassified offenses to be able to petition the court for resentencing. Finally, the new law created a pathway for formerly incarcerated individuals who completed felony sentences for these offenses to petition to have their offense reclassified as a misdemeanor (Judicial Branch of California; see also Karlan and Bankman, 2021).Together, these provisions made sweeping changes to the application of justice in California. The passage of Prop 47 in November 2014 led to the filing of more than 60,000 petitions for resentencing or reclassification within the first two months of implementation, a number which swelled to 200,000 by December 2015 (Judicial Council of California).

The 2016 election cycle once again saw criminal justice reform enacted in the form of Proposition 57, another voter initiative passed with overwhelming approval (California Department of Corrections and Rehabilitation, n.d.-b). Proposition 57, also known as the Public Safety and Rehabilitation Act, allowed individuals convicted of a non-violent felony to become eligible for parole consideration after serving "the full term for his or her primary offense" (Cal. Const., art. I, section 32, subd. (a)(1)). This means that nonviolent felony offenders now become eligible for parole consideration after serving the base of their sentence for their main offense, without any enhancements or consecutive sentences. Additionally, Prop 57 increased the number of good conduct and programming credits incarcerated individuals could possibly earn (California Department of Corrections and Rehabilitation, n.d.-b).

Interestingly, offenders sentenced under three strikes were initially ineligible for relief under Prop 57. It was not until September 2018 that the California Second District Court of Appeal extended the provisions of Prop 57 to those sentenced under the TSL in *In re Edwards* (California Peace Officers Association, n.d.). This decision was applied retroactively, and as of 2017, nonviolent second and third strikers could earn up to 33.3% credits, or "one day credit for two days served" (Prison Law Office, 2017: 7), and violent second and third strikers could earn up to 20% credit. These rates were increased in May 2021; nonviolent second and third strikers may now earn up to 50% credit, and violent second and third strikers may earn up to 33.3% credit (California Department of Corrections and Rehabilitation, n.d.-a). This is summarized in Figure 1 below.

Figure 1

Source: California Department of Corrections and Rehabilitation (n.d.-a)

Conviction Type	Previous Rate	New Rate (as of May 1, 2021)
Violent (PC 667.5(c))	20% (1 day of credit for every 4 days served)	33.3% (1 day of credit for every 2 days served)
Non-violent Second Striker	33.3% (1 day of credit for every 2 days served)	50% (1 day of credit for every 1 day served)
Non-violent Third Striker	33.3% (1 day of credit for every 2 days served)	50% (1 day of credit for every 1 day served)

California's trend towards less punitive application of three strikes law has continued recently, with two interesting developments resulting from the 2020 election. A majority of voters voted against and defeated Proposition 20, which "would have toughened sentencing in criminal cases and reduced the number of prison inmates eligible for parole" (McGreevy, 2020). In the same election, residents of Los Angeles elected George Gascón as the county's district attorney, who, immediately upon taking office, implemented broad systemic changes to the methods by which prosecutors could pursue criminal convictions (Booker, 2020). Among these changes was barring prosecutors from using sentencing enhancements, including three strikes. Just two months later in February 2021, the Los Angeles' union of deputy district attorneys successfully challenged Gascón's new policy. A judge ruled that the policy was unlawful, echoing the union's assertion that "prosecutors don't have discretion 'to refuse the enhancement'" (Diaz, 2021). However, Gascón has stated that he plans to appeal, and it will be interesting to observe this case as it evolves. The ultimate ruling of the court in this case will undoubtedly have implications for the application of the TSL statewide.

Also in February 2021, state congressional representative Miguel Santiago introduced Assembly Bill 1127 into the California state legislature. AB 1127 proposes that strikes accumulated by juveniles should not be included in an adult's three strikes count (Renda, 2021). Gascón has also come out in favor of the proposed legislation, citing well-established knowledge about adolescent brain development. He also observes that juvenile justice proceedings are not criminal proceedings, and therefore they should not count towards an adult's criminal record (Los Angeles County District Attorney's Office, 2021; Renda, 2021).

Reform Shortcomings and Recommended Policy Changes

While the change proposed by AB 1127 is crucial and signals a continued commitment to reform, it is also important to note that there are additional shortcomings with California's TSL that are not addressed by current reform efforts. Three key issues that must be addressed are

the backlog of Proposition 36 and 47 petitions; the discrepancy between which felonies constitute a second strike and which count as a third; and the ineligibility of mentally ill offenders for relief under Propositions 36 and 57.

I. Addressing Proposition 36 and 47 Petitions in a Timely Manner

One important issue related to Propositions 36 and 47 is the lack of resources available to process petitions for release or resentencing. A year and a half after the implementation of Proposition 36, "[s]tatewide, approximately half of all prisoners eligible for release under Proposition 36 have had their cases adjudicated through the court system" (Stanford Law School Three Strikes Project and NAACP Legal Defense and Education Fund, 2014: 3). Figure 2 shows a summary of cases processed in California's 10 largest counties in April 2014. While it is difficult to find more recent data on how the remainder of these cases were resolved, it is nonetheless troubling to consider the possibility that at the time of this report, there may have been individuals eligible and waiting to be released for a year and a half. More resources should have been invested in these cases so that eligible inmates did not spend an undue amount of time awaiting release.

Figure 2
Source: Stanford Law School Three Strikes Project and NAACP Legal Defense Fund (2014: 3)

Ten largest counties	Eligible Prop. 36 petitioners	Percentage of cases processed	Approx. number of pending cases
Los Angeles	1,033	37%	651
San Bernardino	293	95%	15
San Diego	243	75%	60
Riverside	183	77%	42
Kern	175	51%	86
Orange	152	64%	55
Sacramento	150	96%	6
Santa Clara	149	83%	25
Fresno	55	91%	5
Stanislaus	50	86%	7

The same pattern of a lack of resources unfolded upon the passage of Proposition 47. As mentioned previously, the number of Prop 47 petitions grew to 200,000 by December 2015, a number many courts were unprepared to handle. In 2016, the Judicial Council of California reported, for example, that "[o]ne court placed an informal cap on the number of Proposition 47 petitions that could be filed per day due to limited resources" (Judicial Council of California, 2016: 4). The Council also shared that "[c]ourts across the state are at varied stages" (Judicial Council of California, 2016: 3) of processing petitions, and that they "identified certain tasks as

requiring far more time than initially anticipated" (Judicial Council of California, 2016: 3). Again, this demonstrates a lack of resources and a lack of adequate planning for the processing of petitions. Additionally, it signals that the amount of time eligible inmates must wait to be released largely depends on where in the state they are serving time. This is a key area of California's TSL that must be reformed. Individuals who are eligible for relief under reforms to three strikes must have their cases adjudicated promptly so that they may be released with as little delay as possible. This will only be achieved by courts allocating the resources necessary to expeditiously process these petitions.

II. Discrepancy Between Two and Three Strikes

Since the implementation of three strikes, Californians have had a tendency to focus only on the aspects of the law that affect third strikers, and consequences for second strikers have largely been overlooked (Kieso, 2005: 60). This continues to be the case with reform efforts. Crucially, Proposition 36 changes the law so that a third strike can only be a serious and violent felony, but an offender can still accumulate a second strike for a non-serious, non-violent felony offense (Prison Law Office, 2017: 5).

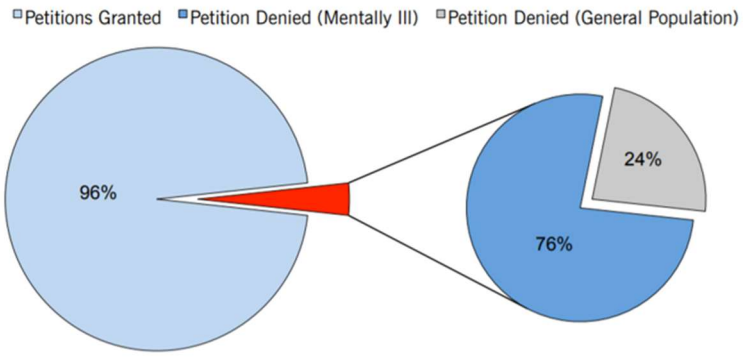
This approach is unduly punitive for second strikers, who have at least one less conviction than a potential third striker. It is imperative that Prop 36 is further reformed to extend to second strikers. Specifically, California's TSL must be reformed so that only serious and violent felonies trigger either a second or third strike.

III. Inadequate Relief for Mentally Ill Offenders

In 2017, the Stanford Justice Advocacy Project published a report that found that despite great reductions in the prison population overall, the number of prisoners with serious mental illness "ha[d] increased dramatically" (Stanford Justice Advocacy Project, 2017: 1) in the five years preceding the report's publication. Not only had the number of inmates with mental illness increased, but the severity of psychiatric symptoms had also increased by 60 percent over the same period of time (Stanford Justice Advocacy Project, 2017: 2).

Mentally ill inmates are much less likely to benefit from reforms such as Propositions 36 and 57. For example, from Prop 36's implementation in 2012 to February 2015, 96 percent of petitions for resentencing under the Proposition's provisions were granted. Among the 4 percent whose petitions were denied, 76 percent had a mental illness (Figure 3) (Steinberg et al., 2015: 14). This indicates that individuals with mental illness are disproportionally denied petitions for relief under Proposition 36, as mentally ill prisoners comprise only 45 percent of California's incarcerated population (Steinberg et al., 2015: 3).

Figure 3
Source: Steinberg et al. (2015: 14)



The language of Prop 36 requires that prisoners demonstrate "that they no longer posed 'an unreasonable risk of danger to public safety'" (Stanford Justice Advocacy Project, 2017: 6). In order to make this determination, courts rely in large part upon an inmate's behavior behind bars. As researchers and advocates point out, it may be more difficult for mentally ill inmates to conform their behavior to what is considered appropriate for the purpose of early release, as prison conditions tend to "exacerbate a prisoner's existing mental illness and deteriorating behavior" (Stanford Justice Advocacy Project, 2017: 7). Therefore, mentally ill inmates are much less likely to be released on reforms such as Proposition 36 because prison does not promote mental health. In fact, incarceration frequently exacerbates antisocial behaviors and unhealthy coping mechanisms that compound mental health challenges, which in turn are used as evidence by courts that a particular inmate continues to pose an unreasonable risk.

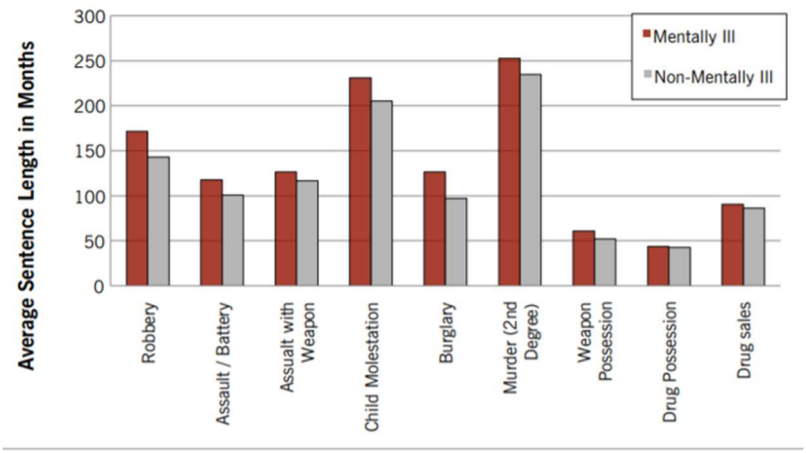
In addition to these conditions that make it more difficult for mentally ill inmates housed in prison to get relief through Prop 36, the California Court of Appeals ruled in 2016 that "defendants found not guilty by reason of insanity are not eligible for sentence reductions under

Proposition 36" (Stanford Justice Advocacy Project, 2017: 6; see also People v. Dobson, 2016). In coming to this decision, the court made the distinction between "prisoners" in the justice system to whom Prop 36 applies and "patients" in state hospitals ineligible for relief (Stanford Justice Advocacy Project, 2017: 6). This is despite the fact that in these cases, patients are confined to state hospitals as a result of criminal justice proceedings. Because of the fact that criminal proceedings precede hospital confinement, nonviolent mentally ill offenders in state hospitals should also be considered eligible for relief under Prop 36.

Because Proposition 57 increases the rate at which inmates can earn good conduct credits (GCCs), a similar problem to that previously discussed for Proposition 36 arises in the way Proposition 57 applies to those who are mentally ill. Again, it is more difficult for a mentally ill offender to earn GCCs predicated on the "presence or absence of prison rule violations committed by the inmate under review" (Stanford Justice Advocacy Project, 2017: 7). For example, the California Department of Corrections and Rehabilitation (CDCR) mandates that inmates who attempt suicide must be sanctioned. This ultimately results in longer sentences for inmates who attempt suicide, as they may lose credits they have earned, and also lose the ability to participate in rehabilitative programming, further reducing the GCCs they may earn in the future (Stanford Justice Advocacy Project, 2017: 7).

A suicide attempt thus is treated as a prison violation, which can also be the case for other mental health issues, such as violent episodes brought on by psychosis. Rather than providing treatment for these symptoms of mental illness, it is CDCR policy to sanction inmates in such a way that their prison time (and thus, the time they spend in an environment that is detrimental to their mental health) is extended. Because of these policies which effectively

Figure 4
Source: Steinberg et al. (2015: 2)



punish mental illness, researchers have found that "[o]n average, the sentences for prisoners with mental illness are 12 percent longer than other prisoners" (Stanford Justice Advocacy Project, 2017: 4). This is demonstrated across various felonies in Figure 4.

An analysis of the structure of three strikes relief provided by Propositions 36 and 57 clearly shows that these reforms do not extend to mentally ill prisoners to the same degree as for those not mentally ill. It is important for reforms to California's TSL to extend equitably to offenders with mental illness.

The Case for Dismantling Three Strikes

The issues discussed in the previous section demonstrate the intentional and unintentional limitations of current three strikes law reform efforts. The intent behind raising these issues was to shed light on these limitations and propose solutions to address them. However, the most impactful and equitable method to address issues with the TSL is to discontinue its use entirely. There are several reasons to pursue dismantling three strikes in California. Chief among these are the limited support for its efficacy coupled with its high cost; the disparity with which the TSL is applied; and the unreasonable application of far-reaching consequences for offenders who have completed their sentences and complied with conditions for release.

I. The Cost of Three Strikes

As demonstrated in the literature review of this paper, there is limited and mixed support showing that California's three strikes law significantly impacts crime rates. Results of different studies largely vary depending on the study's sample and method of analysis. Without a standardized method to measure the impact of the TSL, it is difficult to determine whether it has made a significant difference in crime rates in California, and there are at least as many studies repudiating three strikes as there are finding it effective. One especially convincing study was conducted by Robert Parker in 2012, and included a comparison of crime rates in states with three strikes laws and states without three strikes laws (Parker, 2012: 209-210). Parker is able to demonstrate that the 1990s were characterized by falling crime rates across the country, regardless of whether three strikes laws were adopted or not in a particular state (Parker, 2012: 209-210). This suggests that some factor other than three strikes legislation was responsible for the decrease in crime.

Less debatable is the fact that California's TSL is very costly to the state. In a 1994 research brief for the RAND Corporation, James Chiesa estimated the new law would cost "$4.5 billion to $6.5 billion per year in current dollars" (Chiesa, 1994). In 2012, prior to the reforms implemented by Propositions 36, 47, and 57, it cost approximately $47,000 per year to house an inmate in the California state prison system, and Stanford's Three Strikes Project estimated at the time that nearly half of third strikers were serving terms of 25 years to life for nonviolent offenses (Giovanni, 2012). With reforms to the TSL, the number of third strikers serving life sentences for nonviolent offenses has been greatly reduced, but not entirely eliminated. Additionally, second strikers may still be sentenced to enhanced sentences whether they committed a violent felony or a nonviolent one. In 2018-19, the California Legislative Analyst's Office estimated that it costs about $81,000 per year to incarcerate an inmate in California, a number which represents an increase of 58 percent since 2010-11 (California Legislative Analyst's Office, 2019).

It is important to take these exorbitant costs and weigh them against the potential benefits of California's TSL. An interesting statistic that suggests costs are too great is that the recidivism rate for inmates released under Proposition 36 is 1.3 percent within one year of release (Stanford Law School Three Strikes Project and NAACP Legal Defense and Education Fund, 2014: 2). This extraordinarily low recidivism rate suggests that individuals released under Prop 36 may have actually been a much lower risk than what they were determined to be by the court under three strikes.

By April 2014, Proposition 36 had already saved the state over $30 million in prison costs, a number expected to exceed $750 million by 2024 (Stanford Law School Three Strikes Project and NAACP Legal Defense and Education Fund, 2014: 2). Research has not conclusively shown that decreases in crime in California in the 1990s and 2000s can be attributed to California's three strikes law, but it has shown that three strikes comes with a high financial cost. California has saved hundreds of millions of dollars since reforming the TSL, but these savings could be exponentially increased if use of three strikes was discontinued entirely. These funds could then be reinvested in social services and supports for the justice-involved population, thereby providing opportunities and support to desist from crime for repeat offenders.

II. Entrenched Disparities in the Application of the TSL and in the Application of TSL Reforms

Geographically, California's three strikes law and its reforms have been disparately implemented throughout the state since their adoption. As mentioned previously, Fiber-Ostrow and Tucker found geographic disparities in the application of the law throughout California (Fiber-Ostrow and Tucker, 2013). Furthermore, reform efforts have also been applied distinctly throughout the state, with some counties processing petitions for relief at rates much faster than

other counties (Stanford Law School Three Strikes Project and NAACP Legal Defense and Education Fund, 2014: 2). This ultimately means that an offender in Los Angeles county, for example, may end up serving a significantly longer sentence than an offender in Sacramento county for the exact same crime.

In addition to geographic disparities in the application of California's TSL, the law is also applied in distinct ways with different populations regardless of location. This paper has already examined at length disparities in the law's application between offenders who are mentally ill and offenders with no mental illness, but less extensively discussed thus far is the disparity with which the TSL is applied with respect to race and ethnicity.

In a 2008 study testing the liberation hypothesis[1], Chen finds that rates in the application of the TSL in terms of race and ethnicity were especially divergent for non-serious, nonviolent offenses. This is problematic because the biggest variations in the way the law is applied can be found in lower-level offenses, for which the application of the TSL has always been controversial. Therefore, prior to the reforms of Props 36 and 47, it was a relatively common occurrence, for example, for an African American offender to have a wobbler offense charged as a felony (thereby triggering a strike), while a white man may have the same wobbler offense charged as a misdemeanor. Misdemeanors carry much shorter sentences than felonies, so in this example, if the wobbler is charged as a felony and triggers a third strike, our hypothetical African American offender may have been sentenced to more than 20 years more in prison than our white offender charged with a misdemeanor for the exact same crime. Furthermore, we know that this situation is not simply hypothetical. As mentioned previously, studies of the TSL after the implementation of Proposition 36 have demonstrated that disproportionally high rates

[1] First proposed by Kalven and Zeisel in 1966, the liberation hypothesis posits that when facts of the case such as how serious the punishment should be are less clear, legal actors are "liberated" from only considering legally relevant variables and allow decisions to be influenced by personal opinions, values, or biases (see Chen, 2008b: 6).

of African American offenders are eligible for relief under the reform. In turn, this shows that African American offenders were disproportionally likely to receive a strike sentence for non-serious, nonviolent felonies prior to Proposition 36 (Chen et al., 2020).

While Propositions 36 and 47 have provisions that serve to address these issues of disparity, undeniably the most effective way to ensure the California TSL and its reforms are not applied with disparity is to dismantle the structure entirely. If strike sentencing enhancements were no longer applied, California's justice system would effectively be placing greater emphasis on the facts of the current case. This would make it more likely that only "legally relevant variables" (Chen, 2008b: 2) are considered during trial and sentencing, thus decreasing the consideration of legally irrelevant variables such as race, ethnicity, and criminal history.

III. The Hidden Consequences of Three Strikes

In the preceding section discussing disparities in the application of California's TSL, criminal history is characterized as a legally irrelevant variable. This is because former offenders who have completed their sentence and complied with all conditions for release should not experience additional legal consequences arising from having strikes on their record. Advocates frequently think of secondary consequences for convicts in terms of ineligibility for receiving governmental financial aid (e.g., welfare) or ineligibility to vote. However, the inability to have strikes removed from future consideration can also be considered a secondary hidden consequence that may eventually be used against formerly incarcerated individuals.

At this time, an individual with strikes on their record may never have those strikes removed from consideration in the case of future adjudication; "a prior conviction counts as a strike no matter how old it is" (Prison Law Office, 2017: 3). Three strikes should be dismantled so that this legislation is not a source of secondary consequences for members of the justice-involved population who have completed their sentences. In the same way that activists are

working, for example, to restore voting rights for those formerly incarcerated, activists must insist that individuals who have completed sentences in the past are judged solely on their current offense.

Conclusion

California's three strikes law, first enacted in 1994 and vigorously reformed since 2012, stands out for its especially draconian nature among other TSLs and provides a rich foundation for analysis. While there has been extensive research published on three strikes in California, it has not conclusively proven or disproven an explicit link between the TSL and decreasing crime rates in the 1990s and 2000s.

However, reform efforts since 2012 and as recently as 10 days before submission of this paper demonstrate that Californians are ready to shift to a less stringent application of three strikes law.

This piece goes one step further to suggest that the time has come to wholly dismantle California's three strikes law. While the reforms implemented since 2012, including Propositions 36, 47, and 57, have served to blunt the TSL, these reforms have not been far-reaching enough to provide relief in an equitable manner to all offenders who should be eligible. This, coupled with the fact that three strikes law creates secondary, hidden consequences for former offenders who complete their sentence and comply with conditions for release, demonstrates that the most effective way to equitably address the issues arising from the TSL and its reforms is to discontinue its use.

Bibliography

Booker, B. (2020, December 8). George Gascón Implements Sweeping Changes To Los Angeles District Attorney's Office. *NPR*. https://www.npr.org/2020/12/08/944396495/george-gascon-implements-sweeping-changes-to-los-angeles-district-attorneys-offi.

Cal. Const., art. I, section 32, subd. (a)(1)

California Department of Corrections and Rehabilitation. (n.d.-a). *Good Conduct Credit Changes: Frequently Asked Questions*. https://www.cdcr.ca.gov/credit-earning-opportunities-frequently-asked-questions/

California Department of Corrections and Rehabilitation. (n.d.-b). *Proposition 57.* https://www.cdcr.ca.gov/proposition57/

California Legislative Analyst's Office. (2019, January). *How much does it cost to incarcerate an inmate?* https://lao.ca.gov/PolicyAreas/CJ/6_cj_inmatecost

California Peace Officers Association. (n.d.). *Due To The Passage Of Proposition 57, All Nonviolent State Prisoners, Including "Third Strike" Offenders, Are Eligible For Parole Consideration* https://cpoa.org/due-to-the-passage-of-proposition-57-all-nonviolent-state-prisoners-including-third-strike-offenders-are-eligible-for-parole-consideration/#:~:text=In%20so%20doing%2C%20the%20Court,term%20for%20their%20primary%20offense.&text=Originally%20enacted%20in%201994%2C%20California's,Three%20Strikes%E2%80%9D%20law%20(Pen.

Chen, E. Y. (2008a). Impacts of 'Three Strikes and You're Out' on Crime Trends in California and Throughout the United States. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.2189510

Chen, E.Y. (2008b). The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California's Three Strikes Law. *Journal of Ethnicity in Criminal Justice,* 6(2), 83-102.

Chen, E. Y. (2014). Three-Strikes Legislation. *African Americans and Criminal Justice: An Encyclopedia*, 551–555.

Chen, E. Y., Chung, E., & Sands, E. (2020). General Effects of Proposition 36 on Racial and Ethnic Disparities in Three Strikes Sentencing. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.3729034

Chiesa, James. (1994). California's New Three-Strikes Law: Benefits, Costs, and Alternatives. *RAND Corporation.* https://www.rand.org/pubs/research_briefs/RB4009.html.

Datta, A. (2017). California's Three Strikes Law Revisited: Assessing the Long-Term Effects of the Law. *Atlantic Economic Journal*, *45*(2), 225–249. https://doi.org/10.1007/s11293-017-9544-8

Diaz, J. (2021, February 9). Judge Blocks LA District Attorney's Reforms. *NPR*. https://www.npr.org/2021/02/09/965673109/judge-blocks-l-a-district-attorneys-reforms.

Dillow, G. (1994, September 18). Pizza Case Unlikely Focus of '3 Strikes' Debate: Courts: Defense lawyer says suspect doesn't see how what he allegedly did could send him to prison for 25

years to life. Officials back prosecution of small-time street criminal. *Los Angeles Times*. https://www.latimes.com/archives/la-xpm-1994-09-18-me-40053-story.html.

Fiber-Ostrow, P., & Tucker, J. A. (2013). Third Strikers under Three Strikes and You're Out: Politics and Prosecutions. *California Journal of Politics and Policy*, *5*(2), 168–205. https://doi.org/10.5070/p2fk5t

Giovanni, T. (2012, March 19). '3-Strikes' Penalties are Costly, Waste Lives. *Brennan Center for Justice*. https://www.brennancenter.org/our-work/research-reports/3-strikes-penalties-are-costly-waste-lives#:~:text=That%20number%20is%20nearly%20half,%2447%2C000%20a%20year%20per%20inmate.

Greenwood, P.W., Rydell, C.P., Abrahamse, A., Caulkins, J.P., Chiesa, J., Model, K, & Klein, S.P. (1994). *Three Strikes and You're Out: Estimated Benefits and Costs of California's New Mandatory-Sentencing Law.* RAND Corporation.

Helland, E., & Tabarrok, A. (2007). Does Three Strikes Deter? A non-parametric estimation. *Journal of Human Resources*, *XLII*(2), 309–330. https://doi.org/10.3368/jhr.xlii.2.309

Janiskee, B. P., & Erler, E. J. (2000). Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law. *Duquesne Law Review*, *39*(1), 43–69.

Judicial Branch of California. (n.d). *Proposition 47: The Safe Neighborhoods and Schools Act*. https://www.courts.ca.gov/prop47.htm

Judicial Council of California. (2016, March). *Early Impacts of Proposition 47 on the Courts*. Judicial Branch of California.

Karlan, P., & Bankman, J. (Hosts). (2021, March 27). Three Strikes and You're Out: Revisiting Laws That Lock Up Nonviolent Offenders with Michael Romano [Audio podcast episode]. In *Stanford Legal*. Stanford Law School. https://law.stanford.edu/stanford-legal-on-siriusxm/three-strikes-and-youre-out-revisiting-laws-that-lock-up-nonviolent-offenders-with-michael-romano/

Kieso, D. W. (2005). *Unjust Sentencing and the California Three Strikes Law*. LFB Scholarly Publishing, LLC.

LaFree, G. (2003). Too Much Democracy or Too Much Crime? Lessons from California's Three-Strikes Law. *Law and Social Inquiry*, *27*(4), 875–902. https://doi.org/10.1111/j.1747-4469.2002.tb00985.x

Leonard, J. (2010, February 10). 'Pizza thief' walks the line. *Los Angeles Times*. https://www.latimes.com/archives/la-xpm-2010-feb-10-la-me-pizzathief10-2010feb10-story.html.

Los Angeles County District Attorney's Office. (2021, April 9). District Attorney Gascón, Assembly Member Santiago Unveil Juvenile Three Strikes Reform Bill [Press release]. https://da.lacounty.gov/media/news/district-attorney-george-gascon-assembly-member-santiago-unveil-juvenile-three-strikes-reform-bill

McGreevy, P. (2020, November 3). Prop. 20, which would have toughened sentencing in criminal cases, is rejected by California voters. *Los Angeles Times* https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-20-falling-short-in-early-returns

Parker, R. N. (2012). Why California's 'Three Strikes' Fails as Crime and Economic Policy, and What to Do. *California Journal of Politics and Policy*, *5*(2), 206–231. https://doi.org/10.5070/p2hs3r

People v. Dobson, 245 Cal. App. 4th 310 (2016). Retrieved from https://law.justia.com/cases/california/court-of-appeal/2016/f069588.html

Prison Law Office. (2017, October). Information Re: California's Two and Three Strikes Law [open letter]. *Prison Law Office.* Retrieved from http://prisonlaw.com/wp-content/uploads/2017/10/ThreeStrikesOct-2017.pdf

Ramirez, J. R., & Crano, W. D. (2003). Deterrence and Incapacitation: An Interrupted Time-Series Analysis of California's Three-Strikes Law. *Journal of Applied Social Psychology*, *33*(1), 110–144. https://doi.org/10.1111/j.1559-1816.2003.tb02076.x

Renda, M. (2021, April 9). California Eyes Three-Strikes Reform to Exclude Juvenile Offenders. *Courthouse News Service*. https://www.courthousenews.com/california-eyes-three-strikes-reform-to-exclude-juvenile-offenders/

Stanford Justice Advocacy Project. (2017). The Prevalence And Severity Of Mental Illness Among California Prisoners On The Rise. Retrieved from https://www-cdn.law.stanford.edu/wp-content/uploads/2017/05/Stanford-Report-FINAL.pdf

Stanford Law School Three Strikes Project and NAACP Legal Defense and Education Fund. (n.d.). Progress Report: Three Strikes Reform (Proposition 36) 1,000 Prisoners Released. Retrieved from https://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/441702/doc/slspublic/Three%20Strikes%20Reform%20Report.pdf

Stanford Law School Three Strikes Project and NAACP Legal Defense and Education Fund. (2014, April). Proposition 36 Progress Report: April 2014. Retrieved from https://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/595365/doc/slspublic/ThreeStrikesReport.pdf

Steinberg, D., Mills, D., & Romano, M. (2015, February 19). When Did Prisons Become Acceptable Mental Healthcare Facilities? *Stanford Law School Three Strikes Project.* Retrieved from https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/863745/doc/slspublic/Report_v12.pdf

Stolzenberg, L., & D'Alessio, S. J. (1997). "Three Strikes and You're Out": The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates. *Crime & Delinquency*, *43*(4), 457–469. https://doi.org/10.1177/0011128797043004004

Vitiello, M.I. (1996). Three Strikes: Can We Return to Rationality. *The Journal of Criminal Law and Criminology,* 87(2), 395-481.

Vitiello, M. I. (1997). Three Strikes and the Romero Case: The Supreme Court Restores Democracy. *Loyola of Los Angeles Law Review*, *30*(1), 1601–1666.

Zimring, F. E. (1996). Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California. *McGeorge Law Review*, *28*(1), 243–256.

Zimring, F. E. (2001). Imprisonment Rates and the New Politics of Criminal Punishment. *Punishment & Society*, *3*(1), 161–166. https://doi.org/10.1177/14624740122228159

Zimring, F. E., Hawkins, G., & Kamin, S. (2001). *Punishment and democracy: three strikes and you're out in California*. Oxford University Press.