

THREE STRIKES LAW

MATERIALS

- 1) Enough lesson handouts for each student (at end of lesson and available in the PICC).
- 2) Re-useable white board, markers, eraser (provided in the PICC).
 - This is probably going to be useful during this lesson, so if your room doesn't already have one, you're encouraged to bring one.
- 3) Paper for note-taking during the debate (provided in the PICC)

TAKEAWAYS

- Students will understand: what the Three Strikes Law is, why it was passed, how it works, and how serious the consequences of multiple convictions can be. (Purpose 1, 3)
- Students will form an opinion about whether the Three Strikes Law achieves the right balance between public safety and individual rights. (Purpose 4)
- Students will understand that citizens can form productive opinions about the law, and then work to change the laws or to enact new laws. (Purpose 4)
- Students will be aware that juvenile offenses can count as strikes (Purpose 5)

Note to teachers: Please make sure to read through and be familiar with the material in the appendix as questions are likely to come up about some topics addressed there.

WELCOME

(Time Check: 2 minutes)

Remind the class that we are law students and can't discuss their cases.

→ *Teaching Tip* – People tend to have stronger opinions and be more emotionally involved with topics like these than they are with, say, the right to remain silent. So remind the students that we encourage open sharing of opinions (stories must still be in hypotheticals), but we need to be respectful of each other and each other's ideas. Tell them that everyone in the room has a different background, students and StreetLaw teachers, and that we can all become better informed by listening to each other.

INTRODUCTION

(Time Check: 3 minutes)

Do a quick “yes or no” whip around the room, asking:

→ Should people who have committed crimes before be punished more severely if they commit another crime?

Then ask “Why? Or why not?” and get a few answers from volunteers.

BASIC OVERVIEW: WHAT IS THE THREE STRIKES LAW?ⁱ

(Time Check: 10 minutes)

Explain the following information.

→ *Teaching Tip* – Take a bit of time with this, since it can be confusing. Use the board in the classroom, or a whiteboard you’ve brought with you. In fact, you might want to consider preparing a whiteboard in advance with this information on it. Alternatively, you could use the lesson handout during this lesson, instead of handing it out at the end.

THREE STRIKES LAW:

- First Strike

- (1) Offense: Must be serious or violent.ⁱⁱ
- (2) Sentence: Normal.

- Second Strike

- (1) Offense: Must be serious or violent.
- (2) Sentence: Double the normal sentence for the crime.ⁱⁱⁱ Must serve at least 80%.

**** NOTE:** For ANY felony offense committed the sentence is doubled, even if it does not count for the second strike.

- Third Strike

- (1) Offense: Any felony – need NOT be serious or violent.^{iv}
- (2) Sentence: 25 years to life.^v Must serve at least 25 years; parole is possible after 25 years.

[Note to teachers: No need to mention this to the kids most likely, but the length of sentence on a third strike actually depends whether 25 years is less than three times the normal sentence for the new felony or less than the sentence would be with other enhancements under California law. *See* Cal. Penal Code § 667(e)(2)(A)(i-iii). That said, it usually just ends up being 25 years to life.]

- Juvenile Strikes

Juveniles can accrue strikes in two ways:

- (a) by committing, after age 16, a serious or violent felony (as defined for adults); or
- (b) by committing, after age 16, a 707(b) offense.^{vi}

[Note to teachers: There is significant overlap between these two categories, but they aren’t exactly the same (though Prop 21, passed in 2000, got rid of some of the variation).]

Ask the class if anyone knows some examples of 707(b) offenses.

Murder, arson, robbery, rape, kidnapping, assault with a firearm, discharge of a firearm into an inhabited building, and attempted murder.^{vii}

Teaching Tip – A short-hand way to remember the types of offenses that count as strikes (for juveniles and adults) is BARRKK (Burglary, Arson, Rape, Robbery, Kidnapping, Killing). ***But remember that those are just the most serious offenses in the “strike-zone,” and it’s actually far bigger than that – which is one major criticism of the law.***

Teaching Tip – Write “BARRKK” on the board.

One final point: There are a few ways by which a potential strike might not count as one:

- For the current offense, the prosecutor may choose to charge a lesser rather than a more serious offense – this will often be a part of a plea bargain.
- For prior offenses, the prosecutor may choose not to charge a prior offense as a strike.^{viii}
- The defendant’s attorney may ask the judge not to consider a prior strike in sentencing the defendant. This is called a *Romero* motion.^{ix}
 - NOTE: If granted, the motion only counts for that sentence. In a future case the defendant would still have 2 strikes and would have to make another *Romero* motion.^x)
 - NOTE: Prosecutors and judges seldom agree to disregard strikes.

Tell the students that you realize all this is complicated. So to help get the basics, we’re going to run through a quick scenario.

Q: Ok, imagine that two years ago, I was convicted of robbery. Can that be a strike?

A: Yes, because it’s a serious/violent felony.

Q: Then, imagine that a year later, I am out on probation and am convicted of another robbery. Does this offense count as a strike?

A: Yes, because again it’s a serious/violent felony.

Q: If an ordinary sentence for robbery is 5 years, what will **MY** sentence be?

A: 10 years, because of my prior strike.

Q: How much of that time will I have to serve?

A: At least 80%, or 8 years.

Q: Imagine that after I get out on parole after 8 years, I shoplift \$200 worth of shoes and clothes. Will this offense count as my third strike?

A: Yes it could, **even though the crime is not serious or violent**. Why? Because it’s my third felony, if the prosecutor chooses to charge it as a felony. Though \$200 makes this petty theft^{xi} (not a felony on its own), the prosecutor could charge it as “felony petty theft” (aka “petty theft with a prior”) because of my previous robbery convictions.^{xii}

Q: How long will I be sentenced for the shoplifting if it counts as my third strike?

A: 25 years to life, because this is my third strike.

Q: How much of that time will I have to serve?

A: At least 25 years.

ACTIVITY 1: THREE STRIKES DEBATE

(Time Check: 20 minutes)

Summary for Teachers: This activity starts with the telling of two stories: one that tends to trigger support for a three strikes law, and one that tends to trigger the opposite sympathies. Students will then break into two “lobbying” groups (one for the law and one against), come up with arguments, and try to convince the “voters” (teachers) to vote their way.

Introduction for Students: Tell the students they’re now going to hear the stories of two people’s run-ins with the law. Tell them to pay attention, because they’re going to have a chance to react after both stories have been told.

Two Stories:

- Tell the following two stories about Polly Klaas and Gary Ewing.
 - *Teaching Tip* – Have one teacher read the Klaas story and another teacher read the Ewing story. Afterward, when you split the class into two groups, make sure those teachers go to the groups “outraged” by their respective stories.
- Polly Klaas: In October 1993, twelve-year-old girl Polly Klaas was kidnapped from her bedroom in Petaluma, California. Her body was found several weeks later, after a nationwide search. Police arrested a man named Richard Allen Davis, who later confessed to kidnapping and murdering Polly. Davis previously had been convicted of multiple kidnapping, assault, and burglary charges, and was paroled from prison shortly before Polly’s abduction after serving only half of his most recent sentence. People across the nation had followed the Klaas case and were outraged to learn that Davis had been let out of prison. The outraged public soon passed Proposition 184, which became the Three Strikes Law in 1994. A proposition is a proposed law that is placed on the ballot, and the public (instead of the legislature) gets to vote to determine whether it becomes law. Under the Three Strikes Law, criminals who commit multiple crimes can be punished more severely, as we’ve talked about already.^{xiii}
- Gary Ewing: In 2003, ten years after Polly’s death, the United States Supreme Court decided the case of Gary Ewing. Ewing, a small-time criminal with multiple burglary and theft convictions, including threatening of one his victims with a knife, was on parole in 1999, when he walked into a pro shop in Los Angeles, stuffed three golf clubs down his pant leg and limped out of the store. A store employee thought Ewing looked suspicious and called the police, who arrested Ewing in the parking lot. He was charged with felony grand theft; the charge was what is known as a “wobbler” in California because it can be sentenced as either a felony or misdemeanor. Despite Ewing’s pleas, the judge treated the charge as a felony and, because of Ewing’s previous convictions, under the newly enacted Three Strikes Law, sentenced Ewing to 25-years to life. Ewing took his case all the way to the Supreme Court, arguing that the law violated the United States Constitution’s Eighth Amendment guarantee against “cruel and unusual punishment.” By a vote of 5-4, the Court held the law was not unconstitutional: 3 justices thought Ewing’s sentence wasn’t grossly disproportionate to what he did; 2 justices thought no sentence to a term of years in prison could ever be grossly disproportionate to a crime.

Tell the students:

- We're now going to pretend that we are back in 1993, before the Three Strikes Law was passed. We're going to divide the class into two groups. One group wants the law to be passed because they're outraged by the Polly Klaas story. The other group does not want the law to be passed, because they're concerned about what they think are potentially excessive punishments, like what happened to Gary Ewing. We teachers will play undecided citizens. Your job is to convince us to cast our votes for or against the law.
- Each citizens' group should think of stories, like those of Polly Klaas and Gary Ewing, that might support their side of the debate. They should also brainstorm a list of reasons to vote for or against the law.
- *Teaching Tip* – Either a student or teacher should take notes for each group and each group should elect a student speaker to present the group's ideas to the class.
- *Teaching Tip* – Explain that one way to make effective arguments is to try to anticipate what arguments the other side will make, and then counter those arguments.

Split the students into 2 groups, with one teacher per group:

- Citizens to Defeat Three Strikes.
- Citizens in Support of Three Strikes.

Give the students 5-10 minutes to work in groups, with a teacher in the group to help motivate discussion.

→ NOTE: This is a difficult activity, so teachers should give students a lot of encouragement and help.

Here are some examples of arguments that students can make *against the law*:

- Overly excessive punishments for relatively minor crimes.
- Leads to inconsistency in how the same crimes are punished.
- Gives prosecutors too much discretion or power.
- Leads to judging the person more than judging the crime.
- Really expensive to keep people in prison for such long periods of time.
- Prisons are already overcrowded, and this would make it worse.

Here are some examples of arguments that students can make *for the law*:

- Repeat offenders are more dangerous than first-time offenders.
- Studies show that a small percentage of criminals commit a large majority of crimes.
- Criminals will think twice before committing future crimes (deterrence theory).
- Repeat offenders deserve more punishment than first-time offenders.
- Communities will be safer if dangerous people are kept off the street for longer periods of time.

Have each group present their arguments to the undecided voters (teachers), and let the “voters” ask them questions. Then have the voters/teachers announce what arguments on each side they found most convincing.

→ *Teaching Tip* – Teachers/voters can tell the students which way they'd vote, but make sure to validate the arguments/work of all the students.

ACTIVITY 2: THINKING ABOUT CHANGES TO THE THREE STRIKES LAW (Time Check: 15 minutes)

Summary for Teachers: This activity is a set of small-group discussions about particular aspects of the Three Strikes Law. It allows the students to think more deeply about the law, and introduces the concept of working toward reform.^{xiv}

Introduction for Students: We're now going to talk more in-depth about four particular aspects of the California Three Strikes Law, and consider whether we think these parts of the law should be changed.

Tell the students the four issues we'll be discussing:

→ *Teaching Tip* – If you have a small class, or if they've seemed particularly interested in one aspect of the law or another, feel free to modify this activity in form (maybe large-group discussion) or substance (maybe just focus on 1 or 2 of the issues below).

- (1) The third strike can be for any felony, not just serious or violent felonies.

Teaching Tip – Write this fact down on the board and under line “any felony.”

Fact: Nearly 59% of second strikes and 46% of third strikes are for non-violent/non-serious felonies.^{xv}

Note: This is one of the changes that Proposition 66 tried to make. This is probably the biggest criticism of the Three Strikes Law – that the third strike doesn't have to be violent or serious.^{xvi}

- (2) Crimes committed before 1994 (before the law was passed) can be counted as first and second strikes.^{xvii}

Example: I committed car-jacking in 1992 and arson in 1995. The prosecutor could charge the car-jacking as a strike, even though there was no such thing as a strike in 1992 because the Three Strikes Law wasn't yet passed. This is what happened to Gary Ewing.

- My lawyer should be allowed to argue why they should not be counted as strikes. Reminder: This is a *Romero* motion, and won't often be granted.

- (3) The law can count multiple counts during a single act as multiple strikes.^{xviii}

Teaching Tip – Write this fact down on the board.

Example: If George is convicted of robbing a store with a gun and assaulting the owner on his way out, he could get two strikes.

- (4) Juvenile offenses can count as strikes.

Teaching Tip – Write this fact down on the board

Example: If I am adjudicated delinquent of a 707(b) offense as a juvenile after age 16, that can count as a strike if I later commit a felony as an adult.

Divide the students into two to four groups. Each should be assigned to two to four points described above. Each group should come up with a few arguments why the provision described should be changed, and arguments why it should not be changed.

- Things to consider:
 - the interests of criminal defendants
 - the needs of other members of society to be safe
 - general notions of fairness

After a few minutes, bring the class back together. One person from each group should summarize the discussion about each issue.

→ *Teaching Tip* – If you feel it would be effective with your class, you can try a “scrambler” instead. To do this, within the small groups, have the students number off 1 through 4. Then have all students numbered 1 join together as a new group, all the 2s form a second group, etc. They can then each describe the issue they worked on to the other students in their new group.

Explain to the students that they may think this exercise is far removed from what happens in the real world, but in reality, citizens often organize to look at different aspects of the laws and discuss how they might be changed. **California voters will decide this November whether to reform the harshest aspects of the Three Strikes Law.** Proposition 36 would bar nonserious and nonviolent current crimes from triggering a life sentence. Under the ballot measure, defendants previously convicted of an “extremely violent” crime, such as murder or rape, would still face a 3rd strike life sentence no matter how minor their current offenses. Explain to students that this statewide reform effort grew organically from the work of SLS students who were representing clients through the Stanford Three Strikes Project, and is but one example of how citizens can work together to change the law.

Tell the students that they did a great job of thinking about the arguments on both sides of the debate and that, whatever they think about the law, they now have much more information about how the law works. This information can help them to make better decisions about their own conduct, and to think about how they can become more involved in the process of making and changing law.

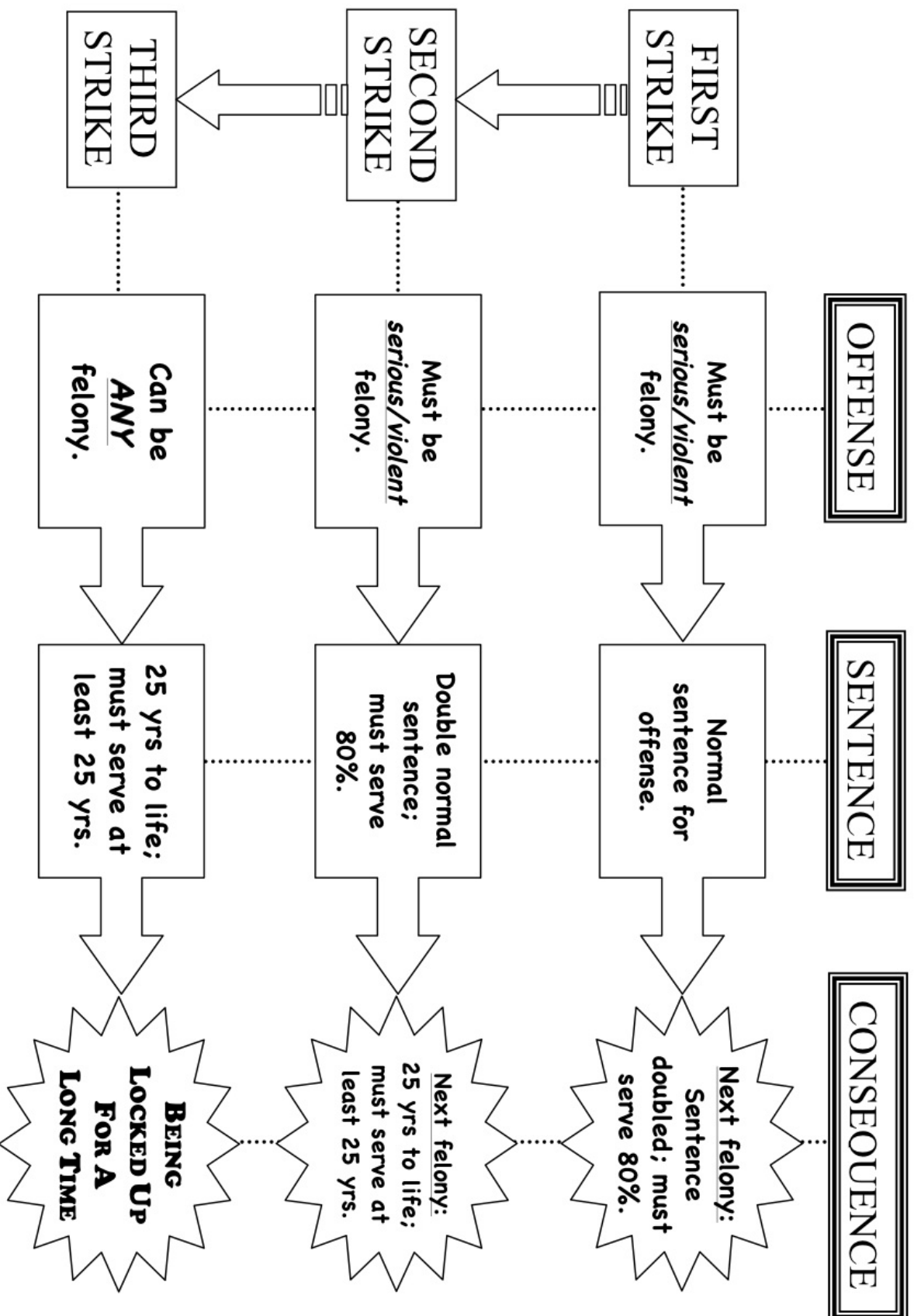
CONCLUSION (Time Check: 2 minutes)

Summarize the Activity: This week, we talked about the Three Strikes Law. You came up with great arguments and questions about the law, and through our activities we saw how citizens can form opinions about laws and organize to change the law.

If you have time, go around the room and ask students to name one thing they learned in the course of the lesson, for purposes of review.

Emphasize that knowledge of the Three Strikes Law is crucial, and that the severity of sentence that the court is authorized and expected to impose should lead juveniles and adults who have prior convictions to take a step back and think twice before getting involved in situations that could lead to a second or third strike.

THREE STRIKES LAW



ENDNOTES & ADDITIONAL INFORMATION

Please read this thoroughly! The Three Strikes Law is EXTREMELY complicated and if you don't at least review the background information below, you will not be able to answer any of the questions that students will inevitably have. That said, of course, if you don't know the answer to one of their questions, just tell them you don't know, write it down, and bring them the answer next time.

ⁱ **Q:** What is the Three Strikes Law?

A: The law is codified in two places, because it was passed both by the legislature (Cal. Penal § 667(b)-(i)) and by initiative (Cal. Penal § 1170.12)). The two sections of the code are almost identical in wording and are functionally the same.

Here's a very helpful overview of the Three Strikes law from the San Diego Public Defenders Office: (www.co.san-diego.ca.us/public_defender/strikes.html)

- **How does the 3-Strikes law work?** California's 3-Strikes and You're Out Law went into effect on March 7, 1994 (*see Romero* at 504-505 for a detailed legislative history of Three Strikes complex passage into law.). Its purpose is to dramatically increase punishment for persons convicted of a felony who have previously been convicted of one or more "serious" or "violent" felonies. A "serious" or "violent" felony prior is commonly known as a "strike" prior.
- **What is a felony?** A felony is a crime punishable by a state prison (as opposed to county jail) sentence. Felonies run the range from petty theft with a prior and possession of small quantities of drugs through kidnapping, rape, robbery, and murder. Any new felony, regardless of how minor, may be punished under the 3-Strikes law if the defendant has one or more "serious" or "violent" felony priors.
- **What are "serious" or "violent" felonies (strike priors)?** are defined in Penal Code sections 667.5(c) and 1192.7(c). They include: residential burglary, robbery, kidnapping, murder, most sex offenses like rape and child molestation, any offense in which a weapon was personally used whether or not anyone was injured, any offense in which great bodily injury was inflicted, arson, crimes involving explosive devices, or attempts to commit any of those offenses.
- **What happens with one "strike" prior?** A defendant who is convicted of any new felony who has one "strike" prior (known as a second striker) must go to prison (i.e., cannot be sent to a rehab facility or placed on probation) for twice the sentence otherwise prescribed for the new offense. Additionally, he must serve 80% of the sentence imposed whereas non-strike prisoners generally get between one third and one half off of the sentence imposed for good behavior and working while in prison.
- **What happens with two or more "strike" priors?** A defendant with two or more "strike" priors (a third striker) faces a minimum of 25-years-to-life in prison. He earns no time off for good behavior or working. After serving the determinate minimum amount of time (25-years on a 25-to-life sentence) he is then eligible for, but not guaranteed, parole. Whether and when an eligible life prisoner (prisoners serving life-without-parole

sentences for murder are never eligible for parole) is paroled is up to the Board of Prison Terms (BPT). The BPT is made up of members appointed by the Governor and tend to be very conservative about paroling eligible life inmates. Since no 3-Strike life prisoner has become eligible for parole and none will until 2019, no one knows how the BPT will deal with 3-Strike inmates.

- **Is 3-Strikes punishment mandatory in all cases?** In certain circumstance where the sentencing court finds that a second or third strike defendant falls outside the "spirit" of the 3-Strikes Law, the court may, either on motion of the prosecutor or on the court's own motion, strike or dismiss one or more "strike" priors. This is done pursuant to the power vested in the courts since 1860 to dismiss all or part of an action for good cause and in furtherance of justice. The court must state on the record and include in the court minutes the facts that the court finds justify dismissing the prior. A decision to strike or dismiss a "strike" prior is appealable by the prosecution and reviewable by the Court of Appeal and the Supreme Court. The San Diego Public Defender's Office is proud to have been the law firm that established this rule of law in the California Supreme Court in the first 3-Strikes case to be decided by the Supreme Court. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.)
- **Do judges dismiss "strike" priors often?** Generally, sentencing judges will strike or dismiss a prior only when it is old and the new offense is minor and the defendant has a non-violent history. It is extremely rare if not unheard of for a court to strike or dismiss a prior when the new offense is also serious or violent. Even though the court can strike priors, California's prisons still receive more drug offenders sentenced as second or third strikers than any other class of crime.
- **What can be done to make the 3-Strikes law more fair?** Of course, not everyone thinks the 3-Strikes law is unfair. More than 60% of the voters who voted, voted for 3-Strikes. However, a lot of people who voted for 3-Strikes were not aware of what it really means and does. This is not surprising since it is very poorly drafted, very long, and very technical. The campaign literature in support of 3-Strikes talked about putting repeat rapists, robbers, and murderers away for a long time. It didn't talk about putting petty thieves and drug users away for 25-years-to-life. As a result of the realization by some that 3-Strikes is much harsher than they originally thought and that it costs a whole lot of money (\$20+ thousand/year) to keep people in prison, certain members of the California Legislature are starting to rethink 3-Strikes to a certain extent. There have been proposals to limit its application to cases where the new offense is a "serious" or "violent" crime. No legislation has yet passed modifying 3-Strikes. It will be very difficult to modify it also, since it take a 2/3 vote of the Legislature to change 3-Strikes or another initiative measure passed by the voters. If you are interested in what is pending in the California Legislature on this or any other issue, you will find the state senate and state assembly web sites very interesting, informative, and useful.

ⁱⁱ Cal. Penal Code § 667(d)(1).

Violent crimes—as defined in 667.5(c):

- (1) Murder or voluntary manslaughter.
- (2) Mayhem.

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- (3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.
 - (4) Sodomy as defined in subdivision (c) or (d) of Section 286.
 - (5) Oral copulation as defined in subdivision (c) or (d) of Section 288a.
 - (6) Lewd or lascivious act as defined in subdivision (a) or (b) of Section 288.
 - (7) Any felony punishable by death or imprisonment in the state prison for life.
 - (8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7, 12022.8, or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55.
 - (9) Any robbery.
 - (10) Arson, in violation of subdivision (a) or (b) of Section 451.
 - (11) Sexual penetration as defined in subdivision (a) or (j) of Section 289.
 - (12) Attempted murder.
 - (13) A violation of Section 12308, 12309, or 12310.
 - (14) Kidnapping.
 - (15) Assault with the intent to commit a specified felony, in violation of Section 220.
 - (16) Continuous sexual abuse of a child, in violation of Section 288.5.
 - (17) Carjacking, as defined in subdivision (a) of Section 215.
 - (18) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.
 - (19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code.
 - (20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code.
 - (21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.
 - (22) Any violation of Section 12022.53.
 - (23) A violation of subdivision (b) or (c) of Section 11418. The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person.

Serious crimes as defined in 1192.7:

- (1) Murder or voluntary manslaughter
- (2) mayhem
- (3) rape
- (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person
- (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person
- (6) lewd or lascivious act on a child under 14 years of age
- (7) any felony punishable by death or imprisonment in the state prison for life

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- (8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm
 - (9) attempted murder
 - (10) assault with intent to commit rape or robbery
 - (11) assault with a deadly weapon or instrument on a peace officer
 - (12) assault by a life prisoner on a non-inmate
 - (13) assault with a deadly weapon by an inmate
 - (14) arson
 - (15) exploding a destructive device or any explosive with intent to injure
 - (16) exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem
 - (17) exploding a destructive device or any explosive with intent to murder
 - (18) any burglary of the first degree
 - (19) robbery or bank robbery
 - (20) kidnapping
 - (21) holding of a hostage by a person confined in a state prison
 - (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life
 - (23) any felony in which the defendant personally used a dangerous or deadly weapon
 - (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug, as described in paragraph (2) of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines, as described in subparagraph (A) of paragraph (1) of subdivision (f) of Section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code
 - (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person
 - (26) grand theft involving a firearm
 - (27) carjacking
 - (28) any felony offense, which would also constitute a felony violation of Section 186.22
 - (29) assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220
 - (30) throwing acid or flammable substances, in violation of Section 244
 - (31) assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245
 - (32) assault with a deadly weapon against a public transit employee, custodial officer, or school employee, in violation of Sections 245.2, 245.3, or 245.5
 - (33) discharge of a firearm at an inhabited dwelling, vehicle, or aircraft, in violation of Section 246
 - (34) commission of rape or sexual penetration in concert with another person, in violation of Section 264.1
 - (35) continuous sexual abuse of a child, in violation of Section 288.5
 - (36) shooting from a vehicle, in violation of subdivision (c) or (d) of Section 12034

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- (37) intimidation of victims or witnesses, in violation of Section 136.1
 - (38) criminal threats, in violation of Section 422
 - (39) any attempt to commit a crime listed in this subdivision other than an assault
 - (40) any violation of Section 12022.53
 - (41) a violation of subdivision (b) or (c) of Section 11418
 - (42) any conspiracy to commit an offense described in this subdivision.

iii Cal. Penal Code § 667(e)(1).

iv Cal. Penal Code § 667 (e)(2)(A)

v Cal. Penal Code § 667 (e)(2)(A)(ii)

vi *See* Cal. Penal Code 667 § (d)(3)(B) ("The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code **or** described in paragraph (1) or (2) as a felony.")

vii **707(b) offenses:**

- (1) Murder.
- (2) Arson, as provided in subdivision (a) or (b) of Section 451 of the Penal Code.
- (3) Robbery.
- (4) Rape with force or violence or threat of great bodily harm.
- (5) Sodomy by force, violence, duress, menace, or threat of great bodily harm.
- (6) Lewd or lascivious act as provided in subdivision (b) of Section 288 of the Penal Code.
- (7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm.
- (8) Any offense specified in subdivision (a) of Section 289 of the Penal Code.
- (9) Kidnapping for ransom.
- (10) Kidnapping for purpose of robbery.
- (11) Kidnapping with bodily harm.
- (12) Attempted murder.
- (13) Assault with a firearm or destructive device.
- (14) Assault by any means of force likely to produce great bodily injury.
- (15) Discharge of a firearm into an inhabited or occupied building.
- (16) Any offense described in Section 1203.09 of the Penal Code.
- (17) Any offense described in Section 12022.5 or 12022.53 of the Penal Code.
- (18) Any felony offense in which the minor personally used a weapon listed in subdivision (a) of Section 12020 of the Penal Code.
- (19) Any felony offense described in Section 136.1 or 137 of the Penal Code.
- (20) Manufacturing, compounding, or selling one-half ounce or more of any salt or solution of a controlled substance specified in subdivision (e) of Section 11055 of the Health and Safety Code.
- (21) Any violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code, which would also constitute a felony violation of subdivision (b) of Section 186.22 of the Penal Code.
- (22) Escape, by the use of force or violence, from any county juvenile hall, home, ranch, camp, or forestry camp in violation of subdivision (b) of Section 871 where great bodily injury is intentionally inflicted upon an employee of the juvenile facility during

the commission of the escape.

- (23) Torture as described in Sections 206 and 206.1 of the Penal Code.
- (24) Aggravated mayhem, as described in Section 205 of the Penal Code.
- (25) Carjacking, as described in Section 215 of the Penal Code, while armed with a dangerous or deadly weapon.
- (26) Kidnapping, as punishable in subdivision (d) of Section 208 of the Penal Code.
- (27) Kidnapping, as punishable in Section 209.5 of the Penal Code.
- (28) The offense described in subdivision (c) of Section 12034 of the Penal Code.
- (29) The offense described in Section 12308 of the Penal Code.
- (30) Voluntary manslaughter, as described in subdivision (a) of Section 192 of the Penal Code.

^{viii} Cal. Penal Code § 667(f)(2).

^{ix} *In case students ask questions, here is some more information on Romero motions: Romero motions grow out of a 1996 California Supreme Court case (People v. Romero, 13 Cal. 4th 497 (1996)), which held that if a trial judge so chooses, he or she can ignore a prior conviction when making Three Strikes sentencing determinations. For example, if I committed a serious or violent felony 2 years ago, and then committed another serious or violent felony, the judge can decide not to count my first felony as a strike, so that I would not be sentenced as a second-striker. To request this, my defense attorney would have to make a motion based on the ruling in Romero – hence, Romero motion. Getting a Romero motion granted is far from a sure thing. The decision is a balancing act (defendant vs. society), and relevant factors include: the nature of the present offense, the nature of the prior offenses, and aspects of the defendant’s character, background, and prospects. (These factors are explained in more detail in People v. Williams, 17 Cal.4th 148 (Cal. 1998).)*

^x This follows from the holding of *Romero* at 529-530 that Cal. Penal Code § 1385(a) “does permit a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law.” The court is only striking an allegation in an indictment, not modifying some metaphysical characteristic of the conviction.

^{xi} Cal. Penal Code § 488.

^{xii} Cal. Penal Code § 666. **Note for teachers:** This presents a good opportunity to explain an idiosyncrasy of California criminal law. Because of the way the California Penal Code is generally written, there are various offenses that can either be charged as misdemeanors or felonies – these are called “wobblers.” “Petty theft with a prior” is a good example. Wobblers are significant to Three Strikes jurisprudence mostly because their existence means that not only could a person be sentenced to 25-to-life for a non-serious and non-violent crime – but a person could be sentenced to 25-to-life for a “felony” that could have been charged as a misdemeanor. The decision whether to charge a wobbler as a felony or a misdemeanor is the prosecutor’s.

^{xiii} See <http://www.pollyklaas.org/about/history.html>; also summarized in *Ewing* at 538 US 14.

^{xiv} Somewhere in the course of this discussion, students may ask about whether (or argue that) the Three Strikes Law is racist. The chart below provides some statistical fodder for such a discussion. (More statistics: <http://facts1.live.radicaldesigns.org/article.php?list=type&type=55>).

Data Analysis Unit
Estimates and Statistical Analysis Section
Offender Information Services Branch

Department of Corrections and Rehabilitation
State of California
May 2007

TABLE 3
SECOND AND THIRD STRIKERS
IN THE ADULT INSTITUTION POPULATION
BY GENDER, RACIAL/ETHNIC GROUP, AND TYPE OF CONVICTION
AS OF MARCH 31, 2007

		TYPE OF CONVICTION		TOTAL NUMBER
		2ND STRIKER	3RD STRIKER	
		NUMBER	NUMBER	
TOTAL		33,468	8,035	41,503
GENDER FEMALE	RACIAL/ETHNIC GROUP			
	OTHER	47	3	50
	BLACK	457	43	500
	HISPANIC	353	9	362
	WHITE	361	25	386
	SUB TOTAL	1,218	80	1,298
MALE	RACIAL/ETHNIC GROUP			
	OTHER	1,457	333	1,790
	BLACK	10,954	3,567	14,521
	HISPANIC	11,660	2,056	13,716
	WHITE	8,179	1,999	10,178
	SUB TOTAL	32,250	7,955	40,205

^{xv} Source: A study was released in 2005 by California, available at http://www.lao.ca.gov/2005/3_Strikes/3_strikes_102005.htm.

^{xvi} See <http://www.smartvoter.org/2004/11/02/ca/state/prop/66/>.

^{xvii} See *Romero* at 505, citing Cal. Penal Code § 667, subd. (c)(3); § 1170.12, subd. (a)(3).

^{xviii} See *Romero* at 505, citing Cal. Penal Code § 667, subd. (c)(3); § 1170.12, subd. (a)(3).