

NOTES

“THE INTEGRITY OF THE GAME IS EVERYTHING”: THE PROBLEM OF GEOGRAPHIC DISPARITY IN THREE STRIKES

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In response to the 1993 kidnapping and killing of twelve-year-old Polly Klaas, California enacted a rigid mandatory minimum sentencing law known as Three Strikes. The product of public fear and political exploitation, Three Strikes engendered little rational debate prior to passage. Consequently, the law's scope was far broader than Californians anticipated, and primarily incarcerated nonviolent felons. In the years following the law's passage, concerns about lost proportionality and the systemic costs of Three Strikes led to widespread adaptation of the law. While modification of Three Strikes is universal across the state, the extent of adaptation varies county by county, as each county's prosecutors enforce the law according to their own principles of proportionality. In this Note, Joshua Bowers analyzes the resulting geographic disparity in the California Three Strikes law and suggests that by applying the Three Strikes law according to personal and local principles, prosecutors are improperly usurping the legislative power to determine a single, coherent principle of proportional punishment. He maintains that varying approaches to Three Strikes render the law a kind of "checkerboard statute," violating what Ronald Dworkin calls the value of integrity in the rule of law. To remedy this problem, California counties must apply the Three Strikes law in a single, uniform manner. Bowers concludes that it is neither desirable nor feasible for prosecutors uniformly to apply the Three Strikes law as written. Instead, to ensure consistent application, the California legislature must change the law to reflect better a principle of proportionality acceptable throughout California.

INTRODUCTION

In San Diego County, a forty-eight-year-old grandfather with two prior nonviolent felony convictions was arrested for shoplifting videotapes from a K-Mart store.¹ The crime was his third strike.² He was

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¹ Harriet Chiang, *Uneven Justice Under 3 Strikes: Counties Vary in How They Enforce Law*, S.F. Chron., Sept. 23, 1996, at A1.

² Under California Penal Code § 667 (West 1999), any offender previously convicted of two or more violent or serious crimes faces a mandatory sentence of at least twenty-five

sentenced to twenty-five years to life behind bars.³ Three hundred miles to the north, a man in Alameda County stole a belt, three shirts, and a backpack from a Target store. Though the crime qualified as his third strike, he received only sixteen months in prison.⁴

There are 6615 people serving from twenty-five years to life in California prisons under the state's Three Strikes law.⁵ Approximately 49,469 inmates have received double sentences for second-strike convictions.⁶ Prisoners incarcerated under Three Strikes legislation constitute over thirty-five percent of California's total prison population.⁷ Despite the law's tremendous impact, the state has yet to develop a uniform application of the Three Strikes law. Consequently, while some repeat offenders convicted of minor crimes for their third strike are sent away for life, others receive much lighter sentences. This checkered pattern of application has transformed the law into a "civic Rorschach test,"⁸ reflecting the disparate crime control approaches of California's fifty-seven counties.

San Diego and San Francisco counties lie at opposite ends of this divide.⁹ In San Francisco, the law is implemented only against defendants charged with violent felonies.¹⁰ Consequently, it has done little to alter traditional modes of criminal justice in the county. The law's application instead closely mirrors conventional, pre-Three Strikes

years to life for any subsequent felony conviction. See *infra* notes 34-37 and accompanying text.

³ Chiang, *supra* note 1.

⁴ *Id.*

⁵ Data Analysis Unit, Cal. Dep't of Corr., Third Strike Cases 8 (Feb. 13, 2001) [hereinafter Third Strike Cases] (unpublished material on file with the *New York University Law Review*) (detailing third-strike commitments as of January 31, 2001).

⁶ Data Analysis Unit, Cal. Dep't of Corr., Second Strike Cases 7 (Feb. 13, 2001) [hereinafter Second Strike Cases] (unpublished material on file with the *New York University Law Review*) (detailing second-strike commitments as of January 31, 2001). Under Three Strikes, offenders with one prior violent or serious felony conviction receive twice the normal sentence for a subsequent felony conviction. Cal. Penal Code § 667 (West 1999). This provision is discussed in detail *infra* at notes 34-37 and accompanying text.

⁷ See *supra* notes 5-6; see also Data Analysis Unit, Cal. Dep't of Corr., Monthly Report of Population 1 (Feb. 5, 2001), <http://www.cdc.state.ca.us/reports/monthpop.htm> (listing total California prison population at 158,153 inmates as of January 31, 2001).

⁸ Christine Markel, Note, A Swing and a Miss: California's Three Strikes Law, 17 *Whittier L. Rev.* 651, 687 (1996).

⁹ San Diego Superior Court Judge Thomas Whelan remarked: "In San Francisco, you get caught with a rock of cocaine, and you probably get probation. . . . You get on a plane and get to San Diego before you're caught, and you can get life in prison." Tony Perry & Maura Dolan, Two Counties at Opposite Poles of '3 Strikes' Debate, *L.A. Times*, June 24, 1996, at A1.

¹⁰ Associated Press, S.F. Prosecutor Vows to Limit '3 Strikes' Cases, *L.A. Times*, Jan. 17, 1996, at A3; Telephone Interview with Paul Cummins, Head of the San Francisco District Attorney Office Three Strikes Panel (Feb. 21, 2001) [hereinafter Cummins, Telephone Interview] (on file with the *New York University Law Review*).

norms of proportionality.¹¹ San Diego represents the other side of the Three Strikes spectrum.¹² It endorses a more rigid approach, potentially prosecuting all felonies as strikes.¹³ Nevertheless, even San Diego fails to apply the law strictly as written. Instead, uneven application creates arbitrary incongruity within San Diego, resulting in intracounty disparity, in addition to the larger problem of geographic disparity.¹⁴

This Note explores disparity in the application of Three Strikes legislation, focusing on the divergent approaches of San Diego and San Francisco counties. Part I opens with a description of the law's origins. Part II continues with an outline of the well-observed process of modification of past mandatory minimum sentencing laws, and describes the disparate practices of San Francisco and San Diego. Part III explains that the absence of a predictable and coherent approach implicates concerns about what Ronald Dworkin calls "integrity" in the law. Part IV argues that integrity ultimately demands that California adopt one consistent standard of application. This one uniform standard cannot be rigid adherence to the strict wording of the law. Such an approach is unworkable in even strict law-and-order communities because it ignores basic communal notions of proportionality and carries a prohibitive price tag. Instead, if California must have a Three Strikes law,¹⁵ the most coherent option is the model adopted by San Francisco—a model that punishes the type of criminals on which the law was designed to focus: recidivist, violent felons.¹⁶

¹¹ *Infra* notes 66 and accompanying text.

¹² *Infra* notes 76-80 and accompanying text.

¹³ S.D. Dist. Attorney, Three Strikes Policy Guidelines 1 (Mar. 25, 1995) [hereinafter Policy Guidelines] (on file with the *New York University Law Review*). Statewide, the San Diego approach represents the dominant model, Perry & Dolan, *supra* note 9, though other counties rarely apply the law with quite as much zeal. *Infra* note 72. This Note will refer to the rigid approach, typified by San Diego, as "the San Diego model," and identify the less stringent approach, typified by San Francisco, as "the San Francisco model."

¹⁴ See *infra* Part IV.B.

¹⁵ Because seventy-two percent of the state's voters endorsed the Three Strikes initiative, Bill Jones, Cal. Sec'y of State, Statement of Vote, Nov. 8, 1994, Gen. Election 107 [hereinafter Cal. Statement of Vote], this Note assumes that Californians wanted a Three Strikes law. It questions, however, whether the citizenry intended minor felonies to be prosecuted as strikes. See *infra* notes 43-51, 131-34, 185 and accompanying text (discussing intent of Californians compared to actual scope of Three Strikes law).

¹⁶ See *infra* Part IV.C.

I
BEFORE THREE STRIKES: BIRTH OF A LAW

In 1992, a violent, recidivist felon killed a young California woman during an attempted robbery outside a restaurant.¹⁷ In response, her father, Mike Reynolds, launched a tough-on-crime proposal entitled "Three Strikes and you're out."¹⁸ Its terms were harsh. Any felony defendant with one prior serious or violent felony conviction on her record would be sentenced to double punishment for a second strike. Any felony defendant with two prior serious or violent felony convictions would receive a minimum mandatory sentence of twenty-five years to life behind bars.¹⁹

The California State Assembly Committee on Public Safety dismissed Reynolds's proposal as too draconian and too broad.²⁰ Undeterred, he turned to the state initiative process. In order to place an initiative on the November 1994 ballot, Reynolds and his small cadre of supporters needed to raise 385,000 signatures.²¹ By October 1993, only 20,000 Californians had signed the initiative.²² These low numbers would soon skyrocket following another tragic event.

On October 1, 1993, shortly before eleven o'clock in the evening, an intruder entered the home of Eve Nichol in Petaluma, California. The man came upon three girls having a slumber party in the family room. He bound and gagged two of the girls at knifepoint and left them to watch as he fled with Nichol's daughter, twelve-year-old Polly Klaas.²³ Polly's family launched a tremendous media campaign to find their daughter.²⁴ The disappearance crystallized California citizens'

¹⁷ Dan Morain, *Lawmakers Jump on '3 Strikes' Bandwagon*, L.A. Times, Jan. 31, 1994, at A3.

¹⁸ *Id.*

¹⁹ *Id.* The terms of the proposal were identical to the Three Strikes statute eventually passed by the California legislature. Compare *id.* with Cal. Penal Code § 667(e)(1)-(e)(2)(A) (West 1999) and *infra* notes 34-37 (describing Three Strikes statute in detail).

²⁰ Morain, *supra* note 17; see also *The Legacy: Murder and Media, Politics and Prisons* (Films for the Humanities & Sciences 1999) [hereinafter *Legacy*] ("[Reynolds's proposal] didn't even pass the giggle test. . . . It was a dog." (quoting Michael Vitiello)).

²¹ Cal. Const. art. II, § 8; see also Dan Morain, "Three-Time Loser" Bid Backed by Lungren, L.A. Times, Dec. 7, 1993, at A3 (citing required 385,000 signature figure).

²² Michael Vitiello, "Three Strikes" and the Romero Case: The Supreme Court Restores Democracy, 30 *Loy. L.A. L. Rev.* 1601, 1614 (1997).

²³ Richard C. Paddock, *All-Out Search for Missing Girl*, L.A. Times, Oct. 6, 1993, at A3.

²⁴ Fliers, radio, television, and the burgeoning Internet all played a role in the hunt. Richard C. Paddock, *New Wave Media Blitz Seeks Polly*, L.A. Times, Oct. 16, 1993, at A1. Describing the scope of the search, Joe Klaas, Polly's grandfather, explained: "We had 40 billion, 40 billion images of Polly. So the whole world was looking." *Legacy*, *supra* note 20.

growing fear of violent crime and undermined their already waning sense of security.²⁵

In December, Polly was found dead, and authorities apprehended a suspect named Richard Allen Davis.²⁶ A twice-convicted kidnapper on parole at the time of the crime,²⁷ Davis was, in Mike Reynolds's words, the "poster boy" for the Three Strikes initiative.²⁸ The crime galvanized support for Reynolds's Three Strikes initiative.²⁹ Reynolds eventually raised 800,000 signatures³⁰—more than twice the number necessary to place the initiative on the ballot.³¹ In November 1994, Proposition 184, the Three Strikes initiative, passed with seventy-two percent of the vote.³²

²⁵ Paddock, *supra* note 23 (quoting Petaluma Police Sgt. Mike Kerns: "A home is a place where we all feel safe, where our children are safe. . . . To have someone come in and steal one of our children makes us all feel uneasy and emotionally involved"); Richard C. Paddock & Jenifer Warren, *Fear, Anger, Calls for Action Are Legacy of Polly's Death*, L.A. Times, Dec. 8, 1993, at A1 ("[T]he abduction and murder of Polly Klaas have bruised the psyche of a nation that is no longer so easy to shock.").

²⁶ Jenifer Warren & Richard C. Paddock, *Polly Is a 'Beautiful Angel Now'*, L.A. Times, Dec. 6, 1993, at B1.

²⁷ Jenifer Warren & Richard C. Paddock, *Suspect's Palm Print Found in Klaas Home*, L.A. Times, Dec. 4, 1993, at A26.

²⁸ *Legacy*, *supra* note 20. One Petaluma resident remarked: "This guy's been in prison more time[s] than I've brushed my teeth." Richard C. Paddock & Jenifer Warren, *Revelations in Klaas Kidnapping Spark Outrage*, L.A. Times, Dec. 3, 1993, at B1.

²⁹ See Paddock & Warren, *supra* note 25 (explaining growing support for Three Strikes in response to Klaas's killing).

³⁰ Victor S. Sze, *Note, A Tale of Three Strikes: Slogan Triumphs Over Substance as Our Bumper-Sticker Mentality Comes Home to Roost*, 28 Loy. L.A. L. Rev. 1047, 1056-57 (1995) (describing Reynolds's effort to get Three Strikes provision adopted into California Constitution using statewide initiative).

³¹ *Supra* note 21 and accompanying text.

³² Cal. Statement of Vote, *supra* note 15, at 107. The initiative, however, was to some degree academic. The California legislature, responding to the massive public outcry for a tough-on-crime measure, had already passed A.B. 971 in March 1994, a "word-for-word" replica of Mike Reynolds's proposal. Daniel M. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves; The Use and Abuse of Initiative and Referendum, A Local Government Perspective*, 19 Seattle U. L. Rev. 47, 78 n.172 (1995); Franklin E. Zimring, *Essay, Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 Pac. L.J. 243, 247-48 & n.24 (1996). The initiative was academic in the sense that it was redundant, not unimportant. It was, after all, the initiative campaign and the public passion that fueled it that drove the legislature to act. See Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. Crim. L. & Criminology 395, 412-14 & n.95 (1997) ("The mixture of Polly Klaas's murder, public perception that crime was on the rise, and election year rhetoric was a potion that Mike Reynolds and his backers used to put the legislature under a spell."). Mike Reynolds pushed ahead with the Three Strikes initiative campaign, despite the passage of A.B. 971, to send a message to the legislature. Vitiello, *supra* note 22, at 1616 & n.81 (noting that Reynolds pushed initiative in response to attempts by legislature to amend A.B. 971); Dan Morain, *Three Strikes: A Steam Roller Driven By One Man's Pain*, L.A. Times, Oct. 17, 1994, at A3 ("When 'Three Strikes' passes by the voters, the Legislature

Under the Three Strikes law,³³ any felony offender previously convicted of one or more “violent” or “serious” felonies is subject to a mandatory penalty enhancement.³⁴ An offender with one previous violent or serious strike—no matter how attenuated—faces a double sentence under the second-strike sentencing structure.³⁵ An offender with two or more violent or serious strikes faces a minimum sentence of twenty-five years to life under the third-strike sentencing structure.³⁶ While prior strikes must be violent or serious, the crime that

will be much less inclined to water it down.” (quoting Charles Cavalier, political consultant for Reynolds and Proposition 184)).

In sharp contrast to their initial rejection of the measure, politicians now embraced the measure for personal advantage. Ray Surette, *News From Nowhere, Policy to Follow: Media and the Social Construction of “Three Strikes and You’re Out,”* in *Three Strikes and You’re Out: Vengeance as Public Policy 177, 177* (David Shichor & Dale K. Sechrest eds., 1996) [hereinafter *Vengeance*] (“Three Strikes . . . may be the most potent conjoining of crime and politics in the history of the Republic. . . . Does a Willie Horton advertisement respond to fear of crime or cause it? It is probably both, consequence and cause—and an opportunity for political exploitation.” (quoting Professor Jerome Skolnick)); Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 *Stan. L. & Pol’y Rev.* 9, 12 (1999) (“[A] primary goal of harsh sentencing policies has been to satisfy the needs of politicians in their seemingly insatiable desire to appear ‘tough on crime.’”); Sherry Bebitch Jeffe, *Wilson Hoping Crime Will Assure His Job—but What Has He Done So Far?*, *L.A. Times*, Jan. 9, 1994, at M6 (describing how 1994 gubernatorial candidates ran like “lemmings to the sea” toward tough anti-crime positions).

³³ Proposition 184 was codified at California Penal Code § 1170.12 (West Supp. 2001). All future citations to the Three Strikes law are to California Penal Code § 667 (West 1999), the codification of A.B. 971.

³⁴ Cal. Penal Code § 667.5(c) (West Supp. 2001). California adopts an expansive view of what constitutes violent or serious felonies. See *id.* (listing violent felonies as murder; voluntary manslaughter; attempted murder; mayhem; rape; sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on victim or another person; oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on victim or another person; lewd acts on child under age of fourteen years; any robbery; certain arsons; kidnapping; assault with intent to commit mayhem, rape, sodomy, or oral copulation; continuous sexual abuse of child; carjacking; felony extortion; threats to victims or witnesses; and any burglary in first degree where it is charged and proven that another person, other than accomplice, was present in residence during commission of burglary); see also *id.* § 1192.7(c) (listing serious felonies as same plus any felony in which defendant personally inflicts great bodily injury on any person; any felony in which defendant personally uses firearm; assault with intent to commit robbery; assault with deadly weapon; assault on peace officer or firefighter; assault by life prisoner on noninmate; any arson; exploding destructive device or any explosive with intent to injure or kill; exploding destructive device or any explosive causing bodily injury or mayhem; any burglary in first degree; any felony in which defendant personally used dangerous or deadly weapon; selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug; grand theft involving firearm; throwing acid or flammable substances; discharge of firearm at inhabited dwelling, vehicle, or aircraft; intimidation of victims or witnesses; terrorist threats; any conspiracy to commit any of above offenses).

³⁵ Cal. Penal Code § 667(c)(3), (e)(1) (West 1999).

³⁶ The mandatory sentence for a third-strike offender is from twenty-five years to life, or triple the normal sentence to life, whichever is greater. *Id.* § 667(c)(3), (e)(2)(A).

ultimately triggers the second- or third-strike enhanced sentence can be any one of more than 500 crimes classified by California law as felonies.³⁷ Because any felony can be a third strike, life sentences for minor crimes have been common. Sensational tales of pizza thieves and pickpockets sentenced to prison for life have peppered the state's newspapers since the law's passage in 1994.³⁸ As of January 31, 2001, only 3.1% of third-strike inmates were incarcerated for first- or second-degree murder and only 1.7% of third-strike inmates were incarcerated for rape.³⁹ Drug and property crimes, on the other hand, comprise the majority of second- and third-strike convictions.⁴⁰

Admittedly, Californians wanted a Three Strikes law. However, the law that was passed was not necessarily the law for which Californians thought they were voting.⁴¹ In an atmosphere of political ma-

³⁷ *Id.* § 667(d)(1), (e)(2)(A); see also Michael D. Harris, *Garcetti Calls for New 3-Strikes Law*, L.A. Daily J., June 9, 1994, at 2 (noting that more than 500 felonies can trigger Three Strikes). These third-strike convictions can be for crimes as minor as petty theft. Since any third-strike defendant already has at least two prior felony convictions, she can be charged with felony petty theft with a prior conviction—a crime normally prosecuted as a misdemeanor—and sentenced to twenty-five years to life. Indeed, 4.9% of all offenders serving sentences for third-strike convictions were convicted of petty theft with a prior conviction, compared with only 3.1% for first- and second-degree murder. *Third Strike Cases*, *supra* note 5, at 15. Likewise, 13.9% of third-strike prisoners were convicted of some form of drug possession. *Id.*

³⁸ See, e.g., Steven R. Donziger, *Nat'l Criminal Justice Comm'n, The Real War on Crime: The Report of the National Criminal Justice Commission 20 (1996)* [hereinafter *Real War on Crime*] (life sentence for theft of \$5.62 worth of meat from grocery store); Mauer, *supra* note 32, at 9 (life sentence for stealing bottle of vitamins); Ken Ellingwood, *Three-Time Loser Gets Life in Cookie Theft*, L.A. Times, Oct. 28, 1995, at B1, available at 1995 WL 9839748 (homeless man sentenced to life for stealing four cookies); Greg Krikorian et al., *Front-Line Fights Over 3 Strikes*, L.A. Times, July 1, 1996, at A1 (life sentence for stealing eleven bottles of shampoo); Rene Lynch & Anna Cekola, *'3 Strikes' Law Causes Juror Unease in O.C.*, L.A. Times, Feb. 20, 1995, at A1 (life sentence for stealing drill from garage); Vincent Schiraldi, *Get Tough on Crime? Study Three Strikes*, San Diego Union-Trib., Sept. 1, 1999, at B9, available at 1999 WL 4086120 (life sentence for shoplifting beer cans; life sentence for stealing batteries); Eric Slater, *Pizza Thief Gets 25 Years to Life*, L.A. Times, March 3, 1995, at B3 (life sentence for theft of pizza slice).

³⁹ *Third Strike Cases*, *supra* note 5, at 15.

⁴⁰ *Id.* (reporting that drug and property crimes, including robbery, accounted for sixty-seven percent of third-strike convictions); see also *Second Strike Cases*, *supra* note 6, at 16 (reporting that same crimes accounted for 72.5% of second-strike convictions).

⁴¹ The long and complex language of the initiative, and the rhetoric of the accompanying ballot pamphlet, did little to dispel the belief that Three Strikes was designed to increase sentences for violent felons. Mike Reynolds et al., *Arguments in Favor of Proposition 184*, in Tony Miller, Acting Cal. Sec'y of State, *California Ballot Pamphlet, General Election 36 (Nov. 8, 1994)* [hereinafter *Ballot Pamphlet*] (“[S]oft-on-crime judges, politicians, defense lawyers and probation officers care more about violent felons than they do victims. They spend all of their time looking for loopholes to get rapists, child molesters and murderers out on probation, early parole, or off the hook altogether.”); see also Judge LaDoris H. Cordell, *Address at the Annual Ruth Scheinberg Lecture at the New York University School of Law (Oct. 20, 1999)* [hereinafter *Cordell, Scheinberg Lecture*] (“Not

neuvering and widespread public alarm, rational debate, calculated policy deliberation and data analysis gave way to hasty action and slapdash legislation.⁴² In such an environment, the initiative process is often a poor indicator of the people's will.⁴³ Californians arguably wanted only a law that would address the problem of violent, recidivist felons.⁴⁴ The Three Strikes Ballot pamphlet promised that it would keep "career criminals[] who rape women, molest innocent

everyone understood what it is they voted for. . . . When you read the law, you can't even understand it and no one is going to read it. You hear Polly Klaas kidnapped. You hear Richard Allen Davis. You think Three Strikes is just for violent felons; it's not.")

Politicians and the media helped to cement the public misperception that Three Strikes focused on violent felons. Robert J. Caldwell, *Violent Crime: Keeping the Most Dangerous Criminals Locked Up is Society's Best Defense*, S.D. Union-Trib., Dec. 12, 1993, at G1 (explaining that Three Strikes will keep violent, recidivist felons behind bars); see also Morain, *supra* note 17 (quoting Governor Wilson's claim that "[t]he only thing we can do as a fit memorial for Polly Klaas is to . . . really put behind bars for life people who are dangerous"); George Skelton, *A Father's Crusade Born From Pain*, L.A. Times, Dec. 9, 1993, at A3 (explaining that Three Strikes "is aimed at keeping violent criminals off the street").

⁴² Three groups traditionally shape criminal justice policy: the mass media, the public, and criminal justice professionals. Surette, *supra* note 32, at 180. Professor Franklin Zimring has argued that criminal justice experts were "missing persons" in California's formation of a Three Strikes law that is in essence "penal practice without a theory." Zimring, *supra* note 32, at 251-52; see also Susan Estrich, *Politics of Crime Skips Over Issues*, Ariz. Republic, Mar. 10, 1994, at B7 ("[P]eople are afraid of the criminals and the politicians are afraid of the people. . . . [P]oliticians . . . vie to talk toughest, good slogans [replace] good policy and bad ideas [are] enacted. The politics of crime leaves no room for a real discussion of policy. . . .").

⁴³ See Warner, *supra* note 32, at 78 n.172 ("[I]n an initiative campaign there is no careful review of any literature; rather, there is mostly sound-bite advertising and sandwich-board sloganeering."); see also Cordell, *Scheinberg Lecture*, *supra* note 41 ("What exists in California today is an initiative industrial complex It's mob rule, but not even by the majority. Rather, small groups of monied and powerful elites manipulate the media and politicians.").

⁴⁴ Cordell, *Scheinberg Lecture*, *supra* note 41 (explaining that Californians wanted Three Strikes to focus on violent criminals like Richard Allen Davis); see also Warner, *supra* note 32, at 78 n.172 (1995) ("Had the citizens carefully reviewed the literature on this issue and considered the implications of their actions, three strikes might not have been enacted into law at all.").

Legal scholars recognize a gap between "global" and "specific" attitudes towards crime. That gap reconciles the disconnect between clear voter support for the Three Strikes initiative and the apparently contrary argument that citizens did not necessarily want the law applied to all eligible offenders. Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 *Crime & Justice* 1, 38, 39 (2000). Studies demonstrate that individuals who support Three Strikes laws often also favor exceptions for minor criminals in compelling cases. *Id.* at 39 (explaining that individuals who generally favored Three Strikes "showed at least a measure of flexibility in punishment attitudes" when presented with "specific vignette[s]").

Notably, Marc Klaas, Polly's father, changed his stance upon learning the true scope of Three Strikes. Initially in favor of the law, Klaas explained that he felt "duped" after discovering that Three Strikes applied to nonviolent offenders, and ultimately lobbied against what he called the "big lie." Legacy, *supra* note 20.

children and commit murder, behind bars where they belong."⁴⁵ Three Strikes is much broader than that, however.⁴⁶ It does not differentiate between the bumbling burglar and the brutal murderer.⁴⁷

Californians wanted stiff mandatory penalties for violent, recidivist felons, but, arguably, they also valued proportionality.⁴⁸ Three Strikes's failure to provide proportional justice has led prosecutors throughout California to modify, to some degree, their application of the law.⁴⁹ The apparent ubiquity of adaptation⁵⁰ suggests that the principle of proportionality endorsed by Three Strikes is unacceptable in even the most punitive California communities.⁵¹

II

ADAPTATION OF MANDATORY MINIMUM SENTENCING LAWS

Adaptation of mandatory minimum sentencing laws is not a new phenomenon. The passage of these laws never guarantees the uniform administration of determinate sentences.⁵² When strict adherence to a law's mandates proves abhorrent to communal principles of

⁴⁵ Ballot Pamphlet, *supra* note 41, at 36. The Ballot Pamphlet repeats the assertion "3 STRIKES SAVES LIVES" four times in two pages. *Id.* at 36; see also Jan Miller et al., *Rebuttal to the Argument Against Proposition 184*, in Ballot Pamphlet, *supra* note 41, at 37.

⁴⁶ *Real War on Crime*, *supra* note 38, at 20 (explaining that California Three Strikes "casts a very wide net").

⁴⁷ See *supra* notes 39-40 and accompanying text (explaining that majority of Three Strikes cases involve drug or property crimes).

⁴⁸ See *supra* notes 41-45 and accompanying text (discussing intent of Californians compared with actual scope of Three Strikes law).

⁴⁹ See *infra* Part IV.A (explaining that Three Strikes often is not applied strictly as written because it ignores Californians' belief in proportional justice).

⁵⁰ This Note uses the terms "exceptions," "adaptation," and "modification" to describe the circumvention of mandatory minimum laws. The term "exception" is used to describe what an individual defendant who avoids the law receives. The term "adaptation" is used to describe the trend of granting exceptions in a broader range of cases. The term "modification" is used to describe the result of this process of adaptation.

⁵¹ See *infra* note 135 (explaining that every indication suggests that no county presently applies Three Strikes strictly as written); *infra* notes 69-70, 140-43 and accompanying text (describing negative juror, victim, and even prosecutorial response to scope of Three Strikes).

This Note will not try to define the different principles of proportionality of San Diego, San Francisco, or any other California county. It is enough to recognize that each county has a different conception of when a punishment fits a crime, and that all of these conceptions seem to endorse a stronger sense of proportionality than is found in Three Strikes.

⁵² See Michael Tonry, *Sentencing Matters* 147 (1996) ("Sentencing policy can only be as mandatory as police, prosecutors, and judges choose to make it."); see also Mauer, *supra* note 32, at 14-15 (explaining that sentencing disparities exist even within mandatory sentencing schemes).

proportionality, exceptions are afforded at all stages of the judicial process.⁵³ These exceptions follow a well-documented, standardized course.⁵⁴ Temporary inequity and confusion are followed by adaptation in a variety of forms and an ultimate return to equilibrium.⁵⁵ In the end, the system provides exceptions regularly and reestablishes the criminal justice status quo by preserving only those facets of the sentencing law that are compatible with communal norms of proportionality.⁵⁶

A. Adaptation in the Past

The modification of mandatory capital sentencing laws for property crimes in eighteenth-century Britain provides a good illustration of this process at work. While numerous crimes against property mandated death,⁵⁷ the system rarely implemented the death penalty for these offenses.⁵⁸ Instead, the legal system made frequent, merciful

⁵³ Michael Tonry, *Malign Neglect—Race, Crime, and Punishment in America* 195 (1995) (concluding that “judges and prosecutors often surreptitiously nullify mandatory penalties that they believe are too harsh”). Studies dating back three decades have found that mandatory sentencing laws likely will result in reduced charges at the prosecution stage or, in the absence of such adjustment, to a refusal to convict at the adjudication stage. Tonry, *supra* note 52, at 145 (citing Frank J. Remington, Editor’s Foreword to Robert O. Dawson, *Sentencing: The Decision as to Type, Length, and Conditions of Sentence*, at xvii (1969)).

⁵⁴ See *infra* notes 62-65 and accompanying text.

⁵⁵ See Malcolm M. Feeley & Sam Kamin, *The Effect of “Three Strikes and You’re Out” on the Courts: Looking Back to See the Future, in Vengeance*, *supra* note 32, at 135, 145 (describing standard course of adaptation); Tonry, *supra* note 52, at 147-48 (listing similar systemic effects that have emerged across jurisdictions upon adoption of mandatory penalties).

⁵⁶ See Feeley & Kamin, *supra* note 55, at 142 (arguing that mandatory minimum laws have “limited-to-no long-term effect” due to successful efforts of criminal justice professionals to reestablish discretionary practices); Tonry, *supra* note 52, at 145 (noting that pattern of downgrading becomes “virtually routine” and that bargaining session becomes mere “ritual” (quoting Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* 182 (1966))).

⁵⁷ Between 1714 and 1830, 156 new capital offenses were added to England’s penal code. Tonry, *supra* note 52, at 143. By 1819, there were 220 capital offenses, most of them for property crimes. *Id.*; cf. Keith C. Owens, Comment, *California’s “Three Strikes” Debacle: A Volatile Mixture of Fear, Vengeance, and Demagoguery Will Unravel the Criminal Justice System and Bring California to Its Knees*, 25 Sw. U. L. Rev. 129, 133 (1995) (detailing England’s use of death penalty in sixteenth century for crimes such as heresy, witchcraft, adultery, homosexuality, bestiality, forgery, and even attempted suicide).

⁵⁸ Despite the rising number of capital crimes, executions plummeted fourfold from the early 1600s through the mid-1700s. Tonry, *supra* note 52, at 143; see also Jerome Hall, *Theft, Law and Society* 118-32 (2d ed. 1952) (detailing circumvention of mandatory capital punishment statutes by English judges, juries, and prosecutors in eighteenth-century larceny prosecutions).

Death decrees symbolized the importance of property to the wealthy classes. Douglas Hay, *Property, Authority and the Criminal Law*, in Douglas Hay et al., *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* 17, 22-23 (1975) (discussing imposition

exceptions in the interest of justice.⁵⁹

Commentators have observed similar adaptation on American soil. Michigan judges in the 1950s countered a mandatory drug law by routinely lessening convictions for drug sales to possession or addiction.⁶⁰ Similarly, to avoid application of mandatory penalties for nighttime break-ins, Michigan courts often changed the time at which offenses were found to have been committed, leading one prosecutor to remark: "You'd think all our burglaries occur at high noon."⁶¹

of capital sentence and subsequent use of pardon to promote ideology of law that served propertied interests). However, they were impractical in application and could never be applied rigidly. Cf. Tonry, *supra* note 52, at 159-60 (arguing that lawmakers generally support mandatory sentencing laws for "symbolic and political reasons" while criminal justice players subvert them for "instrumental and normative reasons").

⁵⁹ Exceptions took many forms. Juries would often nullify a conviction or find a defendant guilty of a lesser offense. Tonry, *supra* note 52, at 143. For instance, if a five-pound theft was the statutory requirement, juries would find a defendant guilty of stealing four pounds and ten pence. *Id.* at 144. Likewise, defendants often were acquitted because of a mistake of form, such as an indictment's failure to state the correct date of an alleged offense. *Id.* In addition, pardons increased. Until 1756 about two-thirds of those convicted ultimately were executed; thereafter the rate fell off. *Id.* Eventually, by the first years of the nineteenth century, only one-eighth of those sentenced to death actually were killed. *Id.* In the end, haphazard, unfair, and arbitrary application of capital sentences undermined the mandatory statutes' deterrent effects, prompting their disappearance from British law. See Hall, *supra* note 58, at 118-32 (discussing ultimate abandonment of mandatory death sentences for property crimes); cf. Owens, *supra* note 57, at 133-34 (identifying American states' shift toward discretionary sentencing in late-eighteenth and early-nineteenth centuries).

⁶⁰ During the first four years that the mandatory minimum existed, only twelve of 476 defendants originally charged with sale were actually convicted of that crime. Tonry, *supra* note 52, at 145 (quoting Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* 179 (1966)).

⁶¹ *Id.* (quoting Newman, *supra* note 60, at 182). Similarly, following Massachusetts's passage of the Bartley-Fox Amendment, which mandated a one-year sentence for any defendant convicted of gun possession, the number of weapons seizures without arrest by Boston police rose 120%. *Id.* at 147. In the end, the law had little effect. Feeley & Kamin, *supra* note 55, at 142-43.

Likewise, a 1977 study of New York's Rockefeller Drug Laws found that the percentage of arrests resulting in felony indictments declined steadily in the years following enactment, from 39.1% in 1972 to 26.9% in 1975. Ass'n of the Bar of the City of New York & Drug Abuse Council, *The Nation's Toughest Drug Law: Evaluating the New York Experience* 94 tbl.24 (1977). Furthermore, the likelihood of a drug indictment resulting in a conviction fell from 86.3% in 1972 to 78.9% in 1975, *id.* at 96 tbl.27, and the dismissal rate rose from 6.8% to 21.3% during the same period, *id.* at 96 tbl.28.

For further discussion of adaptation of the Rockefeller Drug Laws, see Feeley & Kamin, *supra* note 55, at 140. See also *id.* at 144 (explaining how prosecutors implementing Federal Sentencing Guidelines manipulate case records to downgrade seriousness of offenses in approximately thirty percent of all cases (citing Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501 (1992))); U.S. Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 6-7 (1991) (describing findings of similar effects in application of mandatory federal sentencing laws).

Scholars note a number of common traits underpinning patterns of circumvention of mandatory sentencing laws. At first, the system will try to enforce the law rigidly, resulting in a period of uncertainty and unfairness, rife with instances of gross injustice.⁶² However, over time, exceptions are carved out in order to reach just results. More plea bargaining takes place at early stages of defendants' cases, when charging discretion is still available to court officers.⁶³ Trial rates increase for those defendants who are charged under the mandatory sentencing law, and juries, aware of the disproportionately harsh sentences facing these defendants, grow more willing to acquit.⁶⁴ Eventually, courts reestablish traditional operating procedures and apply as mandatory only those aspects of the sentencing law that conform to society's principles of proportionality.⁶⁵

Shortly after Three Strikes passed in 1994, San Francisco's practices began to mirror the standard course of adaptation, culminating in an eventual return to pre-Three Strikes criminal-justice norms when the district attorney announced that Three Strikes would only be applied to truly violent felons.⁶⁶ Five years later, San Diego remains mired in the middle stages of the adaptation process. Within that county, modification is masked behind prosecutorial rhetoric in favor of the law as written.⁶⁷

B. Adaptation of the California Three Strikes Law

Initially, even San Francisco applied Three Strikes to certain non-violent offenders.⁶⁸ In response, jurors began to express an unwillingness to endorse its harsh consequences.⁶⁹ Facing widespread jury nullification, San Francisco District Attorney Terrence Hallinan announced in 1996 that, contrary to the mandates of the written law, the

⁶² Feeley & Kamin, *supra* note 55, at 145; cf. *infra* notes 162-68 and accompanying text (describing haphazard application of Three Strikes law in San Diego).

⁶³ Feeley & Kamin, *supra* note 55, at 144-45.

⁶⁴ *Infra* notes 69-70, 140-41, 174 (discussing jury nullification and increased trials under Three Strikes).

⁶⁵ See *supra* notes 55-56 and accompanying text; see also *infra* notes 185-88 (explaining indications that all counties apply Three Strikes to violent criminals because it is compatible with communal principles of proportionality in California).

⁶⁶ See *infra* notes 69-70 and accompanying text.

⁶⁷ See *infra* Part IV.B (examining San Diego's explicit rhetoric favoring strict application of Three Strikes with its implicit adaptation in practice).

⁶⁸ See *infra* note 70 (describing San Francisco prosecutors' move away from stricter approach).

⁶⁹ E.g., Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 *Nw. U. L. Rev.* 877, 895-97 (1999) (discussing reluctance of San Francisco juries to convict in Three Strikes cases); Perry & Dolan, *supra* note 9 (same); see also Walter L. Gordon III, *California's Three Strikes Law: Tyranny of the Majority*, 20 *Whittier L. Rev.* 577, 599 (1999) (describing jury nullification in San Francisco and across northern California).

County would no longer pursue strike convictions for drug cases and other nonviolent felonies.⁷⁰ At that time, some commentators be-

The third-strike carjacking case of Eugene Jones provides telling insight into the hesitance of San Francisco juries to convict under the Three Strikes law. At one point Juror One broke down crying, announcing:

I cannot send a man to jail for burglary for life. . . . I don't care. I'm sorry. Hold me in contempt of court. I cannot send a man to prison for the rest of his life for burglary and carjacking. If he'd murdered somebody that's one thing. . . . I think that most of the laws that we have to follow and go by are reasonable laws. . . . But . . . even if there are numerous . . . burglaries and robberies, I don't think he deserves to go to prison for the rest of his life. And I can't. I can't. I won't. I just can't follow that. I think it's too harsh. I think Three Strikes should be for people who commit severe, severe crimes.

Record at 1066, 1071-72, *People v. Jones*, No. 157934 (S.F. County Sup. Ct. Jan. 26, 1995). At another point during the trial, Juror Four explained to Judge Anne E. Bouliane: "[W]e agreed to abide by the laws. . . . I don't know if this is a jury that can honestly abide by . . . the Three Strikes law." *Id.* at 1068. Juror Seven echoed this sentiment: "I felt really strongly that the man was guilty, but I feel that you're asking too much from me. . . . I can't give you a fair judgment anymore." *Id.* at 1087. Eventually, at the prosecution's urging, Judge Bouliane declared a mistrial. *Id.* at 1090.

Victims' attitudes in San Francisco also limit prosecutors' ability to apply the law strictly. *Sze*, *supra* note 30, at 1077-78 (discussing several victims' disapproval of punishments faced by perpetrators under Three Strikes). One victim risked contempt of court charges for refusing to testify against a man accused of stealing a box of clothing from her car after she learned that a conviction would be the man's third strike. *Id.* at 1077 (quoting Jim Herron Zamora, *City Burglary Victim Leads Fight Against '3 Strikes'*, S.F. Examiner, Aug. 14, 1994, at C1 (quoting victim: "[L]ife in prison for stealing my boxes of old clothes is really ridiculous"))).

For further discussion of nullification of Three Strikes throughout California, see, for example, Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 *Minn. L. Rev.* 1149, 1183 (1997) (noting increased nullification by California juries in Three Strikes prosecutions); Lawrence W. Crispo et al., *Jury Nullification: Law Versus Anarchy*, 31 *Loy. L.A. L. Rev.* 1, 36 (1997) (same); Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 *U. Chi. L. Rev.* 433, 433 & n.3 (1998) (same).

⁷⁰ See Marder, *supra* note 69, at 897 (explaining that, in response to nullification, San Francisco prosecutors have been "very careful" in deciding when to apply Three Strikes); Associated Press, *supra* note 10 (describing new San Francisco approach as "substantial change" from past practice); see also Cummins, *Telephone Interview*, *supra* note 10 (estimating that San Francisco has used Three Strikes no more than eighteen times in past four years, and explaining that Three Strikes is presently under review in county to make it even more restrictive). District Attorney Hallinan explained: "We pretty much use '[T]hree [S]trikes' [only] for vicious people. . . . I myself feel I am able to tell the difference between a bad person and someone who has just done the wrong thing." Perry & Dolan, *supra* note 9. Paul Cummins, head of the San Francisco District Attorney's Three Strikes panel, explained: "In San Francisco, we play to a tougher audience than other [district attorneys] do. . . . We're not going to ask for 25-years-to-life sentences when a guy . . . steals a car radio. We tried it a couple of times and got kicked in the teeth by the jury." *Id.*; see also R. Christian Mittelstaedt, *Jury Justice: The Jury Nullification Movement Is Helping Slow the Three Strikes Justice System*, S.F. Bay Guardian, Sept. 24, 1997, at 18 (describing prosecutorial reaction to jury nullification of Three Strikes).

Even Hallinan's more conservative predecessor in the San Francisco District Attorney's office, Arlo Smith, brought only eight Three Strikes cases to trial in the year following the law's enactment. Fox Butterfield, *'3 Strikes' Law in California Is Clogging Courts and Jails*, N.Y. Times, Mar. 23, 1995, at A1.

lieved it was inevitable that the remainder of California eventually would follow suit.⁷¹ However, contrary to this assumption, the degree of adaptation has remained dependent on the county of prosecution.⁷²

⁷¹ Feeley & Kamin, *supra* note 55, at 151 (“[I]t is not unreasonable to expect, once moral panic subsides or takes another form, that [California’s] three-strikes law will eventually be robbed of much of its draconian strength.”). Commentators initially viewed the Three Strikes law as just “the latest of a long line of laws associated with episodic moral panics and wars on crime.” *Id.* at 145. The general consensus was that the force of Three Strikes, like past mandatory minimum laws, eventually would be minimized by judicial and/or prosecutorial adaptation. *Id.* at 151; see also Robert C. Cushman, *Effect on a Local Criminal Justice System, in Vengeance* 90, 106-07 (noting instances of adaptation observed within year following Three Strikes’ enactment); Lisa O. Monaco, *Comment, Give the People What They Want: The Failure of ‘Responsive’ Lawmaking*, 3 *U. Chi. L. Sch. Roundtable* 735, 754 (1996) (“Three-strikes may engender something akin to the episodes of judicial revolt that accompanied mandatory minimum sentencing.”).

⁷² Cushman, *supra* note 71, at 105 (“[F]ewer three-strikes cases survive the entire passage from charging to sentencing . . . [but] these ratios are developing differently for each county . . . taking place in its own fashion in each.”); Feeley & Kamin, *supra* note 55, at 149, 151 (arguing that adaptation of Three Strikes will occur at different rates across the state, leading to continuing disparities); Marder, *supra* note 69, at 897 (“What is interesting about this law is that even though it applies statewide, it is being enforced differently on the local level because of local juries’ respective views of the law.”); Wendy Thomas Russell, *Enforcement of Three Strikes Measure Varies in Long Beach, Cal. Area*, *Knight-Ridder/Trib. Bus. News*, Oct. 28, 2000, 2000 WL 28946784 (citing study finding that enforcement of law varies widely across state); Molly Selvin, *Preserving a Sense of Justice in ‘Three Strikes’ Environment*, *L.A. Times*, Mar. 17, 1996, at M3 (“[W]hether your case gets filed and gets settled, many times [it] is determined by which court you’re in, which district attorney is hearing it.” (quoting Los Angeles Superior Court Judge James A. Bascue)).

Contrast the approaches of some major California counties: Alameda follows San Francisco’s model, using the law only for violent or serious crimes. See Feeley & Kamin, *supra* note 55, at 148-49. Of Alameda’s discretionary approach, one local prosecutor remarked: “The law can be a flexible scalpel or a sledgehammer. We like the scalpel approach.” Dan Walters, *Three Strikes Application Varies*, *S.D. Union-Trib.*, June 20, 1995, at B6.

Initially, Los Angeles applied the Three Strikes law more rigidly. See 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, 67-68 (1999) (noting “seven-fold proportionally greater use of three-strikes in . . . Los Angeles [County] . . . than in Alameda and San Francisco counties”). However, because Los Angeles County is so large and because the initial decision to charge under Three Strikes is up to each supervising prosecutor, the Los Angeles District Attorney’s office is not uniformly rigid. Krikorian et al., *supra* note 38. The possibilities of adaptation “vary radically depending on the courthouse.” *Id.* For instance, Antelope Valley and Compton hand down maximum sentences to third-strike defendants in only 14.6% and 10.1% of the cases, respectively. *Id.* On the other hand, defendants facing third-strike charges in Norwalk and Pomona receive twenty-five years to life in 27.6% and 34.2% of the cases, respectively. *Id.*

There are indications of a dramatic change in Los Angeles County’s application of the law. Newly elected District Attorney Steven L. Cooley has promised a more circumscribed approach to Three Strikes. Dominic Berbeo, *Cooley “Three Strikes” Plan Attacked*, *L.A. Daily News*, Nov. 30, 2000, at N4 (discussing Cooley’s new plan for Three Strikes application in Los Angeles); see also Editorial, *Tough Tasks on Cooley’s List*, *L.A. Times*, Nov. 9, 2000, at B10 (discussing Cooley’s promise to instruct prosecutors to limit third strikes to violent or serious felonies). However, doubt remains whether Cooley’s office, in fact, will

The divergent models adopted by San Diego and San Francisco epitomize the wide geographic disparity fostered by variant prosecutorial approaches across California.⁷³ In San Diego, nullification is less of a concern than in San Francisco.⁷⁴ Prosecutors, accordingly, are often willing to pursue Three Strikes convictions for any type of felony.⁷⁵ After all, San Diego is, in the words of its district attorney, "a law enforcement county."⁷⁶ Therefore, while San Francisco prosecutors fear nullification, San Diego prosecutors worry about being branded soft on crime.⁷⁷ The District Attorney's Office, consequently, does not tolerate what one prosecutor called small-

make the promised change a reality. Twila Decker, L.A. Lawyers Accuse D.A. of Breaking Three-Strikes Pledge, L.A. Times, Jan. 22, 2001, at A10 (citing lawyers' complaint that Cooley's approach was not proving to be much different than prior approach).

For a detailed county-by-county comparison of Three Strikes application, see generally Second Strike Cases, *supra* note 6; Third Strike Cases, *supra* note 5.

⁷³ Chiang, *supra* note 1 (calling approaches of San Francisco and San Diego "like night and day"). San Francisco has as many instances of violent crime and only twenty percent fewer property crimes than San Diego. Nat'l Inst. of Justice, U.S. Dep't of Justice, A Review of State Three Strikes Laws 5 Ex.5 (1997). Nevertheless, San Diego convicts almost ten times as many defendants for second strikes and seventeen times as many defendants for third strikes. *Id.*

⁷⁴ Perry & Dolan, *supra* note 9.

⁷⁵ Marder, *supra* note 69, at 897 (explaining that because nullification is less likely in San Diego than in San Francisco, San Diego prosecutors can be more diligent about pursuing strike convictions); see also Policy Guidelines, *supra* note 13, at 1, 3 (explaining that law applies to all current felonies and that prosecutors should only move to dismiss prior felony convictions in "rare" instances). Even if a defendant is allowed to plead guilty to a second-strike sentence in a county like San Diego, the initial decision to charge a crime under the law gives the prosecutor substantially more leverage in plea bargaining. See John Hill, Three Strikes: Betting Line 25-to-Life, To Cut a Deal or Play the Odds, *Contra Costa Times*, Feb. 2, 2000, at A1 (describing case of defendant who spurned unattractive eight-year plea offer for minor felony and instead received maximum); see also Krikorian et al., *supra* note 38 (noting that prosecutors can offer third-strike defendants "heftier bargaining sentences, knowing that the defendants' alternative, if found guilty, is to serve at least 80% of 25 years to life"); Samara Marion, Justice by Geography? A Study of San Diego County's Three Strikes Sentencing Practices from July-December 1996, 11 *Stan. L. & Pol'y Rev.* 29, 36 (1999) (describing one defendant who took plea that left him with six-year sentence for stealing two flashlights; another who accepted nine-year sentence after stealing purse from Nordstrom's; and third who got seven-year sentence for stealing shoes); Russell, *supra* note 72 (describing Three Strikes as effective plea-bargaining tool for Los Angeles prosecutors). In her study of Three Strikes adaptation in San Diego, Professor Marion found that thirty-eight percent of defendants facing third-strike charges ultimately plead guilty in exchange for second-strike sentences. Marion, *supra*, at 47 fig.12. Because these defendants ordinarily would not be charged under Three Strikes in a county like San Francisco, there is great disparity across counties even amongst those offenders who escape the full force of the law.

⁷⁶ Chiang, *supra* note 1 (quoting San Diego District Attorney, Paul Pfingst).

⁷⁷ *Id.* Describing the different approaches of San Francisco and San Diego, Paul Cummins of the San Francisco District Attorney's Office stated: "[T]he D.A.'s down in San Diego . . . have a different jury pool, and . . . different constituents than we have." Perry & Dolan, *supra* note 9, at A1.

time, recidivist criminals “doing life on the installment plan.”⁷⁸ Instead, San Diego is the paradigm of strict Three Strikes enforcement.⁷⁹ San Diego has sent more Three Strikes defendants to prison per capita than any other urban or suburban county in the state with a comparable violent crime rate.⁸⁰

San Francisco, San Diego, and the rest of California share some measure of similarity in their respective approaches to Three Strikes. For example, all California counties often are willing to apply the law to truly violent felons.⁸¹ However, in practice, violent felons are infrequent targets of Three Strikes prosecution. Instead, even though counties like San Francisco and Alameda use the law only against violent criminals, small-scale, nonviolent offenders still constitute the bulk of strike convictions statewide.⁸² Different sentencing structures across the state, therefore, create vast disparities in the treatment of equally culpable minor criminals. For instance, a recidivist offender

⁷⁸ *Id.* (describing San Diego approach as model of “prosecutorial determination”). San Diego County prosecutor Gregg McClain defended his office’s use of Three Strikes, claiming it is just enforcing the law passed by the legislature and electorate. Leslie Wolf, *State Courts Called Uneven in Use of Three-Strikes Law; Its Application Here Is Termed Aggressive*, S.D. Union-Trib., Sept. 19, 1998, at B5. The claim begs the question of whether Three Strikes as written was truly what California’s voters wanted. It was probably not. See *supra* notes 43-51 and accompanying text (discussing reasons why Three Strikes might not reflect intent of Californians); see also *infra* Part IV.A (arguing that Three Strikes is not applied literally as written because it ignores Californians’ belief in proportional justice).

⁷⁹ Marion, *supra* note 75, at 32 (describing San Diego as one of “the toughest enforcers of the Three Strikes Law”). In 1997, San Diego District Attorney Pfingst boasted: “We’ve been the state of California poster child for going after three strike cases.” Anne Krueger, *After 2 Years as DA, Pfingst Revels in His Job*, S.D. Union-Trib., Jan. 6, 1997, at B1.

⁸⁰ Marion, *supra* note 75, at 32 (explaining that rural Kern County is only county with lower violent crime rate that uses Three Strikes at higher rate than San Diego). For a discussion on the disparate application between Kern and San Francisco, see generally Stephanie Francis Cahill, *All Courts Are Not Alike: If You Do the Crime, You Should Do the Time, Right? In California, That Depends More on Geography than Justice*, Cal. L. Bus., Feb. 16, 1999, at 13.

⁸¹ San Francisco uses Three Strikes more sparingly than any other county. Males & Macallair, *supra* note 72, at 68. Nevertheless, even San Francisco prosecutors remain willing to use the law against certain violent felons. Cummins, *Telephone Interview*, *supra* note 10 (explaining that San Francisco still uses law for some violent offenses); see also Marion, *supra* note 75, at 41 (noting San Francisco District Attorney’s willingness to use law for vicious offenders).

⁸² Only 24.3% of all second-strike convictions and 41.9% of all third-strike convictions were for crimes against persons. *Second Strike Cases*, *supra* note 6, at 15; *Third Strike Cases*, *supra* note 5, at 15. Meanwhile, almost two-thirds of all second-strike convictions, and nearly half of all third-strike convictions, were for drug or property crimes. *Second Strike Cases*, *supra* note 6, at 14; *Third Strike Cases*, *supra* note 5, at 15. Drug possession and petty theft alone account for 41.3% of all second-strike convictions, and 23.5% of all third-strike convictions. *Second Strike Cases*, *supra* note 6, at 15; *Third Strike Cases*, *supra* note 5, at 16.

convicted of a “wobbler” crime—a crime such as petty theft that can be prosecuted as either a misdemeanor or a felony—potentially will garner a twenty-five-years-to-life sentence in San Diego. However, the same offender never will receive a third-strike sentence in San Francisco, but instead will earn no more than a twelve-month sentence.⁸³ Even more troubling, commentators note that “wobbler” offenses traditionally open the door to racial bias.⁸⁴ Therefore, racial disparities compound the underlying problem of Three Strikes geographic disparity.⁸⁵

III

THE PROBLEM OF GEOGRAPHIC DISPARITY

A number of commentators have recognized that geographic disparity in Three Strikes application is a major problem,⁸⁶ yet none of them give a precise articulation of why it is so disturbing.⁸⁷ Equally culpable defendants commonly are sentenced in vastly disparate ways across states.

⁸³ According to some estimates, “wobbler” crimes comprise half of all Three Strikes convictions. Editorial, *Trouble in Anti-Crime Paradise*, L.A. Times, Jul. 15, 1994, at B6 (noting Attorney General Dan Lungren’s attempt to limit discretion so as to charge more wobbler offenses as felonies).

⁸⁴ Jerome G. Miller, *Search and Destroy: African American Males in the Criminal Justice System* 69 (1996) (arguing that “wobbler” offenses are overwhelmingly “where racial bias is most likely to enter the scene”).

⁸⁵ There is ample evidence of Three Strikes’ disproportionate impact on the African American community. One 1996 study found that under the Three Strikes law African Americans were arrested at 4.7 times the rate of whites, incarcerated at 7.8 times the rate of whites, and convicted at 13.3 times the rate of whites. Jerome Skolnick, *Swamping the System With Small Fish ‘Three Strikes’: The Law Was Rigid, Unfair and Restrictive, Hooking Only Low-Level Offenders*, L.A. Times, June 27, 1996, at B9 (discussing study).

⁸⁶ See, e.g., *People v. Andrews*, 76 Cal. Rptr. 2d 823, 826 (Cal. Ct. App. 1998) (explaining that geographic disparity in application of Three Strikes is “disturbing”); Lise Forquer, Comment, *California’s Three Strikes Law—Should a Juvenile Adjudication Be a Ball or a Strike?*, 32 San Diego L. Rev. 1297, 1302-03 (“The legal consequences of a person’s actions should be based on culpability, not geographic location.”); Marion, *supra* note 75, at 41 (“As a sentencing law that ultimately imprisons more petty thieves and chronic drug users, this brand of ‘justice by geography’ fails to fulfill its promise.”); Interview with LaDoris H. Cordell, California Superior Court Judge, in New York, New York (Oct. 20, 1999) (on file with the *New York University Law Review*) (“If you want a fair system, you need predictability. There’s a problem when someone is sentenced to life for doing something unkosher in one place, but that same person gets just a slap on the wrist for the same crime somewhere else.”); cf. Stephen R. Sady, *The Armed Career Criminal Act—What’s Wrong With “Three Strikes, You’re Out?”*, 7 Fed. Sentencing Rep. 69, 70 (1994) (describing problem of disparity in application of federal Three Strikes statute).

⁸⁷ One obvious problem with adaptation of Three Strikes is that it creates a sentencing scheme that is not *mandatory* at all. See Marion, *supra* note 75, at 30 (noting that inconsistent sentencing in San Diego undermines mandatory nature of Three Strikes).

A. *Three Strikes: An Affront to Integrity*

The root of the difficulties in accepting intrastate geographic disparity can be traced to an absence of what Ronald Dworkin calls the value of "integrity" in the law.⁸⁸ Integrity, together with justice and fairness, constitute the rule of law's three operating principles.⁸⁹ Fairness demands that citizens play a role in the development of law, and justice requires that the legislatively chosen body of law reflect communal principles.⁹⁰ When communal principles are in dispute, however, integrity commands that the legislature settle on a coherent set of principles and codify law that endorses those principles above all others.⁹¹ Integrity demands that the sovereign state speak with a single voice.⁹² Therefore, integrity is violated by "internally conflicted laws" or "checkerboard" statutes.⁹³ Laws lacking integrity express conflicting principles concurrently and thereby undermine coherence.⁹⁴

Dworkin's classic example involves abortion. Society would deem it absurd for the legislature to pass a law permitting abortions for women born in odd years while criminalizing the practice for women born in even years.⁹⁵ However, the problem with such a compromise statute has nothing to do with either justice or fairness. Fairness, defined as a democratic value, is actually fostered through such a resolution to the abortion debate; each side's viewpoint is represented, at least to some degree.⁹⁶ Additionally, justice is not hindered: The compromise statute protects each conception of justice, pro-life and pro-choice, in half the cases. "[T]he winner-take-all scheme our

⁸⁸ Ronald Dworkin, *Law's Empire* 176-224 (1986) (defining and exploring value of integrity). In *Law's Empire*, Professor Dworkin discusses integrity's relationship with prosecutorial discretion very sparingly and does not address its relationship with geographic disparity at all. Generally, Professor Dworkin only examines integrity in the context of judges and legislators. *Id.* Nevertheless, the value of integrity is particularly well suited for describing the problem of geographic disparity in *Three Strikes*.

⁸⁹ *Id.* at 176-77.

⁹⁰ See *id.* at 178-80.

⁹¹ *Id.* at 179 (explaining that values of fairness and justice demand "that each point of view must be allowed a voice in the process of deliberation but that the collective decision must nevertheless aim to settle on some coherent principle").

⁹² *Id.* at 186. Integrity is not mere consistency. Integrity, in the first instance, implies legislative fealty to the values of justice and fairness. *Id.* at 185. Therefore, the legislature must not only speak in one voice, but that voice must, as much as possible, approximate the voice of the people. *Id.* at 219.

⁹³ See *id.* at 184 (arguing that state lacks integrity when it must "endorse principles to justify part of what it has done that it must reject to justify the rest").

⁹⁴ *Id.* (explaining that integrity is flouted when law fails to express "coherent ranking of different principles of justice or fairness").

⁹⁵ See *id.* at 178-79.

⁹⁶ *Id.* at 179.

instincts prefer,⁹⁷ on the other hand, fully recognizes one conception of justice, while completely ignoring the other.⁹⁸ The problem with the abortion example lies outside the values of justice and fairness, within the nebulous concept of integrity.⁹⁹

California's disparate application transforms Three Strikes into a checkerboard statute. Across the state, different communal principles of proportionality conflict, and administration of Three Strikes varies county by county.¹⁰⁰ While geographic disparity in Three Strikes application on its face may not appear to be as striking a problem for integrity as Dworkin's abortion example, the two scenarios share the same core problem: the incoherent application of different principles under a single law to equally situated individuals within a single sovereign state.¹⁰¹ Imagine for a moment that the legislature announced that any felony could constitute a third strike in San Diego, but that only a violent or serious crime would trigger the law in San Francisco or Alameda. Such a Solomonic law would be a checkerboard statute and an affront to integrity.¹⁰² As applied, this is the Three Strikes law in California. Within the borders of California no one principle of Three Strikes justice dominates. Instead, cacophony has displaced coherence.

The value of integrity applies only to the distinct communities within which a particular body of law applies. Integrity does not demand harmony and coherence between separate sovereigns—only harmony within the sovereign state.¹⁰³ California is a sovereign state. The natural limits of its laws are the state's borders.¹⁰⁴ California passed Three Strikes to apply to the entire state; therefore, integrity demands that the law be applied equally throughout the state.

⁹⁷ *Id.* at 178-80.

⁹⁸ *See id.*

⁹⁹ *Id.* at 183. The abortion example that Dworkin outlines clearly is extreme. However, it provides a good framework for understanding justice, fairness, and integrity, and how the problem with internally conflicted laws implicates only the latter value.

¹⁰⁰ *See supra* Part II.B.

¹⁰¹ In one sense, Three Strikes' disparity actually is more problematic than Dworkin's abortion example. Because disparate application of the law fails to reflect the communal principles of any California community, it violates both the values of justice and integrity, thereby rendering it worse than the typical checkerboard statute that simply embodies conflicting, communally held principles. *See infra* notes 128, 132, 134, 144, and accompanying text.

¹⁰² *See* Dworkin, *supra* note 88, at 179-83 (arguing that "Solomonic model" improperly treats law as distributive good to be divided up and administered differently across society).

¹⁰³ *Id.* at 185-86 (arguing that integrity holds only within communities, and explaining that United States Constitution recognizes states as distinct political communities and assigns them sovereignty over many issues of principle).

¹⁰⁴ *See* Dworkin, *supra* note 88, at 186.

One might respond that laws are rarely, if ever, applied evenly statewide, and society accepts this disparity as the cost of prosecutorial discretion. Three Strikes, however, was not meant to be a discretionary law. Proponents of Three Strikes called for an end to indeterminate sentencing practices for recidivist felons,¹⁰⁵ and the legislature and citizenry responded by adopting a sentencing scheme devoid of discretion. However, like past mandatory sentencing laws, Three Strikes failed to divest the system of its ability to exercise discretion; it merely shifted such power from the judge to the prosecutor.¹⁰⁶

B. The Principle/Policy Distinction

San Francisco and Alameda prosecutors use their discretion to shape Three Strikes application around principles of proportionality different from those adopted in San Diego.¹⁰⁷ Consequently, district

¹⁰⁵ *People v. Superior Court (Romero)*, 917 P.2d 628, 647 (Cal. 1996) (“Plainly the Three Strikes Initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.”); Marion, *supra* note 75, at 36-37 (describing intention of Three Strikes proponents to remove discretion from “‘soft-on-crime’ players,” namely judiciary, probation officers, defense attorneys, and politicians).

¹⁰⁶ Feeley & Kamin, *supra* note 55, at 150; (“[Three Strikes], like so many other laws designed to restrict discretion, has the effect of enlarging the discretionary powers—and hence sentencing powers—of the prosecutor at the expense of the judges.”); Marion, *supra* note 75, at 37 (“To the same extent that the Three Strikes law conspicuously sought to limit the discretionary powers of the judiciary, it affirmed the prosecution’s discretionary powers.”); Tonry, *supra* note 52, at 148 (arguing that laws shift discretion from judge to prosecutor); Franklin E. Zimring, *Curb Imperial Power of Prosecutors*, L.A. Times, Apr. 20, 1999, at B7 (stating that “‘three strikes’ remove[s] judicial discretion. . . . and give[s] it instead to the prosecutor”). Indeed, the only explicit grant of discretion in the Three Strikes statute is the limited power vested in prosecutors under California Penal Code § 667(f)(1)-(2) (West 1999) to strike prior convictions on the record. California prosecutors, however, have adapted Three Strikes to a far greater degree than their statutorily vested authority. *Infra* note 123.

¹⁰⁷ The district attorneys’ rhetoric demonstrates their offices’ divergent principles. San Francisco District Attorney Terence Hallinan stated, “If you restructure ‘three strikes’ to reach violent or vicious people, you can make a real argument for it.” Perry & Dolan, *supra* note 9; see also Terence Hallinan, *Judge Performance by Results, Not Numbers*, S.F. Chron., Sept. 15, 1999, at A27 (

[T]he real chore for any society is to find the proper balance between punishment and compassion, to recognize when you have gone too far. . . . [I]f you only lock people up, you miss the opportunity to change people . . . in ways that makes our city not just safer but better. . . . [W]hile slamming cell doors . . . could create some startling figures, it would not necessarily make our community safer, stronger, nor, certainly, more humane. . . . So, I decided there had to be a better way.)

Similarly, Alameda District Attorney, Tom Orloff, explained his office’s rationale: “We’re here to do justice, not throw people away.” Chiang, *supra* note 1. Likewise, former San Fernando District Attorney Stephen L. Cooley explained: “I’ve got some very strong feelings about this. . . . I think there has to be a strong sense of proportionality.” Krikorian et al., *supra* note 38. Torrance District Attorney Denis K. Petty announced dur-

attorneys' offices in San Francisco and San Diego enforce conflicting notions of justice and proportionality.¹⁰⁸ Many San Francisco prosecutors find Three Strikes's harsh mandates inimical to their personal penological principles.¹⁰⁹ Like criminal justice reformers in England who refused to enforce mandatory death statutes for property crimes,¹¹⁰ San Francisco and Alameda prosecutors are standing up to a system of justice to which they do not subscribe.

From the standpoint of integrity, this form of prosecutorial discretion is presumptively improper.¹¹¹ With different principles of proportionality in conflict, the legislature and citizenry settled on one principle and made that one principle mandatory. Therefore, prosecutorial adaptation of the law not only fails to comply with the legislative decision to create an honest mandatory minimum, but also it violates the legislatively chosen principle of proportionality.¹¹² For these two reasons, Three Strikes disparity differs from acceptable prosecutorial disparity in the typical case. Normally, criminal laws

ing Three Strikes's first year that he would follow his own conscience by adopting a circumscribed approach to the law. See Richard Lee Colvin & Ted Rohrlich, Courts Toss Curveballs to '3 Strikes,' L.A. Times, Oct. 23, 1994, at A1.

Conversely, the rhetoric in San Diego supports a punitive principle of rigid application. Of minor, recidivist felons, San Diego Deputy District Attorney Gregg McClain explained: "I've given up on rehabilitating that class of individual . . . I'm not a social worker." Perry & Dolan, *supra* note 9.

¹⁰⁸ Geographic disparity in criminal law is often an indication of different principles of proportionality. See Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"?*, 87 J. Crim. L. & Criminology 130, 155-56 (1996) ("[G]eographic disparities are . . . at the heart of the concept of proportionality itself.").

¹⁰⁹ *Supra* note 107 and accompanying text.

¹¹⁰ See *supra* notes 57-59 and accompanying text; see also Feeley & Kamin, *supra* note 55, at 148, 151 (comparing adaptation of Three Strikes to past instances of adaptation of mandatory minimum laws); cf. Brown, *supra* note 69, at 1178-79 (describing northern courts' refusal to enforce nineteenth-century fugitive slave laws viewed as unjust).

¹¹¹ That presumption holds except in instances where the law lacked integrity in the first place. A law cannot possess integrity no matter how consistently it is applied if the principles endorsed by the law are not the communal principles of the people subject to that law. See Dworkin, *supra* note 88, at 219 (arguing that integrity demands that communal principles "express a single, coherent scheme of justice and fairness in the right relation"); see also *infra* notes 126-30 and accompanying text (explaining that integrity demands more than blind obedience to text when that text fails to reflect communal principles). This Note argues that factors leading to Three Strikes's passage helped create a mandatory minimum that did not reflect the principle of proportionality of any California community, thereby violating the value of justice and undermining any possibility of achieving real integrity. See *infra* Part IV.A.

¹¹² See Tonry, *supra* note 52, at 161 (explaining that amidst these exceptions "important values are being sacrificed" resulting in "dishonest and tawdry" practices); Mauer, *supra* note 32, at 15 ("[The] development [of prosecutorial discretion] not only exacerbates sentencing disparities, but is also harmful to the development of a justice system committed to fairness and accountability.").

permit disparate prosecutorial approaches, both because the laws' commands are not mandatory and because these different prosecutorial approaches are based on neutral prosecutorial policies rather than variant principles.

Dworkin defines arguments of policy as largely utilitarian and goal-oriented, while arguments of principle focus on the protection of individual rights.¹¹³ Integrity in the context of disparate prosecutorial approaches is concerned only with matters of principle.¹¹⁴ Decisions based on neutral criteria like differing resources are questions of policy, and neutral policy variance between offices is always permissible.¹¹⁵ However, a prosecutor who makes decisions based on her own principled choice about proportionality oversteps her bounds and violates the value of integrity.¹¹⁶ Therefore, prosecutorial decisions based on principles contrary to legislative determination are unacceptable. Nor should a prosecutor use policy grounds as an excuse to disregard a principle in which she does not believe. Where supposedly "neutral" prosecutorial policy negatively affects individual rights protected by legislatively chosen principles, the prosecutorial decision actually is an improper, principled choice masked as "ostensible policy."¹¹⁷

¹¹³ Ronald Dworkin, *A Matter of Principle* 2, 3 (1985) ("Arguments of policy try to show that the community would be better off . . . if a particular program were pursued. . . . Arguments of principle claim . . . that particular programs must be carried out . . . because of their impact on particular people, even if the community . . . is . . . worse off in consequence.").

¹¹⁴ Dworkin, *supra* note 88, at 221.

¹¹⁵ *Id.* at 224.

¹¹⁶ *Id.* at 179, 223, 224 (explaining that integrity rejects division over matters of principle and demands that government speak with one voice).

¹¹⁷ See *id.* at 224 (explaining, for example, that prosecutors would be engaged in impermissible principled decision if they announced on policy grounds that they would preserve resources by prosecuting African Americans for given crime); see also Ronald Dworkin, *Taking Rights Seriously* 31 (1977) (arguing that discretion is only permissible when executed subject to set standards).

Supreme Court jurisprudence supports this idea. While the Court recognizes that prosecutors have "broad discretion" to enforce criminal laws, see *United States v. Armstrong*, 517 U.S. 456, 464 (1996), it has repeatedly held that this power will be circumscribed when prosecutorial zeal interferes with the liberty rights of the accused. See, e.g., *id.* (noting in dicta that prosecutorial discretion is subject to constitutional constraints); *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (noting in dicta that while prosecutorial policy decisions based on, for example, strength of case, are not subject to review, prosecutorial discretion itself is not "unfettered" and is subject to constitutional constraints); *United States v. Lovasco*, 431 U.S. 783, 795 n.17 (1977) (affirming that Court may find due process violation based on improper use of prosecutorial discretion); *United States v. Marion*, 404 U.S. 307, 324 (1971) (same); see also Leonard N. Sosnov, *Separation of Powers Shell Game: The Federal Witness Immunity Act*, 73 *Temp. L. Rev.* 171, 190-92 (2000) (detailing jurisprudence supporting judicial review of prosecutorial discretion).

Each of the rule of law's three values is tied into this principle/policy distinction. To satisfy the values of fairness and justice, it is the responsibility of a publicly accountable legislature—not a prosecutor—to determine dominant communal principles and to codify these principles in law.¹¹⁸ To satisfy the value of integrity if principles conflict, the legislature ultimately must settle on one “winner-take-all” choice. The prosecutor, in turn, must execute the laws neutrally respecting the principles the laws embody.¹¹⁹ If the prosecutor bases the decision to charge on varying personal principles regarding the rights of the accused and ignores the actual principles codified in the law, coherence and integrity are undermined.¹²⁰

¹¹⁸ See *supra* notes 89-90 and accompanying text.

¹¹⁹ *Id.*

¹²⁰ See *supra* note 116 and accompanying text. Beyond the context of Three Strikes, geographic disparity has garnered similarly broad critical attention in another area where prosecutors base discretion on principle: capital prosecutions. See Bienen, *supra* note 108, at 137 (explaining problem of broad geographic disparity in capital sentencing, and concluding that each “court has been its own conscience”); Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty*, 26 *Fordham Urb. L.J.* 767, 767-70 (1999) (explaining that different ideologies of prosecutors contribute to disparity between decisions on whether to seek death penalty in Philadelphia and the Bronx). For example, in 1995, Bronx District Attorney Robert Johnson announced that he had no “present intention” to pursue the death penalty because of his “intense respect for the value and sanctity of human life.” DeMay, *supra*, at 768-70 & 770 n.6. In response to Johnson's decision, New York Governor George Pataki remarked: “No one, including a District Attorney, can substitute his or her sense of right and wrong for that of the Legislature.” *Id.* at 779 n.77. To ensure that New York laws were “faithfully executed,” Pataki superceded Johnson in a death-qualifying case. *Johnson v. Pataki*, 691 N.E.2d 1002, 1003 (N.Y. 1997). Governor Pataki was insisting, essentially, that for integrity's sake Johnson must either properly enforce the legislatively chosen principle of proportionality or forfeit his position in potential capital cases. In Johnson's defense, it is possible that in passing the death penalty statute the legislature improperly interpreted the communal principle of proportionality. If that were the case, then the original legislative choice to permit capital sentencing would violate the value of justice. See *infra* notes 130-35 (explaining that integrity demands fidelity to values of justice and fairness and allegiance only to those laws that adhere to communal principles).

Perhaps because of the troubling link between prosecutors' principled decisions and disparate death convictions, death sentencing is the one area in which the Supreme Court potentially recognizes Eighth Amendment objections to justice by geography. The concept of “proportionality review” endorsed by the Court is meant to avoid the kind of unpredictability in which the decision to afford a defendant a sentence of death “smacks of little more than a lottery system.” *Pulley v. Harris*, 465 U.S. 37, 68 (1984) (quoting *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring)). Notably, one of Pataki's primary grounds for superceding Johnson was that allowing such a disparate policy would open the door to a subsequent claim based on proportionality review. *Pataki*, 691 N.E.2d at 1003.

The only case in which a court addressed geographic disparity in Three Strikes application was *People v. Andrews*, 76 Cal. Rptr. 2d 823 (Ct. App. 1998). The California Court of Appeal was deeply disturbed by geographic disparity under the law, holding: “Even with the sparse record . . . it is clear there can be vast differences in the manner of enforcement of this draconian sentencing law. . . . That a person faces either probation or 25 years

The existence of radically differing approaches to Three Strikes violates integrity because these approaches reflect prosecutors' differing principles concerning the meaning of an offender's right to proportional punishment.¹²¹ Nor can California prosecutors rely on the normally acceptable policy ground that individual characteristics of defendants may be considered in charging decisions. First, that policy rationale would never permit San Francisco District Attorney Terrence Hallinan's blanket decision to forego applying the law against a particular class of defendants.¹²² More importantly, because the legislature and the people chose a *mandatory* principle for Three Strikes, consideration of individual characteristics of defendants can only be at best an impermissible "ostensible policy" in direct conflict with legislative determination of principle.¹²³

to life based only on geography should trouble any thinking person." *Id.* at 825. In the absence of "invidious or otherwise improper discrimination," however, the court felt powerless to intercede. *Id.* at 826. Had the *Andrews* court properly comprehended disparity as the product of disparate prosecutorial principles, it might have claimed this power, at least theoretically, by exercising proportionality review.

¹²¹ Unlike the court in *Andrews*, Professor Joseph P. Charney recognized that disparity in Three Strikes is not the product of variant-neutral policy. Joseph P. Charney, Justice Must Be Measured, Rational and Proportionate, *L.A. Times*, Mar. 8, 1999, at B5 ("When the San Francisco prosecutor chooses never to file a drug offense as a third strike and the Los Angeles prosecutor does so routinely, we have gone beyond any reasonable policy of discretion. Discretion that provides for such arbitrary enforcement and disparate consequences makes a mockery of justice.").

Professor Samara Marion's study comparing Three Strikes application across California counties underscores the conclusion that different modes of application appear to be the result of different local values of proportionality. She found that disparate use of the law bears no statistically significant correlation with crime rates. Marion, *supra* note 75, at 32. For example, though San Diego has a slightly lower crime rate than Santa Cruz, defendants are three times more likely to receive a third strike sentence in San Diego County than Santa Cruz County. *Id.* Indeed, in sharp contrast to its more aggressive approach, San Diego consistently enjoyed a crime rate below the state average throughout the 1990s. *Id.* Therefore, divergent principles—not divergent crime rates—may better explain disparate application of Three Strikes.

¹²² See *Pataki*, 691 N.E.2d at 1007 (holding that legislative decision does not permit individual prosecutors to effectively veto death penalty statute by adopting "blanket policy" against use).

¹²³ See *supra* note 117 and accompanying text. Even though Three Strikes vested power in prosecutors to strike prior convictions in the interest of justice under California Penal Code § 667(f)(2) (West 1999), it was not intended to confer the power to circumvent mandatory sentencing. *Sze*, *supra* note 30, at 1078 (describing vested discretion under statute as limited and explaining that language of statute will "stymie[]" prosecutorial efforts to further justice by striking prior convictions); see also Marion, *supra* note 75, at 37 (arguing that Three Strikes proponents did not believe prosecutors would use their limited discretionary powers broadly); Berbeo, *supra* note 72 (citing Secretary of State Bill Jones's complaint that overly broad use of prosecutorial discretion violated intent of Three Strikes statute). One specific limitation on prosecutorial discretion is the statutory requirement that all eligible prior convictions be pled and proven by the prosecutor before they can be stricken. Cal. Penal Code § 667(f)(1) (West 1999). The statute similarly limits discretion

IV

WHAT MUST BE DONE: CHOOSING A MODEL
OF THREE STRIKES APPLICATION

If varying application of the California Three Strikes law is an affront to integrity, then one standard of Three Strikes must be legislatively adopted and applied uniformly by all prosecutors. The twin goals of uniformity and integrity can be realized only through legislative codification of a new Three Strikes law that prescribes the principle of proportionality presently endorsed by San Francisco prosecutors.¹²⁴

At first blush, this claim appears counterintuitive. The legislature and the people, after all, already adopted a principle of proportionality embodied in Three Strikes as written. That was the legislative choice,¹²⁵ and that, arguably, should be the principle that is applied uniformly throughout the state. Prosecutors violate integrity by improperly appropriating the legislative power to determine communal principles. Presumably the answer, then, is that prosecutors must cease applying their own principles of proportionality and apply the law as written.

Integrity, however, demands that, in certain circumstances, a state look beyond the strict wording of a law toward the societal val-

by constraining prosecutors' ability to plea bargain in qualifying Three Strikes cases. *Id.* § 667(g) (stating that "[p]rior felony convictions shall not be used in plea bargaining").

Under any perspective, Hallinan's decision to forego charging all nonviolent crimes under the law clearly exceeds the scope of permissible discretion under the statute. Cf. *supra* note 122 and accompanying text (arguing that blanket prosecutorial decisions to avoid application of Three Strikes exceeds any permissible notion of discretion); see also Berbeo, *supra* note 72 ("[A] blanket policy to let career serious and violent criminals off the hook because their third felony is a nonviolent one is a dangerous abuse of discretion and a flagrant disregard for the law." (quoting Secretary of State Bill Jones)). To lesser degrees, prosecutors across California avoid the law's mandates in ways that exceed Three Strikes's statutorily granted discretion and therefore improperly infringe on legislatively determined principle. See Marion, *supra* note 75, at 33 (arguing that even San Diego exercises discretion in manner statute purportedly forbids); Russell, *supra* note 72 (explaining that, in Los Angeles, mandatory sentences under Three Strikes "are anything but automatic"). Prosecutors are able blatantly to disregard the filing requirement in several ways. See Marion, *supra* note 75, at 34 (describing different means by which prosecutors adapt Three Strikes before, during, and after filing of case). They can strike prior convictions off the record. *Id.* at 36-38. They also impermissibly can use prior convictions to plea bargain. *Id.* at 32-33; see also Russell, *supra* note 72 (quoting legal scholar that California uses plea bargaining to "tailor justice" in cases in which Three Strikes proves too harsh). Lastly, prosecutors can choose not to charge eligible crimes under the Three Strikes law in the first place. Marion, *supra* note 75, at 34 (discussing this option).

¹²⁴ See *infra* Part IV.C.

¹²⁵ Because Three Strikes was passed by identical initiative and legislative measures, this Note uses the terms "legislative determination" or "legislatively chosen principle" interchangeably to denote the actions of both the electorate and the formal legislature.

ues that law was meant to embody.¹²⁶ The value of justice, after all, requires that communal principles be made known through legislation, and the value of fairness demands that the people have a voice in legislative choice. Therefore, when these values are undermined, integrity demands more than mere consistency. Integrity requires something deeper than blind obedience to text.¹²⁷ True integrity is fealty only to rules that result from legislative allegiance to the values of justice and fairness.¹²⁸

When communal principles are cast aside or not properly considered, participants in the system often will tailor the law to take these principles into account.¹²⁹ Under these circumstances, geographic disparity and a lack of integrity are the products of legislative disregard for justice and fairness. Real integrity will only arise through laws that pay “fidelity” to these “fundamental principles” at the heart of the justice system.¹³⁰

¹²⁶ Dworkin, *supra* note 88, at 185 (explaining that society must look beyond text to discover whether text accurately reflects communal principles). Some commentators view law “[as] contingent not just upon the acts of legislatures . . . but also upon the surrounding social context, the content of an entire form of life. . . . [It is] a pragmatic, normative activity.” Brown, *supra* note 69, at 1164-66 (quoting Margaret Jane Radin); cf. Duncan v. Louisiana, 391 U.S. 145, 156 (1972) (holding that one function of juries is to depart from unjust application of rules).

¹²⁷ Dworkin, *supra* note 88, at 219.

¹²⁸ See *id.* at 185. In this respect, the absence of integrity here is more troubling than in Dworkin’s abortion example. The problem is not merely that integrity is violated because conflicting communal principles are expressed through a single law; the problem is that the law never reflected communal principles in the first place. See *infra* notes 132, 134, 144.

¹²⁹ See, e.g., *supra* Part II.A (describing adaptation of past mandatory minimum laws as process of reestablishing status quo criminal justice norms); *supra* notes 68-69 and accompanying text and notes 70-71 (describing process of adaptation and return to status quo in San Francisco); *infra* Part IV.A (explaining indications that all counties, including San Diego, adapt Three Strikes to recapture traditional norms of proportionality).

¹³⁰ Dworkin, *supra* note 88, at 220 (arguing that integrity may demand discovery and expression of implicit standards between and beneath the explicit ones); see also Cordell, Scheinberg Lecture, *supra* note 41 (arguing that when judge faces decision of applying law as written or following moral imperatives to do what judge considers right, judge should follow moral imperatives). In *Law’s Empire*, Dworkin offers the example of nullification of the fugitive slave law by northern juries. Dworkin, *supra* note 88, at 189. In his view this form of nullification served integrity because the statute as written was inconsistent with the people’s “underlying commitment to [a] . . . more fundamental public conception of justice.” *Id.*; see also Brown, *supra* note 69, at 1180 (explaining that nullification of fugitive slave law furthers goals of coherence and democratic process above literal statutory interpretation). Notably, commentators have contrasted nullification of Three Strikes laws with nullification of the fugitive slave law. *Id.* at 1183; Marder, *supra* note 69, at 898-99.

Ultimately, however, adaptation cannot, by itself, recapture lost integrity. When prosecutors and juries adapt the law to reestablish communal values, they necessarily usurp legislative power to determine laws’ principles. Therefore, to realize integrity fully, the legislature must view widespread adaptation as an indication that a particular law is flawed, and it then must change the text of the law to accommodate communal principles properly.

A. *Uniform Application of the Three Strikes Law
is Unacceptable and Unworkable*

Fidelity to Three Strikes as written is not fidelity to California's underlying commitment to proportionality.¹³¹ It is fidelity to the text of a statute born of catch phrases, media hype, political maneuvering, and public fear, rather than fidelity to deliberation, contemplation, and analysis.¹³² As a consequence, the law does not even reflect the proportionality principles of California's most punitive counties.¹³³ Because application of Three Strikes to minor criminals violates underlying proportionality concerns, actors within the criminal justice system have found ways to avoid uniform, strict implementation of the law.¹³⁴ For the same reasons other communities modified past determinate sentencing laws whose mandates ignored ingrained penal val-

¹³¹ See Marion, *supra* note 75, at 30, 33 (arguing that prosecutorial adaptation of Three Strikes indicates its failure to take proportional punishment into account).

¹³² See Warner, *supra* note 32, at 47, 78 (“[P]roponents of initiatives have no particular incentive to curb their legislation’s extremism. . . . [V]oters are not likely to read the proposal, either when they sign it or when it is on the ballot. Initiatives . . . appeal to passions and prejudices [and] spotlight tensions.” (internal quotation marks omitted)). In this way, Three Strikes violates the value of integrity through geographic disparity, violates the value of justice by not reflecting communal principles, and violates the value of fairness because it is the product of the “anti-democratic” forces at work in the initiative process. Cordell, Scheinberg Lecture, *supra* note 41 (describing problems with initiative process); see also *supra* note 128 (explaining that laws of this type are worse than Dworkin’s abortion example, which violated integrity but was acceptable under values of fairness and justice).

¹³³ See *infra* notes 136-39 and accompanying text (explaining that uneven application indicates that even San Diego’s principle of proportionality is disregarded by Three Strikes).

Proportionality is an entrenched value of a well-functioning criminal justice system; it is not a radical proposition. Two hundred years ago the political philosopher Cesare Beccaria announced that “there ought to be a fixed proportion between crimes and punishment.” Cesare Beccaria-Bonesana, *An Essay on Crimes and Punishments* 28 (Academic Reprints 1953) (1819); see also Charney, *supra* note 121 (“Justice must be measured, rational and proportionate or it isn’t justice. . . . By permitting lifetime incarceration for both minor and heinous crimes punishment loses its moral compass. . . [leaving] nothing more in our punishment arsenal to show our particular revulsion to the despicable crimes.”).

¹³⁴ See Marion, *supra* note 75, at 38 (“[E]ven a judiciary and prosecution that wholeheartedly embraces Three Strikes cannot literally apply it . . . presumably because of its blanket disregard of fundamental principles of fairness and penal proportionality.”); see also Gordon, *supra* note 69, at 602 (citing study of ninety-eight third-strike cases filed in Los Angeles County between March and August 1994 finding that only one in six eligible defendants received mandatory minimum); Russell, *supra* note 72 (citing study finding that nearly eighty percent of 956 third-strike cases filed in Long Beach during law’s first five years ended in shorter sentences than law’s mandatory minimum); *supra* Part II.B (describing adaptation of Three Strikes in various California counties).

The California Department of Corrections reports that the number of third-strike inmates delivered to state prisons has declined steadily since 1996, when it registered an average of 110.7 new third-strike prisoners per month. *Third Strike Cases*, *supra* note 5, at 3-4. That average decreased to 101.9 in 1997, 97.0 in 1998, 88.4 in 1999, and 67.8 in 2000.

ues, California counties today are adapting Three Strikes in varying ways across the state.¹³⁵ The San Diego approach is the closest functional model to the law as written, and yet even there prosecutors occasionally abandon the law's mandates in practice.¹³⁶

Modification in San Diego remains circumscribed. After all, seventy-five percent of San Diego residents voted for the law.¹³⁷ In that climate, it would be political suicide for a prosecutor publicly to reject any aspect of Three Strikes.¹³⁸ Nevertheless, because the law as written sometimes is incompatible with even San Diego's more punitive principle of proportionality, prosecutors carve exceptions below the radar of popular scrutiny in individual cases to readopt a modicum of proportionality.¹³⁹

Id. In the last six months of 2000, only 60.3 inmates per month were imprisoned for third-strike convictions. Id.

Prosecutors often permit third-strike defendants to escape the law's mandates by pleading guilty to second-strike charges. Marion, *supra* note 75, at 36 (discussing study where forty-five percent of defendants facing third-strike charges eventually pled guilty to second-strike charges). It would seem likely, then, that as third-strike commitments decreased, second-strike commitments would increase accordingly. Nevertheless, the Department of Corrections still reports a steady reduction even in the numbers of new second-strike inmates. Second Strike Cases, *supra* note 6, at 5 (listing average of 760.9 new second-strike prisoners per month for 1998, 731.2 for 1999, and 661.3 for 2000).

¹³⁵ See Marion, *supra* note 75, at 38 (explaining that no county can literally enforce law because of its disregard for proportionality); see also *supra* note 72 and accompanying text (explaining that while adaptation is taking place across California, it is occurring at varying speeds in different counties).

A comprehensive synopsis of adaptation in every California county is beyond the scope of this Note. Even without such detailed analysis, however, the assumption that some degree of adaptation is presently occurring throughout California appears well-founded. If San Diego—as one of the law's strictest enforcers—still adapts Three Strikes, it is very likely that every county adapts the law to some degree. Indeed, the author of this Note has found no evidence or scholarly work indicating the contrary. See Marion, *supra* note 75, at 38 (reaching same conclusion based on her analysis of law's application in San Diego).

¹³⁶ Id. at 30, 38 (discussing disparate sentencing practices in San Diego).

¹³⁷ Cal. Statement of Vote, *supra* note 15, at 106. Notably, fifty-seven percent of San Francisco's citizens voted against Three Strikes. Id.

¹³⁸ District attorneys are politically elected government officials; their public stance on crime affects their popularity. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *Fordham L. Rev.* 13, 57 (1998) (arguing that prosecutors, as elected, highly political officials, campaign on general crime control themes, not on specifics); see also Beth Shuster, *Living in Fear*, *L.A. Times*, Aug. 23, 1998, at A1 (quoting then-Los Angeles City Attorney James K. Hahn: "[For prosecutors] '[t]rying to sell this big drop in crime is not an easy task.' . . . 'That message seems to be in direct conflict with everything else [people are] hearing.'"). See generally Mauer, *supra* note 32, at 13-14 (tracing history of politicization of crime).

¹³⁹ Marion, *supra* note 75, at 32-33, 38 (discussing modification in San Diego as tool to recover lost proportionality); Russell, *supra* note 72 (explaining that roughly seventy to seventy-five percent of San Diego Three Strikes cases result in sentences below the mandatory). Publicly, normative concerns about proportionality are secondary to an explicit approach favoring strict enforcement for "symbolic and political reasons." Tonry,

San Diego's efforts to recapture lost proportionality underscore the notion that strict application of Three Strikes is not feasible in any California county, and that attempts to achieve it only can come at serious psychological cost. If prosecutors are divested of discretion and forced to apply the law strictly as written in all qualifying cases, jurors who disagree with the law's application toward minor felons will be left with a troubling dilemma: convict against their will or make "sham findings" against the written law.¹⁴⁰ In either case, their confidence in the system will be seriously undermined.¹⁴¹ Forcing

supra note 52, at 160; see also Cullen et al., supra note 44, at 40 ("[T]hree-strikes laws may have struck a chord with the public not because they were a compelling crime control strategy but because they offered a symbolic means of affirming a shaky social order."); supra note 58 (discussing symbolic reasons for capital punishment for property crimes in eighteenth-century England). However, in individual cases proportionality demands modification. See Cullen et al., supra note 44, at 38-40 (noting that when given particular vignette of criminals who would fall under Three Strikes rule, survey respondents often choose less than life sentences). This modification can be done implicitly, even while prosecutors maintain explicit rhetoric supporting the law. See Feeley & Kamin, supra note 55, at 150 (describing decision not to charge defendant under Three Strikes as "very low visibility" and "highly discretionary"); see also supra note 123 (explaining that under statute discretion can be exercised only on record, but arguing that in reality prosecutors exercise discretion out of public eye).

¹⁴⁰ Sze, supra note 30, at 1076. Although these "sham findings" may take the form of outright nullification, jurors also might mask nullification behind a sliding burden of proof. See Gerald F. Uelman, *Why Some Juries Judge the System*, L.A. Times, Jan. 24, 1996, at B9 (discussing "more lenient standard of reasonable doubt" in Three Strikes cases); see also Sze, supra note 30, at 1076 ("[W]e're going to have a tremendous jury backlash. Jurors are going to require more proof than beyond reasonable doubt.") (quoting former Los Angeles District Attorney Gil Garcetti)). Jurors also have a partial-nullification option. The Three Strikes law requires that all prior convictions must be proven during an additional postconviction trial phase. Cal. Penal Code § 667(f)(1) (West 1999). Bifurcation provides a "particularly effective" means of freeing jurors from the "release-or-punish-unfairly dilemma" confronting all-or-nothing nullifiers. Sze, supra note 30, at 1076.

The willingness of juries to make "sham findings" is an insurmountable obstacle to strict application of the Three Strikes law. If prosecutors are forced to use Three Strikes against minor felons, juries will find ways to effectuate implied standards of proportionality. Whether through nullification, partial nullification, or a sliding scale of reasonable doubt, juries will take punishment into account even if explicitly instructed against it. Uelman, supra.

¹⁴¹ See, e.g., Lynch & Cekola, supra note 38 (reporting juror's sentiment that he "felt deceived by the court" because he was not told that convicting defendant for taking five-dollar cut in cocaine deal would, as defendant's third strike, result in life imprisonment); Uelman, supra note 140 ("The jury is the most democratic institution we have left in America, where real power is placed directly in the hands of ordinary people. When growing numbers of jurors [in Three Strikes cases] deeply distrust the system . . . their exercise of power will reflect that distrust."); see also Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 Ind. L.J. 1233, 1236 (1995) (citing psychological pain experienced by death penalty jurors); Joseph L. Hoffmann, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137, 1142, 1155 (1995) (describing psychological toll in death sentencing and quoting juror who reported that he "'had nightmares for several months' [and] '[l]ost respect for the legal system.'"). This psychological strain was evident in the case of *People v. Jones*,

prosecutors to pursue Three Strikes's harsh punishments will take a similar psychological toll on victims who disagree with its application.¹⁴² Even prosecutors may not be immune to the psychological effects of being forced to apply the law rigidly in cases where they feel its mandates are not warranted.¹⁴³ If jurors, victims, and prosecutors are forced to exact justice under a criminal law that violates their sense of proportionality, their confidence in the system will wane. When this occurs, not only will integrity be undermined, but the values of fairness and justice will be subverted as well.¹⁴⁴

Three Strikes's psychological effects on defendants raise even more pernicious problems. Distrust and disdain for the legal system is on the rise among suspects facing Three Strikes's harsh mandates.¹⁴⁵ Despair is common.¹⁴⁶ As hopelessness increases, deterrence is un-

No. 157934 (S.F. County Sup. Ct. Jan. 26, 1995). One juror told the judge: "I feel somewhat as if . . . our good faith and trust in the system has been duped and frankly betrayed, and I think it's a sad day. . . . I feel violated, and I'm not happy about that." Record at 1082-83, *Jones* (No. 157934). Another juror explained: "This is something that would definitely be gnawing away at me. . . . [W]e all feel sort of tricked." *Id.* at 1084-85. Other jurors reported to the judge that the process was "bogus," and that convicting under Three Strikes was a "burden . . . too great" to bear. *Id.* at 1077, 1088.

Should a judge continue to release jurors from their "burden" by declaring a mistrial, as Judge Bouliane did in *Jones*, *id.* at 1090, eventually the only jurors who would sit would be the select few who agree with the broad scope of the law. Such a jury would not represent the community as a whole and would thus represent a process violative of the values of fairness and justice.

¹⁴² See, e.g., Sze, *supra* note 30, at 1077 (discussing case of victim who wanted offender punished for attempted theft of wallet but did not want offender to spend remainder of life in prison); Martha Bellisle, *Man Gets 25 Years to Life for Alleged Food Heist*, *L.A. Times*, Jul. 18, 1999, at A1 (describing case of Gregory Taylor, thirty-seven-year-old homeless man sentenced to twenty-five years to life for attempting to break into church to steal bread, and explaining how minister of church considers sentence unjust and still exchanges letters with Taylor in prison); see also *supra* note 69 (describing case of victim who risked contempt-of-court charges by refusing to testify in Three Strikes case).

¹⁴³ See, e.g., Colvin & Rohrlrich, *supra* note 107 (noting former Los Angeles County District Attorney's claim that some prosecutors find it traumatic to seek life sentences for minor crimes).

¹⁴⁴ The value of justice is violated when laws do not reflect communal principles; the value of fairness enables citizens to play a role in the development of law. See *supra* notes 89-92 and accompanying text. Both values are violated when jurors can only speak through nullification and witnesses and victims choose not to speak at all for fear of the consequences their testimony may have for the accused.

¹⁴⁵ Pomona Public Defender Michael Judge remarked: "There have been many defendants who did not believe their public defender was telling the truth' . . . 'or thought the [public defender] was somehow trying to sell them out.'" Krikorian et al., *supra* note 38.

¹⁴⁶ For example, after Los Angeles defendant Larry Olin received twenty-five years to life for stealing two pairs of pants, he exclaimed: "[H]as the world gotten crazy or is it me?' . . . 'Am I so terrible at this thing called life' . . . 'that they decided to throw me out of the world?'" *Id.*

dermined¹⁴⁷ and minor offenders are driven to perform desperate acts.¹⁴⁸ California criminals, frightened by the specter of a lifetime behind bars, increasingly are resisting arrest.¹⁴⁹

When these suspects finally are arrested, they are less likely to accept plea offers. After all, for many defendants, a sentence of twenty-five years to life is "in reality a death sentence."¹⁵⁰ Consequently, California has experienced a dramatic increase in jury trials under the present administration of Three Strikes.¹⁵¹ Indeed, second- and third-strike cases account for forty-eight percent of the state's jury trials.¹⁵² If the law were applied strictly as written, there would be even more trials and fewer plea bargains, since the statute explicitly prohibits the use of prior convictions in plea negotiations.¹⁵³

Once in court, Three Strikes trials generally last longer than typical jury trials.¹⁵⁴ Facing long sentences, defendants file more motions

¹⁴⁷ See Beccaria-Bonesana, *supra* note 133, at 32 ("If an equal punishment be ordained for two crimes that injure society in different degrees, there is nothing to deter men from committing the greater as often as it is attended with greater advantage."); *infra* note 160 (discussing findings that Three Strikes does not deter crime).

¹⁴⁸ For example, Steven White became agitated after he was charged with a third-strike crime for stealing a VCR. Markel, *supra* note 8, at 689. He began firing a shotgun randomly and eventually killed himself, leaving a suicide note disparaging the Three Strikes law. *Id.*

¹⁴⁹ John Johnson & Beth Shuster, *Police Shootings Raise Questions About Three Strikes*, L.A. Times, Mar. 13, 1996, at A1 (chronicling lawbreakers' "desperation to resist arrest, regardless of the risk"). In 1996, Los Angeles Police Department Chief Willie Williams announced that criminals' "heightened awareness" of the possibility of long prison terms was driving them to resist arrest. *Id.* Commander Tim McBride added: "There are some indications that some of our convicted felons are more desperate than before because of three strikes." *Id.*

¹⁵⁰ Cordell, Scheinberg Lecture, *supra* note 41; see also Marion, *supra* note 75, at 35 ("Three Strikes defendants risk little by going to trial.").

¹⁵¹ Cushman, *supra* note 71, at 95-96; see also Butterfield, *supra* note 70 (noting increase in jury trials under Three Strikes); James Kachmar, *Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials*, 28 Pac. L.J. 273, 297-98 (1996) (describing thirty-five percent increase from 1994 to 1995 in jury trials in Los Angeles County); Marion, *supra* note 75, at 35 (explaining study indicating that jury trials play far more significant role in Three Strikes cases than in other felony cases).

¹⁵² Krikorian et al., *supra* note 38; see also Marion, *supra* note 75, at 35 (citing fact that three to four percent of criminal cases in California result in jury trials, while thirty-four percent of defendants in San Diego study went to trial in Three Strikes cases); Carlos V. Lozano, D.A., *Public Defender Cite Heavy Caseload*, L.A. Times, Mar. 3, 1997, at B1 (describing fifty percent increase in felony trials between 1995 and 1996 in Ventura County); Perry & Dolan, *supra* note 9 (noting that criminal trials in San Diego County rose thirty-seven percent during first full year of Three Strikes law).

¹⁵³ Cal. Penal Code § 667(f)(1) (West 1999); see also Russell, *supra* note 72 (summarizing assessment of attorneys and criminal justice experts that literal enforcement of Three Strikes "would cause the court system to collapse under the weight of so many trials").

¹⁵⁴ Krikorian et al., *supra* note 38.

and fight their cases more diligently.¹⁵⁵ Additionally, the trial does not end with the conviction. Instead, prior strikes must be proven during a second sentencing phase.¹⁵⁶ Consequently, trial times in California have increased from forty-six days for normal felonies to 106 days for second-strike cases and 160 days for third-strike cases.¹⁵⁷

Beyond its impact on courts, the law's economic effect on the prison system is immense. The cost of housing an inmate in a California prison was estimated in 1993 to be \$20,800 per year.¹⁵⁸ Therefore, disregarding time value and inflation, keeping a third-strike inmate imprisoned for the minimum twenty-five years is a \$500,000 investment.

For all these reasons, rigid administration of Three Strikes only can be realized at prohibitively high social costs.¹⁵⁹ In the end, even if California feasibly could shoulder this expense, the benefits would be slim: Three Strikes does not deter criminals,¹⁶⁰ nor does it conform with the principles of proportionality held by Californians.

¹⁵⁵ Chiang, *supra* note 1 (“[D]efendants are swamping the court with requests to dismiss the charges, to get a new lawyer, ‘every motion imaginable.’” (quoting Superior Court Judge Carl Morris)).

¹⁵⁶ Cal. Penal Code § 667(f)(1) (West 1999).

¹⁵⁷ Krikorian et al., *supra* note 38.

¹⁵⁸ Peter W. Greenwood et al., *Estimated Benefits and Costs of California’s New Mandatory-Sentencing Law*, in *Vengeance*, *supra* note 32, at 67 tbl.3.2.

¹⁵⁹ See Chiang, *supra* note 1 (describing Alameda County District Attorney Tom Orloff’s estimate that strict Three Strikes application would force county to double or possibly triple its number of courts, prosecutors, and defense lawyers).

¹⁶⁰ A common critique of past mandatory minimum sentencing laws is that uneven adaptation actually undermines deterrence. See U.S. Sentencing Comm’n, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, at ii (1991) (“While mandatory minimum sentences may increase severity, the data suggest that uneven application may dramatically reduce certainty.”); see also *supra* notes 146-49 and accompanying text (discussing growing recklessness and increased instances of resisting arrest amongst offenders facing third-strike sentences); *supra* note 59 (explaining that mandatory death sentences for property crimes were repealed because their arbitrary application undermined deterrence). See generally Mauer, *supra* note 32, at 11-12 (listing reasons why mandatory minimum sentencing laws fail to deter and specifically describing limited deterrence impact of Three Strikes).

Increasing data indicate that Three Strikes does not deter crime. Males & Macallair, *supra* note 72, at 68 (describing study that found no deterrent value to Three Strikes); see also Linda S. Beres & Thomas D. Griffith, *Did “Three Strikes” Cause the Recent Drop in California Crime? An Analysis of the California Attorney General’s Report*, 32 *Loy. L.A. L. Rev.* 101, 120 (1998) (concluding that Three Strikes “was not a major cause” of recent decline in crime rate); David Schultz, *No Joy in Mudville Tonight: The Impact of “Three Strike” Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 *Cornell J.L. & Pub. Pol’y* 557, 574 (2000) (concluding that data do not indicate that Three Strikes played role in California crime drop). Indeed, a study of Three Strikes’s application between 1994 and 1997 found that, despite San Francisco’s modified approach toward the law, the County witnessed a decline in overall crime that exceeded or equaled the counties that pursued Three Strikes most aggressively. Males & Macallair, *supra* note 72,

B. Uniform Application of the San Diego Model Is Unwise

In contrast to the law as written, the San Diego approach is at least functional, but it still fails to provide an acceptable model for uniform application of Three Strikes. Within San Diego County, implicit steps toward proportionality in specific cases strain public support for the law. Exceptions run counter to the prosecutor's explicitly rigid approach, creating dissonance between rhetoric and application.¹⁶¹ The result is inconsistent and haphazard modification,¹⁶² in sharp contrast to San Francisco's thorough and uniform adaptation of the law.¹⁶³ Sometimes an exception is made because the law proves too harsh in a specific case, but often there is no cogent reason why a prosecutor chooses to apply or disregard Three Strikes's mandates.¹⁶⁴ Consequently, the sentencing ranges for similarly situated defendants are extraordinarily broad, and inherently contrary to any notion of

at 68. The study found that, of the twelve most populous counties in the state, the six counties that enforce Three Strikes most rigorously witnessed an average decline of 22.3% in overall crime, while the six most lenient counties enjoyed a similar 23.1% decline. *Id.* at 71 tbl.6.

¹⁶¹ See Marion, *supra* note 75, at 29, 32-33 (discussing gap between San Diego's claimed Three Strikes approach and its actual application of law). San Diego's written Three Strikes policy explains that prosecutors should not strike prior convictions in exchange for a suspect's cooperation with law enforcement, nor should they offer to strike prior convictions in exchange for guilty pleas except in isolated cases in which a conviction seems unlikely based on the evidence. Policy Guidelines, *supra* note 13, at 4. However, contrary to the County's explicit policy limiting plea bargains, Professor Marion found that half of all San Diego defendants facing third-strike charges ultimately pled guilty in exchange for lesser sentences. Marion, *supra* note 75, at 47 tbls.12 & 13.

¹⁶² Marion, *supra* note 75, at 32 ("[T]he law's attempt to remove all discretion from sentencing has created even more arbitrary and disparate sentencing patterns that often bear little relationship to the seriousness of the offender or the crime."). This observation is typical of past mandatory sentencing regimes. See Feeley & Kamin, *supra* note 55, at 141 (explaining that because adaptation is often uneven it creates "grossly inequitable sentences" for offenders who receive mandatory sentences); see also *supra* Part II.A (describing uneven adaptation of past mandatory minimums). Especially striking was the unequal application of mandatory death sentences for property crimes in England. See *supra* notes 57-59 and accompanying text.

For this reason, the exception-riddled San Diego model does not solve the problem of disproportionate punishment under Three Strikes. There will always be instances of felons who deserved, but were not afforded, an exception. See *infra* note 165 and accompanying text (discussing broad sentencing range in San Diego for equally culpable defendants under Three Strikes); see also Tonry, *supra* note 52, at 159 (explaining that mandatory sentencing laws are often arbitrary for less serious cases).

¹⁶³ See *supra* notes 69-70 (describing San Francisco District Attorney's decision to forgo Three Strikes for nonviolent felonies).

¹⁶⁴ Marion, *supra* note 75, at 30 ("[I]n numerous [cases] . . . it is difficult to discern distinguishing characteristics between those who received a 25-years-to-life sentence and those who were spared this punishment.").

mandatory or, for that matter, proportional punishment.¹⁶⁵ In this way, the San Diego model appears completely “unprincipled.”¹⁶⁶ Shrouded in incomplete, veiled, arbitrary, and unpredictable modification, the ad hoc application of Three Strikes in San Diego is workable, but highly undesirable.

The conjunction of the County’s strict rhetoric and uneven adaptation produces an inherently conflicted law that is not applied uniformly even in San Diego, and never could be applied uniformly throughout the state.¹⁶⁷ San Diego doles out twenty-five-years-to-life sentences to some minor felons, while others receive little jail time for their crimes. The law in San Diego, therefore, is neither justifiably merciful nor rigidly unjust. San Diego, instead, remains stuck in the confusion and unfairness characteristic of the early and middle stages of modification observed in studies of past mandatory minimum sentencing laws.¹⁶⁸ This confusion creates disparity between equally culpable defendants within the borders of San Diego, compounding the problem of geographical disparity across California counties.¹⁶⁹

¹⁶⁵ In her study of 185 San Diego defendants originally facing third-strike charges, Professor Marion compared equally culpable defendants who were convicted under Three Strikes with those who were able to avoid such punishment. *Id.* at 38-39. Among defendants with at least three violent offenses, sentences ranged from county jail to 207 years. *Id.* at 39. Only half of the defendants in this category received a mandatory Three Strikes sentence. *Id.* Defendants with two violent felonies received sentences ranging from county jail to twenty-five-years-to-life. *Id.* Less than one-sixth of these individuals received a mandatory Three Strikes sentence. *Id.* Similarly, defendants with one violent felony received a third-strike sentence in just fewer than one-sixth of the cases. *Id.* Remarkably, however, Professor Marion found use of long third-strike sentences at an inversely high proportion for the least culpable group of defendants. Defendants with no violent crimes at all received twenty-five-years-to-life in two-fifths of the cases. *Id.* They received third-strike sentences more often than any other group except recidivist criminals with at least three violent felony convictions. *Id.* Accordingly, the average sentence for defendants with no violent crimes was seventeen years, while criminals with one or two violent felony convictions received lesser-than-average sentences of 11.7 and 9.6 years, respectively. *Id.*

¹⁶⁶ Marion, *supra* note 75, at 38. The county’s erratic application of the law demonstrates that, whatever San Diego’s principle of proportionality may be, its prosecutorial approach is not expressing that principle coherently.

¹⁶⁷ Even if San Diego did provide merciful exceptions for all deserving defendants, the pro-Three Strikes rhetoric of the District Attorney’s Office renders Three Strikes a disingenuous and dishonest law, negatively impacting the coherence and integrity of the criminal justice system. It is justice by sleight of hand.

¹⁶⁸ See *supra* notes 55, 62-63 and accompanying text (describing historically observed early stages of adaptation).

¹⁶⁹ See *supra* note 165 and accompanying text (describing wide range of sentences for equally culpable defendants in San Diego). Application of this kind is hardly mandatory. Marion, *supra* note 75, at 30 (discussing inconsistency between sentencing structure supposedly devoid of discretion and disparate sentences that offenders actually receive); see also *supra* notes 52-53 (arguing that mandatory sentencing laws usually do not actually result in mandatory sentences).

In this sense, the San Diego model is completely devoid of integrity. It fails to endorse any single principle of proportionality and creates a sentencing law that is far from mandatory. Instead, it arbitrarily changes its standards case by case, creating in application a checkerboard statute with no fixed pattern, inlaid within the larger phenomenon of statewide geographic disparity.¹⁷⁰

The exercise of judicial discretion or jury nullification cannot adequately correct these discrepancies. Jury nullification should be the exception to the rule,¹⁷¹ and judicial discretion under the law is a highly circumscribed practice.¹⁷² Instead of rectifying the problem,

¹⁷⁰ By adapting Three Strikes behind a veil of explicit support, the San Diego model is a compromised statute that violates the principle of integrity. See Dworkin, *supra* note 88, at 179 (arguing that if there is to be compromise concerning divisions of principle, the compromise, at minimum, "must be external, not internal").

¹⁷¹ Jury nullification has been on the rise under Three Strikes. See *supra* note 69. While nullification may function as a corrective measure in an individual case, invoked on a broad scale it opens the door to anarchy. See *United States v. Dougherty*, 473 F.2d 1113, 1136-37 (D.C. Cir. 1972) (holding that to avoid anarchy in rule of law, nullification must necessarily be no more than "occasional medicine"). But see generally Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *Yale L.J.* 677, 679 (1995) (arguing that jury nullification is best means to combat racist application of drug laws); Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 *UCLA L. Rev.* 143, 147 (1996) (same).

¹⁷² The original Three Strikes law strictly forbade any exercise of judicial discretion. Cal. Penal Code § 667 (West 1999). The California Supreme Court, however, subsequently afforded judges the power to strike convictions in the interest of justice. *People v. Superior Court (Romero)*, 917 P.2d 628, 632 (1996). However, this discretion is "limited." *Id.* at 648; see also Cordell, *Scheinberg Lecture*, *supra* note 41 (describing "very limited judicial power to exercise discretion"); Marion, *supra* note 75, at 31-32 (arguing that reversals of trial court rulings to strike prior convictions since *Romero* illustrates that judicial discretion remains limited). Court records confirm that judges strike references to prior convictions only rarely. Chiang, *supra* note 1. After all, since many judges are elected in the same manner as district attorneys, they too may succumb to political influences. *Id.* (arguing that *Romero* will not have pronounced effect in communities like San Diego because many of its judges were former prosecutors, are subject to reelection, and are not likely to paint themselves soft on crime). Moreover, should a judge show leniency by striking a prior conviction, the prosecutor may appeal that decision. See *People v. Williams*, 948 P.2d 429, 439 (1998) (overruling lower court and holding its exercise of discretion to be "outside the bounds of reason"); Feeley & Kamin, *supra* note 55, at 150 (explaining that prosecutors often appeal judicial decisions to strike prior convictions); Alan Abrahamson, *Prosecutors Told to Object to '3 Strikes' Leniency*, *L.A. Times*, June 25, 1996, at B3 (describing instruction of L.A. District Attorney to object on record to effort of judges to strike prior convictions).

A broad climate of societal distrust for indeterminate sentencing and judicial discretion contributed to the creation of Three Strikes. *Supra* notes 105-06 and accompanying text. *Romero* does not alter that fact. Judges know they are being watched and feel pressure to follow the prosecutors' lead. Judge LaDoris H. Cordell stated: "The attitude in California is that you judges don't know what you're doing. . . . The legislators are not willing to give us carte blanche discretion in sentencing. They keep records on us judges, and those records can reflect badly upon the judge at reelection time." Cordell, *Scheinberg Lecture*, *supra* note 41.

sporadic instances of judge- and jury-made adaptation inevitably reinforce inconsistent application of Three Strikes,¹⁷³ and further undermine integrity in the rule of law.¹⁷⁴

C. *Recommendation for a Uniform Three Strikes Law*

California's prosecutors have usurped legislative power by applying Three Strikes according to their communities' individual principles of proportionality.¹⁷⁵ Therefore, a Three Strikes supporter might fault California's prosecutors for geographic disparity by arguing that the legislature already chose one principle in 1994—Three Strikes. Now prosecutors in communities like San Francisco and Alameda impermissibly and unilaterally are vetoing that choice. However, such a claim ignores the fact that all California communities are vetoing the law in varying degrees.¹⁷⁶ Even San Diego is trying to recover lost proportionality in its own confused way.¹⁷⁷ More importantly, prosecutors are not responsible because different principled prosecutorial approaches are not the problem; rather, they are symptoms of the unacceptable principle of proportionality originally prescribed by the legislature in Three Strikes.¹⁷⁸ The legislature made a choice, but that choice, by itself, is not enough. Integrity, when coupled with the values of fairness and justice, demands not only that the legislature settle

¹⁷³ Crispo et al., *supra* note 69, at 3 (arguing that inconsistent nullification leads to haphazard and arbitrary results and allows bad laws to remain in force); see also *supra* note 162 and accompanying text (explaining that exceptions to mandatory sentencing laws are not guaranteed for all deserving nonviolent felons, creating arbitrary and broad sentencing disparities).

¹⁷⁴ Nullification in the isolated case may be an effective tool for counteracting the unjust results of a generally just law. Marder, *supra* note 69, at 887-88. Rampant nullification, on the other hand, is symptomatic of problems with the law itself. Cf. *infra* text accompanying note 178 (arguing that prosecutorial adaptation of Three Strikes is symptom of law's failure to take communal principles into account). When law fails to embody societal principles, nullification functions primarily as an indicator to the legislature that change is necessary. Without legislative action, widespread nullification merely will engender the same integrity problems of improper appropriation of legislative function. See Crispo et al., *supra* note 69, at 3 ("If it is true that '[t]he public conscience must be satisfied that fairness dominates the administration of justice,' then it follows that laws must be given consistent application." (quoting *Adams v. United States*, 317 U.S. 269, 279 (2d Cir. 1942))); see also *Dougherty*, 473 F.2d at 1136 (holding that advising juries of power to nullify would transform jury into "mini legislature" and would lead to undemocratic, anarchic, and arbitrary results).

¹⁷⁵ See *supra* notes 121-23 and accompanying text (arguing that different California prosecutors are applying different principles of proportionality).

¹⁷⁶ See *supra* notes 134-36 and accompanying text.

¹⁷⁷ See *supra* Part IV.B.

¹⁷⁸ See *supra* notes 128, 132, 144 and accompanying text (explaining that lack of integrity created by geographic disparity is actually product of initial failure to realize values of fairness and justice during formation of Three Strikes).

on a principle, but that it settle on the right principle.¹⁷⁹ The political pressures and hasty deliberation leading up to Three Strikes's passage hindered the ability of the legislature and the citizenry to choose a proper principle in 1994.¹⁸⁰ As a consequence, Three Strikes as written fails to reflect the communal notions of proportionality of even the most punitive California counties.¹⁸¹

In 1994, the legislature did not need to determine exactly the principles of proportionality championed by each California county; it would have been enough to recognize that these principles did not endorse a law that sentences petty thieves to twenty-five-years-to-life in prison.¹⁸² Likewise, the legislature did not need to determine ideal Three Strikes policy; it would have been enough to recognize that it was an expensive law that fails to deter and cannot be applied evenly within or across counties.¹⁸³ At a minimum, to preserve integrity and uniformity, the legislature must codify a principle of proportionality that is acceptable to, and can be applied by, the entire state.¹⁸⁴

To design an honest mandatory sentencing law that can be administered evenly throughout the state, Three Strikes must be rewritten to achieve integrity in text, rhetoric, and practice. That is the San Francisco model. It is important to recognize, however, that codification of that model does not conflict with the principles of proportionality of other California communities. Despite differences, San Francisco, San Diego, and the rest of California for that matter, do share two commonalities: They use the law against truly violent felons, and they provide at least occasional exceptions to the law for minor felons.¹⁸⁵

¹⁷⁹ See Dworkin, *supra* note 113, at 31-32; *supra* notes 126-30 and accompanying text (explaining that integrity, combined with value of justice, demands that legislature properly codify communal principles in law).

¹⁸⁰ See *supra* notes 131-34 and accompanying text.

¹⁸¹ See *supra* notes 134-36 and accompanying text (explaining indications that all counties modify sentences in effort to recapture lost proportionality).

¹⁸² *Supra* notes 43-51, 131-34 and accompanying text (discussing intent of Californians compared with actual scope of Three Strikes law). Dworkin maintains that for all decisions of principle there is one right answer that properly balances societal principles. Dworkin, *supra* note 113, at 31-32. Dworkin fails to demonstrate satisfactorily how the weighing is done. However, by any conceivable measuring of divergent principles the answer cannot be the conflicted San Diego model, which fails to endorse one clear set of principles, nor can it be the Three Strikes law as written, which completely fails to reflect societal principles of proportionality toward petty criminals.

¹⁸³ See *supra* notes 151-59 and accompanying text (discussing Three Strikes's tremendous price tag); see also *supra* note 160 (discussing indications that Three Strikes does not deter crime); *supra* Part II.B (describing disparity across counties); *supra* Part IV.B (describing uneven adaptation within San Diego County).

¹⁸⁴ See *supra* Part III (explaining that integrity requires that Three Strikes be applied uniformly across state according to one principle of proportionality).

¹⁸⁵ Perry & Dolan, *supra* note 9 (quoting Hallinan's claim that county still uses law for "vicious" people); *supra* notes 70, 72 and accompanying text (describing approach of San

San Diego may be more ambivalent about applying the law to lesser offenders, but its intermittent adaptation suggests that even its principle of proportionality is opposed to a mandatory law for this class of defendants.¹⁸⁶ Therefore, codification of the San Francisco model is not a matter of choosing San Francisco's principles above San Diego's. It is a matter of choosing the only law that can be applied mandatorily to any qualifying offender in any California county.¹⁸⁷ The San Francisco model is the only version of the law that imprisons only the violent, recidivist felons that California meant for Three Strikes to address.¹⁸⁸

The California legislature must, therefore, incorporate into the text of the law the changes already adopted by San Francisco.¹⁸⁹ This means that all strikes must be violent—including the fateful third strike—and the enumerated list of violent offenses must be limited to

Francisco and Alameda). The fact that California counties apparently apply the law uniformly to truly violent felons reinforces the claim that they are the specific group that Californians wanted the law to address. See *supra* note 44 and accompanying text.

¹⁸⁶ See *supra* notes 136-39 and accompanying text. San Diego may want the discretion to apply the law to minor criminals, but its uneven adaptation clearly indicates that it does not want Three Strikes's punishments mandated for this group. The state can only ensure mandatory punishment by focusing the law on the worst class of offenders. Newly elected Los Angeles District Attorney Steven L. Cooley recently invoked this argument to defend his decision to limit the scope of Three Strikes, explaining that such a shift would help guarantee predictable and consistent enforcement while still incarcerating the "recidivist predator criminals" the law was meant to address. Berbeo, *supra* note 72.

¹⁸⁷ Arguments of principle, in contrast to those of policy, protect individual rights. Dworkin, *supra* note 113, at 2-3. As such, even if one deemed San Diego's principle of proportionality to be undermined by codification of a more rights-protective San Francisco model, strong arguments still could be crafted that adopting a principle that provides for overprotection of a felon's right to proportional punishment is of lesser concern than a principle that underprotects. See *Harris v. Reed*, 489 U.S. 255, 267 (1989) (Stevens, J., concurring) (explaining that expenditure of scarce judicial resources and interference into state affairs is less justified when state courts overprotect federal rights); *Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting) (arguing that overprotection cases "should not be of inherent concern to this Court"). Overprotection merely ensures that the rights protected by communal principles are acknowledged.

¹⁸⁸ See *supra* note 70 (describing San Francisco model); *supra* notes 43-51, 131-34 and accompanying text (discussing intent of Californians compared with actual scope of Three Strikes law). The San Francisco approach appropriately deters the class of criminals the law was intended to incapacitate. Indeed, the Males & Macallair study found that between 1994 and 1997 San Francisco witnessed a greater drop in violent crime than any of the state's twelve most populous counties. Males & Macallair, *supra* note 72, at 71 tbl.6. Of these twelve counties, the six that applied the law most leniently witnessed a 25.1% decline in violent crime, while the six that applied the law most strictly only witnessed an 18.4% decline. *Id.*

¹⁸⁹ Presently, efforts are underway to raise the necessary signatures to put just such a modified Three Strikes initiative on the ballot. See Attorney General Issues Initiative Summary, California Three Strikes Project, <http://www.3strikesproject.com> (last visited Feb. 28, 2001).

truly violent crimes like murder, rape, and armed robbery.¹⁹⁰ Such a dramatic change to the law may appear unlikely; political pressure and societal fear of crime weigh against legislative action. However, if California is honest with itself, it will recognize that such a change carries tremendous benefits and few costs.¹⁹¹ The class of criminals envisioned by the law still will fall within its mandatory grasp, geographic disparity will disappear, and integrity will be preserved.

CONCLUSION

The apparent ubiquity of adaptation in some form across the state demonstrates that California can only mandatorily apply those aspects of Three Strikes that conform with each of its counties' variant principles of proportionality. California counties presently are trying to fashion Three Strikes to fit their local norms of proportionality. However, adaptation is occurring at varying speeds across the state. While modification is complete and explicit in counties like San Francisco, it is uneven, unpredictable, and veiled in counties like San Diego. The result of this disparity is a lack of coherence in California's criminal law and a lack of integrity in its justice system.

The California legislature must reclaim decisions of principle from its district attorneys; it must give California's prosecutors a law they can apply or forgo on permissible policy bases alone. To achieve these goals, the legislature must codify the modified San Francisco approach. It is the only viable Three Strikes model that can be employed statewide in a mandatory, predictable, and uniform manner, preserving proportionality and protecting both California's citizens and its justice system.

¹⁹⁰ Therefore, the category of violent felonies should be narrowed for the purposes of Three Strikes and the category of serious felonies should be removed altogether. See *supra* note 34 (describing overly broad categories of violent and serious crimes under present Three Strikes law). An acceptable list of violent felonies might read as follows: murder or voluntary manslaughter; attempted murder; mayhem; rape; sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; any first-degree robbery; arson of an occupied home or building; kidnapping; assault in the first degree; and carjacking with a weapon.

¹⁹¹ One of the only conceivable arguments for a stricter Three Strikes law might be its possible deterrence value, but data indicate that applying Three Strikes to minor felons does not deter crime. *Supra* note 160 (discussing indications of Three Strikes's lack of deterrence). In fact, between 1994 and 1998, San Francisco witnessed a larger drop in the rate of crime than San Diego. Males & Macallair, *supra* note 72, at 69.