
FEATURE

STRIKING BACK:
USING DEATH PENALTY CASES TO FIGHT
DISPROPORTIONATE SENTENCES IMPOSED
UNDER CALIFORNIA'S THREE STRIKES
LAW

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INTRODUCTION

At the climax of oral argument in one of the most important criminal cases ever before the United States Supreme Court, *Gregg v. Georgia*,¹ Justice Potter Stewart asked defense attorney Anthony Amsterdam whether his argument that the death penalty was inherently unconstitutional would also unravel the country's entire criminal justice system.

The argument lasted two days and involved four other related cases.² Amsterdam and co-counsel from the NAACP Legal Defense Fund (LDF) represented all of the defendants—and, in effect, every death row inmate in the country. Their basic argument was that enforcement of the decision of whether or not to impose a death sentence was inherently arbitrary, in violation of the Eighth and Fourteenth Amendments.

Justice Stewart was considered the swing vote in the case. Four years earlier, in *Furman v. Georgia*,³ he joined four colleagues holding unconstitutional all capital procedures then in effect throughout the country.

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1. 428 U.S. 153 (1976).

2. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *see also* Lesley Oelsener, *Justices Hearing Views on the Death Penalty*, N.Y. TIMES, Mar. 31, 1976, at 68 (reporting on the argument).

3. 408 U.S. 238 (1972).

Following *Furman*, state legislatures amended their states' death penalty procedures to address concerns raised by the Court. Those newly enacted procedures were at issue in *Gregg*. The Court was finally forced to decide whether the death penalty was unconstitutional across the board.

"Mr. Amsterdam," Justice Stewart pressed, "Doesn't your argument prove too much?" Our entire system of justice is rife with discretion, nullification, grace, and capriciousness. Is it all unconstitutional?

Amsterdam famously responded as follows:

Our argument is essentially that death is different. If you don't accept the view that for constitutional purposes death is different, we lose this case"⁴

Although others had previously argued that the death penalty required unique constitutional protections, Amsterdam is credited with coining the "death is different" phrase and articulating its core rationale.⁵ As he explained to the Court during the argument in *Jurek v. Texas* and *Roberts v. Louisiana*, two companion cases of *Gregg*:

Death is final. Death is irremediable. Death is unnullable; it goes beyond the world. . . . Death is different because even if exactly the same discretionary procedures are used to decide issues [in noncapital sentences] . . . the result will be more arbitrary on the life or death choice.⁶

Amsterdam lost the argument. In *Gregg* and its companion cases, the Court held that capital punishment was permissible, provided that certain safeguards were in place to ensure against arbitrary and disproportionate executions.⁷ However the Court ultimately embraced Amsterdam's position that "death is different" from all other forms of criminal punishment, and ever since *Gregg* capital defendants have received special constitutional protections (sometimes called "super due process") and financial resources for trial, appellate, and habeas counsel that do not apply to the vast majority of ordinary criminal defendants who are prosecuted in noncapital cases.⁸

4. Transcript of Oral Argument at 21, *Jurek*, 428 U.S. 262 (1976) (No. 75-5394), *Roberts*, 428 U.S. 325 (1976) (No. 75-5844), in 90 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, 1975 TERM SUPPLEMENT 637 (P.B. Kurland & G. Casper, eds.) (1977).

5. See, e.g., *Furman*, 408 U.S. at 306 (Stewart, J. concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."); H.L. POHLMAN, CONSTITUTIONAL DEBATE IN ACTION: CRIMINAL JUSTICE 294-95 (1955) (crediting Amsterdam with coining the phrase).

6. Transcript of Oral Argument, *supra* note 4, at 22.

7. See *Gregg*, 428 U.S. at 187, 195; *Woodson*, 428 U.S. at 285, 303 (finding that North Carolina's mandatory death sentence for first degree murder failed to curb arbitrary and wonton jury discretion with objective standards).

8. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (Scalia, J., concurring) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."); *Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (holding that "a capital defendant accused of an

The thesis of this Article is that the case law and litigation strategies forged by Amsterdam, LDF, and a generation of capital defense lawyers litigating under the “death is different” rubric since *Gregg* provide a roadmap toward resolving some of the most intractable criminal constitutional issues outside of the capital context. I am particularly interested in constitutional issues raised by California’s so-called “Three Strikes” law, which is widely recognized as the harshest and most broadly applied (noncapital) sentencing scheme in the country.⁹

As a historical matter, Amsterdam says that he and his colleagues at LDF were initially interested in addressing injustice throughout the criminal system, not just the death penalty. They focused on death cases for two reasons. First, Amsterdam says that he and LDF felt morally compelled to represent any death row inmate who requested their help. “We could no more let men die that we had the power to save than we could have passed by a dying accident victim sprawled bloody and writhing on the road without stopping to render such aid as we could,” he says.¹⁰ Second, Amsterdam believed the death penalty put problems that plagued the entire criminal system in stark relief. He felt constitutional rights developed in the death penalty context would “trickle down” to nondeath cases and reform the entire criminal justice system.¹¹

“One would have to be ignorant of the entire history of constitutional criminal procedure . . . to be unaware that death cases had always been the occasions for whatever modest advances the Supreme Court was willing to make in the protections afforded criminal defendants generally,” Amsterdam

interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias”); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that a capital sentencing judge must consider individualized mitigating facts at sentencing); *Beck v. Alabama*, 447 U.S. 625 (1980) (holding that in capital cases a court must permit a conviction of lesser-included noncapital offenses supported by the evidence); see also Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1169-73 (1979-80).

9. See *Riggs v. California*, 525 U.S. 1114, 1115 (1999) (Stevens, J., denying certiorari) (“California appears to be the only State in which a misdemeanor could receive . . . a [Three Strikes] sentence.”); *Ramirez v. Castro*, 365 F.3d 755, 772 (9th Cir. 2004) (noting that California officials “concede[] [that] the statute . . . is the most stringent in the nation”); Marc Peyser, *Strike Three, You’re Not Out*, NEWSWEEK, Aug. 24, 1994 (describing California’s Three Strikes law as the “toughest” in the nation). As discussed in more detail below, as of December 2009, over twenty-five percent of California’s entire prison population is serving a sentence enhanced by the Three Strikes law. See CAL. DEP’T OF CORR. AND REHAB. DATA ANALYSIS UNIT, SECOND AND THIRD STRIKER FELONS IN THE ADULT INSTITUTION POPULATION 2 (2009) [hereinafter CDCR], available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1/STRIKE1d0912.pdf.

10. MICHAEL MELTSNER, THE MAKING OF A CIVIL RIGHTS LAWYER 219 (2006); see also Michael Meltsner, *Litigating Against the Death Penalty: The Strategy Behind Furman*, 82 YALE L.J. 1111, 1113 (1973).

11. E-mail from Anthony Amsterdam to author (Nov. 4, 2009) (on file with author).

says.¹² The Scottsboro Boys case, *Powell v. Alabama*,¹³ established that indigent defendants had a constitutional right to court-appointed counsel in capital cases. *Gideon v. Wainwright*¹⁴ extended the right to court-appointed counsel in all felony trials. *Gideon*, in turn, begat *Argersigner v. Hamlin*,¹⁵ which extended the right to appointed counsel in misdemeanor cases involving the potential deprivation of liberty.

But the death penalty cases took on a life of their own.¹⁶ Relying on the “death is different” rubric, the Supreme Court applied special rules and constitutional protections in capital cases that it explicitly refused to extend to nondeath cases.¹⁷

According to Professor James Leibman, who was an LDF lawyer alongside Amsterdam, the “death is different” argument led to some perverse consequences. Leibman contends that new constitutional special rights provided to capital defendants ultimately provoked death penalty proponents to “fast track” capital appeals (by legislation and court rule), arguing that death penalty trials were especially reliable because they followed special procedures designed to protect the accused from unfair conviction.¹⁸

Though Amsterdam and LDF hoped constitutional protections won in capital cases would spread to nondeath cases, Leibman laments that the exact opposite has taken place. “Confounding [our] predictions,” Leibman says, “the death-driven ‘reform’ of the last fifteen years has been that procedural rights . . . ‘wither’ first in capital cases, with the blight spreading to, and the devastation being greatest in, noncapital cases.”¹⁹ New rules designed to prevent condemned inmates from delaying their executions with frivolous appeals have led to new procedural obstacles that apply to all criminal cases. These obstacles are virtually impossible to navigate for the vast majority of criminal defendants,

12.*Id.*

13.287 U.S. 45 (1932).

14.372 U.S. 335 (1963).

15.407 U.S. 25 (1972).

16.The evolution of constitutional doctrine and capital sentencing procedures is an important aspect of this Article, but it is also an area of considerable scholarship, which I do not intend to replicate. For a discussion of relevant issues, see Craig Haney, *Evolving Standards of Decency*, 36 HOFSTRA L. REV. 835, 851 (2008); James Liebman & Lawrence Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607 (2006); James Liebman, *Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000); Carol & Jordan Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

17.*See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 686, 705 (1984) (“Because of [the] basic difference between the death penalty and all other punishments, this Court has consistently recognized that there is ‘a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.’” (quoting *Barefoot v. Estelle*, 463 U.S. 880, 913-14 (1983) (Marshall, J., dissenting))).

18.Liebman, *supra* note 16, at 2043-46 (citing the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214).

19.*Id.* at 2045.

who unlike capital defendants, have no right or access to lawyers beyond the direct appeals process.²⁰

If Leibman is right—that the backlash against special constitutional rules in death cases has done the most damage in nondeath cases—no group has suffered more than those serving life sentences for minor crimes under California’s infamous Three Strikes recidivist sentencing law.

Twenty-five years after *Gregg*, the Supreme Court granted certiorari in two cases challenging California’s Three Strikes law as cruel and unusual punishment, in violation of the Eighth Amendment.²¹ At the time, it was unclear exactly how the Eighth Amendment applied to noncapital sentences—or even if the Eighth Amendment prohibited excessive prison terms, no matter how long or disproportionate a sentence may seem. The Court had previously noted that “one could argue without fear of contradiction by any decision from this Court that . . . the length of [a prison] sentence actually imposed is purely a matter of legislative prerogative.”²²

On November 5, 2002, Erwin Chemerinsky came before the Court on behalf of Leandro Andrade, who was serving a Three Strikes sentence for shoplifting children’s videotapes from Kmart. As with all Three Strikes defendants, Andrade was subject to a life term because he had been previously convicted of at least two prior “strikes,” which are certain felonies deemed to be “serious” as defined by statute.²³ In Andrade’s case, his prior strikes were nonviolent residential burglaries.²⁴ Chemerinsky argued that no other person in the history of the United States has ever received a life term for such a minor crime. “The punishment here isn’t just cruel and unusual,” Chemerinsky told the Court; “It’s cruel and unique.”²⁵

The argument fell on deaf ears. The Court affirmed Andrade’s sentence, ruling that the Three Strikes law was well within California’s legislative prerogative and that Andrade’s life sentence for shoplifting did not even raise an “inference” of disproportionality. Although the majority did leave room for Eighth Amendment relief in the “extraordinary” case, most observers believed that *Andrade*, and its companion case, *Ewing v. California*, effectively foreclosed constitutional challenges to sentences imposed under California’s

20. *Id.* at 2044-46.

21. *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing v. California*, 538 U.S. 11 (2003); *see also Riggs v. California*, 525 U.S. 1114 (1999) (denying certiorari, but recognizing the significant constitutional issues raised by the Three Strikes law).

22. *Rummel v. Estelle*, 445 U.S. 263, 274 (1980).

23. California Penal Code section 1192.7 provides the list of “serious” crimes that qualify as strikes.

24. “Violence” is a term of art in California. Throughout this Article, I refer to the definition provided by the California legislature, which enumerated “violent” crimes in California Penal Code section 667.5. These crimes span from murder on the high end to robbery by “force or fear” on the low end.

25. Transcript of Oral Argument at 55, *Andrade*, 538 U.S. 63 (No. 01-1127).

Three Strikes law.²⁶

This Article describes the experience of the Mills Criminal Defense Clinic at Stanford Law School, which is successfully litigating cases on behalf of clients sentenced under California's Three Strikes law. The Clinic is the only organization in the country devoted to Three Strikes cases. When Professor Larry Marshall and I formed the Clinic in 2006, conventional wisdom held that *Ewing* and *Andrade* foreclosed constitutional challenges to life sentences imposed under the Three Strikes law, even for minor crimes like petty theft and simple drug possession.²⁷ Amending the law also seemed impossible. In 2004, California voters rejected a ballot measure that would have ameliorated the most punitive aspects of the law.

The Criminal Defense Clinic took a different approach. We believed that the "death is different" rubric litigation strategies developed in the capital context could apply to Three Strikes cases.

My thesis is that constitutional doctrine and litigation tactics developed under the "death is different" rubric can and should be applied to noncapital defendants, particularly those serving life sentences under California's Three Strikes recidivist sentencing scheme.²⁸

My intent is to provoke renewed judicial, academic, and public scrutiny to the same sort of car wreck Amsterdam saw in 1968. There are thousands of inmates serving life sentences under California's Three Strikes law for nonviolent offenses. Unfortunately, contrary to Dean Chemerinsky's Supreme Court argument, Leandro Andrade's life sentence for shoplifting is not "unique." Three Strikes sentences for minor crimes are shockingly common. In fact, the majority of defendants sentenced under the Three Strikes—over 4650 inmates—are currently serving life sentences for nonviolent third strike offenses.²⁹ Current clients of the Stanford Criminal Defense Clinic include inmates serving life terms for: stealing one dollar in loose change from a parked car, simple possession of 0.03 grams of methamphetamine, and petty

26. *Andrade*, 538 U.S. at 77; *Ewing*, 538 U.S. 11; see also *Andrade*, 538 U.S. at 83 (Souter, J., dissenting) ("If [a life] sentence [for shoplifting] is not grossly disproportionate, the principle has no meaning.").

27. Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1050 (2004) ("Together, the decisions in *Andrade* and *Ewing*, will make it very difficult, if not impossible, for courts to find any prison sentence to be grossly disproportionate and thus cruel and unusual punishment."); Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1031 (2004) (describing how *Andrade* and *Ewing* foreclosed "virtually all challenges to Three Strikes sentences").

28. This Article unavoidably provides some scholarly foundation for the litigation I lead at the Stanford Clinic and could conceivably be cited in future cases. However my intentions are quite the opposite. Rather than using this Article to bolster the Clinic's legal practice, my intent is to show how the Clinic's novel litigation can advance scholarship in the area.

29. CDRC, *supra* note 9.

theft of a pair of socks on sale for two dollars.³⁰

I am particularly interested in reaching those who believe the fight is hopeless and those who remain transfixed by the death penalty.³¹

An important subtext here is that the Clinic's efforts to extend the line of "death is different" cases to the Three Strikes context inevitably calls into question the well-settled constitutional doctrine and public policy decisions that depend on distinguishing capital punishment as exceptional and deserving of special rights, resources, and procedures. Although I take issue with the idea

30. I acknowledge, of course, that each of these defendants has committed at least two prior "serious" felonies, as defined in California Penal Code section 1192.7. I focus on the defendant's third strike offense for several reasons. The first is practical. It is simply easier to say that a client "is serving a Three Strikes sentence for petty theft." I assume that readers will understand that the sentence necessarily means that the client in question is subject to a Three Strikes sentence because he has been previously convicted of at least two prior serious felonies. When an individual's prior criminal history is relevant—for instance, when discussing the proportionality of his sentence—I will describe his prior convictions as well. It is extremely difficult to obtain the raw data on the prior convictions of all inmates currently serving life sentences. Currently available data from the Department of Corrections indicates that one-third of more than 3,000 inmates who received a Three Strikes sentence for a nonserious felony, like petty theft, have never committed a "violent" crime, as defined by California Penal Code section 667.5. I intend to publish another article on this data when more complete information is fully available.

Another reason for focusing on the individual's third strike offense is legal convention. The Supreme Court has clearly held that the commitment offense is the focus of constitutional concern. *Solem v. Helm*, 463 U.S. 277, 279 n.21 (1983) ("[Courts] must focus on the principal felony—the felony that triggers the life sentence—since [the defendant] already paid the penalty for each of his prior offenses.").

The final reason is that I hope to avoid other constitutional issues raised by the prior convictions of Three Strikes inmates, particularly issues under the Double Jeopardy Clause (this too is on my scholarship agenda). In *Riggs v. California*, 525 U.S. 1114 (1999), Justice Stevens wrote a short opinion respecting the denial of certiorari in which he called the Double Jeopardy issue "obviously substantial" and unresolved in the Three Strikes context. Of course, the Court has repeatedly held that under recidivist sentencing schemes "the enhanced punishment imposed for the [present] offense 'is not to be viewed as . . . [an] additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" *Witte v. United States*, 515 U.S. 389, 400 (1995). However, *Witte* doesn't quite resolve the issue. In *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 798 (1994) (Scalia, J., dissenting), Justice Scalia argued that of course recidivist sentencing laws are repeat punishments for prior criminal conduct. He has no problem with this because, in his mind, the Double Jeopardy Clause prohibits successive *prosecutions* not successive *punishments*. To me, this issue remains unresolved. *See, e.g., Duran v. Castro*, 227 F. Supp. 2d 1121, 1130 (E.D. Cal. 2002) ("[To the extent that] punishment greatly exceeds that warranted by the aggravated offense, it begins to look very much as if the offender is actually being punished again for his prior offenses."). For immediate purposes, I note the issue and move on to other concerns.

31. *See, e.g.,* E-mail from Guido Calabresi, Senior Judge, U.S. Court of Appeals for the Second Circuit, to author (July 16, 2009) ("I care a great deal about capital punishment, but sometimes I think that the focus some of us tend to have on life and death detracts from the attention that should be put on situations in which people are sentenced to huge terms, and especially life, for relatively minor offenses.").

that “death is different” for constitutional purposes, this is not my principal concern. I see the Clinic’s work as continuing in the best traditions of LDF and the litigation it pioneered in the 1970s. These lawyers are an inspiration and have been individually helpful in the Clinic’s work and in the drafting of this Article.

Others have observed that the Supreme Court’s death penalty jurisprudence—particularly its approach to disproportionate sentences under the Cruel and Unusual Punishment Clause of the Eighth Amendment—is unjustifiably inconsistent with its treatment of life sentences under California’s Three Strikes law.³² I describe how that inconsistency can be resolved, at least in part, through litigation under the Sixth Amendment’s guarantee to effective assistance of counsel.

This Article is partially a case study of litigation conducted by students enrolled in the Stanford Clinic. A critical part of the Clinic’s mission is to give students the training, supervision, and authority to lead all aspects of our litigation.³³ To date, Clinic students have won reversals of twelve life sentences imposed under the Three Strikes law for minor crimes. Most of these victories involve post-conviction reversals of Three Strikes sentences imposed many years ago. Because these clients had already served the length of their new, reduced sentences, they have been released from prison.

Although we will pursue any avenue of relief for our clients, the Clinic’s core litigation strategy, and the focus of this Article, is that the Sixth Amendment requires trial attorneys to develop mitigating evidence for Three Strikes sentencing hearings, and that failure to develop this evidence constitutes ineffective assistance of counsel.

The argument requires two relatively large, but I believe well-founded, conceptual leaps. First, defendants facing Three Strikes sentences are entitled to introduce mitigating evidence in an effort to win a reduced sentence. Second, a trial attorney’s failure to develop such evidence constitutes ineffective assistance of counsel under the Sixth Amendment.

At first blush, I concede that neither premise holds much water. The language of the Three Strikes statute leaves no room for a reduced sentence. The statute plainly provides that a life sentence “shall” be imposed in every case tried under its authority.³⁴ Furthermore, the Supreme Court has explicitly

32. See Chemerinsky, *supra* note 27, at 1062.

33. The California Rules of Court permit students to write and sign pleadings and appear in court if properly supervised by a practicing attorney and certified by the California Bar Association. Students in the Stanford Clinic take responsibility for selecting clients, investigating case facts, interviewing witnesses, researching law, writing pleadings, and arguing cases in open court.

34. CAL. PENAL CODE §§ 667, 1170.12 (West 2010). Furthermore, although the Eighth Amendment prohibits mandatory sentences in death penalty cases, the Supreme Court has held that the same is not true for noncapital sentences. *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

reserved judgment on the applicability of the Sixth Amendment to noncapital sentencing hearings.³⁵ Absent direction from the Supreme Court, the notoriously liberal Ninth Circuit refuses to recognize—and denies outright—federal habeas corpus claims involving challenges to the adequacy of trial counsel in noncapital sentencing proceedings.³⁶

Also consider that prior to litigation initiated by the Stanford Clinic, no published or unpublished case in state or federal court had considered such a Sixth Amendment argument. Nor had any court reversed a Three Strikes sentence as disproportionate under state law.

This Article proceeds as follows: Part I lays out the basic terms of the Three Strikes law. I outline the legislative history of the law, describe some of its harshest implications, and discuss the primary constitutional implications. Part II details the Clinic's core litigation strategy. In order to justify our reliance on death penalty law and litigation practices, I describe the evolution of Three Strikes sentencing procedures and analogize to the better-known case law in the capital context. Part III confronts the unavoidable tension between the Clinic's Three Strikes practice and the "death is different" concept forged by Amsterdam and adopted by the Court following *Gregg*.

I. THE HISTORY, MECHANICS, AND CONSTITUTIONAL LIMITS OF CALIFORNIA'S THREE STRIKES LAW

A. A Brief Legislative History

On June 19, 1992, an eighteen-year-old named Kimber Reynolds was murdered in Fresno, California, during a purse-snatch robbery gone wrong. Ms. Reynolds was leaving a restaurant with her boyfriend when her assailant, a methamphetamine addict recently released from prison, tried to steal her purse. She resisted and was shot dead. Kimber's father, Mike Reynolds, channeled his grief into a proposal to put repeat felons in prison for life. He called the bill "Three Strikes and You're Out." In 1993, the California Assembly considered and rejected Reynolds's proposal as unnecessarily harsh and costly. Undeterred, Reynolds recast his bill as a voter initiative. But the campaign had no money, and Reynolds doubted he could gather over 300,000 signatures needed to qualify for the ballot.³⁷

Seven months later, an eleven-year-old girl named Polly Klaas was kidnapped during a slumber party in Petaluma, California. She was raped and

35. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

36. *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1244 (9th Cir. 2005).

37. See generally JOE DOMANICK, *CRUEL JUSTICE: THREE STRIKES AND THE POLITICS OF CRIME IN THE GOLDEN STATE* 106-107 (2004) (detailing the campaign for the passage of Three Strikes in California).

murdered by Richard Allen Davis, who was on parole at the time.

The Klaas murder gained national notoriety in a way that the Reynolds murder did not, and efforts to revive the Three Strikes sentencing legislation immediately gained momentum. Polly Klaas's father, Marc Klaas, was invited to the White House.³⁸ In January 1994, less than two months after Kimber's body was found, President Clinton called for enactment of a federal three strikes sentencing law during his State of the Union Address.³⁹ Soon afterward, Reynolds's Three Strikes initiative collected enough money and signatures to qualify for the November 1994 California ballot as Proposition 184. Proponents campaigned that the measure would keep murderers and child molesters in prison.⁴⁰

In March 1994, before the public could vote on Proposition 184, the California legislature passed its own version of the Three Strikes law (which it had rejected a year earlier).⁴¹ The legislation was almost word-for-word identical to the language in the Three Strikes initiative. Reynolds's initiative was still on the ballot in November, and voters approved his measure (Proposition 184) with seventy-two percent of the vote.⁴²

Ten years later, opponents of the Three Strikes law mustered their own initiative campaign. Proposition 66 aimed to limit life sentences only to defendants convicted of a third "serious" felony. Residential burglary (one of the country's most common crimes) would have been eliminated from the list of qualifying strikes. Several thousand inmates stood to have their sentences drastically reduced. Despite early support for Proposition 66, voters rejected the measure by a vote of 52 to 48 percent.⁴³

38. *Id.* Ironically, the Klaas family eventually became opponents of the Three Strikes law. Polly's grandfather, Joe Klaas, was particularly active in efforts to reform the harshest aspects of the law. *Id.* at 132.

39. See Gwen Ifill, *White House Offers Version of Three-Strikes Crime Bill*, N.Y. TIMES, Mar. 2, 1994, at A13.

40. CAL. SEC'Y OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION NOVEMBER 8, 1994, at 36 (1994).

41. See Assemb. B. 971, 1993-1994 Leg., Reg. Sess. (Cal. 1994) (amending California Penal Code section 667); see also *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 504 (1996) (surveying the political history of the Three Strikes law(s)).

42. The rush to pass the Three Strikes law (twice) was stoked in part by major players in California politics, including all living former governors and the California Correctional Peace Officers Association, which represents prison guards and is said to be the most powerful lobbying organization in the state. Years later, United States Supreme Court Justice (and Sacramento native) Anthony Kennedy called the politics behind the Three Strikes campaign "sick." Justice Anthony Kennedy, Speech at the Economic Club of New York (Sept. 26, 2007).

43. Proposition 66 was funded largely by a single family whose son was in prison and would have benefited from the reform proposal. The ACLU and George Soros also contributed to the effort. Perhaps most interestingly, Polly Klaas's grandfather, Joe Klaas, was co-chair of the committee to enact the reform measure.

For a list of contributors to Proposition 66, see National Institute on Money in State Politics, Fix Three Strikes Yes on 66,

The following year, in October 2005, California's nonpartisan Legislative Analyst's Office published a report on the impact of the Three Strikes law ten years after its enactment. The report estimated that the Three Strikes law cost the court and prison system an additional \$500 million a year to administer. The report also addressed the critical and contentious issue of whether the Three Strikes law improved public safety. The report noted that since the Three Strikes law was enacted in 1994, crime rates in California and nationwide dropped dramatically. However, the report also noted that it was impossible to isolate the impact of the Three Strikes law. The report states that California's Attorney General credited the law with significant improvement in public safety. On the other hand, the report notes that the RAND Institute and some academics disputed those conclusions, pointing out that that counties in California with the largest number of Three Strikes prosecutions had similar (if not slightly higher) violent crime rates as those counties that prosecuted fewer Three Strikes crimes. Ultimately, the report concluded that the impact of the Three Strikes law on public safety "remains an open question."⁴⁴

The public safety justification for the Three Strikes scheme remains an important argument for supporters of the law.⁴⁵ My sympathies and instincts lean toward the academics who argue that California's reduced crime rate cannot be traced to the Three Strikes law. But I do not intend to wade into this debate.

B. Three Strikes Basics

Because California's Three Strikes law was passed both by the legislature and subsequently as a ballot initiative, its provisions are codified in two separate places in the California Penal Code.⁴⁶ The two versions are virtually identical.

The scheme requires that a trial judge impose a life sentence for almost any

<http://www.followthemoney.org/database/StateGlance/committee.phtml?c=1201&PHPSESSID=c3e2b1769412bd3e422a4e994652c405> (last visited May 11, 2010). See also Dan Morain, *Man Banks Initiative to Change 3-Strikes Law*, L.A. TIMES, May 31, 2004, available at <http://articles.latimes.com/2004/may/31/local/me-strikes31>. Opponents of Proposition 66 were led by Polly's father, Marc Klaas, and Governor Arnold Schwarzenegger.

44. BRIAN BROWN & GREG JOLIVETTE, CAL. LEGISLATIVE ANALYSTS'S OFFICE, A PRIMER: THREE STRIKES - THE IMPACT AFTER MORE THAN A DECADE (2005), http://www.lao.ca.gov/2005/3_Strikes/3_strikes_102005.htm; see also FRANKLIN ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 101 (2001) (concluding that the drop in California's crime rate "was not the result of the [Three Strikes] statute"); 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, 102 (1998) (concluding that there is "no evidence" that the Three Strikes law influenced the crime rate in California).

45. See, e.g., MIKE REYNOLDS, 15 YEARS OF THREE STRIKES AND STILL WORKING (2009), available at <http://www.threestrikes.org/pdf/15YearReport09.pdf>.

46. CAL. PENAL CODE §§ 667, 1170.12 (West 2010).

crime if the defendant has been previously convicted of two statutorily defined “serious” felonies.⁴⁷ Serious felonies run the gamut from truly brutal crimes, like rape and murder, to less serious property crimes, including purse-snatching (robbery) and nonconfrontational residential burglary.⁴⁸ Defendants sentenced under the law have an opportunity for parole after twenty-five years in prison.⁴⁹

Over 8500 inmates are currently serving life sentences under the law.⁵⁰ A majority of them (fifty-five percent) committed a nonviolent crime for their third strike sentence.⁵¹

The Three Strikes law also includes a so-called “second strike” provision, which requires a sentencing judge to double the prison term for a defendant convicted of any felony if the defendant has one prior “serious” felony conviction. This provision is less well known but impacts a far larger group of defendants. As of December 2009, over 32,000 inmates were serving second-strike sentences. In total, twenty-six percent of the entire California prison population is serving a sentence enhanced by the Three Strikes law.⁵²

C. Sentencing Discretion: People v. Superior Court (*Romero*) and its Progeny

Soon after the Three Strikes scheme was enacted, some judges bridled at the law’s requirements. They joined defense attorneys in challenging the law on the ground that it violated California’s separation of powers doctrine by stripping from trial judges their authority to tailor individual criminal sentences.⁵³

The issue came to a head in the case of Jesus Romero, who on May 9,

47. I am intentionally vague about the phrase “almost any crime.” The Three Strikes statute imposes a life sentence for “any felony.” However, as discussed below, vagaries in California’s Penal Code permit prosecutors and judges to elevate certain minor offenses that would otherwise qualify as misdemeanors to felonies, thus triggering the Three Strikes law. Crimes that may be prosecuted as felonies or misdemeanors, including petty theft and simple drug possession, are colloquially known as “wobblers.” The Three Strikes law also describes prior qualifying strikes as “serious” or “violent” crimes. Because all violent crimes are contained in the list of statutorily-defined serious crimes, I refer only to “serious” crimes. See CAL. PENAL CODE §§ 1192.7 (listing serious crimes), 667.5 (listing violent crimes) (West 2010).

48. See CAL. PENAL CODE §§ 667.5, 1192.7 (West 2010).

49. CAL. PENAL CODE §§ 667, 1170.12 (West 2010).

50. CDCR, *supra* note 9.

51. *Id.* There are no formal statistics on the prior offenses committed by third-strike offenders, but one newspaper survey of almost two hundred cases found that fewer than fifteen percent had prior convictions for truly brutal crimes like manslaughter, rape, or attempted murder. See Wendy Thomas Russel, *Third-Strikers: Their Crimes Are as Varied as Supporters’ Opponents’ Opinions*, LONG BEACH PRESS-TELEGRAM, Nov. 1, 2000, available at http://www.threestrikes.org/lbart4_pg1.html.

52. CDCR, *supra* note 9.

53. See Peyser, *supra* note 9 (describing reluctance by judges and prosecutors to impose the Three Strikes law in certain cases).

1994, was arrested in San Diego County for possessing 0.13 grams of crack cocaine. Because Romero had prior serious felony convictions, he was charged under the Three Strikes law. His prior strikes were second-degree burglary, attempted burglary of an inhabited dwelling, and first-degree burglary of an inhabited dwelling, the most recent of which was committed eight years prior to the drug arrest.⁵⁴

Romero pleaded guilty in exchange for a sentence reduced to nine years by the trial judge. The prosecution objected, claiming that the plain language of the Three Strikes statute required a life sentence. The court of appeals issued a writ directing the trial judge to impose a life term. The nominative defendant in the writ proceeding was the San Diego Superior Court; Romero was the real party in interest. Together they appealed the writ to the California Supreme Court, which accepted review.

In a long and confounding but unanimous decision, the state supreme court reversed the court of appeals decision and dismissed the mandate. Despite language in both Three Strikes statutes indicating that life terms were mandatory (a trial court “shall” impose a life term),⁵⁵ the Court held in *People v. Superior Court (Romero)* that voters and the legislature did not intend to strip trial courts of their traditional authority to dismiss criminal charges and sentencing enhancements. The Court concluded that trial courts retained discretion to disregard prior strikes and impose lesser sentences “in furtherance of justice.”⁵⁶

The Court did not define what “in furtherance of justice” means, and it did not set a standard or legal test that a trial court could follow in deciding whether to exercise its discretion. To the contrary, the decision is indecipherable on the issue.

On the one hand, *Romero* provides that a trial court has “limited” authority to sentence outside of the Three Strikes scheme and must proceed in “strict compliance” with Penal Code section 1385, which provides trial courts with safety valve authority to dismiss criminal charges. On the other hand, in the very next paragraph, the Court acknowledges that a trial court’s authority under

54. See *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 505-08 (1996).

55. CAL. PENAL CODE §§ 667, 1170.12 (West 2010).

56. *Romero*, 13 Cal. 4th at 508-12. The court reasoned that stripping the judiciary of its traditional authority to dismiss charges or sentencing enhancements would raise concerns under the state’s separation of powers doctrine. The court acknowledged that lawmakers (both the legislature and the electorate) had authority to take such action. However, the court ruled that if lawmakers intended to tread so close to the constitutional line, they must be unambiguous about their intentions. Ambiguities would be read as to avoid possible constitutional conflicts. Despite language in two Three Strikes statutes (which clearly provides that a sentencing court “shall” impose a life term), the Supreme Court ruled there was no explicit intent to strip the judiciary of its authority to exercise discretion in criminal sentencing. Thus, the court ruled that the Three Strikes laws must be read to permit sentencing judges to “strike strikes” and sentence outside the Three Strikes sentencing scheme when doing so would be in furtherance of justice.

Penal Code section 1385 is “broad” and constrained only by “the amorphous concept” that a court acting under this authority must promote “justice.”⁵⁷

Romero went on to hold that in deciding whether or not to impose a life sentence under the Three Strikes law, a trial court should consider the constitutional rights of the defendant and the interests of society represented by prosecution. A trial court’s reasons to depart from the Three Strikes scheme must be sound enough to “motivate a reasonable judge.”⁵⁸

In the end, the supreme court did not even decide whether the trial court erred by failing to impose a life sentence for *Romero*’s drug conviction. Instead, the court sent the case back to the superior court to explain its decision on the record.⁵⁹

Regardless of its shortcomings, the *Romero* decision is a landmark. Three Strikes sentencing hearings are now called “*Romero* hearings.”

Two years later, in *People v. Williams*,⁶⁰ the California Supreme Court was called upon to clarify *Romero* and the standard for determining whether to impose a life sentence under the Three Strikes scheme. The case involved a defendant charged under the Three Strikes law for driving under the influence of PCP. After reviewing its decision in *Romero*, the *Williams* court set forth the following test:

[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . the court in question must consider whether, in light of the nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [sentencing] scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.⁶¹

Applying this standard, the *Williams* Court ruled that the trial court below abused its discretion and acted “outside the bounds of reason” when it departed from the Three Strikes law to impose a ten-year prison sentence for *Williams*’s DUI conviction. The court noted that the defendant had prior convictions for attempted robbery and rape and that his record was “devoid of mitigation.”⁶²

57. *Id.* at 530-31.

58. *Id.* The supreme court was clearer on what a trial court was prohibited from considering in its decision whether or not to impose a Three Strikes sentence. A trial court may not consider judicial convenience or court congestion. Nor may a judge dismiss a prior strike allegation if guided “solely by personal antipathy” for the Three Strikes law. The closest the Court came to articulating a workable test for deciding whether to depart from the Three Strikes law was holding that a trial court would not “act properly” if it ignored the “defendant’s background, the nature of his present offenses, and other individualized considerations.”

59. *Id.*

60. *People v. Williams*, 17 Cal. 4th 148, 161 (1998).

61. *Id.* at 161.

62. *Id.* at 163.

The *Williams* decision did at least two things. First, it clarified the relevant factors that a sentencing court should consider in deciding whether to depart from the Three Strikes law at a *Romero* hearing. A trial court “must” consider a defendant’s background, character, and prospects, and shall not impose a life sentence if these factors place the defendant at least partially outside the “spirit” of the Three Strikes scheme.⁶³ Second, in reversing the trial court’s decision to impose a lesser sentence in a DUI case, *Williams* telegraphed to lower courts that a decision to sentence outside the Three Strikes sentencing scheme would be closely scrutinized.

Indeed, in the fifteen-year history of the law, there has not been a single published or unpublished appellate decision in California reversing a trial court for abusing its discretion by imposing an unnecessarily harsh Three Strikes sentence.⁶⁴

63. *Id.* at 161.

64. The one possible exception is *People v. Cluff*, 87 Cal. App. 4th 991 (Ct. App. 2001), where a California appeals court reversed a lower court’s ruling that a defendant’s failure to comply with California’s sex offender registration scheme merited a third Strike, describing the Three Strikes sentence as “disproportionate by any measure.” Yet the appeals court made clear that its decision to find an abuse of discretion was based on the trial court’s misreading of the factual record rather than a misapplication of *Romero* and *Williams*. *Cf.* *People v. Carmony (Carmony I)*, 33 Cal. 4th 367, 379 (2004) (questioning whether *Cluff* remains good law).

Although no statistics are kept and superior court records are not published or otherwise available online or in databases, it is safe to assume that many trial courts have relied on *Romero* and *Williams* to reduce sentences for defendants charged under the Three Strikes scheme. It is also safe to assume that prosecutors frequently accept these sentencing decisions. When prosecutors do appeal a reduction in sentence under *Romero* or *Williams*, they almost always prevail. *See, e.g., Williams*, 17 Cal. 4th at 148.

It is also worth noting that there are numerous cases where trial courts have been reversed for exercising leniency and sentencing a nonviolent defendant to a term of years rather than a life sentence under the Three Strikes law.

Perhaps the best example is *People v. Carmony*, which involved a defendant convicted of violating California’s sex offender registration laws. The defendant’s prior strikes involved lewd acts with minors, which triggered his obligation to register with authorities. The trial court imposed a life sentence for the registration violation. The court of appeals reversed, holding that the registration violation was minor and merely “technical,” and that the trial court’s refusal to dismiss a prior strike allegation constituted an abuse of discretion. The supreme court granted review and reinstated the life sentence. The court held that the trial court’s original decision deserved great deference and did not constitute an abuse of discretion under state law. *Carmony I*, 33 Cal. 4th at 377.

The story does not end there. Following the supreme court’s rebuke, the court of appeals ruled that even if the trial court did not abuse its discretion, the Three Strikes sentence violated state and federal constitutional prohibitions of cruel and unusual punishment. *People v. Carmony (Carmony II)*, 127 Cal. App. 4th 1066 (Ct. App. 2005). The supreme court subsequently denied an opportunity to review the case again to address the constitutional issue.

No court has explained how a trial court’s discretion can be so broad as to include authority to impose an unconstitutionally disproportionate sentence. Yet that is the current state of California law. Further, the court of appeals’ second *Carmony* decision provides no additional recourse for a defendant facing a Three Strikes sentence for minor criminal

D. The Eighth Amendment: *Ewing* and *Andrade*

Before detailing the Clinic's Sixth Amendment strategy, it is worth noting that many other challenges to Three Strikes sentences were considered (and rejected) by the courts.⁶⁵ Among these, the most famous and important involved a pair of cases mounting direct challenges to the Three Strikes law as a violation of the Eighth Amendment's ban on cruel and unusual punishment.⁶⁶

Following the *Romero* and *Williams* decisions by California's high court, the United States Supreme Court was on the lookout for a good case to test the constitutional boundaries of California's recidivist sentencing scheme.⁶⁷ In 1999, four Supreme Court Justices declared that California's Three Strikes law raised "obviously substantial" concerns under the Eighth Amendment and complained that the California state courts and lower federal courts had not adequately addressed the issues. Ultimately, however, the Justices decided that the particular case before them (involving an inmate serving a life term for shoplifting a bottle of vitamins from a supermarket) was not ripe for review.⁶⁸

Four years later, the Court granted certiorari in a pair of Three Strikes cases involving life sentences for minor criminal conduct. The first case was *Ewing v. California*,⁶⁹ which came before the Court on direct appeal from the California Supreme Court (which had declined to review the case). *Ewing* involved an inmate serving a life sentence for attempting to steal three golf clubs from a sporting goods store by slipping the clubs into his pants leg. Store employees

conduct. No court in California has ruled since *Carmony II* that a Three Strikes sentence constitutes cruel and unusual punishment.

65. See, e.g., *Monge v. California*, 524 U.S. 721 (1998) (holding that the Double Jeopardy Clause does not apply to recidivist sentences, reasoning that a sentencing proceeding is not an "offense" within the meaning of the clause, and that an enhanced sentence is not viewed as either new jeopardy or an additional penalty for the earlier crimes, but as a stiffened penalty for the new offense); *People v. Helms*, 15 Cal. 4th 608 (1997) (upholding against Ex Post Facto Clause challenge a Three Strikes sentence based on strike convictions suffered prior to the enactment of the Three Strikes law); *People v. Fuhrman*, 16 Cal. 4th 930 (1997) (holding that three or more charges brought and tried together may count as three separate strikes).

66. Although both *Romero* and *Williams* refer to the obvious Eighth Amendment concerns raised by the Three Strikes law, neither decision addressed the issue directly. In fact, the California Supreme Court has never accepted review of a challenge to a Three Strikes sentence as cruel and unusual punishment under the Eighth Amendment or California's analogous constitutional provision.

67. See *Riggs v. California*, 525 U.S. 1114 (1999) (denying certiorari).

68. Justice Stevens, joined by Justices Souter and Ginsburg, wrote that the case raised important questions under the Eighth Amendment and Double Jeopardy Clause: "Given the fact that a defendant's prior criminal record may play a dual role in the enhancement scheme—first converting the misdemeanor into a felony, and then invoking the provisions of the three-strikes law—there is some uncertainty about how our cases dealing with the punishment of recidivists should apply." *Id.* Ultimately, Justices Stevens, Ginsburg, and Souter decided it was premature to hear the case. Justice Breyer wrote separately to say that he would have granted the petition. *Id.*

69. 538 U.S. 11 (2003).

apprehended him as he limped toward the exit. The second case, *Lockyer v. Andrade*,⁷⁰ came to the Court as a federal habeas corpus matter on appeal from the Ninth Circuit. The case involved an inmate sentenced to life for shoplifting video cassettes from Kmart.⁷¹

The drama and import of *Ewing* and *Andrade* have been adequately discussed elsewhere and need not be repeated here.⁷² Ultimately the Court ruled that neither case presented a violation of the Eighth Amendment's prohibition of cruel and unusual punishments.

Before moving on, I would like to highlight one particularly relevant aspect of the gamesmanship involved in this litigation that the results tend to obscure.

Going into *Ewing* and *Andrade*, the Court appeared divided over whether the Eighth Amendment prohibited excessive prison sentences. In death penalty cases, the rule was clear: the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits capital sentences that are "grossly disproportionate" to the crime committed.⁷³ However an important fraction of the Court believed that the disproportionality principle simply did not apply in noncapital cases.

Prior to *Ewing* and *Andrade*, the most recent noncapital Eighth Amendment case before the Court was *Harmelin v. Michigan*.⁷⁴ *Harmelin* involved a defendant sentenced to life for possessing, with intent to sell, a pound and a half of cocaine. Picking through earlier case law and citing historical practice, Justice Scalia penned the Court's opening opinion. He wrote that the Eighth Amendment only prohibits certain "modes" of noncapital punishment, such as torture, and that courts should not be in the business of gauging whether an ordinary prison sentence is inappropriately long. "Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides," Justice Scalia explained.⁷⁵ A majority concurred in the result of Justice Scalia's opinion, denying the Eighth Amendment challenge to the drug sentence. But the plurality did not go so far as to endorse Scalia's view that prison sentences can never be unconstitutionally long.⁷⁶

By the time *Ewing* and *Andrade* came before the Court, three of the four

70. 538 U.S. 63 (2003).

71. The Ninth Circuit held that the sentence violated clearly established Eighth Amendment law and granted habeas relief. *Andrade v. Attorney General*, 270 F.3d 743 (9th Cir. 2001).

72. See, e.g., DOMANCIK, *supra* note 37; Chemerinsky, *supra* note 27; Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1 (2003); Vitiello, *supra* note 27, at 1031.

73. See *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that a death sentence was unconstitutionally disproportionate to the crime of rape).

74. 501 U.S. 957 (1991).

75. *Id.* at 994 (citing *Turner v. Murray*, 476 U.S. 28, 36-37 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Beck v. Alabama*, 447 U.S. 625 (1980)).

76. *Id.* at 996-1009 (Kennedy, J., concurring).

Justices who dissented in *Harmelin*, and would have found an Eighth Amendment violation, had retired.⁷⁷ The viability of proportionality review in noncapital cases appeared to be a live issue. Indeed, it appeared to be the only issue. If the Eighth Amendment prohibited disproportionately long sentences, then surely the life sentences imposed for the minor, nonviolent offenses at issue in *Ewing* and *Andrade* should be struck down. If the Eighth Amendment prohibited only certain modes of punishment and did not concern the length of “mere” prison terms, as Justice Scalia argued, then the inmates’ claims would of course fail.

Surprisingly, a conservative majority of the Court concluded that lengthy prison sentences *should* be reviewed for proportionality under the Eighth Amendment, but that relief was inappropriate in these cases. Applying proportionality review to the *Ewing* and *Andrade* cases, the Court concluded that neither Three Strikes sentence violated the “narrow” prohibition on excessive noncapital sentences.⁷⁸

Perhaps more surprising is that Chief Justice Rehnquist, who joined Justice’s Scalia’s opinion in *Harmelin* (and in fact laid its foundation ten years earlier⁷⁹), voted with the majority of Justices who held that noncapital sentences *should* be reviewed for proportionality under the Eighth Amendment.⁸⁰

More surprising still is that Justice Scalia, who stuck by his position in *Harmelin* that the proportionality test should not be applied to noncapital cases, wrote in a concurring opinion that the sentence in *Ewing* seemed inappropriately long. Scalia conceded that “in all fairness,” a life sentence for shoplifting golf clubs seemed unconstitutional under the proportionality principle adopted by the Court. Justice Scalia explained that he voted to affirm *Ewing*’s conviction under his belief that the Cruel and Unusual Punishment Clause provides no guarantee against disproportionately long prison sentences.⁸¹

77. Justices Marshall, White, and Blackmun.

78. *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003).

79. *See Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (opinion by Rehnquist, J.) (“[F]or crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.”).

80. In the end, a solid majority of seven Justices agreed that the Eighth Amendment prohibited disproportionately long prison sentences, although—critically—they disagreed on the application of the constitutional review. Chief Justice Rehnquist, along with Justices O’Connor and Kennedy, ruled that the Eighth Amendment prohibited “grossly disproportionate” noncapital sentences but that the Three Strikes sentences in *Ewing* and *Andrade* were within constitutional boundaries and California’s legislative prerogative. Justices Scalia and Thomas rejected the proportionality analysis altogether and voted to uphold the Three Strikes sentences on that ground. Justices Stevens, Souter, Ginsburg, and Breyer dissented in *Ewing* and *Andrade*, arguing that the Three Strikes sentences were unconstitutional under the disproportionality analysis.

81. *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring).

When the dust settled, it appeared that the Eighth Amendment's prohibition of disproportionate prison sentences remained in name only. As Justice Souter complained in his *Andrade* dissent, "If [a life] sentence [for shoplifting] is not grossly disproportionate, the principle has no meaning."⁸²

E. A Glimmer of Hope: *Ramirez v. Castro*

Those who followed the issue closely concluded that *Andrade* and *Ewing* "[made] it very difficult, if not impossible, for courts to find any prison sentence to be grossly disproportionate and thus cruel and unusual punishment."⁸³

One startling exception is the case of Isaac Ramirez, who was sentenced to life under the Three Strikes law for shoplifting a VCR. Having exhausted his state court appeal (and the services of public defenders), Ramirez represented himself in federal habeas corpus proceedings.⁸⁴ The Ninth Circuit ultimately ruled that Ramirez's sentence was the "exceedingly rare" case envisioned in *Andrade* where habeas relief was appropriate. The court found Ramirez's life sentence "grossly disproportionate" and in violation of clearly established Eighth Amendment law.⁸⁵

The Ninth Circuit's decision in *Ramirez* was so contrary to the Supreme Court's still recent decisions in *Ewing* and *Andrade* that the Attorney General's decision to let the deadline pass for petitioning the Supreme Court for certiorari made news.⁸⁶ *Ramirez* may be an outlier among Eighth Amendment cases, but it remains good law in the Ninth Circuit and leaves a glimmer of hope for defendants sentenced under the Three Strikes law for very minor crimes.⁸⁷

82. 538 U.S. at 83 (Souter, J., dissenting).

83. Chemerinsky, *supra* note 27, at 1050; *see also* Vitiello, *supra* note 27, at 1031.

84. *See Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004). Ramirez began his habeas litigation prior to the Supreme Court's decisions in *Ewing* and *Andrade*, and the Ninth Circuit's initial decision in *Andrade* (awarding Eighth Amendment relief) was good law at the time. The district court ordered Ramirez released under the Ninth Circuit's authority. Ramirez remained free on bail. He reconnected with his wife and children, joined a church, found work, and prepared for his appeal. The case was stayed when the Supreme Court granted *certiorari* in *Andrade* and *Ewing*, and it did not look good for Ramirez when the Supreme Court returned its decisions. Appellate experts rushed to Ramirez's assistance, including Dean Chemerinsky. Ramirez turned them down and decided to proceed *pro se*. Interview with Isaac Ramirez (Apr. 2, 2008).

85. *Ramirez*, 365 F.3d at 769-70 ("[I]t is doubtful that California's Three Strikes law, passed largely in response to the infamous" [Polly Klaas] murder, "was ever intended to apply to a nonviolent, three-time shoplifter such as Ramirez. . . . [N]either the 'harm caused or threatened to the victim or society,' nor the 'absolute magnitude' of Ramirez's three shoplifts justifies the Three Strikes sentence in this case.").

86. Henry Weinstein, *Lockyer Gives Up Three Strikes Case*, L.A. TIMES, Apr. 30, 2004, available at <http://articles.latimes.com/2004/apr/30/local/me-strike30>.

87. Since *Ramirez* was decided, only two other Three Strikes sentences have been reversed on its authority. *See Gonzalez v. Duncan*, 551 F.3d 875 (9th Cir. 2008) (invalidating a life sentence for failing to register as a sex offender); *Reyes v. Brown*, 399

Seven months after *Ramirez* was decided, however, California voters reaffirmed their support for the Three Strikes law in rejecting Proposition 66, which would have eliminated Three Strikes sentences for nonviolent crimes.

II. CLINIC LITIGATION

A. Case Selection

The Stanford Criminal Defense Clinic was launched with the premise that an astonishingly large number of inmates are serving unfairly harsh sentences under the Three Strikes law for relatively minor criminal conduct.⁸⁸ At the same time, we recognized the obstacles provided by *Ewing* and *Andrade* and the one-year statute of limitations which constrained the Ninth Circuit's decision in *Ramirez* to Three Strikes sentences imposed after 2004.⁸⁹ Indeed, most of the Clinic's clients have already served over a decade of their Three Strikes sentences before we get involved in their cases.

Since the Clinic was founded in 2006, over one thousand inmates, their

F.3d 964 (9th Cir. 2005) (holding that a Three Strikes sentence for forging a DMV application "may" be grossly disproportionate and remanding for more fact finding); *Mack v. Dexter*, No. 07-56392, 2010 U.S. App. LEXIS 2977 (9th Cir. Feb. 16, 2010) (unpublished opinion) (holding that a life sentence for violating California's sex offender registration scheme was grossly disproportionate and violated the Supreme Court's clearly established Eighth Amendment jurisprudence).

In the Clinic's practice, very few of our clients stand to benefit from the *Ramirez* ruling, even though most of our clients have criminal records similar to—or even less serious than—*Ramirez*'s. *Ramirez* is limited not only in scope but in time. Given the statute of limitations for filing federal habeas corpus petitions, 28 U.S.C. § 2254 (2006), it really only applies to defendants sentenced after 2004. Almost all of the Clinic's clients were convicted and sentenced well before then. Most have already served over a decade for their crimes. Although this puts us at a procedural disadvantage, as described below, the Clinic takes advantage of some little known and rarely applied state post-conviction rules and ultimately turns the age of our clients' cases to an advantage.

88. The Los Angeles District Attorney's Office estimates that there were 1700 inmates sentenced to life under the Three Strikes law between 1995 and 2000 in Los Angeles who would not be serving life terms had their crimes been committed after 2000, when the current District Attorney, Steve Cooley, took office. Interview with Lael Rubin, Deputy District Attorney, Los Angeles District Attorney's Office (2006). Soon after taking office, Cooley issued a directive to prosecutors to exercise their discretion to avoid Three Strikes sentences for inmates convicted of nonviolent, nonserious crimes. See Los Angeles District Attorney's Office Special Directive 00-02, Three Strikes Policy (Dec. 19, 2000), available at <http://da.co.la.ca.us/3strikes.htm>.

89. See 28 U.S.C. § 2254 (2006). Of course, the Clinic will represent a client in federal court if the one-year filing deadline has not yet elapsed. See, e.g., *South v. Hall*, No. 01-10117 (C.D. Cal. June 20, 2009), appeal docketed, No. 09-56162 (9th Cir. July 24, 2009) (involving a third strike for petty theft); *Burden v. Almager*, No. 07-06431 (C.D. Cal. Oct. 3, 2007) (involving a third strike for petty theft); *Provencio v. Chrones*, No. 06-01760 (S.D. Cal. Aug. 25, 2006) (involving a third strike for simple drug possession).

friends and family members, and their attorneys have sent letters to Stanford requesting our help. We triage these requests to select clients with the least serious criminal records. As a general policy, the Clinic does not represent clients who have ever been convicted of a violent crime. Our clients are all indigent; most have drug addiction problems and are formally homeless, and many are mentally ill. We represent approximately fifteen clients at a time in all stages of the criminal process—at trial, on direct appeal, and in state and federal habeas corpus proceedings.

Given the procedural obstacles in federal litigation, the Clinic has had most success litigating cases on collateral review in state court, where time limits for filing habeas corpus petitions are more flexible.⁹⁰ The Clinic has succeeded in persuading courts that our clients' lack of post-conviction counsel and poor education excuse filings that would otherwise be dismissed as untimely.⁹¹

On the merits, the Clinic will pursue any viable claim whether the claim goes to a client's sentence or his underlying conviction.⁹² But our most common, most successful, and probably most controversial litigation strategy argues that our clients' sentences violate the Sixth Amendment's guarantee of effective assistance of counsel.

B. The Sixth Amendment at Sentencing: *Strickland* and its progeny

*Strickland v. Washington*⁹³ provides that the Sixth Amendment guarantees a criminal defendant "effective" legal representation. In order to establish a violation of these rights, *Strickland* holds that a defendant must prove that (1) his attorney's performance fell below a reasonable standard of professional competence and (2) the attorney's errors probably influenced the outcome of the case.⁹⁴

Although it was not always true, it is now routine practice for capital defense lawyers to bring habeas corpus claims challenging the effectiveness of counsel during the penalty phase of their clients' trials. Indeed, it has proven

90. See *In re Clark*, 5 Cal. 4th 750, 775 (1993) (holding that habeas petitions must be filed "without substantial delay"); see also *In re Robbins*, 18 Cal. 4th 770 (1998) (same); CAL. CONTINUING EDUC. OF THE BAR, CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE § 42.27 ("There are no statutory or other specific time limits for filing a petition for writ of habeas corpus . . . [I]t should be filed as soon as practicable after discovery of the claim.").

91. See, e.g., *In re Maese*, No. HC-10580A (Wash. Super. Ct.-Kern June 6, 2007) (holding in an unpublished order that a thirteen year delay in filing a state habeas petition was excused because the petitioner (1) had limited education; (2) diligently pursued claims in federal court; and (3) did not understand the legal complexity of his case).

92. See, e.g., *Almager*, No. 07-06431 (involving a claim that the trial court violated clearly established Supreme Court law by permitting our client to represent himself without admonitions required by *Faretta v. California*, 422 U.S. 806 (1975), and its progeny).

93. *Strickland v. Washington*, 466 U.S. 668 (1984).

94. *Id.*

one of the most successful strategies for inmates on death row.⁹⁵

However, *Strickland* itself initially stood as a significant barrier to these claims. In *Strickland*, the Court established the famous two-part test for effective representation under the Sixth Amendment. However, in applying that test, the Court held that Strickland's defense attorney at trial performed satisfactorily. Strickland alleged that his trial counsel provided ineffective representation during the penalty phase of his client's capital trial. During the guilt phase of his trial, Strickland pleaded guilty to three murders. Still, his trial counsel did virtually nothing during the penalty phase of the case. He did not put on any witnesses in mitigation and he did not cross-examine prosecution witnesses who were called to detail how each of three victims was murdered. Writing for the Court, Justice O'Connor explained that the defense attorney engaged in a reasonable strategy based on his belief that the sentencing court would spare his client because he had pleaded guilty.⁹⁶

Although *Strickland* clearly held that a defendant is entitled to competent counsel, the facts in *Strickland* made it hard to imagine how an attorney could ever be found ineffective.

Sixteen years later, the Court found such a case in *Williams v. Taylor*.⁹⁷ Like *Strickland*, the *Williams* case involved a claim that trial counsel was ineffective for failing to adequately represent his client during the sentencing phase of a capital trial. Unlike the attorney in *Strickland*, the trial attorney in *Williams* put on a relatively robust mitigation case, including extensive testimony from family members and a psychiatrist.⁹⁸

Elaborating on her opinion in *Strickland*, Justice O'Connor wrote for the Court, ruling in favor of the defendant. Justice O'Connor explained that the defense attorney in *Williams* violated the principles in *Strickland* by failing to present readily available evidence concerning his client's "nightmarish childhood" and alcoholic parents which, in the Court's opinion, would have persuaded a jury to recommend a life sentence rather than death.⁹⁹

The Court followed *Williams* with *Rompilla v. Beard* and *Wiggins v. Smith*, both of which also held that capital defendants' Sixth Amendment rights were violated because their attorneys failed to adequately investigate and present

95. The Clinic focuses on Sixth Amendment claims because it is one of the few areas of constitutional criminal law where the modern Supreme Court has repeatedly ruled in favor of criminal defendants (at least in capital cases). *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

96. *Strickland*, 466 U.S. at 671-75.

97. 529 U.S. 362 (2000).

98. *Id.* at 369.

99. *Id.* at 414 (holding that a capital defendant's Sixth Amendment rights were violated when his attorneys failed to present evidence involving the defendant's low IQ and his childhood, which was "filled with abuse and privation"). According to the Court, this and other evidence would have likely persuaded the jury that the defendant's crime "was a compulsive reaction rather than the product of cold-blooded premeditation"—and thus that mitigating circumstances outweighed aggravating circumstances). *Id.*

mitigating evidence at sentencing.¹⁰⁰

I simply cannot explain how Justice O'Connor and the rest of the Court could hold the attorney in *Strickland* effective and the attorneys in *Williams*, *Wiggins*, and *Rompilla* ineffective. The mystery is even deeper given that the latter cases came to the Court with more conservative members, under a new standard of review provided in the Antiterrorism and Effective Death Penalty Act of 1996, which requires great deference to the state court's decision affirming a conviction or sentence. The only plausible explanation is that the Court had grown increasingly concerned about the application of the death penalty.

Regardless, this string of cases serves as the primary inspiration for the Clinic's litigation strategy.¹⁰¹

C. Applying *Strickland* to Three Strikes Cases

The similarity between California's Three Strikes sentencing hearings and capital sentencing hearings forms the central theoretical underpinning of the litigation at Stanford's Criminal Defense Clinic. It also justifies application of *Strickland*, *Williams*, and their progeny to sentences imposed under the Three Strikes law.

In *Romero* and *People v. Williams*, the California Supreme Court ruled that Three Strikes sentences must be based on individual considerations. Under *People v. Williams*, a sentencing court "must" consider whether the defendant's character, background, and prospects, place him outside the spirit of the recidivist sentencing scheme before imposing a life sentence. If so, then the defendant receives a reduced prison term of years rather than a life sentence.¹⁰²

The primary innovation of the Criminal Defense Clinic is our claim that a defense attorney's failure to present an adequate mitigating case during a *Romero* sentencing hearing constitutes ineffective assistance of counsel under *Strickland*, *Williams*, *Rompilla*, and *Wiggins*.

100. In *Wiggins*, the Supreme Court held that trial counsel erred in failing to present evidence of his client's "severe privation," sexual molestation, "physical torment," homelessness, and "diminished mental capacities"—and that this mitigating evidence reduced the defendant's moral culpability and outweighed aggravating circumstances. 539 U.S. at 512. In *Rompilla*, the Supreme Court held that defense counsel was incompetent for failing to uncover certain traumatic events in his client's social history despite the fact that counsel had interviewed his client, and his family, and retained three separate mental health experts to evaluate his client. 545 U.S. 374 (2005).

101. Note that *Williams*, *Wiggins*, and *Rompilla* coincide with a larger group of recent rulings by the Supreme Court in favor of criminal defendants under the Sixth Amendment, albeit on entirely different grounds. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Cunningham v. California*, 549 U.S. 270 (2007); *Blakely v. Washington*, 542 U.S. 296 (2004); *Crawford v. Washington*, 541 U.S. 36 (2004); *United States v. Booker*, 541 U.S. 36 (2004).

102. *People v. Williams*, 17 Cal. 4th 148, 161 (1998).

In order to make out a claim of ineffectiveness under *Strickland's* two-part test, the Clinic must first demonstrate that a client's trial counsel performed below a reasonable standard of professional care. This work involves a great deal of investigation of trial court transcripts and other records, which, in the Clinic's case, is conducted by students enrolled in our program. Students comb records to reconstruct the work that the public defenders did (or did not do) on behalf of our clients at their original sentencing hearings.

Despite the enormous consequences at stake, our anecdotal experience with Three Strikes cases involving minor crimes has revealed a shocking dereliction of duty. In one Clinic case, defense counsel submitted sentencing pleadings using the wrong client's name. In another case, defense counsel used the wrong facts—telling the court that her client had committed violent crimes, when in fact he had not. In another, our client was having auditory hallucinations during his sentencing proceedings, but his attorney did nothing to investigate the possibility that he may be suffering from a mental illness that could mitigate his culpability.

Take, for example, the case of William Anderson, who was sentenced under the Three Strikes law for breaking into a car and stealing one dollar in loose change.¹⁰³ In 1997, Anderson was homeless and drug addicted when he was arrested and convicted of vehicular burglary. At his *Romero* hearing, Anderson's public defender presented a sentencing motion and mitigating case that consisted of only one sentence of information concerning her client. The sentencing court expressed some reluctance at sentencing but nonetheless imposed a life term under the Three Strikes law. Anderson's conviction and sentence were affirmed on appeal.

Eleven years later, investigation conducted by students in the Criminal Defense Clinic revealed that Anderson's attorney did nothing to develop readily available mitigating circumstances in her client's background that would have placed him outside the spirit of the Three Strikes law. She did not ask Anderson any questions about his social or mental health history, nor does it appear that she read his case file. Had she taken these basic steps, she would have learned that Anderson had suffered from organic mental illness his whole life, was raised in squalor and institutionalized as a young child, had attempted suicide as a teen, and was found mentally incompetent to stand trial as an adult. None of this information was presented to the sentencing court, despite the fact that mental illness is one of the few mitigating sentencing factors provided for under California law.¹⁰⁴ In fact, Anderson's social history included the same

103. William Anderson is a client of the Criminal Defense Clinic. *See generally In re Anderson*, No. BA146607 (Cal. Super. Ct.-Los Angeles Nov. 5, 2009). His prior strikes came from burglarizing the same house twice in 1985. On one occasion he entered the home through a broken window but was quickly chased away without stealing anything. On the other occasion, he broke into the residence's garage and stole some household goods. No one was ever threatened or injured. He was tried and convicted in a single case.

104. *See* CAL. R. CT. 4.423.

sort of “nightmarish childhood” and alcoholic parents which, in *Williams*, constituted powerful mitigating evidence of reduced criminal culpability.¹⁰⁵

Given the shockingly poor performance of counsel we have observed in Three Strikes cases, it may be tempting to argue that *Strickland* provides no relief to Three Strikes defendants sentenced during truncated hearings. If the prevailing standard of care is so low, the argument goes, then there is no breach of duty in failing to conduct a thorough mitigation investigation.¹⁰⁶

Only one case in California has addressed the proper standard of care for defense attorneys at a Three Strikes sentencing hearing. In *People v. Thimmes*, a California Court of Appeals concluded that, “A standard of reasonable competence requires defense counsel to diligently investigate the case and research the law.”¹⁰⁷ This seemingly innocuous and uncontroversial holding would impose a substantial and costly duty on defense lawyers in Three Strikes cases, if taken seriously. So too would the American Bar Association (ABA) guidelines for defense counsel, which the Supreme Court has referred to in death penalty cases as guidelines for measuring the prevailing standard of professional care.¹⁰⁸ The ABA standards for defense lawyers in noncapital cases call for exploration of “all avenues” of relief regarding a reduction of sentence.¹⁰⁹ According to the ABA, a defense lawyer should not rely on “general emotional appeals or on the strength of statements made to the lawyer

105. *Williams v. Taylor*, 529 U.S. 362, 414 (2000).

106. Admittedly, generally poor performance of defense counsel in Three Strikes sentencing hearings poses a problem in this regard. Eventually we expect that rulings in our favor—finding Sixth Amendment violations for failure to conduct adequate mitigation investigations in Three Strikes cases—will put pressure on public defenders’ offices to improve their standards, as they did in the death penalty context.

107. In *Thimmes*, the California Court of Appeals ruled that trial counsel was ineffective for failing to correct a sentencing court’s misinterpretation of the factual record. The case involved a defendant convicted of drug possession and sentenced as a “second striker” under the Three Strikes law—that is, his prison term was doubled because he had one prior strike conviction (making criminal threats). At Thimmes’s sentencing hearing, his attorneys presented evidence that he had low mental functioning and suffered from mental illness. Despite this mitigation evidence, the court refused to “strike a strike” and sentenced Thimmes to the maximum term, thirty-two months. The court explained that Thimmes had been warned of the consequences of the Three Strikes law when convicted for making criminal threats in 1999 and deserved the enhanced sentence because he failed to heed the warning.

However, as the court of appeals subsequently pointed out, Thimmes could not have received any such warning in 1999 because criminal threats wasn’t considered a strike offense until 2000. The court held that Thimmes’s trial counsel was ineffective in failing to correct the trial court’s mistaken view of the record. *People v. Thimmes*, 138 Cal. App. 4th 1207, 1212-13 (Ct. App. 2006).

108. *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.”); see also *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (same).

109. AM. BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, at Defense Standard § 4-4.1(a) (3d ed. 1993).

by the defendant.” A defense lawyer should collect information concerning the defendant’s background, education, employment record, mental and emotional stability, family relationship, “and the like.”¹¹⁰

In practice, the Criminal Defense Clinic generally takes the position that our clients’ attorneys performed below any possible reasonable standard of care. To fully develop this claim, students investigating the performance of prior counsel search court records for specific facts that should have alerted our clients’ original counsel to dig deeper for mitigating evidence. For example, in the Anderson case, court records at the time of his sentencing hearing in 1997 recorded that Anderson had previously been declared mentally incompetent to stand trial and was committed to a state mental hospital. This fact should have led Anderson’s attorney to investigate her client’s mental health, a factor mitigating against a Three Strikes sentence.¹¹¹ Instead, she did nothing.

Mere incompetence, however, does not entitle a defendant relief under *Strickland*. *Strickland* also requires that a defendant demonstrate that there is a “reasonable probability” that the attorney’s errors contributed to the outcome of the case. In other words, in the Clinic’s Three Strikes cases, we must also show that had our clients’ original counsel performed adequately, she would have developed evidence that put our clients outside the “spirit” of the Three Strikes law.¹¹²

Although no court has ever defined the spirit of the Three Strikes law, the first and most important clue to clarifying the issue is that there is a legally cognizable distinction between the “spirit” and “letter” of the law. In other words, a defendant cannot be wholly within the spirit of the Three Strikes law merely because he has two prior serious or violent felony convictions and is

110. *Id.* § 4-4.1 cmt. I do not contend that defense attorneys in Three Strikes cases are constitutionally obligated to devote the same kind of time and resources to sentencing hearings as required of defense counsel in capital cases. I merely argue that defense counsel should devote time and resources that are proportionate to the punishment at stake. As I’ve argued throughout, the death penalty cases do not provide substantive constitutional requirements for Three Strikes hearings. Instead, these cases provide helpful litigation strategies and analytical frameworks for approaching Three Strikes hearings from a practitioner’s perspective.

111. *See* CAL. R. CT. 4.423. In another Clinic case, defense counsel became aware that his client, Kevin Davenport, was experiencing paranoid auditory hallucinations in court. Davenport complained to his attorney that the judge was making derogatory statements from the bench. When the attorney confronted Davenport with a transcript of the proceeding (showing no such comments), Davenport insisted that the court reporter must also be conspiring against him. Despite this “red flag” that his client was exhibiting classic signs of mental illness, the attorney conducted no investigation of Davenport’s mental health. He did not even ask his client about his psychiatric history. Had the attorney taken this small step, he would have learned that his client had been hospitalized for a suicide attempt as a teenager. Had the attorney gone so far as to have Davenport evaluated, he would have learned that Davenport suffers from schizoaffective disorder, and the attorney could have constructed a compelling mitigation case.

112. *See* *People v. Williams*, 17 Cal. 4th 148, 161 (1998).

statutorily eligible for a life term.¹¹³

Absent instruction from the courts, Clinic students divined the spirit of the Three Strikes law in *Anderson* by reviewing its legislative history and intent. According to ballot material accompanying the Three Strikes initiative, the sentencing scheme was intended to keep “career criminals, who rape women, molest innocent children and commit murder, behind bars where they belong.”¹¹⁴ But if the “spirit” of the Three Strikes law is equivalent to its “intent,” then presumably the California Supreme Court would have said so in *Williams*.

Another resource for divining the spirit of the Three Strikes law may be found in public comments by prosecutors who support the law. For example, Solano County District Attorney David Paulson, who is a leading proponent of the Three Strikes law, says that the scheme targets the “worst of the worst” offenders.¹¹⁵

California’s Rules of Court also provide some assistance by laying out several general aggravating and mitigating circumstances for courts to consider in sentencing under California’s determinate sentencing scheme.¹¹⁶ For example, the Rules recognize that mental illness can “significantly reduce[] culpability.”¹¹⁷

Finally, the Supreme Court’s death penalty cases provide broad guidance germane to the Three Strikes context. In *Wiggins*, the Court held that a defendant’s “troubled history,” including childhood abuse and neglect, may reduce “moral culpability” for subsequent criminal acts.¹¹⁸ In *California v. Brown*, Justice O’Connor explained that American society has “long held . . . that defendants who commit criminal acts that are attributable to a

113. See generally Michael Romano, *Divining the Spirit of California’s Three Strikes Law*, FED. SENT’G REP. (Vol. 22, no. 3) (Feb. 2010).

114. CAL. SEC’Y OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 36 (1994).

115. David W. Paulson, *From the Editor’s Desk*, 1 J. INST. FOR ADVANCEMENT CRIM. JUST. 4, 4 (2007); see also CAL. DISTRICT ATTORNEYS ASSOC., PROSECUTORS’ PERSPECTIVE ON CALIFORNIA’S THREE STRIKES LAW: A 10-YEAR RETROSPECTIVE, at iii, v (2004) (stating that the law applies to “demonstrably violent and dangerous repeat felons”); Jan Scully, *IACJ President’s Message*, 1 J. INST. FOR ADVANCEMENT CRIM. JUST. 2, 2 (2007) (stating that the law targets “the most serious and violent repeat offenders”); Jennifer E. Walsh, *Defining the Strike Zone: Discretion and California’s Three Strikes Law*, 1 J. INST. FOR ADVANCEMENT CRIM. JUST. 17, 17 (2007).

116. See CAL. PENAL CODE § 1170 (West 2010) (establishing the rules for California’s determinate sentencing scheme); CAL. R. CT. 4.421 (aggravating factors), 4.423 (mitigating factors); *Cunningham v. California*, 549 U.S. 270, 277-81 (2007) (describing the history, mechanics, and constitutionality of California’s determinate sentencing laws). Although determinate sentencing involves its own distinct issues, the aggravating and mitigating circumstances provided in the California Rules of Court may provide some guidance in the Three Strikes context.

117. CAL. R. CT. 4.423(b)(2).

118. 539 U.S. at 535.

disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.”¹¹⁹

Against this outline of the “spirit” of the Three Strikes law, Clinic students develop mitigating evidence that was overlooked by earlier counsel. Students interview our clients and their family, friends, and former employers. They obtain early court records, probation reports, mental health records, school reports, and foster care documents when applicable.

In the *Anderson* case, students documented that our client had been committed to mental health institutions from a young age. They also retained a mental health expert to testify that Anderson’s untreated mental illness led to self-medication with illicit drugs, which in turn compromised his executive functioning and impulse control. Students argued that not only had Anderson’s trial attorney acted unreasonably in failing to develop a mitigation case, but that the new mental health and social history evidence uncovered by the students, combined with Anderson’s nonviolent criminal history, put him at least partially outside the spirit of the Three Strikes law and entitled him to relief under *Romero* and *Williams*.

On November 6, 2009, the same Superior Court judge who sentenced Anderson to life in 1997 granted the Clinic’s habeas writ, acknowledging not only that Anderson’s trial attorney was incompetent but that the new evidence developed by Clinic students placed Anderson outside the spirit of the Three Strikes law. Anderson was resentenced as a “second striker” to eight years and ordered released from prison based on the time he had already served.

As of this writing, post-conviction investigations conducted by Clinic students have led to new, reduced sentences in twelve cases between November 2008 and June 2010. Because most of our clients have already served over a decade for their crimes—which span from simple drug possession to petty theft—those whose cases we have won in court have been released from prison for time served. I am also happy to report that all of these clients have been reunited with their families and are leading crime-free and productive lives.

III. IMPLICATIONS

A. Is Death Different?

Despite the Clinic’s success litigating cases under the Sixth Amendment, the right to effective assistance of counsel in Three Strikes sentencing hearings

119. *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (“This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. . . . [Our cases] reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant.”)

is far from obvious.

The Ninth Circuit, for example, refuses to recognize, and denies outright, federal habeas corpus claims involving challenges to the adequacy of counsel in noncapital state sentencing proceedings.¹²⁰ According to the Ninth Circuit, although *Strickland* clearly requires effective representation at a *capital* sentencing hearing, the appropriate standard for evaluating Sixth Amendment challenges to sentencing procedures in Three Strikes cases is insufficiently “established” to warrant federal habeas review.¹²¹

The Ninth Circuit’s reluctance to extend Sixth Amendment rights to noncapital sentencing hearings comes directly from *Strickland*, which explicitly limits its holding to death penalty cases. In *Strickland*, the Court explained that the “adversarial format and . . . existence of standards for decision” in capital sentencing hearings create a testing ground similar to the guilt phase of any trial and thus demand strict Sixth Amendment compliance.¹²² On the other hand, the Court concluded that noncapital sentencing hearings “may require a different approach to the definition of constitutionally effective assistance.”¹²³

On *Strickland*’s own terms, however, there is little to distinguish the constitutional structure and procedures in capital sentencing hearings from Three Strikes sentencing rules.

B. Structural Similarities Between Capital and Three Strikes Sentencing Procedures

The first and most basic similarity between the administration of the death penalty and Three Strikes law is that both punishments have survived direct challenges under the Eighth Amendment. In *Gregg* and *Ewing* respectively, the Supreme Court ruled that neither executions nor Three Strikes sentences per se violate the Eighth Amendment’s ban on cruel and unusual punishments. Instead, both capital and Three Strikes sentences are reviewed to ensure that a defendant’s punishment is not grossly disproportionate to his or her crime.¹²⁴

120. See *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th Cir. 2006); *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1244 (9th Cir. 2005) (“When the Supreme Court established the test for ineffective assistance of counsel . . . the Court expressly declined to consider the role of counsel in an ordinary sentencing, which . . . may require a different approach to the definition of constitutionally effective assistance. Since *Strickland*, the Supreme Court has not decided what standard should apply to ineffective assistance of counsel claims in the noncapital sentencing context. Consequently, there is no clearly established law in this context.”); cf. *Glover v. United States*, 531 U.S. 198 (2001) (applying *Strickland* to a noncapital sentencing error); *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (“[T]he *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims . . .”).

121. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

122. *Id.*

123. *Id.*

124. See generally *Ewing v. California*, 538 U.S. 11 (2003); *Gregg v. Georgia*, 428 U.S.

The second important similarity between the death penalty and Three Strikes law is that both require individualized sentences and neither may be imposed automatically. In *Woodson v. North Carolina*, the Court rejected state statutes that called for mandatory death sentences for specific brutal crimes. The Court clarified that the death penalty is permissible, but the Eighth Amendment requires consideration of evidence that may mitigate a capital defendant's culpability and warrant a reprieve from execution.¹²⁵ Likewise, albeit under a different rationale, the California Supreme Court ruled in *Romero* that sentencing judges must consider a defendant's "individual" circumstances and depart from the Three Strikes sentencing scheme when appropriate.¹²⁶

The third similarity between the death penalty and Three Strikes law is the way that the rulings in *Woodson* and *Romero* have been interpreted and applied. In practice, both sentencing schemes pose nearly the exact same question to the people who are deciding how to punish the defendant.

Following *Woodson*, states with death penalty statutes enacted sentencing rules that provided for consideration of a full range of mitigation evidence.¹²⁷ California's capital sentencing procedure is set forth in Penal Code section 190.3, which provides that a jury must consider:

[T]he nature and circumstances of the present offense, any prior felony conviction or convictions [committed by the defendant] . . . and the defendant's character, background, history, mental condition and physical condition.¹²⁸

The jury is then instructed to decide whether aggravating circumstances

153 (1976).

125. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *see also* *Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989) (holding that "full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned *moral* response to the defendant's background, character, and crime"); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (holding that capital sentencing hearings must consider any evidence that may mitigate a defendant's culpability).

126. *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 508-12 (1996).

127. *See* *Ring v. Arizona*, 536 U.S. 584, 587 (2002) ("States have constructed elaborate sentencing procedures in death cases because of constraints this Court has said the Eighth Amendment places on capital sentencing."); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

128. CAL. PENAL CODE § 190.3 (West 2010). Following this general instruction, juries in death penalty cases are directed to consider eleven specific sentencing factors, including the age of the defendant at the time of the crime, whether or not the defendant was a principle actor or merely an accomplice, and if the defendant had prior criminal convictions. The jury is then instructed to impose a death sentence if the aggravating circumstances "outweigh" the mitigating circumstances.

I refer to California's death penalty law merely to draw an analogy to the state's Three Strikes sentencing rules. Of course, different states have different formulations of the basic question put to a jury deciding whether to impose a death sentence.

“outweigh” mitigating circumstances.¹²⁹

A nearly identical standard applies in Three Strikes cases. Recall that in *People v. Williams*, the California Supreme Court held that before imposing a Three Strikes sentence a trial court must consider:

[T]he nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects.¹³⁰

If, upon consideration of these factors, a trial court determines that the defendant falls outside the “spirit” of the recidivist sentencing scheme, it may not impose a Three Strikes sentence.¹³¹

Thus, the legal question of whether or not to impose a Three Strikes sentence is, for all practical purposes, identical to the question that jurors face in deciding whether to impose a death sentence.

Finally, the standard for reviewing death and Three Strikes sentences leads to a fourth important similarity between the punishment schemes. In both contexts, trial courts are given broad discretion over sentencing decisions. A capital sentence cannot be reversed on appeal unless no “rational finder of fact” could possibly agree with the verdict.¹³² Likewise, a Three Strikes sentence must be affirmed on appeal unless the trial court’s sentencing determination is “so irrational or arbitrary that no reasonable person could agree with it.”¹³³ In

129. The fact that a jury concludes that aggravating circumstances outweigh mitigating circumstances “beyond reasonable doubt” does not, to me, clarify anything. *See* Barclay v. Florida, 463 U.S. 939, 951-52 (1983) (discussing the “beyond reasonable doubt” standard and concluding: “We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. . . . As long as that discretion is guided in a constitutionally adequate way, and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more.”) (citing *Proffitt v. Florida*, 428 U.S. 242 (1976)).

130. *People v. Williams*, 17 Cal. 4th 148, 161 (1998).

131. *Id.*

132. *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990) (holding that the sufficiency of evidence standard provided in *Jackson v. Virginia*, 443 U.S. 307 (1979), controls federal review of decisions made by juries that aggravating circumstances outweigh mitigating circumstances); *see also* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 605 (1995) (“Indeed, ‘[t]he appellate court’s task is particularly complicated because the jurors are almost unguided in how they may use the evidence,’ as well as how much value they may attach to it and how they may compare it to other evidence in the ‘weighing’ process they must engage in.” (quoting Linda Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 GA. L. REV. 125, 156 (1993))). I appreciate that *Jeffers* and *Jackson* set a constitutional standard for evaluating death penalty determinations and that state courts and legislatures may provide different standards for reviewing the sufficiency of aggravating evidence in capital cases. For immediate purposes, the constitutional rule is sufficient for drawing the rough analogy between standards for reviewing Three Strikes and capital sentences.

133. *People v. Carmony*, 33 Cal. 4th 367, 377 (2004). In the fifteen-year history of the Three Strikes law, only one Three Strikes sentence has been reversed under this standard:

both contexts, strongly deferential standards of review inhibit legal development of precisely those questions put to sentencers.¹³⁴

Before moving on, there is one important structural *distinction* between Three Strikes and death penalty sentencing procedures that deserves discussion. Under *Ring v. Arizona*,¹³⁵ only juries may impose a death sentence. Under the Three Strikes law, a judge decides whether the defendant falls outside the spirit of the sentencing scheme.

Ring may turn out to be a turning point in the Court's "death is different" jurisprudence. In *Ring*, it was the government that invoked "death is different" in its effort to enforce the death penalty.¹³⁶ The State of Arizona defended its death penalty statute, which provided that judges (not juries) must decide whether to impose the death penalty. The State argued that judges better protect against arbitrariness in capital sentencing than juries.

The Court called the government's argument "unpersuasive" and framed the issue somewhat differently. According to the Court, under Arizona's statute, aggravating circumstances amounted to elements of the crime. Because the sentencing factors were de facto elements, the Court held that *Apprendi v. New Jersey*¹³⁷ (a noncapital case) required juries to decide them.¹³⁸ The Court explained:

[There is] no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent . . . We see no reason to differentiate capital crimes from all others in this regard.¹³⁹

According to the Court, it was extending to capital defendants constitutional protections that it had earlier provided to defendants in

People v. Cluff, 87 Cal. App. 4th 991 (Ct. App. 2001) (holding that a trial court abused its discretion by misinterpreting the facts at trial and assigning unfair culpability to the defendant).

134. I am not the first to observe that the Supreme Court refined the framework for death penalty sentencing procedures indirectly, by ruling on standards for effective assistance of counsel under the Sixth Amendment. In a series of cases beginning with *Williams v. Taylor*, the Court sketched the contours of proper capital sentencing hearings by describing what defense attorneys should *not* do. In ruling that trial counsel erred in failing to develop certain evidence (including evidence of childhood "privation," physical and sexual abuse, and low intelligence) and, further, that this evidence would likely have persuaded a jury that mitigating factors outweighed aggravating factors, the Court began to describe what constituted material and persuasive evidence at a capital sentencing hearing. See, e.g., Craig Haney, *Evolving Standards of Decency*, 36 HOFSTRA L. REV. 835, 851 (2008) (describing *Williams v. Taylor*, 529 U.S. 362 (2000), as "the key ruling" in the development of standards for mitigation evidence in capital cases).

135. See *Ring v. Arizona*, 536 U.S. 584 (2002).

136. Transcript of Oral Argument at 43, *Ring*, 536 U.S. 584 (No. 01-488).

137. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

138. *Ring*, 536 U.S. at 587. The question of how to differentiate an element of a crime from a discretionary sentencing factor is not a simple one, and I will not pretend to clarify the issue here.

139. *Id.* (citation and quotation marks omitted).

noncapital cases, *i.e.*, *Apprendi*. (Note that this is the opposite direction that Amsterdam and his LDF colleagues believed that constitutional protections would flow. In this instance, rights are “trickling up” to death cases.)

The Court may soon embrace the idea that death cases are not that different. Justice Scalia, who wrote the majority opinion in *Ring*, has long condemned the Court’s “death is different” line of cases.¹⁴⁰ It is still too early to tell, but if *Ring* cabins “death is different” to the Eighth Amendment’s guarantee that capital defendants must be able to present mitigating evidence at sentencing (rather than *Strickland*’s Sixth Amendment guarantees), then the difference between the death penalty and Three Strikes law dissolves further. Recall that the California Supreme Court has already decided in *Romero* and *People v. Williams* that Three Strikes defendants also must be able to present mitigating evidence as a matter of state law.

Even without Justice Scalia’s opinion in *Ring*, the structural similarities between capital sentencing procedures and rules governing Three Strikes sentences thoroughly undermine *Strickland*’s rationale for limiting its holding to death penalty cases. In form, Three Strikes sentencing hearings are no less adversarial, formal, or standardized than capital sentencing procedures. There is no reason to deprive Three Strikes defendants the constitutional protections provided in *Strickland* and its particular place in the “death is different” jurisprudence should fall.¹⁴¹

C. Arbitrariness in Capital and Three Strikes Cases

In fairness, the death penalty is more often differentiated from noncapital sentences in less structural terms. The original thrust of the “death is different” rationale focused on the practical and moral significance of the sentence at stake, and the structural argument later adopted in *Strickland* was explicitly abandoned. During oral argument in *Gregg*, Amsterdam argued that “[d]eath is different because even if exactly the same discretionary procedures are used to decide issues [in noncapital sentences] . . . the result will be more arbitrary on the life versus death choice.”¹⁴²

The basic argument is that the life-or-death decision in capital cases is so

140. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting).

141. In light of the “death is different” language in *Strickland* itself, I do not blame the Ninth Circuit for its decisions in *Cooper-Smith* and *Grigas* that *Strickland* is not “clearly established” for purposes of evaluating federal habeas corpus claims under 28 U.S.C. § 2254. The unavailability of federal review of claims of ineffective assistance of sentencing counsel by Three Strikes inmates (and all other noncapital defendants) is a problem that the Supreme Court must rectify. *Cf. Glover v. United States*, 531 U.S. 198 (2001) (applying *Strickland* to a noncapital sentencing error).

142. H.L. POHLMAN, *CONSTITUTIONAL DEBATE IN ACTION: CRIMINAL JUSTICE* 294-95 (1955); *see also* Liebman & Marshall, *supra* note 16, at 1663-64 (discussing how “the problem of arbitrariness continues to plague capital sentencing” and how the Supreme Court grappled with the problem following *Furman* and *Gregg*).

binary, so rare, and so enormous, that ordinary people sitting in judgment cannot be expected to return reliable or consistent verdicts.

I believe the same holds true in the Three Strikes context. When a defendant is convicted of a minor, nonviolent, third-strike felony, a trial court has the authority to either reduce the crime to a misdemeanor and release the defendant on probation or sentence him to spend the rest of his life in prison. The breadth of sentencing options and gulf between probation and life in prison is as difficult and momentous as the life-or-death decision put to capital juries.

Consider for example *People v. Superior Court (Alvarez)*.¹⁴³ On Christmas day in 1994, Long Beach police officers observed Steven Alvarez “on the wrong side of the street riding a skateboard.” They stopped and searched Alvarez, discovering a small bag containing 0.41 grams of methamphetamine. Prosecutors chose to file the case as a felony because Alvarez had prior burglary convictions. The state then sought a life sentence under the Three Strikes law. Alvarez took the case to trial but was convicted.

The trial court was then faced with several sentencing options. Standing alone, a felony conviction for possession of methamphetamine carries a minimum sentence of 18 months in prison and a maximum of three years. Thus the court could have sentenced within this range if it “struck” all of Alvarez’s prior convictions.¹⁴⁴ Another option was to strike some of Alvarez’s prior felony convictions, and keep just one prior conviction, thus sentencing him as a “second striker.” Under this scenario, the court could sentence Alvarez to six years. On top of the six years, the court also had authority to impose up to four one-year enhancements for each of Alvarez’s prior burglary convictions, bringing the total to ten years. The final option was the prosecution’s choice: a life term under the Three Strikes law.

The trial court chose “none of the above,” and exercised its authority to avoid the Three Strikes sentencing scheme altogether by reducing Alvarez’s felony conviction to a misdemeanor.¹⁴⁵ Alvarez was sentenced to a year in county jail and three years unsupervised probation. The California Supreme Court ultimately upheld the sentence as within the trial court’s discretionary authority.¹⁴⁶

Against this backdrop, next consider *People v. Foroutan*, a remarkably

143. 14 Cal. 4th 968 (1997).

144. See *People v. Williams*, 17 Cal. 4th 148 (1998); *People v. Superior Court (Romero)*, 13 Cal. 4th 497 (1996).

145. Pursuant to section 17(b) of the California Penal Code.

146. *Alvarez*, 14 Cal. 4th at 978-80. Note that the standard for deciding whether to reduce a felony to a misdemeanor (a judge must consider “the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, and his traits of character as evidenced by his behavior and demeanor at the trial,” *People v. Morales*, 252 Cal. App. 2d 537, 547 (Ct. App. 1967)) is almost identical to the standard of whether to disregard prior strikes under *Romero* and *Williams*. Both decisions are reviewed for abuse of discretion.

similar case handled by the Stanford Criminal Defense Clinic. In *Foroutan*, our client stood convicted of possession of 0.03 grams of methamphetamine. His prior strikes were three nonviolent burglaries, the most recent of which was ten years prior to his drug conviction. (Alvarez had four prior burglary convictions.) Yet the trial court in *Foroutan* read *Alvarez* to confer wide-open discretion, and sentenced Foroutan to life under the Three Strikes law. The decision was affirmed on appeal.¹⁴⁷

Given the enormous stakes involved in Three Strikes cases—particularly those involving minor third-strike convictions—and the widely different and irreconcilable results in *Alvarez* and *Foroutan*, I am not convinced by the argument that sentencing determinations in death penalty cases are any more arbitrary than Three Strikes cases. This is especially true considering that capital juries are deciding between life sentences and execution (a distinction, which I discuss below, that frequently has no practical difference) while the possibilities available in a Three Strikes sentencing hearing range from immediate supervised release to permanent incapacitation by life imprisonment.

D. Finality

In *Woodson*, the Supreme Court explained that the irrevocability of execution set it apart from other criminal punishments:

Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.¹⁴⁸

Justice Stewart made the same argument in *Furman*:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total revocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.¹⁴⁹

Yet here too the “death is different” rationale breaks down. On one base level it breaks down because most inmates sentenced to death are never actually executed. Since *Gregg* was decided in 1976, a total of 4491 defendants have been sentenced to death in the United States. Roughly one quarter of them have been executed. Only one state (Virginia) has executed more than half of the defendants sentenced to die in its jurisdiction. California has by far the largest death row in the country with over 650 inmates. Yet the state has carried

147. *People v. Foroutan*, No. A118978, 2009 WL 252617 (Cal. Ct. App. Feb. 4, 2009). The Clinic is currently pursuing relief in federal court.

148. *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

149. *Fuhrman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

out only thirteen executions since 1976. The vast majority of inmates who have died on California's death row have been done in by disease, old age, and suicide.¹⁵⁰

Even assuming that most death row inmates will eventually be executed, I believe that convictions of inmates sentenced under the Three Strikes law are no less final and irrevocable.¹⁵¹ Inmates sentenced to noncapital prison terms have no means of challenging their convictions beyond the direct appeals process. Even if new evidence of innocence surfaces after conviction (the nightmare scenario in the capital context) it is improbable that a Three Strikes inmate, who is most likely indigent and poorly educated, would be able to successfully litigate his release without professional representation.¹⁵² As one observer put it, "[a]n innocent Californian . . . is almost better off being sentenced to death than to life in prison—at least the case will get a long, hard look."¹⁵³

Personally, I abhor the death penalty because I believe executions are unnecessarily brutal, wasteful, and vindictive. However I do not believe the death penalty is procedurally distinct or uniquely arbitrary in its administration. Nor is the death penalty any more final, in real terms, than a life sentence under California's Three Strikes law.

Finally, in the moral calculus comparing Three Strikes and capital cases, it must be acknowledged that Three Strike inmates receive a small fraction of the legal resources and constitutional protections provided to capital defendants. Yet the majority of inmates sentenced under the Three Strikes law are serving life terms for nonviolent conduct.

CONCLUSION: A CALL FOR HELP

"Death is different" is more than a constitutional principle. It is a cornerstone of criminal justice law and policy. Countless legal resources and

150. See generally Death Penalty Information Center, <http://www.deathpenaltyinfo.org/death-row> (last visited Feb. 20, 2010).

151. Another factor to consider is the sheer human toll excised by each sentencing regime. Collectively, there are currently 3316 inmates on death row in the United States. An additional 1175 capital defendants have been executed since 1976. The total number of defendants sentenced to death (4491) is almost exactly the same as the number of inmates serving Three Strikes sentences for nonviolent crimes (4609).

Furthermore, our anecdotal experience at the Criminal Defense Clinic is that our Three Strikes clients share similar social histories with inmates on death row. Our clients are all indigent. They suffered similar childhood neglect and abuse, struggles with addiction, and exposure to violence that are common among capital defendants.

152. See Liebman, *supra* note 16, at 2044-46 (discussing how noncapital defendants are deprived post-conviction resources and remedies available to capital defendants).

153. Nina Martin, *Innocence Lost: What Happens When the Toughest Criminal Justice System in the World Keeps Locking Up the Wrong People—for Life*, S.F. MAG., Nov. 2004, available at <http://www.sanfrancmag.com/story/innocence-lost>.

non-constitutional legal safeguards are statutorily directed toward capital cases for the same reasons that the Supreme Court justifies its heightened constitutional scrutiny of death penalty convictions.¹⁵⁴

To be perfectly clear, I am *not* arguing that the Three Strikes law is worse than the death penalty or that capital cases do not deserve careful scrutiny. Nor do I fault Amsterdam and LDF for embracing and articulating the “death is different” principle.

Amsterdam recognizes that, since *Gregg*, the Supreme Court, Congress, and state legislatures have expedited appellate and post-conviction review procedures with arcane rules intended to hasten executions, particularly under the auspices of the Antiterrorism and Effective Death Penalty Act of 1996.¹⁵⁵ However, unlike his LDF colleague James Leibman, Amsterdam does not trace these fast-track procedures to the line of “death is different” cases.¹⁵⁶

When I asked Amsterdam recently if he has any regrets about advancing “death is different,” he responded that his first commitment was, beyond question, to his clients, and that he was bound to mount the strongest argument on their behalf, regardless of the broader consequences.¹⁵⁷ Of course, he is right.¹⁵⁸ The argument helped Amsterdam’s clients, and death row inmates generally, because under “death is different” courts could extend constitutional rights to a relatively small class of defendants without upsetting the entire criminal justice system.

But Leibman is right, too. He is right that “death is different” has ricocheted through the system to the severe detriment of noncapital defendants, particularly those facing life terms under California’s Three Strikes law.

The Stanford Clinic grapples with the tension between being a law reform organization and legal service agency daily. All of our clients are serving Three Strikes sentences for extremely minor conduct and, in my mind, all face disproportionate sentences. But some of our cases and clients are undeniably more sympathetic than others. Do we want to bring our “best” cases before the Ninth Circuit and California Supreme Court, where favorable rulings will have the broadest impact? Of course. Are these cases ideally positioned to execute this strategy? No. Are other, less sympathetic, cases making their way to these

154. One important example is that although there is no Sixth Amendment right to counsel in collateral habeas corpus proceedings, even in death cases, every state in the country (except Alabama) funds attorneys to provide post-conviction representation to inmates sentenced to death. California alone spends \$15 million per year on post-conviction investigations and legal fees for inmates on death row. No money is allocated for habeas counsel for the vast majority of criminal defendants serving noncapital sentences.

155. Amsterdam, *In Favorem Mortis*, 14 HUMAN RIGHTS 14 (1987).

156. Liebman, *supra* note 16, at 2044-46.

157. E-mail from Anthony Amsterdam to author (Nov. 4, 2009) (on file with author).

158. See MICHAEL MELTSNER, *THE MAKING OF A CIVIL RIGHTS LAWYER* 215 (2006) (discussing criticisms of “death is different” and concluding that “[c]utting back on the death penalty required that a line be drawn between capital punishment and the rest of criminal law. To argue otherwise would have been suicidal.”).

high courts, and do I wonder if decisions in these will set back our agenda to reform the harshest aspects of the Three Strikes law? Absolutely.

Amsterdam faced the same conundrum when he was before the Court in *Gregg*. He did not hesitate, and neither should the Stanford Clinic. Like LDF in 1968, the Stanford Clinic has stumbled on a horrible car accident. In my mind, the Three Strikes law is the single largest unaddressed problem with the nation's criminal justice system. Few in the legal establishment have noticed. I believe they are still "distract[ed]" by the death penalty.¹⁵⁹ We will try to stem the bleeding until backup arrives.

159. E-mail from Guido Calabresi, Senior Judge, U.S. Court of Appeals for the Second Circuit, to author (July 16, 2009) (on file with author).