

U.S. COMMISSION ON CIVIL RIGHTS

BRIEFING ON MANDATORY LIFE SENTENCES  
AFTER THREE FELONY CONVICTIONS

EXECUTIVE SUMMARY

On July 12, 1996, the Commission on Civil Rights held a briefing on possible civil rights implications of mandatory life sentences after three felony convictions, the "three strikes and you're out" laws. The Commission frequently arranges such public briefings, with presentations from experts outside the agency and a representative range of advocates, in order to inform itself and the Nation of civil rights situations and issues.

The July 12, 1996 briefing was arranged because of questions raised about three-strikes laws and assertions that those laws discriminate against people of color and that reductions of crime can better be achieved in less costly ways that do not have disparate impacts on racial minorities.

Performing the briefing were six panelists, divided into two panels. Some panelists sharply criticized three-strikes laws, especially for applications called unfair to African American men. Others presented mixed assessments. No one defended such laws as the best means of achieving a just, lawful society.

The panelists were Jonathan P. Caulkins, Associate

Professor of Operations Research and Public Policy at Carnegie Mellon University and co-author of a Rand Corporation report on California's three-strikes law; James Wootton, President of Safe Streets Alliance; Laura W. Murphy, Director of the Washington Office of the American Civil Liberties Union; Malcolm C. Young, Executive Director of The Sentencing Project; Julie Stewart, President of Families Against Mandatory Minimums; and William B. Moffitt, a Senior Partner with the law firm of Asbill, Junkin, and Moffitt and Treasurer of the National Association of Criminal Defense Lawyers.

The first speaker on the opening panel, Mr. Caulkins, co-author of the Rand report "Three Strikes and You're Out: Updated Benefits and Costs of California's New Mandatory Sentencing Law," stated that the study found the law would in time, if fully implemented, lead to a 28 percent reduction in serious and violent crime committed by adults and would cost an average of \$5.5 billion a year. The cost would be \$16,000 for each serious or violent crime averted, Mr. Caulkins said. Because of the "enormous" estimated annual

cost, the study predicted that the law would never be fully implemented, Mr. Caulkins said.

Mr. Caulkins noted that the anticipated crime reduction arose primarily from the fact that prisoners while behind bars have no opportunity to commit crimes against the general public. The study assumed, he said, that other factors arising from such a law and imprisonment tended to offset one another. He said that the dominant cost in implementing the law was that of incarceration.

Furthermore, the researchers found, Mr. Caulkins said, that the third-strike provision in the California law was not responsible for most of either the crime reduction or the cost. Provisions in that law mandating longer sentences after a second strike, the elimination of probation, and reductions of credit for good behavior in prison were large responsible, Mr. Caulkins said.

On racial impact of the California law, Mr. Caulkins noted that the report did not address that issue. His own view, Mr. Caulkins stated, was that the longer sentences under the new law would fall disproportionately on minorities. He said that such disproportionality arose under other sentencing systems, too, because minorities were arrested and convicted at higher rates than the general population.

But Mr. Caulkins suggested that removing drug law violations from three-strikes laws would reduce the racial

disproportionality. He said that minorities are arrested for drug offenses at rates higher than their percentages of the drug-using population.

The other speaker on the first panel, Mr. Wootton of the Safe Streets Alliance, stated that the real question was not whether a sentencing law had a disparate impact on racial minorities but whether greater crime in minority communities made a disparate impact appropriate. He cited a Justice Department study that reports from victims of crimes indicated about half the assailants were black, roughly the same, he said, as the proportion of blacks in the prison population. He also cited statistics indicating that one in 30 black men will be a homicide victim, in contrast to one in 278 white men, and that 90 percent of the victims of black assailants are black.

Mr. Wootton criticized "a stereotype" portraying the young black male population as a group at risk of becoming violent offenders. He said studies show that 94 percent of the young people who come in contact with the criminal justice system have no further involvement and that only 2 percent become habitual criminals responsible for most serious and violent crime.

Mr. Wootton, whose organization supports "truth-in-sentencing" laws, stressed that his main goal is a criminal justice system that promotes "a sense that the sentences that are being meted

out are based on individual justice being done" for both victim and defendant.

The first speaker on the second panel, Ms. Murphy of the ACLU, focused on the "three-strikes" provisions in the Federal Omnibus Crime Bill of 1994 because, she said, States tend to view that "three-strikes" law as a model. Ms. Murphy noted that the Federal law also has a category of drug offense as a strike and called that "extremely troubling" because the category is "based merely on the amount of drugs and not on the degree of culpability." She said that a low-level courier hauling drugs in a vehicle stands to receive the same degree of punishment as the mastermind behind the operation. She suggested that, especially with prosecutorial discretion, minorities would incur harsher punishment under the law than whites.

Ms. Murphy said that the "three-strikes" law violates the U.S. Constitution's Eighth Amendment -- as interpreted by the Supreme Court to require that a punishment fit the crime -- in that life imprisonment is not appropriate punishment in some cases where the law has brought about that sentence. She said that under the law a 69-year-old first-time drug courier who had committed two violent felonies 30 years earlier would receive life imprisonment:

Ms. Murphy also criticized the law as unnecessary because U.S. Sentencing Commission guidelines are already stringent, as perhaps promoting

an increase in crime rather than enhancing public safety, and as exacerbating "existing problems of racial discrimination" in criminal justice. "We know without a doubt that race is a significant factor in deciding whom to target, whom to stop, whom to detain, and whom to search and arrest," she said. Race is also behind longer sentences given African Americans, Ms. Murphy said.

The next panelist, Mr. Young of The Sentencing Project, stated that "three-strikes" legislation provides "every opportunity" for discriminatory application. Mr. Young said that a shift toward prosecutorial discretion takes from the judge the power to determine sentences for defendants who appear before the court, leading in California and perhaps other States to what seems to be discriminatory or disproportionate applications to minorities. In California, 13 times more African Americans than whites are sent to prison under the "three-strikes" law, he said.

One problem, Mr. Young said, is that application of the California law apparently varies from jurisdiction to jurisdiction. Different racial compositions of jurisdictions would presumably bring about disparate treatment, he said.

Mr. Young cited a report issued by his organization showing that almost one in three young black males was incarcerated, on parole, or on probation in 1995. He said that

the report also documents that the punishment of minorities in the criminal justice system does not correlate to their participation in crime. Although drug use is about equal among African Americans and all Americans, African Americans are 35 percent of those arrested for possession, 55 percent of those convicted, and 74 percent of those sentenced to prison, he said the report shows.

Speaking next, Ms. Stewart of Families Against Mandatory Minimums said that a Federal "three-strikes" law is "totally redundant" because the U.S. Sentencing Commission already had sentences that would send a convicted person with two or three prior offenses to prison for life.

Under the Federal law, the means by which strikes are accumulated discriminates against African Americans, Ms. Stewart suggested. Severe penalties, including the 10-year sentence that constitutes a strike, are more likely for the possession of crack cocaine than of powder cocaine, and crack cocaine is the drug for which African Americans are primarily convicted, she said.

Ms. Stewart said that cooperation, or a refusal to cooperate, also resulted in a racial disparity in accumulation of strikes. She cited a Federal Judicial Center study showing that African Americans tended not to cooperate with prosecutors as readily as whites, and thus would be more likely to incur longer sentences that would

qualify as strikes.

The final panelist, Mr. Moffitt of the National Association of Criminal Defense Lawyers, said that a civil rights concern becoming more important with the rise of "draconian sentencing schemes" was the exercise of prosecutorial discretion in the treatment of defendants. Unlike judicial discretion, prosecutorial discretion is not likely to be subject to review for abuses and correction, he said. Since whether to go to trial involves the question of what the defendant risks in doing so, more severe sentences discourage defendants from exercising their right to trial, he said. In particular, "three-strikes" laws give prosecutors a "tremendous power" to pressure defendants to plead guilty to lesser charges that would not be strikes, he suggested.

Mr. Moffitt also warned against "sound-bite solutions" to crime, and metaphors such as "war on drugs" and "war on crime." He added, "We have created a perception ... that everyone in this country must live in fear, and the citizenry has responded to that perception by allowing and permitting the most draconian criminal justice system that exists in the world today."

The attached transcript provides the complete presentations of the panelists and the discussions between the Commissioners and the panelists at the July 12, 1996 briefing.

**Members of the Commission**

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A. Leon Higginbotham, Jr.

Constance Horner

Yvonne Y. Lee

Russell G. Redenbaugh

Mary K. Mathews, Staff Director

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BRIEFING ON MANDATORY LIFE SENTENCES  
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**July 12, 1996**

**CHAIRPERSON BERRY:** We ask the invited guests who were so agreeable to come to this briefing and are on the first panel to please come forward, and we apologize for delaying you for a few minutes.

**COMMISSIONER HIGGINBOTHAM:** Madam Chair?

**CHAIRPERSON BERRY:** Yes, Judge?

**COMMISSIONER HIGGINBOTHAM:** On the briefing, I presume that we will have the tapes available?

**CHAIRPERSON BERRY:** Yes, Judge Higginbotham.

**COMMISSIONER HIGGINBOTHAM:** If I have to cut off -- because we've finished the official business, I want to see if I can get a plane out of here -- I'll go through the tapes, and I want to say I am most appreciative for this session and will review the materials carefully.

**CHAIRPERSON BERRY:** All right.

**COMMISSIONER HIGGINBOTHAM:** Thank you.

**CHAIRPERSON BERRY:** Let me say that on behalf of the Commissioners, I welcome all the panelists to this briefing on civil rights implications of three strikes and you're out felony sentencing laws, and I thank everyone for appearing today to share your information and insights with us on this important issue.

We're well aware that public concern over violent crime is real, that it has captured the attention of government at all levels with good reason, and that elected officials, police and the judiciary are continually looking for better ways to reduce serious crime and assure that violent criminals are caught and locked up. We all want to be more secure in our homes and on the streets.

Yet all kinds of questions have been raised in news reports and by civil rights groups about the rigid application of the three strike sentencing laws, such as the one in California recently declared unconstitutional. Some claim that these laws unintentionally discriminate against certain people, in particular people of color, and various researchers, policy-makers, and taxpayers ask how much crime reduction has been achieved from three strikes laws, and other people want to know whether there are alternative, more cost-effective ways to reduce serious violent felonies, ways that do not have a disparate impact on racial minorities.

The Commission is very interested in this subject in terms of a lot of the work we do -- and that's why we have these briefings, to inform the work -- and this briefing is intended to explore the civil rights dimensions of these and other related issues connected to three strikes sentencing. We are glad that you were willing to come here today to help us learn more about it.

Our first briefer is the Fairfax County Commonwealth's

Attorney, Robert F. Horan, Jr. Is Mr. Horan here? He's not here?

In that case, we will go to Professor Jonathan P. Caulkins, who is an Associate Professor of Operations Research and Public Policy at Carnegie Mellon University's Heinz School of Public Policy, and he's also Co-director of Rand's Drug Policy Research Center. His research focuses on modeling and analyzing criminal justice and drug policy interventions, and his recent research interests include estimating the effects of mandatory minimum drug sentences, analyzing the implications of alternative goals for drug policy, and comparing the cost effectiveness of various drug and crime control measures.

Thank you very much for coming, and please proceed, Professor Caulkins.

**PROFESSOR CAULKINS:** Thank you.

I'd like to add that I am a co-author of Rand's report "Three Strikes And You're Out: Updated Benefits and Costs of California's New Mandatory Sentencing Law". I have a copy of that report, and also of a brief summary of that, that I can leave for the Commission.

**CHAIRPERSON BERRY:** We'd very much like to have it.

**PROFESSOR CAULKINS:** In my 10 minutes, I'd like to try to do three things. The first is to summarize the principal findings of that report. The second is to discuss a few insights the project team obtained through conducting the study, and, third, to make two comments about racial disproportionality in



sentences under that law.

The principal finding of the Rand study was a prediction that if the California three strikes law were fully implemented, and I do stress the "if," then the law would have both a substantial impact on serious and violent crime in California and would cost California taxpayers dearly.

More specifically, we predicted that over time, the law would lead to a 28 percent reduction in serious and violent crime committed by adults, and it would cost an average of \$5.5 billion a year. If one divides the \$5.5 billion a year by the roughly 340,000 serious and violent crimes averted per year, it works out to be about \$16,000 per serious or violent crime averted.

We went on to predict that one way or another, the law would not be fully implemented. \$5.5 billion is an enormous price tag, even for a state as large as California.

I don't have time to detail the methodology by any means, but very briefly, it focused on the incapacitative benefits of incarceration, that is, the belief that incarcerating criminals prevents them from committing crimes against members of the general public while they're behind bars. It largely ignored the possibility of deterrence, rehabilitation, replacement and crimino-genetic effects of incarceration or, more precisely, it assumed that those factors tended to offset each other, leaving incapacitation as the dominant effect.

Through the course of conducting that study, we obtained a number of interesting insights, of which I'll mention

three this morning. The first is that it's almost nonsensical to talk about the effects of three strike laws in general. Their effects, both positive and negative, depend enormously on how the laws are written, particularly with regard to what violations count as strikes and/or trigger other provisions of the law.

For instance, laws that are highly targeted can be much more cost effective than those that cast a broader net.

A second insight is that the costs associated with incapacitation, particularly prison, are really the dominant costs of these laws to the taxpayers. They can certainly clog courts, and they can certainly drive up judicial costs dramatically in percentage terms, but to put it very simply, multiple years of imprisonment cost a lot more than a trial.

So, from the taxpayer's perspective, the dominant cost comes from the incarceration.

The third insight is that with California's three strikes law, the third strike provisions are not responsible for the majority of either the costs or the reductions in crime. That may sound very odd. You might think that the third-strike provisions are at the heart of the law and would be responsible for all of its impact, but the California bill included other important provisions. Doubling sentences after conviction for the first serious felony, eliminating probation, and cutting back on good time in a way very similar to the so-called Truth-in-Sentencing laws.

We estimated that a "second strike only" version of

California's three strike law, one that omitted the third strike, 25 years to life sentences would achieve 85 percent of the crime prevention benefits and cost 75 percent as much as the full package itself.

Finally, I'd like to make two comments about the law and racial disproportionality in sentencing. These comments are not based directly on the report and hence are attributable to me, not to my co-authors and certainly not to Rand as an institution. The report didn't even address racial disproportionality in sentencing. It focused on the crime reduction impact, and the cost to the taxpayers.

The first of these two comments is that I'm confident that the additional prison years sentence under the three strikes law will fall disproportionately on minorities relative to minority representation in California's population.

Such disproportionality also pertained under the sentencing system that was in place before this law, and it would likely be true for any of a wide range of sentencing regimens, in no small part because minorities are arrested and convicted at rates which are highly disproportionate to the minority share of the population, both in California and in the nation more generally.

So, in discussing racial disproportionality in sentencing with respect to a three strikes law or any sentencing reform, I think it's important to ask, *Compared to what?* There's no one reference. So, I'm not going to argue that there's one

reference that is the appropriate one. My appeal is simply that any analysis should explicitly identify what the base case or alternative is to which the law in question is being compared in this regard.

The second comment is that I'd like to say a few words about sentences for drug offenders under California's three strikes law, and I preface that by pointing out that not only are minorities arrested for drug offenses at a rate which is disproportionate to minority share of the general population, but also at a rate which is disproportionate to minority share in the population of people who have used an illicit drug in the last 12 months.

With rare exceptions, such as selling drugs to a minor, drug law violations do not meet California's statutory definition of a serious or violent crime. So, they don't count as strikes.

However, when someone who already has a strike is convicted of a drug law violation, that person is not eligible for probation, the sentence is doubled, and good time is substantially limited.

Likewise, although in the California law, the first two strikes have to be serious or violent felonies as defined in California statute, the third strike can be any felony, including a drug felony, and in fact, there are some other separate statutes which "promote" a misdemeanor conviction to be like a felony conviction.

So, there are cases in which even a misdemeanor drug

law violation can count as a third strike and, hence, trigger the 25 year to life sentence.

We know a fair amount about how incarcerating drug offenders for long sentences affects drug use, drug prices, spending on drugs, and somewhat less precisely the impact on drug-related crime.

The magnitude of the impact of incarcerating drug sellers on crime depends on a variety of parameters describing who it is exactly that you're incarcerating and a variety of factors related to the incarceration, what went on in the arrest, what quantity of drugs was seized, and so on.

So, there's no single number of crimes averted per year of incarceration for a drug offender, but, in general, such incarcerations are not as cost effective as the other components of this California three strikes law, and I could elaborate on reasons why during the question and answer period.

So, one might conclude that a reasonable recommendation is that drug offenses be excluded from these laws. For every recommendation, there are certainly exceptions, but if the goal is to control serious and violent crime, meting out long sentences to drug offenders is rarely a cost effective way of achieving that goal.

Furthermore, excluding drug law violations from three strikes laws would ameliorate, at least partially, some of the racial disproportionality in the burden of sentencing generated by those three strikes laws.

**CHAIRPERSON BERRY:** Interesting. Thank you very much.

I wanted to remind Commissioner Redenbaugh -- I don't know if he heard this -- that you said that the three strikes you're out laws cause a 28 percent reduction in serious crime, but the cost was \$5.5 billion, which worked out to \$16,000 per crime, is that right?

**PROFESSOR CAULKINS:** I'd like to split one hair. It was a 28 percent reduction in adult crime. The three strikes law really doesn't affect crime by juveniles. If you factor in juveniles, it would only be about a 22 percent reduction in total crime. But a 28 percent reduction in adult crime.

**CHAIRPERSON BERRY:** And how many dollars?

**PROFESSOR CAULKINS:** 5.5 billion was our estimate.

**CHAIRPERSON BERRY:** Works out to about --

**PROFESSOR CAULKINS:** \$16,000 per serious or violent crime averted.

**COMMISSIONER REDENBAUGH:** Yeah. Thank you for that.

**CHAIRPERSON BERRY:** He's always interested in numbers.

Thank you very much, and we will get to the questions as soon as we've had our other presenter.

Mr. Horan is not here yet because, as the prosecutor, he happens to be in court.

James Wootton is President of Safe Streets Alliance, which he founded as a national organization to reduce violent crime. Most recently, the Alliance has focused on building support for "truth-in-sentencing," requiring that convicts serve

at least 85 percent of their sentences, and Mr. Wootton helped draft a Truth-in-Sentencing constitutional amendment that was sponsored in the Congress and approved by the House 377 to 50 in April.

He was Deputy Administrator of the U.S. Justice Department's Office of Juvenile Justice and Delinquency Prevention from 1983 to 1986, and helped create the National Center for Missing and Exploited Children.

Thank you very much for being with us.

**MR. WOOTTON:** Thank you, and thank you for having me.

I want to start out by saying that when I was asked to speak, I said that our organization basically did not take a position on three strikes and you're out because our main focus has been on truth-in-sentencing, and I was interested to hear Professor Caulkins say that the elements of the three strikes law in California that had the greatest crime effect included the truth-in-sentencing effects that took place even before the third strike -- some of us who have been involved in this have wondered at the notion that you wait until the third strike to impose the entire sentence because the main goal, it seems to me, of the justice system is to do justice, and all of the other goals are corollaries to that or ancillary to that -- and they're also discounted in the Rand study, that is, the rehabilitative effect, the deterrence effect, of doing justice.

And, so, to the question, I think, that society is grappling with in the face of what they see as the explosion of

violent crime, which I want to remind everybody is up over 500 percent since 1960, although it may be down slightly for adults in the last couple of years. We're also facing an increase in the homicide rate for juveniles.

But we are in an environment in which we have accepted a level of violence in our society that we would not have contemplated in the early '60s, and we went in 1960 to having about 750 people in prison for every 1,000 violent crimes to in 1980 having about 220 people in prison for every 1,000 violent crimes, and during the '80s, the prison building activity that went on actually increased the number of people in prison to about 440 people in prison, and at that point, the steep rise in violent crime was arrested, and we've seen a slight decrease in violent crime.

Since I associate myself with the findings of the Rand Corporation, that there would be a substantial reduction at some cost, I would like to say something about the cost issue.

Our estimate is that for every robber who is taken off the street, you are going to save for that robber that you've taken off the street about \$550,000 a year, and the way we arrive at that is that another Rand study found that a robber on a self-report basis commits between 60 and 62 robberies a year.

If you take the 60 robberies a year and multiply that times about a \$12,000 cost per robbery, you come up with about \$550,000 a year that's saved by keeping that robber off the street.



Now, if the cost is \$16,000 per serious and violent crime -- and we're not comparing apples and apples here, I understand that -- we would be conceivably losing in a cost benefit analysis \$4,000 a year if you implemented the full three strikes.

You might be willing to lose that, however, if you thought that doing justice as opposed to the cost benefit or the sort of pragmatic effect of keeping people in prison was worth doing that.

But then we have to get to the question of justice, and the perception of justice, and my observation of the debate with regard to the disparate impact of changes in sentencing law on racial minorities is that the question to be asked isn't whether there's a disparate impact, but whether or not there is in fact a greater amount of crime occurring in the minority communities for which it would be appropriate that there be a disparate impact.

There have been a number of studies that have tried to address this in different ways. The most persuasive, I think, is a study that was done by the Justice Department in a victim report study in which the victims were asked whether or not their assailant was of a certain minority, and the prediction, based on that study, was that the assailant was a black about 50 percent of the time, and that is about the proportion of the incarcerated individuals who are black in the system today.

The other observation that I make of a statistical nature is that the risk of homicide between blacks versus whites

in this country is about one in 30 black men is going to be the victim of a homicide, about one in 278 white men is going to be the victim of a homicide, and about 90 percent of the victims of black assailants are black, and therefore again there is an indicator, not an absolute proof, that there is a disproportionate amount of violent crime occurring in the black community.

There have been other studies that indicate a question -- and this is a very tough societal decision, and it's one that we're being pushed to because of the wave of violent crime -- whether we are going to reserve prison space for only violent offenders versus white collar offenders or other types of nonviolent offenders, and that's where people are being pushed, and therefore is it more just to have prison sentences only for violent offenders -- and the violent crimes are being committed disproportionately apparently by minorities -- or should we in order to maintain a sense of justice across the system build enough prisons so that violent and nonviolent offenders receive sanctions that are proportionate to their crime, even though they may not both be seen as an immediate community danger that the incapacitation effect of the system would normally be aimed at?

I'll say one final thing about this selective incapacitation issue. The Rand Corporation are the people who sort of broke the ground on this, but it was based on a study that was done by Marvin Wolfgang, who was a professor at the University of Pennsylvania. Everybody knows these statistics

today, but they're probably worth reviewing to understand what the public policy goal is that's at stake.

He did a study of a cohort of people who were born in 1946. So, this was well before there was any sense of breakdown of the family or any sense that this was all taking place in minority communities or the inner city or anything like that, and the birth cohort in Philadelphia in 1946 was found to be divided roughly and most importantly into two sections.

Seven -- six to seven -- percent of that birth cohort was responsible for 60 to 70 percent of the serious crime. It was responsible for 75 percent, I think, of rapes and robberies, and responsible for virtually all of the murders.

So, this seven percent got identified as the high crime part of the distribution within that cohort, and, so, the people in the criminal justice world started saying to themselves, *Perhaps if we could concentrate on that seven percent and get that seven percent off the street, we'd have the greatest crime control effect by getting that seven percent off the street.*

The early career criminal activities and the enhancements which were the precursors of the enhancements that now are labeled "three strikes and you're out" were an attempt to get at that high rate offender population and get those high rate offenders off the street, making the best use of the police and prisons and courts and all the costly resources.

So, the initial recommendation or at least observation of Rand in selective incapacitation is that you would have the

greatest crime control effect by focusing on those people.

Well, there are a couple of problems with that, and Peter Greenwood, who was one of the original authors of that, has noted that one of the things you have to do is be in the business of predicting, or making a decision on your incarceration decision by predicting that, the person you're incarcerating is going to continue to offend and by taking that person off the street, you're preventing the offending of who you're predicting is going to offend, and that is a very popular notion. People like to think that you're having these crime control effects by taking the potential future offender off the street.

My problem with that -- and it's my problem, frankly, with the arguments that the death penalty is a deterrent -- is that if you are using those kinds of arguments, you could justify taking a whole host of people off the street, and you would then stop taking them off the street only at the point that you decide that your cost of doing this was greater than the crime control effect that you're having.

I would like to emphasize that we can only punish people based on the crimes that they've committed, and maybe in the past, they've committed crimes that require enhanced sentencing -- based on the past crimes that they've committed -- but you're still doing it on a justice basis, not a kind of scientific determinism basis, which I think could lead to a lot of pernicious kinds of outcome.

One of the kinds of attempts that have been made to

narrow the scope of the people who get this selective incapacitation is the civil commitments statute of Washington State. They decided that they wanted to declare people to be a sex offender and therefore commit them civilly again, and then with a civil standard about whether they would be released. Again, it was an attempt to narrow the population, so the cost was less, and the crime control benefit was the greatest.

I disagreed with the decision in California as to making the third strike a felony as opposed to a violent felony. I thought it was over-inclusive. I thought it would have a greater cost than it would in terms of a benefit.

I'm interested in the notion that the third strike being a drug felony would perhaps have that same effect -- it would be over-inclusive without having an appropriate crime control benefit.

I will say I think that the voters of California probably are feeling a certain level of frustration now with the Supreme Court out there saying that there is no legislatively imposed scheme that could take away the discretion of the courts to decide whether or not to count previous strikes, and I think that there's going to be some further sorting out of whether or not that is the constitutional limit of the legislative power to tie the hands of the court, which would go across a full range of mandatory sentences and maybe range of sentences generally.

But on balance, my concern is that we create in this country a sense that the sentences that are being meted out are

based on individual justice being done, and that the support for the justice system is not that it is a social experiment that is using cost benefit analysis to decide how big a part of a certain potential population we're going to lock up, but, instead, it is one where people have a sense that when they come before the bar of justice, that the victims and the defendant are going to be given individual justice.

I want to make one last observation, and that is that I'm very concerned about the perception that a whole segment of the population is at risk of becoming violent offenders, and by that, I mean the young black male population.

I think that a stereotype is developed and has been to some extent encouraged by well-meaning people who think this is a way to encourage resources being spent on that population, and, so, the argument is that if we're going to reduce crime in that population, we want to make sure that we spend more money on prevention programs or programs that we can style as crime prevention programs.

And I would urge people to make their case for social programs to that segment of the population, not on the basis that every one of those young men is at risk of becoming what we would call a serious habitual offender, because most of the people in that population are good, law-abiding young people who are just as much the victims of the serious habitual offenders in their midst as anybody. They are more the victims than anybody else, and all our studies show that Marvin Wolfgang was right, although

it's even a narrower population. Ninety-four percent of the young people who come in contact with the juvenile justice system never come back. Four percent come back on a regular basis. Two percent come back habitually.

It's that two percent who are responsible for the most serious and violent crime among the seven percent, and those are the people whom most of the community wants to see identified and either their criminal behavior suppressed by better prevention programs or law enforcement or, if that doesn't work, for them to be removed from the community.

So, I think that there is a danger today of stereotyping the offenders and not supporting the law enforcement activities that will make that whole population less at risk of being victims of crime.

**CHAIRPERSON BERRY:** Okay. Thank you very much, both of you.

Any of the commissioners have questions for either one of the panelists? Commissioner Redenbaugh?

**COMMISSIONER REDENBAUGH:** I'll start with Dr. Caulkins. I apologize for missing the early part of what you said, but I appreciated the Chair including me with an update.

The 28 percent reduction in violent crime, how closely can you estimate causality between that and the changes in laws, particularly three strikes and truth-in-sentencing?

**PROFESSOR CAULKINS:** I'm not sure exactly what you're asking.

**COMMISSIONER REDENBAUGH:** Well, you spoke about the 28 percent reduction in violent crime. That was over what time period?

**PROFESSOR CAULKINS:** That's sort of a steady state result. The impact is less in the first few years, of course, in part because many of the people whom you incarcerate for long sentences would have, in the absence of the law, been incarcerated for a short sentence anyhow.

So, for the first years, the effect is smaller, but it reaches that within a half dozen years or so.

**COMMISSIONER REDENBAUGH:** And when did this law go into effect?

**PROFESSOR CAULKINS:** It was passed in March of 1994.

**COMMISSIONER REDENBAUGH:** '94. So, the 28 percent is a prospective?

**PROFESSOR CAULKINS:** Correct.

**COMMISSIONER REDENBAUGH:** So, this is a --

**PROFESSOR CAULKINS:** Literally, it's an average reduction over a 20-year time horizon, but by the time you get out to five or six years, it looks a lot like the average.

**COMMISSIONER REDENBAUGH:** Hm-hmm. Okay.

**CHAIRPERSON BERRY:** Commissioner Horner?

**COMMISSIONER HORNER:** First, I'd like to ask Mr. Wootton if you have a written version of your remarks or something that would contain much of the same information.

**MR. WOOTTON:** Yes, and I'd be glad to provide it.



**COMMISSIONER HORNER:** Would you provide it, please?  
Thank you. Because there was a lot in there that I had never heard or read, especially the figures at the end.

You used a figure of 500,000. I know that your argument is -- and I agree with it fully -- that justice is the primary consideration, but I do have an interest in the economic consequences of crime, and the figure of \$550,000 a year saved for each robber taken off the street -- do you have any figures that would give us information on the suppression of economic activity because of the fear of crime?

I'm just thinking. I had an armed robbery a block from my house last week. Last night, I decided not to go out and spend \$20 at the grocery store nearby, and boarded-up windows are beginning to appear in my segment where I usually shop on Connecticut Avenue.

Is there any way to know whether we would have increases in economic activity disproportionate to the costs of suppression of street crime?

**MR. WOOTTON:** There have been some studies, and I'd be glad to share them with you.

**COMMISSIONER HORNER:** Can you tell me whether in some there is a demonstrated correlation between street crime and suppression of economic activity on those streets or not?

**MR. WOOTTON:** Yes, there is.

**COMMISSIONER HORNER:** Okay.

**MR. WOOTTON:** A growing body of literature is trying

to address that, and I'd be glad to share that.

**COMMISSIONER HORNER:** Thank you.

**CHAIRPERSON BERRY:** Commissioner Anderson?

**COMMISSIONER ANDERSON:** Yes, thank you.

I have a couple of quick questions. First, you said the law went into effect in '94. So, in fact, the effect of it we're not going to see for a number of years. So, in reference to people who say that it has X effect or it has no effect -- really we're going to have to wait a little while?

**PROFESSOR CAULKINS:** Some of the provisions will have effect quickly. For instance, the elimination of probation will have an effect very quickly, because if under the old law you would have left somebody out on probation but with the new law they serve time, that takes effect very quickly.

The impact of the third strike 25 year to life sentences, that piece of it doesn't take effect very quickly because most of those people would have served some amount of time, more than a year or two under the old law.

So, it comes into effect in phases in some sense, and in the first year or two, you would expect impacts of like five or eight percent reductions.

**COMMISSIONER ANDERSON:** Have you seen that kind of effect?

**PROFESSOR CAULKINS:** That is about the size of the directions in California which may be attributable to the three strikes law, although Peter Greenwood often quips it's truly

remarkable that California's three strikes law has had a commensurate effect in all 50 states simultaneously. There's a national trend going on at the same time, and sorting out what is national trend because of other phenomena and what is attributable to the law is not possible.

**COMMISSIONER ANDERSON:** Now, I heard the other day that someone was contending that nine out of 10 violent crimes are committed by individuals between the ages of, say, 20 and 40, and that when you get plus 40 in age, it turns out to be roughly one out of 10.

I don't know whether that's accurate or not, but they were using that figure to argue that what's really essential in the three strikes provision is the second strike, which usually comes into effect in the early 20s or late 20s, and therefore by doubling the sentence at that point, you take individuals out of that high-risk 20-to-40-age bracket and release them in their 40s or later, and that's where the very important effect is. That would seem to be consistent with your findings.

**PROFESSOR CAULKINS:** Yes, I actually would have expected the nine out of 10 to have had to go back to include some of the teenage years and be more like 12 to 40, but your basic point that older people commit less crime, especially less violent crime, is absolutely true, and therefore very long sentences have less preventive effect during those out years because the person very possibly would not have been committing crime even if they were not kept in prison as long.

That is something that we consider in the study, and it is one of the reasons that the three strikes law is estimated to be less cost effective than some alternatives that we looked at that stress more certainty of sentences and moderate length sentences rather than extremely long sentences for some people.

**COMMISSIONER ANDERSON:** I'd like to ask Mr. Wootton just a final question, and to begin by saying I agree with you, as I understand you to say, that justice ought to be the primary rationale for the criminal justice system, not necessarily deterrence or rehabilitation or predictability.

Given that, are we not seeing in the third strike issue an indirect public argument as to what a just sentence is or are we seeing something very much different?

**MR. WOOTTON:** You know, it's funny, I spoke before the American Bar Association, and I said to them that they should embrace truth-in-sentencing or they're going to get mandatory sentences, and I think that the public's perception is that the sentence given at trial won't be served, however much the perception is that the sentence given might have been a just sentence, and that this debate has been largely driven by some very high profile anecdotes, and the three that I cite most regularly are the tourist murders in Florida, the murder of Michael Jordan's father, and the murder of Polly Klass, and the Polly Klass murder, I think, had a fairly significant impact on the three strikes referendum in California, although it wasn't necessarily Polly's father who was leading that effort.

The interesting thing about taking this beyond the crime-prone years is that, I think, there's a perception that justice is only served by taking this beyond the crime-prone years, that the crime control effect is only indirectly driving the public demand for the longer sentences, that the cases that get the high profile are cases where people feel that the person should get the death penalty or should go to prison for life, and I think that there's a perception on life without parole -- and there's been a number of fairly again high profile cases where people got life without parole, it was commuted, they were released, they committed some horrible crimes upon being released -- that the more the system's hands could be tied to follow through on what it would take to be a just sentence in the beginning would be good things.

The problem is in the current environment -- and we're a group that pushes for truth-in-sentencing; we don't push for mandatory minimums, and we don't push for three strikes, and we don't take a position on the death penalty -- is that there is a need to have a rational trustworthy alternative to overly punitive sentences being mandated because of a lack of trust in the system, and we look at the press clips from around the country from various things that happen, and in some states, you'll get juries sentencing people to 500 years in prison in the hope that they'll serve 10 or 15. So, I think that the debate would be rationalized significantly if there got to be some faith that there was a higher correlation between what the people and

their legislators wanted to see as punishment and what actually occurred in the justice system.

So, I think that there's a lot of reaction to that, and some could describe it as an overreaction. My sense is, as I think Peter and you all have kind of alluded to, that there are going to be corrective mechanisms within the system to push us to something that is perhaps more rational than what's happening in the debate today.

**COMMISSIONER ANDERSON:** Thank you.

**CHAIRPERSON BERRY:** Commissioner Lee?

**COMMISSIONER LEE:** Professor Caulkins, despite the California Supreme Court decision last week, do you have any projection, let's say, within the next five or 10 years what the prison population is going to be because of three strikes?

**PROFESSOR CAULKINS:** We have projections of what would happen if the law were fully implemented, and --

**COMMISSIONER LEE:** And what would --

**PROFESSOR CAULKINS:** -- I didn't review the numbers before coming here, but it's a more than doubling.

It's very hard to predict what will actually happen. The state Supreme Court ruled that judges could discount strikes, and then Tuesday of this week, the state Assembly passed a bill that said not in the case in which the person has been previously convicted of a violent felony in which the third strike is either serious or violence or one other situation --

**COMMISSIONER HORNER:** Or been released from prison

within the last five years.

**PROFESSOR CAULKINS:** Thank you. Which is now going to go to the Senate, and who knows how the Senate will handle that?

We also have an impression that something like 40 percent of cases in which prosecutors could pursue the third strike 25 years to life, they don't in one form or another. So, there's the whole world of prosecutorial discretion, whereas the court case in the Assembly bill addressed judicial discretion.

There's also a scenario which is that the state doesn't build enough prisons to keep up with the sentencing so there may be the possibility of a Federal judge taking over the California prison system because of overcrowding.

There are a lot of different scenarios. How it actually plays out is very hard to predict. We can only say what would happen if things went through as if the law were going to be fully implemented.

**CHAIRPERSON BERRY:** Yes, Commissioner Redenbaugh?

**COMMISSIONER REDENBAUGH:** Just a follow-up on that. What assumptions did you make about the change of behaviors?

**PROFESSOR CAULKINS:** On the part of?

**COMMISSIONER REDENBAUGH:** Potential criminals.

**PROFESSOR CAULKINS:** Essentially none. The motivation for that is that there's a large literature on deterrence and trying to empirically observe instances in which punishment has been enhanced and there's been a response on the part of criminals.

It would take a long time to adequately summarize it, but in very short summary, you really don't see much empirical evidence of deterrence.

This is a different law. This is a much more highly publicized, much more draconian law. To the extent that it does succeed in deterring criminals, then it could have effects more positive than what we projected.

**COMMISSIONER REDENBAUGH:** Is it thought that if a career criminal had two strikes and was in the two strike position, that person might leave California?

**PROFESSOR CAULKINS:** It's talked about a lot. You get great anecdotes about interviews with two strike felons who say exactly that, that they're going to leave.

I don't think that anyone has come up with a serious estimate of how much of that happens. I'd be skeptical that anyone could. That's obviously a very difficult thing to count or to measure.

**COMMISSIONER REDENBAUGH:** Okay. Thank you.

**CHAIRPERSON BERRY:** What has been the history of sentencing reforms and changes on deterring criminals? Are most criminals deterred by the prospect of whatever sentence? What does the literature show in terms of if you change the sentence to X, Y or Z, over time, I mean?

I must confess to you that I teach a course in which I have to read all this literature. So, I just want to make sure I haven't missed something.



But what has been the impact historically of sentencing changes on deterring particular criminals from engaging in certain kinds of offenses, to your knowledge? Either one of you.

**PROFESSOR CAULKINS:** My summary of the literature would be it is mixed, inconclusive, and it's very hard to come up with what you would consider to be strong scientific evidence.

**CHAIRPERSON BERRY:** Right. But what does the literature also show about the public belief in changes in sentencing having a deterrent effect?

**PROFESSOR CAULKINS:** I think the public believes there is a deterrent effect.

**CHAIRPERSON BERRY:** Right. Do you agree with that, Mr. Wootton, or do you have anything to add to that?

**MR. WOOTTON:** Well, only that Justice put out a paper on making confinement decisions. The thing that they cited in that said that there was a 1.1 percent impact, that there's a slight impact on the reduction in crime over and above the actual incapacitation effect of the person that you're putting away.

**CHAIRPERSON BERRY:** Right. So, we have a consistent wish and hope on the part of the public at any point in history that changing the sentence somehow is going to deter, and we have consistent evidence that we can't prove that it does, and that we may see a 1.1 percent effect.

When I listened to both of you, and you in particular, Professor Caulkins, it seemed to me that there was a lot of irrationality in this process. If I understood you correctly,

Professor Caulkins, if we were to exclude drug offenders who didn't engage in violent crime but had drug offenses, that this would not be inconsistent with the public concern about violent crime, which seems to be where the public is concerned, and it would also reduce the numbers and reduce the costs of the sentencing of people to prison. Did I hear you correctly or was I mistaken?

**PROFESSOR CAULKINS:** I think that's a fair summary.

**CHAIRPERSON BERRY:** Then there must be some other reason that we are incarcerating drug offenders under the three strikes you're out, something other than the concern about violent crime. Or is it just that the public doesn't draw a distinction, or would it be better to change the law so that you excluded non-violent offenders -- which is what I think Mr. Wootton was suggesting, not necessarily drugs but other kinds of offenses -- from this, if that's where the public is concerned, or what would be the answer?

**PROFESSOR CAULKINS:** Well, I certainly think that the law could be changed, and my hunch is that would be a good change to make. You can offer a variety of hypotheses about why the average Californian walking down the street supported the law, despite that provision.

Certainly there was not a great deal of indepth knowledge about the details and the provisions. For example, many people had no knowledge whatsoever that there was anything except a third strike provision in the law. I've given talks in

a variety of settings describing our study, and I often do a little poll and a show of hands and ask Californians in the audience, *So what do you think would happen with this law if we got rid of the third strike provision?* and the typical reaction is there wouldn't be anything left. So, there's a great deal of ignorance. They may not have known.

I think even on the part of the people drafting the law, they may not have anticipated the large fraction of the third strike sentences that would go to people who did not commit a serious or violent offense a third time. Obviously they did for the first two.

So, it may not have been the intention. It may have been in some sense a mistake by people focusing on other aspects.

**CHAIRPERSON BERRY:** Uh-huh. Yes, Commissioner Horner?

**COMMISSIONER HORNER:** Madam Chair, I might offer a hypothesis as to why people want to incarcerate drug criminals and not just violent criminals, and that hypothesis might be fear that their children will be enticed into drug addiction, which many people would feel would be comparable to experiencing a violent crime themselves.

I would far prefer to be knocked over the head with a gun than to have either of my children addicted, and therefore I would prefer to put a drug dealer, or a user likely to become a dealer, in jail equally to putting in someone who would hold me up with a gun.

**PROFESSOR CAULKINS:** It's very plausible. Another

common misconception on the part of the public concerns the efficacy of incarcerating individual drug sellers and failing to make the distinction between the provision of a black market good and another kind of crime.

Incarcerating a pathological rapist presumably reduces the number of rapes that the general public experiences. Incarcerating someone who provides a black market good for which there is a fairly large and robust market may have much, much less impact because it's relatively easy for that person's labor to be replaced by somebody else.

**CHAIRPERSON BERRY:** You mean there are only a limited number of rapists, pathological rapists?

**PROFESSOR CAULKINS:** You would hope so. You would hope that incarcerating one wouldn't generate a second. But when there's a market, and a potential employment, there is the potential for that replacement.

**COMMISSIONER HORNER:** But at \$16,000 a year, it's well worth it to keep putting people who might cause your children to become addicted away, even if they weren't suppressing economic activity in poor neighborhoods.

**PROFESSOR CAULKINS:** There are a million to two million people who have sold an illicit drug in the last 12 months in this country. There are millions more who would be willing to. It's a lot of people.

**CHAIRPERSON BERRY:** Yes, Commissioner Anderson?

**COMMISSIONER ANDERSON:** What do you say to the

contention that so many violent crimes accompany an activity but for the violent part of it would be of a very small monetary value? For example, you cited the example of the purse snatching in California, where the woman who resisted the purse being snatched then was shot dead.

**MR. WOOTTON:** I didn't cite that example.

**COMMISSIONER ANDERSON:** Isn't that the Polly -- oh, that's the kidnaped girl. But there's another -- maybe it's Richard's, but, in any event, the woman who resisted the purse snatching. She is murdered.

The convenience store clerk resists giving over the \$30 or the hundred dollars in the drawer. He's shot dead. The same thing with the gas station attendant.

But for the murder, it is a crime of very small monetary value, and, in fact, you might say that many murders accompany the crime of small monetary value.

So that the third offense being of small monetary value, and therefore not an aggravated felony, may simply relate to the fact that the woman let go of the purse, or the clerk smiled when he handed over the money or did not look crosswise at the robber. So that the rationale behind the third offense not necessarily being an aggravated or serious felony is that.

**MR. WOOTTON:** Well, I haven't spoken yet on the reasoning that went into the choice between a felony versus a violent felony, and as I said, I supported the Brown version that was a violent felony as opposed to a non-violent felony, and it

really only has to do with whether or not you're using this sanction for the right kind of crime, and avoiding the pizza case that, you know, everybody has sort of made the poster child of three strikes being inappropriately draconian.

One of the things that we don't know is that if we stopped incarcerating drug dealers, for instance, at the rate we're incarcerating drug dealers, whether or not we would -- we are not inadvertently but we are always predictably locking up people who are violent, but we're not locking them up for a violent crime. In other words, you put Al Capone in prison for a violation of the IRS Code, but you're also locking up somebody that was killing a lot of people. So, those are sort of hard to know.

As to the very example that you represented, Mark Cohen, who did the study on the cost of crime, said -- and these are violent crime acts that you're describing, because they use the force or the threat of the use of force, and usually a weapon -- that robbery has some kind of statistically predictable risk of death, and if you take robberies in large numbers, there are going to be a number of times that they end up in somebody being murdered or shot, and that's part of the cost on an actuarial basis of robbery generally.

Some robberies where a death actually does occur, the cost is far above \$12,000, and, so, his study was trying to tease out of the data and using jury awards and some other techniques to compare what the actual, you know, surrogate costs would be.

But again I think the goal has to be doing justice, and if we move too far away from doing justice, these things won't be implemented. Prosecutorial discretion will be used to avoid implementing them. Judges will refuse to implement them at risk of being overturned. Juries won't convict because they don't think that the sentence that the person is facing is fair.

Fairness and justice are intangibles, but in my experience in practicing law, that is what the system tries to do. So, I think the debate has to be, *How do we create a system that is perceived by everyone as being fair?* And I think that the reason three strikes occurred was some very high profile cases where people had been let out of prison after not serving what was perceived at the time that the judge or jury gave the sentence as being a fair sentence. They served so much less than that, went on to commit another violent crime, that everybody says we have got to fix a system that seems to feel that it has the discretion to overturn the will of the people in these cases on a regular basis, and that's why again we support truth-in-sentencing over maybe some of these more draconian kinds of solutions.

**PROFESSOR CAULKINS:** If I could add a quick comment in response to your example, in California law, all robberies are at least serious. If they involve great bodily harm, the use of a firearm or the use of another deadly weapon inside a residence, then they are even violent, not just serious.

So, the examples you were citing would have been

included as third strikes if the California three strike law had required the third strike to have been a serious or violent crime.

**COMMISSIONER ANDERSON:** I don't want to continue this too long, but my point was on, for example, the purse snatching. The purse snatching would not be? Right? Or would it?

**MR. WOOTTON:** Without a weapon, it might not.

**COMMISSIONER ANDERSON:** Right.

**PROFESSOR CAULKINS:** Depending on the circumstances, it could be prosecuted as a robbery, if the person is confronted. So, it depends whether it looks like a pickpock or not.

**COMMISSIONER ANDERSON:** All right.

**CHAIRPERSON BERRY:** Commissioner Lee?

**COMMISSIONER LEE:** I'm from California. So, I just remember the *use a gun, go to prison* law that we had, in which a gentleman who was doing a research paper using a loaded gun went to a store just to prove how easy it was to have been incarcerated, and sure enough, he was sent to jail, because of that *use a gun, go to jail* law.

And my question is -- you mentioned earlier that the prosecutors have really wide discretion, even with the eventual passage or whatever that the state legislators are going to do with three strike -- if prosecutors of different counties have such wide discretion in how to apply three strike, do you see any potential problem with fairness, as Commissioner Anderson said, the fairness of the applicability of this law to specifically



certain populations?

**PROFESSOR CAULKINS:** Yes, the potential exists.

**CHAIRPERSON BERRY:** Okay. Commissioner George?

**COMMISSIONER GEORGE:** Mr. Wootton, I wanted to follow up a little bit your stress on the importance of retributive goals of the judicial system.

There are a lot of studies which show a great divergence in attitude and belief between popular opinion and a lead opinion about a lot of things.

One example would be capital punishment. I mean if you just take the first 750 names in the Trenton phone book and ask them about capital punishment, you're going to get a different outcome than if you poll the Princeton faculty about capital punishment.

Now, I'm wondering if there's a similar divergence of opinion among professionals and academics in the criminal justice area. Do you find that while the public broadly believes in the retributive justification for punishment, that a lead opinion is much more oriented towards much more skeptical retributive ideas, much more inclined to make value judgments based on judgments about deterrence in rehabilitation and all of these other things, apart from the retributive justification for punishment, and, if so, does that in your experience affect the kind of information that those within the system and academics who study the system -- the kind of information that they bring to the public policy-making table?

**MR. WOOTTON:** Yes, very much, and I think that most of the professionals that I've encountered, and still encounter as I go around talking about these kinds of things, are less persuaded that the goals of the criminal justice system ought to be punishment or retributive.

One professor from California, whom I won't name, although I don't think he'd be embarrassed in being named, has written recently that he doesn't think there should be any retributive aspect to our decision to incarcerate. It should be all done on a pragmatic decision to restrain people who don't have an ability to control their impulses, and he said that his conclusion was based on having a son that had attention deficit disorder and some other of what he took to be genetic kinds of problems, that led to his having very firsthand experience with what he took to be a lack of ability as a matter of will on the part of criminals to control their behavior; therefore, the rationale for punishment -- the rationale for retribution -- is eliminated if there is no appropriate responsibility that can be lodged in the actor. And I think that on the skewing of the population between the Princeton faculty and the Trenton phone book -- you would have a skewing of the sense that the man on the street thinks people ought to be held responsible for what they do because they're making free will decisions about what they do, and the more educated might be willing to attribute it to some kind of either scientific or environmental determinism that the person who's committing the crime is doing it because of the

family they were raised in -- maybe some genetic factors, the environment, the neighborhood, lack of opportunity, a whole host of reasons. I can tell you from my experience in the juvenile justice system, when you're looking at 13 or 14 year olds who are beginning their lives of crime, they look more like victims than victimizers, but fairly soon, when they graduate to doing crimes in which they are putting the rest of the neighborhood and everybody else at risk, whether or not they've had a bad childhood -- And I would almost stipulate they've had a bad childhood. I can tell you the statistics of the profile of the serious habitual offender, and most don't have fathers in the home, most have seen some kind of abuse or been abused, they've witnessed violence. About two percent of the families produce about 80 percent of the violent criminals, and these are violent families largely. So, these people have three strikes against them from the time they're born, and the question that society, I think, grapples with continually, and I don't think ever comes down sort of hard on one side or the other, is: *Can you hold somebody responsible that's had such a rotten start in life? Is it fair to do that?* And then the victims' people, who are now finding their voice, are saying: *But is it fair for us to then be the victims of leaving these people on the street?*

**COMMISSIONER GEORGE:** Let me shift to another point that you raised which interested me, and again I won't ask you to name names, but you mentioned well-intentioned people who say or imply that every member of the class of African American males

under -- I don't know if you stipulated as to young -- under 18, or whatever it is, is a potential criminal.

Now, do you have in mind here sort of people on the street or politicians, or do you have in mind here criminologists whose studies should be faulted for making such presuppositions? I'm just trying to get at what level the people are that you're finding fault with on this particular score. Has this affected serious studies as far as you know, or is this just the kind of something that politicians are presupposing or the man on the street's thinking?

**MR. WOOTTON:** I would attribute that mostly to politicians and the media and not so much to serious scholars. I would say serious scholars would be more careful in defining what the at-risk population was.

**COMMISSIONER GEORGE:** But --

**MR. WOOTTON:** I'm not saying it's devoid in academia, but I would say that the offenders who I think have the most impact are in the media and politicians.

**COMMISSIONER GEORGE:** And you do say, and your very startlingly statistics would bear this out, that in the African American male population, you are disproportionately likely to be a victim. You cited those astonishing --

**MR. WOOTTON:** Right.

**COMMISSIONER GEORGE:** -- homicide --

**MR. WOOTTON:** That's right.

**COMMISSIONER GEORGE:** -- statistics.

Thank you.

**CHAIRPERSON BERRY:** Okay. We thank you both very much for the briefing. This was very useful information that we will be able to use in our deliberations, and thank you very much for coming.

**PROFESSOR CAULKINS:** Thank you.

**MR. WOOTTON:** Thank you.

**CHAIRPERSON BERRY:** We now call the next panel.

**VICE CHAIR REYNOSO:** Mary?

**CHAIRPERSON BERRY:** Yes?

**VICE CHAIR REYNOSO:** This is Cruz. I'm sorry to say that I cannot hear well enough to follow the discussion. So, I'm going to get off the phone and just go over the transcript.

Those matters that I have been able to hear have been really very instructive. I'm just sorry that I can't hear well enough to follow the discussion, but I'll be reading this in the transcript.

**CHAIRPERSON BERRY:** All right.

**VICE CHAIR REYNOSO:** Okay. Thank you.

**CHAIRPERSON BERRY:** Thank you.

We ask Laura Murphy, Malcolm Young, Julie Stewart and William Moffitt to please come forward. Let me welcome you and thank the panel for agreeing to come.

Laura W. Murphy, who is our first presenter, has been with us before and has been very agreeable to come to discuss with us a number of issues.

She's been Director of the Washington Office of the American Civil Liberties Union since February 1993, and as head of that office, she develops and directs the Federal legislative and executive efforts of the organization. She lobbied for the mandatory minimum sentencing "safety valve" in the 1994 Omnibus Crime Bill, among a whole host of legislative measures in which she has been very much involved.

Earlier she was a congressional and California legislative assistant.

We welcome you, and please proceed.

**MS. MURPHY:** Thank you, Madam Chair.

I would like to make a request, because the issues of three strikes you're out go far beyond the narrow issue of what the implications of three strikes you're out are. The issues go to the whole question of bias in the criminal justice system, and the use of mandatory minimums in the criminal justice system. Three strikes you're out is a mandatory minimum sentence. It is just different from other mandatory minimum sentences in the way that it assures the imposition of a particular sentence, in this case, mandatory life imprisonment for a convicted felon.

So, the request that I'd like to make is that I be permitted to submit four documents for the Commission's review. One is a University of Dayton Law School Law Review article by Nikichi Taifa, a former colleague at the ACLU, who worked very closely with Congress on three strikes you're out. The second is a Center on Juvenile Justice and Criminal Justice study, which is

a California-based study, "Young Africa Americans and the Criminal Justice System". It was just released in February of 1996, and a lot of the information there is pertinent to your deliberations. The third is a friend of the court brief filed by the NAACP Legal Defense and Educational Fund and the ACLU in *U.S. v. Armstrong*, a case that looked at the selective prosecution of African Americans in the criminal justice system for crack violations in Los Angeles. And, finally, an "Evaluation of Mandatory Minimum Sentences" prepared by the Campaign for an Effective Crime Policy.

**CHAIRPERSON BERRY:** Thank you very much, and we will review those.

**MS. MURPHY:** The Federal three strikes you're out law is the issue that the ACLU has worked the most on, and for the purpose of my presentation, I will limit my remarks to the Federal statute.

I think it's important to talk about the Federal statute because it stands as a national *model* in many cases for the states, and I think there were about 14 states that had three strikes you're out laws prior to the adoption of a Federal three strikes you're out law, and now there are about 20 states that have three strikes you're out or some sort of repeat offender statute.

This Federal law was adopted as a part of the Crime Control and Effective Law Enforcement Act of 1994. That's also known as the Omnibus Crime Bill that President Clinton signed

into law. It allows or requires life imprisonment for a person convicted of a serious felony if that person has two or more final convictions for a serious violent felony or one prior conviction for a serious drug offense and one or more convictions for a serious felony. Each offense must have occurred on separate occasions and be separated by a conviction.

The definition of a serious violent felony includes any felony that is punishable by a maximum term of imprisonment of 10 years or more or that has as an element the use, the accepted use or threatened use of physical force against the person of another that by its nature involves a substantial risk that physical force against the person of another may be used in the course of committing an offense.

So, for example, the serious violent felonies that would be included would be murder, manslaughter other than involuntary manslaughter, aggravated sexual abuse and arson.

The reason that I go into this detail about the definition of the Federal three strikes you're out statute is that the definition itself raises some civil rights concerns.

For example, I was wondering whether or not a person convicted of numerous church burnings would be eligible for the three strikes you're out provision, and it's interesting that Congress carved out exceptions for arson and robbery in its deliberations. Thus, if the defendant could establish clear and convincing evidence that there was no threat to human life, then these become non-qualifying felonies. So, if a defendant in a



church burning can prove that he or she was setting the fire at night knowing that no one would be in the church and knowing that there were no guards in the church, more than likely the defendant would be viewed *ineligible* for this mandatory minimum sentence. I just thought that was very interesting, given the recent rash of church burnings.

I think the question about the use of drug offenses as a strike was raised in the earlier panel and is of great significance here. The definition of the drug offense category is extremely troubling because it's based on the amount of drugs involved and not on the individual's degree of culpability for trafficking in certain quantities.

Thus, an unwitting low-level drug courier who merely drives a tractor-trailer truck full of crack cocaine or powder cocaine will receive the same level of punishment that someone who masterminded the importation of that substance or set up the distribution mechanism or actually hired individuals to sell crack cocaine to children.

We think that there are some grave inequities created by establishing a drug offense based merely on the amount of drugs and not on the degree of culpability.

We know that in particular, there is a Federal statute calling for the punishment of people who use crack cocaine, and those people who are convicted under the crack cocaine statute receive punishment that is 100 times more than those who are convicted of trafficking in powder cocaine, and whites tend to be

prosecuted under the powder cocaine statute rather than the crack cocaine statutes, even though whites use crack cocaine in greater numbers, and that seemed to be of some issue. I would refer you to our brief in the *U.S. v. Armstrong*, and I'd like to quote from the brief.

"A recent survey of prosecutions for crack cocaine offenses conducted by the Los Angeles Times revealed that not a single white offender who had been convicted of a crack cocaine offense in the Federal court serving the Los Angeles Metropolitan Area since 1986 -- that not a single white offender had been convicted, despite the fact that whites comprise a majority of crack users."

These assertions are also based on a study by Dan Wikle "War on Crack Targets Minorities Over Whites", and also a study by The Sentencing Project.

Also, the use of non-violent drug offenses as a strike leading to the three strikes you're out punishment raises the issue of prosecutorial discretion, because what we're finding is that in many jurisdictions, prosecutors will decide more often than not to prosecute minorities under the tougher Federal standards than under the state law, which tends to be less harsh.

Prosecutorial discretion contributes to the widening gulf between the incarceration rate of juvenile and adult African Americans and the incarceration rate for other offenders. While the total number of white juveniles brought to court on drug charges in 1990 exceeded the total number of blacks by 6,300, a

far greater number of white youths were sent home without being tried, were released to drug counseling programs or were placed on probation. Consequently, 2,200 more blacks than whites ended up in correctional facilities. These data were provided in a news article by Ron Harris, also of the L.A. Times, "Hand of Punishment Falls Heavily on Black Youth".

Again, I just wanted to describe what three strikes you're out means at the Federal level, and how the definition itself raises some problems because the underlying crimes have been prosecuted in a racially biased manner.

I guess the question you would like answered is: From our perspective, what is wrong with three strikes? There are several problems.

One, it violates the proportionality requirement of the 8th Amendment, in our view. The 8th Amendment basically has been interpreted by the Supreme Court to say that the punishment ought to fit the crime, and we don't believe that life imprisonment is the appropriate punishment in all cases where the three strikes law has caused life imprisonment to be imposed. There's no reason, for example, that a judge should not be able to distinguish between someone who commits three crimes, like kidnaping, rape and murder, from someone who is a first-time drug courier, who is 69 years old and may have committed two violent felonies 30 years before. I mean, that just doesn't seem to make sense to us, that two people with vastly different criminal histories ought to be treated equally as harsh. If you look at

the statistical evidence, you know that a person in his or her 60s is not likely to be a repeat offender and is more expensive to incarcerate, and there are a number of issues that accompany the whole question of proportionality like that.

We also think that three strikes is unnecessary given the already stringent U.S. sentencing guidelines. The U.S. Sentencing Commission is charged with the responsibility of making recommendations to the Federal judiciary as to the appropriate amount of time that should be spent by convicted felons for particular crimes. They do this based on an analysis. It is not an emotional analysis. They take into account what kinds of deterrent effects certain penalties have, and without a doubt, the U.S. Sentencing Commission recommendations for sentences are very, very stringent, especially as compared to most state punishments.

Thirdly, there's no evidence that public safety is enhanced, and there is some evidence that three strikes you're out may actually lead to an increase in crime. Now, there's a great deal of argument about the public safety enhancement issue, and I'd like to look at the Rand study carefully, but our view is that a lot of people end up incarcerated at the state and the Federal level who are non-violent criminals, and precisely because of the way the laws are drafted to include non-violent drug offenders.

**CHAIRPERSON BERRY:** Laura, you've got to wrap up.

**MS. MURPHY:** All right.

Lastly, the reason we are opposed to three strikes you're out is that we believe that it exacerbates the existing problems of racial discrimination within the criminal justice system, because of its disproportionate application to African Americans, the poor and to other racial minorities. The ACLU has provided evidence in the *Armstrong* brief that shows how poorly African Americans fare, in general, in the Federal criminal justice system, and we know without a doubt that race is a significant factor in deciding whom to target, whom to stop, whom to detain, and whom to search and arrest. We also know that race is a significant factor in the substantially greater length of incarceration meted out to African Americans.

That's pretty much it. I'll be happy to answer any questions at the end of the panel.

Thank you, Madam Chair.

**CHAIRPERSON BERRY:** Okay. Thank you. Thank you very, very much.

Malcolm C. Young is Executive Director of The Sentencing Project, which he founded in 1986 to promote national sentencing and corrections reform. He earlier directed The Sentencing Project of the National Council on Crime and Delinquency. He has been a criminal defense lawyer and a clinical law instructor and has had various roles in developing sentencing programs.

Thank you very much for coming before us, and please proceed, Mr. Young.

**MR. YOUNG:** Thank you very much, Madam Chairman, members of the Commission, and Staff Director Mary K. Mathews, who was kind enough to coordinate the invitation.

I appreciate the informality that was stressed by your staff in the letter because I received the invitation just before I left on some travel and then vacation and came back from travel just before appearing today. So, I am not, as you suggested, submitting prepared remarks.

I did, however, have the opportunity to send over a report which we recently published, in October of '95, "Young Black Americans and the Criminal Justice System; Five Years Later", and it's my understanding that this has been made available to you for whatever use you want. If that's, by any chance, not the case, I certainly would like to offer this report today.

**CHAIRPERSON BERRY:** Okay.

**MR. YOUNG:** It does touch upon some of the issues that I will be discussing and that I think may be of concern to the Commission.

In addition, I also have a request. Three strikes and you're out is of great interest and concern to The Sentencing Project, and also to the other groups that we work with, and I believe that the Campaign for Effective Crime Policy, an organization of criminal justice professionals and experts across the country, will be issuing some kind of report or analysis of three strikes. I know that it's not ready now, and I'm not

certain what the time line is, but I would be very pleased to submit that report as well to the Commission.

**CHAIRPERSON BERRY:** All right. We will receive it and review it. Thank you.

**MR. YOUNG:** Now, after spending 22 years focused on criminal justice issues as a practitioner and at a national level, I did, after receiving your invitation, spend some time reflecting upon the context for my remarks to you today.

Your question, as I understood it, was: What were the civil rights implications of the three strikes laws? This is a question that's very important, but one that we don't always attend to.

We've been critical of the three strikes laws for reasons of effectiveness in crime control and for the overall impact on race and class groups. I heard a portion of this earlier panel's presentation that included some discussion of these issues. I'm tempted, I must say, to depart from what I planned to say in order to respond to those comments, but I'm going to refrain from that temptation, unless your questions lead me that way, except to add an important perspective, which I think will be helpful, and that is this:

Three strikes and you're out laws, both at the Federal and the state level, are not by any means the be all and the end all, or even a significant new direction, for criminal justice policies in the United States.

As my office has documented, it is well known that the

United States locks up more of its population, incarcerates and punishes more of its population, than almost any other country in the world. We have increased the use of incarceration fourfold since the 1970s. So, laws such as three strikes and you're out, which are undoubtedly having the effect of increasing incarceration, are not new.

The trend in this country has been going on for several decades, and we are in a position to observe the results of increasing incarceration. There is a tradition or history here to draw from. I think that this perspective, at least for my remarks, may be important.

Now, what I wanted to say to you is that there are at least two areas of concern for civil rights in three strikes and you're out laws.

The first of these is the laws that are unequally applied with discriminatory result, if not discriminatory intent, on racial and ethnic minorities and other groups are not to be tolerated and should be challenged and changed wherever possible.

Certainly in the three strikes legislation, there is every opportunity for discriminatory application of these laws. Some of those opportunities have already been discussed before this panel.

There is thought to be a shift toward prosecutorial discretion, which takes out of the hands of the judge the ability to determine the sentence for individuals that appear before the court, and there is some evidence in California and perhaps in



some other states that this discretion results in discriminatory or disproportionate application to blacks and other minorities in the criminal justice system.

We know, for instance, in California, that of those sent to prison under the three strikes laws, 13 times more African Americans are included in that group than are white Americans. This is true even though African Americans in California constitute 7 percent of the population and 20 percent of the felony arrests, compared to the 25 percent of the three strikes and you're out inmates who are white, although they constitute 53 percent of the population and 33 percent of the felony arrests.

We know anecdotally that there are instances reported, examples, of disparate treatment from jurisdiction to jurisdiction, and because of the different racial make-up of jurisdictions, we can assume that there is some disparity introduced in that fashion.

So, there ought to be, must be, and I'm sure is a concern about the opportunity for disparate application of these laws that vest great discretion in the prosecutor's office.

On the other hand, and from that perspective, and to be fair, I think it must be said, that shifts toward increased prosecutorial discretion are not new. And it is somewhat unique to the criminal justice system that outcomes are determined not by any one decision-maker but by a host of decision-makers acting in series and not coordinated among each other: police,

prosecutors, judges, probation officers, and parole officers.

So, I think it's quite possible that the potential misuse of prosecutorial discretion could be slightly exaggerated, and that it is not perhaps the sole or largest area of concern, but certainly one area of concern for those interested in civil rights.

The second area of concern, as I thought about the civil rights issues that are implicit in three strikes legislation, is that even if laws are fair on their face and appear to be drafted so that their impact will be neutral, if they have a disparate impact upon racial minorities or women or other protected groups not related to or made necessary by legitimate objectives, then these laws should be closely examined by those who are concerned with civil rights. This seems to me to be particularly true in the criminal justice system because of the opportunity for varied exercise of discretion, various application of laws throughout the process, by the many decision-makers that contribute to the results in most criminal cases.

This observation bears upon our work at The Sentencing Project, and the facts that we have reported nationally. As you may know, our first report on African Americans in the criminal justice system was issued for 1989. At that time, we reported, one in four young black males in the United States was involved in the criminal justice system by being incarcerated or being on parole or on probation.

The report that I believe I sent over to the Commission

earlier, which we issued in October of last year, reported that the rate of involvement had increased from one in four to nearly one in three in 1995. There were also increases in participation in the system for Hispanics and particularly for women, particularly African American women.

Since 1989, the rate at which African American women, for instance, have been involved in the criminal justice system has jumped 78 percent.

Now what I'd like to do is to simply comment on -- I gather that this report may not be before you. So, I will --

**CHAIRPERSON BERRY:** Why don't you summarize, so that we can have time for questions after we finish with the presenters?

**MR. YOUNG:** So, if I might, Madam Chair, I will just focus on one aspect of that report.

In the 1995 report, we were able to document better than we had for 1989 the fact that participation of African Americans and other minorities in the criminal justice system was not related to their participation in crime.

We did this by examining what happens to African Americans in the general population who are arrested and convicted and sentenced to prison for the offense of drug possession, which reasonably is related to drug use in this country.

We know from surveys by NIDA and other agencies that the rate of drug use by African Americans and white Americans is similar: about 12 percent of the white population uses drugs on

an occasional basis, and about 13 percent of African Americans reported using drugs on an occasional basis.

So, we have about equal participation in the offense of illicit use of controlled substances. What happens from that point on explains the impact of the current criminal justice system on a large portion of the African American population. Because while occasional drug use is reasonably equal between African Americans and the overall population, African Americans constitute 35 percent of those who are arrested for possession offenses, 55 percent of those who are convicted, and 74 percent of those who are sentenced to prison for possession of controlled substances.

So, we felt that this statistical information documents without question the racial impact of the operation of the system. Our feeling is that when the impact is this disparate in outcomes, where the participation is equal, then the impact on civil rights of African Americans and Hispanics cries out for the attention of this Commission and of those who are concerned with these issues.

I would like therefore to invite and encourage the Commission's further inquiries into an issue that is of greatest importance to the country, and one which has not been adequately addressed within the criminal justice community.

**CHAIRPERSON BERRY:** Okay. Thank you. Thank you very much, and we will have some questions for you in a minute.

Julie Stewart is President of Families Against

Mandatory Minimums, a national organization that she founded in 1991 after her brother was sentenced to five years in Federal prison on a marijuana-growing conviction. Before that, she was Director of Public Affairs for three years at the Cato Institute.

Go right ahead, Ms. Stewart.

**MS. STEWART:** Okay. Thank you.

I don't want to spend time repeating a lot of what's already been said. I certainly can agree with much of what the two panelists before me said as well as the two who spoke earlier.

I do want to note that I've got a summarized version of the Rand study. I don't know if they submitted one to you at all. I didn't bring it for your purposes, but I have it here, and I'd be happy to give it to someone to make copies of.

**CHAIRPERSON BERRY:** Why don't you, just in case. I think we have it, but just in case, we'd be happy to receive your materials.

**MS. STEWART:** Good. It's certainly worth you looking at.

I wasn't clear in being invited to speak here whether you were focusing on the Federal three strikes law or three strikes laws in general. So, my remarks kind of go --

**CHAIRPERSON BERRY:** In general.

**MS. STEWART:** -- to both. All right.

First of all, I'd say that the U.S. Sentencing Commission has done a very good job of looking at sentencing

issues. As you know, that's their responsibility, and I feel that they have quite an amount of expertise on this.

They have not done too much on three strikes law. When I called to ask them if they had tracked it at all to see who's being incarcerated, they said no.

I don't know if the Department of Justice is tracking it Federally or if the Bureau of Prisons is, but at this point, there seems to be no data available on Federal three strikes law, which is a little bit troubling.

And having said that, I would say because we have a U.S. Sentencing Commission, we do not need a Federal three strikes law, which is exactly what you've already said, but I just want to reiterate that. How absolutely insane it is for us to layer on another sentencing system on top of the U.S. Sentencing Commission's job of determining sentences! And they already had offender sentences that would put someone in prison for life if the person had two or three prior offenses. So, it's totally redundant to have a Federal three strikes law.

Having said that, I will say that there are lots of mechanics involved in both the Federal and the state three strikes laws that need to be addressed. One of them certainly is race, and it's been talked about very thoroughly here, but I would just point out -- because I think in some ways, this may be a little bit new to you -- that the way in which you get a strike is very important, and there are lots of studies and there's a lot of evidence that shows in fact that blacks and Hispanics do

receive mandatory minimum sentences more often than whites who are arrested for the same crime.

Now, what happens then is that those people if their sentence is, at least in talking about the Federal three strikes law, 10 years or more, that qualifies as a strike.

The easiest drug to get a 10-year qualifying strike under is crack, and crack is the drug that is predominantly used by the African American community, or at least that they're convicted for. Actually, the use is different, but they're convicted for it more often than whites. So, right there, they've got a strike. Where a white defendant with 499 grams of powder cocaine or even 500 grams of powder cocaine would not have a strike, 50 grams of crack cocaine would mean that.

So, I think it's important to understand how you accumulate strikes, and there's definitely racial disparity built into the accumulation of the strikes, partly for the crack reason.

Another reason is cooperation, and there have been studies done. In fact, I have one here. It's my only study, but I can certainly make a copy or give you the name of it, if you don't already have it. It was done by the Federal Judicial Center.

**CHAIRPERSON BERRY:** We do have it.

**MS. STEWART:** You do have it? Okay. The statistics in here are excellent about the consequences of mandatory sentences, and basically three strikes is just another mandatory minimum.

But they have found -- I guess you've already read this study -- that blacks tend to not cooperate and provide substantial assistance as readily as whites do, and, therefore, they are not being offered reductions in sentences. Again, in that cooperating and negotiating stage, a black defendant who does not cooperate is more likely to get stuck with that strike, that 10-year minimum sentence, whereas a white defendant who may cooperate will get below that level and won't have that strike used against him.

Now, there's certainly lots of evidence about selective prosecution. Let's just assume that there is no selective prosecution, and everyone is offered -- both black and white are offered -- equal opportunities to cooperate. Even if that's true, there are still unintended racial consequences.

For whatever reasons, blacks are still getting the sentences that are higher, even if they're offered equal opportunities to cooperate and get reduced sentences.

I think it's important to recognize that the triggering strikes are more easily applied in often non-white cases, and then another aspect of the triggering strike, again this is in the Federal law, is one of the definitions of a prior as any other offense punishable by a maximum term of imprisonment of 10 years or more that has the element or use of force blah-blah-blah-blah. So, a maximum term of punishment of 10 years or more.

Now, different states carry different maximums for the same crimes. For instance, a burglary in Ohio might have a



maximum of 10 years, whereas a burglary in Indiana might have a maximum of seven. Those are identical defendants, but the one in Ohio is going to get a strike because it's a 10-year maximum; the one in Indiana won't.

So, again, there's so much arbitrariness built into this three strikes law, the way that it's written, that it ends up creating disparity, whether it's racial or disparity between like defendants even.

So, I think that those are my main points. I do want to say we at Families Against Mandatory Minimums get lots of cases from individuals who have been sentenced to a whole variety of mandatory sentences, and an article that was sent to us recently was about an inmate in California -- and I've heard of other inmates who have done this as well -- who committed suicide rather than face his 25 years to life sentence. He had two prior burglaries from 1983. His instant offense was stealing about a \$180 worth of video cassettes.

Granted that's an extreme reaction. We hope that not too many people will choose that path, but I see that it is an option for inmates who feel *What's the point of staying in prison for my whole life?* or felons that are faced with that choice, and the man was only 32 years old.

And one last point. Someone earlier -- it may have been Mr. George, who's left -- was asking something about what is a just sentence, and I think that it's a really important question for you to consider, and it's something that The

Sentencing Commission has talked about, and I applaud the chairman, who was the person who really brought this to the attention of a commission meeting one time, because they're doing a study on what is just punishment. In fact, on the 17th of this month, next week, they're reporting on it.

The chairman said that a lot of the public is urging longer sentences and tougher sentences, and, you know, let's put everybody away for life. But he said that he had recently read about a case in Saudi Arabia -- actually, it may not have been Saudi Arabia, but another country, Third World country -- where they stoned a woman to death who was an adulteress, and the public sat around and clapped as they were stoning her to death.

Does that mean that it's just punishment? The public's opinion is important, but we also have to temper it with some rational thinking and some studies that prove or try to disprove whether or not prison works, and that's why you all and The Sentencing Commission and members of Congress are in leadership positions, to lead, not to follow.

So, I urge you to keep that in mind as you work on this issue.

**CHAIRPERSON BERRY:** Thank you very much, Ms. Stewart. We appreciate that, and there will be some questions.

William B. Moffitt is a Senior Partner with Asbill, Junkin and Moffitt, a D.C.-based law firm, where he specializes in state and Federal criminal defense and constitutional litigation. We thank you very much for being with us, Mr.

Moffitt, and please proceed with whatever summary you'd like to give.

**MR. MOFFITT:** I'm also here on behalf of the National Association of Criminal Defense Lawyers, an officer in the association, and much of what has been said to you are things that I wanted to say if I were at the other end of the panel.

But I would like to begin by saying that the National Ministry of Justice in The Netherlands conducted a study to determine whether America was more criminal than anywhere else, and I think these are important things for us to be mindful of.

You are more likely to be burglaried in Australia or New Zealand, and you are more likely to be robbed with violence in Spain. You are more likely to be robbed without violence in Spain, Canada, Australia, and New Zealand, and you are more likely to be raped or indecently assaulted in Canada, Australia, or Western Germany, and I think we have to bring some rationality to our discussion about crime.

As a member of the NACDL, and as a criminal defense lawyer, I am concerned that our crime policy is being set at the 5:00 news hour, by what appears in the 5:00 news.

I think we must be mindful that one of the most astounding figures or pieces of information that came from the Rand study was that one in 10 children in this country is abused or neglected. In the face of that statistic, it should be obvious to all of us why we have the crime problem.

Let me address briefly some of the issues that have

been addressed by other members of this panel. I think the first civil rights real issue for those of us who practice criminal law is that it is virtually impossible in our society to review the exercise of prosecutorial discretion.

We certainly can review the exercise of judicial discretion, and there are a whole host and wealth of case law on the issue of abuse of judicial discretion. So, when a judge exercises a sentencing decision or a situation as to whether a particular individual is treated a certain way, most often we have the right to review that, if the judge abuses that discretion.

In the context of prosecutorial discretion, the *Armstrong* case, which Ms. Murphy has mentioned, indicates that we virtually have no right to review the exercise of prosecutorial discretion or even study or understand or acquire the discovery for such review, and I think it is an important factor to understand that much of our crime policy now is being made by 26 and 27 year old prosecutors who have very little experience in life rather than judges who were chosen because of their experience and the wealth of knowledge that they bring to these types of decisions.

I also think that you must also understand from the perspective of the trial lawyer that whether a particular defendant goes to trial on a particular charge is often an issue of mere risk assessment, and as we promote more draconian sentencing schemes, what happens is people assess that risk and

they sacrifice their right to go to trial because of the nature of the risk that trial imposes.

Already we have a sentencing scheme in the Federal system that rewards a person for pleading guilty, and, consequently, I suggest, punishes a person for exercising what we have all come to understand as the full fruition of the rights that a person has when they are accused of a crime. They are given -- three points are deducted for acceptance of responsibility.

You can imagine the tremendous power that a prosecutor, who is now exercising discretion, brings to bear on a particular accused when they are confronted with an issue of whether or not a three strikes type of law is going to be applied to a given defendant, and the assessment of risk, which obviously resulted for that young man that my colleague here has just discussed, and whether or not a particular defendant waives every one of his rights and decides to plead guilty to a lesser charge or perhaps cooperate in an effort to avoid the draconian sentencing that is offered by three strikes you're out.

I think the final thing I would like to say to you is that those of us in the NACDL are very concerned about the metaphors that are used in our discussion in crime today as a policy.

In my lifetime, I have lived for the last 40 years with a war on drugs and a war on crime, and the meaning of that to me is that war is a very interesting thing. It is won very often by

the notion of attrition. How many on the other side can we kill until they ultimately surrender?

And we must understand when we use that metaphor, we're not talking about people outside the United States. We are talking about our own citizens, and this war that we have declared on both crime and drugs is a war that we have declared on our own.

When you read the Rand study you realize that something as simple as creating incentives for graduation has a much more profound and remarkable effect on the potential for crime than any of these -- I would suggest to you -- fast boot-type solutions and sound bite solutions to the crime policy problems in this country. These are serious problems. They are difficult ones, and we must respect each side in the discourse, but we must also be aware that the public must not be whipped into a frenzy, I would suggest, looking for sound bite solutions because what we're going to end up with is the kind of statistical balance where we incarcerate in this country seven times proportionately more than any European country, where incarceration has become the only solution that we look at, where every one of our resources or virtually every one of our resources is placed at the back end of the system as opposed to at the front end, where we should be addressing issues of prevention and understanding the nature of what it is we need to do to prevent the crime problem.

We have created a perception in this country that

everyone in this country must live in fear, and the citizenry has responded to that perception by allowing and permitting the most draconian criminal justice system that exists in the world today.

We place more of our citizens in jail than anywhere else, and we need to be concerned about that. I would suggest to you that once we incarcerate, once we create felons, once we make felons, we create individuals who have far less of a stake in this society, and why should they care when they can't be employed, when they can't find a means to partake in what we all consider the American dream? Why should they give a damn?

We must address these problems in a very different way than we've decided to address them. We cannot, ladies and gentlemen, I suggest, build enough jails to incarcerate enough people to make the overwhelming effect the public wants.

**CHAIRPERSON BERRY:** Thank you.

**MR. MOFFITT:** We can't afford it, and it would be injustice anyway, and one final thing, if I might: While everyone in here has talked about their concerns about the perception of justice, it is much more than a perception that I am interested in as a lawyer.

Our system requires justice. It doesn't require merely a perception of justice. It is completely out line, and we must do something.

Thank you very much.

**CHAIRPERSON BERRY:** Thank you.

I would like to turn to my colleagues for whatever

questions, but I only have one question after listening to this whole discussion. Why is it that the public seems not to care very much about most of the things that the four of you have talked about, that despite your concerns about disparate sentencing, that despite your concerns about the crack-powder cocaine disparity, which has been aired in the media and in public debate and in the Congress and, you know, it's out there, most people still think that it's fine to pursue the law in this way, that the Supreme Court in the *Armstrong* case didn't seem to go along with the arguments that were made in the briefs, that despite your concern about not incarcerating drug offenders, people thinking that's okay to do, that despite your concern about prevention instead of punishment and incarceration, people keep building more and more jails? Citizens demand more and more jails, the building of them, and that's happening all over the country. Why is it that these criticisms that you make seem to be falling for the most part on deaf ears? Is it that they're invalid or is it that something else is going on?

**MS. MURPHY:** If I may respond, Madam Chair?

**CHAIRPERSON BERRY:** Yes.

**MS. MURPHY:** I think that the public has the capacity to understand these issues, if we treat the public respectfully. If you go into a black neighborhood, and you tell them that you're going to sentence all the people who distribute crack cocaine to stiff sentences, they'll say, *Yes, right on, I'm for stiff sentences*, but if you also go into that same neighborhood



and talk to the same minority leadership and tell them that their kids are getting disproportionately tougher sentences than kids in other neighborhoods, they are sophisticated enough to understand the distinctions there.

We embarked in August of 1993, and I think that's when I met Julie Stewart and worked with Marc Mauer from The Sentencing Project, and I met Bill Moffitt. We had a conference on Capitol Hill on the disparity between crack and powder cocaine, and the civil rights groups did not want to touch that issue with a 10-foot pole. They did not think that the criminal justice sphere was an appropriate area to discuss civil rights, and we had to go and meet with people, meet with members of Congress, meet with leadership in the civil rights community, and it was through a public education campaign that we were able to at least get the Congress to vote to have this issue put to a study.

The Congress still will not do anything about the disparity between crack and powder cocaine, but I am convinced that as we engage in this battle to put justice back into the criminal justice system, that once people understand the information, look at the statistics, look at the factual basis, look at whether or not incarceration is a deterrent, that the tide will change.

I think you could say the same thing about Jim Crow many years ago. Why didn't the public stand up and say this was wrong, that separate but equal was an unacceptable doctrine?

I think it takes time, but I think we are on our way, and that is why I am so grateful to you that the U.S. Commission on Civil Rights is beginning to delve into the criminal justice arena.

**MR. MOFFITT:** Perhaps if I might?

**CHAIRPERSON BERRY:** Yes.

**MR. MOFFITT:** I will tell you that I am very concerned and part of the reason a million men showed up in Washington last year was the crack and powder disparity. It was in the same week that Congress was voting on that issue, that those million men showed up. They were a million African American men, and their voices on this issue were not heard.

That has always been a problem in this society, and I would suggest to you, Madam Commissioner, as African American people we are not strangers to disparate treatment in the criminal justice system.

This is a criminal justice system that has never been fair with regard to African Americans, and it would be a remarkable accomplishment if we could ever make it fair.

The problem here is that people are willing to accept that unfairness if they are afraid, and the politicians in this country have exploited that fear for their own purposes. So, we cannot have a rational discussion about these issues because people are frightened, and what we must understand is that our country is not very much different from many countries.

This is a problem that we have suffered with, but a

face has been given to crime, a *face*, and the only face that has ever been given to crime in this country, and certainly in the 1988 campaign stands as a metaphor for that, is the face of an African American.

There are certainly other crimes being committed in this society by people other than African Americans, but the face of the 5:00 news portrays crime in this country as being a problem in the African American community, and we must understand that, and that is not a community that our society has ever really been willing to address itself to in any real way, I would suggest.

**MS. STEWART:** I would just add that I think I didn't give a damn who was in prison until my brother was arrested, and I think that's true with a lot of people. They don't care about AIDS. They don't care about whatever until it happens to them. I think that's a human nature sort of trait, and one thing that I think we are trying to do is to help people understand how prison in this rapid and vast incarceration of our citizens and non-citizens affects us individually.

If you can put it even into pocketbook terms, if you can say it's costing you this many dollars, or if you can somehow turn it into something tangible and real for the general public who have not yet been affected, I think it becomes a much more real issue for them. In California, the American Bar Association did a report on that three strikes law, and the author of the three strikes report said if we buy the prison space this will

require, then the options are to raise taxes, which hardly seems a political option, or to completely cut off funding for other services, like public education or pollution control or fire fighting.

It's when those kinds of programs are affected that the general public will become more interested in this, and then I would also just add that there has been some work done on educating the public, and the public right now sees the option of incarceration or let them go free, and they don't see any middle ground. The Ed McConnell Clark Foundation did a good study in Delaware, where they took some people and sort of gave them a scenario of the defendant and asked *What would you do with him?* and overwhelmingly they all said incarcerate, and then they spent the day teaching them about some other intermediate punishments and stuff like that, and at the end of the day, there was a much greater mix of what they would do with that defendant based on these other alternatives. So, the public needs a lot of educating.

**CHAIRPERSON BERRY:** Yes, Mr. Young?

**MR. YOUNG:** I wonder if I might respond briefly. I hope not to duplicate what has been said.

I think the answers include five or six short ones right off the jump.

First of all, historically, there was a dramatic increase in crime in the '60s, running into the '70s, so that there was a factual basis for a concern about crime, sufficient

to, as a second reason, lead to considerable fear, not a totally unrational fear, for many segments of the American population, and that this fear existed and came into play in the late '60s and the '70s.

Third, there was then a leadership failure, if you will, a political demagoguery that has focused around crime for decades. Spiro Agnew was charged with the responsibility of making a political campaign based upon people's antipathy towards those who were "soft on crime." He spoke out strongly on the issue, until, of course, his own case came to court.

But to be bipartisan and going to the fourth factor, government role in crime prevention changed markedly with Lyndon Baines Johnson and the Democrats, when the LEAA was established, and for the first time --

**CHAIRPERSON BERRY:** Law Enforcement Assistance Administration.

**MR. YOUNG:** Correct. Thank you. I've always been the beneficiary of that agency, but I've always stumbled over its full name.

But that agency funneled a lot of Federal money for the first time into law enforcement operations that had been a traditional state responsibility, and that has continued until, combined with the political rhetoric and the excesses there, now another Democratic administration has allocated up to \$22 billion on punishment and prison building, and this has had an impact on the realities of policy and on the fears that people have.

And then, as another factor -- and these are not in chronological order -- the role of the media, which has been much commented upon, is prominent here with the Vietnam-era type of living room presentation of violent crime. Just as we saw the deaths in Vietnam on our televisions, now you can see the impact of violent crime, perhaps in an exaggerated way, in your own room at night when you go home. This is bound to increase that fear that began with a valid factual basis.

And then, last, in coming to where I think Ms. Murphy and Ms. Stewart brought you, are issues of race and class. Given my experience as a lawyer in criminal justice for 22 years, with The Sentencing Project and our research, and observations that have been well documented and reported, I would personalize this, if I might, for just a minute.

I live in Montgomery County. I have children in high school there. I know what Montgomery County citizens do in the Bethesda-Potomac region with kids who get into trouble with the law, kids who get into trouble with narcotics. I know this through the experience of my own children's friends, and I listened when the Commissioner commented about that concern this morning, and it stirred these thoughts in my mind.

What happens to those children is that a lot of resources are spent on counseling, on help, on assistance; and sometimes a lot of money is spent to keep them out of the criminal justice system, a criminal justice system that statistically, factually in application, is designed and operates

for the poor, the racial and ethnic minorities, the people who ride buses, not airplanes and trains, in this country, and that is why I think this is a totally appropriate area of concern for the United States Commission on Civil Rights.

Three strikes and you're out will aggravate the phenomena we have documented and about which I spoke earlier, the disparate treatment of minorities in the criminal justice system. Three strikes and you're out, which can only aggravate the present situation, and other criminal justice issues are of utmost concern -- should be, I hope, pray and recommend that they will be -- through this Commission.

And that concludes my response to your question.

**CHAIRPERSON BERRY:** Commissioner Lee?

**COMMISSIONER LEE:** Okay. I just have a quick question. You mentioned that there was a fourfold increase in incarceration during a certain period of time.

Was there a corresponding drop in crime rates during that same period, and if it were, can you honestly say it was directly attributed to these incarcerations?

**MR. YOUNG:** To answer the last question first: in my opinion, you cannot honestly say that any decrease in crime rates was linked to the increase in incarceration.

However, perhaps more important, because there are those who will contest that statement and may have contested it here, historically, certainly since 1972, roughly in the mid-'70s, when incarceration took off like a rocket, if you look at

any graphs, against the history since the turn of the century of the very level rate and number of incarceration, running in the 100-200, -- under 200,000 range -- crime at various times in various categories decreased, and at other times, in some categories, increased.

So that if you look at the data over a particular period of time or a chosen period of time, you can "document" -- in quotation marks -- that crime or categories of crime decreased while incarceration was increasing.

But if you look at the aggregate picture, you can't do that because you've got incarceration going up like a rocket on its flight and crime generally fluctuating.

Now, it's convenient for a number of reasons to look at, for instance, 1980 as a year. It makes sense. It's the turn of a decade. It was a point at which crime was an issue. But 1980 was a peak year -- 1979-1980 was a peak year for crime -- and many comparisons that were made to 1980 showed a decrease in crime, and that matched, of course, an increase in incarceration. And some would say that that increase in incarceration explained the decrease in crime.

But in the mid-1980s, several categories of crime, particularly the ones that concern the public most, violent crime and homicides, went on an upswing. So, if you happened to look at 1984-85 as your base year instead of 1980, for some of the same criminal justice data, you'd find crime rates increasing in several categories, and you'll still have that remarkable



increase in incarceration.

In fact, since 1990-92, there have been documented decreases again in crime, and, of course, increasing incarceration. So, this does leave some people free to interpret that the crime decrease is linked or tied to incarceration.

This is particularly relevant in California, where proponents of three strikes have cited a six or larger percentage decrease in serious and violent crime in that state in the two years since three strikes and you're out was in place and operating. But what needs to be said is that the crime decrease began two years in advance of three strikes and you're out coming into play.

**CHAIRPERSON BERRY:** The presentation we had before you came from the man who did the Rand study and was that he didn't have any evidence that it was three strikes that caused the decrease. He thought it was the second strike of the three strikes that may have been the cause -- the enforcing that part, no parole and the rest of it, and serving the sentences.

**MR. YOUNG:** Thank you, and since I know of that report, I assume that he may have referred to other factors, such as a decrease in unemployment and a decrease in the numbers of the crime-prone age group of the population.

**CHAIRPERSON BERRY:** No, he didn't refer to those.

**MR. YOUNG:** Well, I would like to refer to them. There were 106,000 fewer males, young males, in the crime-prone age of the population at the end of the two-year period of three strikes

and you're out than there were at the beginning.

So, demographics may explain the decrease in crime. So, the answer that, in conclusion, we give in our office, and that I think is the fair one -- and it is what I think I heard the gentleman from Rand say -- is that there really cannot be any kind of weighty link between this remarkable increase in incarceration, of which three strikes and you're out is but a small part, and the changing crime rates.

**CHAIRPERSON BERRY:** Commissioner Horner, do you have any questions?

**COMMISSIONER HORNER:** Yes, and I'm not going to go into all of them in the interest of time. Listening to the presentations has reinforced my own sense of how complicated these issues are.

If you'll just bear with me very briefly, I'm going to have one quick question, and then the rest, I'll have to forebear for reading materials that you've submitted.

Unlike me, Mr. Young, you're a guy. You're not a female. You've raised your children in the suburbs. I raised my children on the south side of Chicago and in Northwest DC, and although I am acutely aware of the degree to which people sell products on the 10:00 news by giving us lurid presentations of violent crime, I also think that it is deceptive to the dialogue that must occur on this subject not to acknowledge the legitimacy of fear that people have, and as long as people don't acknowledge the legitimacy of fear, especially fear for one's children, I

think we can't have a good conversation about how to handle the outcome of the fear that people are experiencing.

The issue of disparate impact is a very sensitive one that needs much more direct encounter because I have read plenty of things that say there is a disparate impact, and some of those things have a subset that says that's because of racism, and another has a subset that says that's because of unintentional outcomes of well-intended laws or even proper laws.

For instance, you mentioned the resources that people who have resources -- presumably white -- devote to their children when they get into trouble with the law.

The first resource that prevents young well-off white kids from ending up in jail is the presence of a mother and a father in the home prepared to assure the judge they're going to watch closely and this kid won't damage the public again, and, so, the unintended consequence of single parenthood is unprotected children who cannot assure the judge that the public will be protected from their violent acts if they aren't incarcerated.

Now, you can put up against that phenomenon a powerful characterization of callous and racist behavior, too, and it's very, very difficult to sort this all out, very, very difficult.

Ms. Stewart, you feel outraged that an injustice -- I don't know the details of what happened with your brother. I've had a family member incarcerated for selling drugs. It is not clear to me that I would prefer that that family member have

remained on the street and able to sell to young people who became my children.

**MS. STEWART:** I never said that.

**COMMISSIONER HORNER:** I know you didn't. I'm just trying to express my sense of the complexity of this, and therefore I think it's very important that people who feel that the current system is damaging young black men inappropriately be very, very careful when they talk about things like crack cocaine and powder cocaine.

I have read, for instance, that the reason these laws were disproportionately passed was not because a bunch of legislators decided that they wanted to put black kids in jail but prevent white yuppies from having to go to jail for the same illicit pleasures, but that there was a great fear about the reported stronger addictiveness of crack cocaine, its association with violence and so on.

Now, if these things are all false, there's one way that people who feel the way you do could show your bona fides and get to the table on this discussion in a serious way, and that is to urge that the penalties for powder cocaine be raised to the levels for crack cocaine, thereby removing the disparate impact.

You see, that way, you would show you were deeply concerned about drug use and not just concerned about the phenomenon of large numbers of young black men being incarcerated.

I personally don't think the country can go on like this, putting more and more people in jail. It is a nightmare, and it reverberates against our history in particularly unsavory ways. But I also feel deep resentment at the constraints upon my personal liberty, my family's liberty, and the deterioration in our economic circumstances associated with crime.

So, we got to work this out. We need some very honest discussions, it seems to me, and an ability to put facts, histories, and statistics in a direct way one against the other, not just debate how to remove -- because I keep reading one set of articles in this publication and one set in that publication, and I don't know which set is correct, and I don't have an all-powerful judge to tell me.

I need to hear the direct back and forth, and this is useful for that purpose.

**CHAIRPERSON BERRY:** Thank you.

**MS. STEWART:** I have three responses.

**CHAIRPERSON BERRY:** Each one of you will get a chance. That's very powerful. They want to respond.

**COMMISSIONER HORNER:** And I know you can't all say all that's in your hearts and minds to respond to what I said just as I've held back a fair amount, too, and I hope we can do this another day or maybe in person directly over lunch or something, but --

**MS. MURPHY:** I have to say a couple of things because I'm a single mother and I'm deeply offended by the notion that

having two parents in the home is a guarantee or affords necessarily greater protection to children at risk.

I have a young black son who's six years old, and I'm very worried about him, and I have a lot to fear, too. I was married to a man at one point who was a partner in a Beverly Hills law firm who was routinely stopped in Beverly Hills because he drove a sports car, and now there is a lawsuit that has finally come about because there are many, many professionals who are stopped and whose children are stopped because officers assume that they have stolen the car that they're in or they've stolen the clothes that they've had.

So, yes, you fear a certain set of things that are based on factual information that you get from the evening news, but I want you to know that I fear a certain set of things that are based on direct personal experience and factual information that I get from the evening news, which is selective prosecution, selective stop and search, and selective arrest, and I don't think that I'm any less qualified to raise my son in a moral and lawful fashion than many parents I know who are at home in Montgomery County or upstate New York or wherever you find middle-class neighborhoods, both smoking pot, both doing drugs, and both not caring about the outcome of their kids.

Secondly, on the point about the pharmacological differences between crack and powder cocaine, the conference that we put together in August of 1993 on Capitol Hill brought those scientists to Washington, DC, and they presented evidence about

the propensity for violence created by both drugs, and they found that there was no difference on the system, on the nervous system, between crack and powder cocaine, and those findings were later upheld by the U.S. Sentencing Commission's own report, that the disparate sentences were not justified because of some underlying chemical difference between the base form of crack cocaine and powder cocaine, and in fact, the law was passed because Len Bias died of a cocaine overdose, and he was a choice pick for the Boston Celtics, and Tip O'Neill ran to the Floor of the House and rammed this crack penalty down the throats of the United States Congress, saying that crack was different, not having adequate hearings, not basing it on research.

So, the idea that somehow the research is what made this penalty more egregious or out of line with powder cocaine -- I want to disabuse you of that notion. If you look at the legislative history of the law, you will see that it was built on a great deal of emotion. That's all I have to say.

**CHAIRPERSON BERRY:** Anybody else have a quick statement?

**MS. STEWART:** A really quick statement.

**CHAIRPERSON BERRY:** Yes.

**MS. STEWART:** First of all, I understand where you see and hear through your own prism of experience. We all do. I would urge you to get a copy of the U.S. Sentencing Commission Report on Crack Cocaine and Powder Cocaine. That's not our words. It's The Sentencing Commission's own study.

Some of what Laura just said is in there, and one of the other things, you suggested that we raise powder cocaine penalties. Again, I mean we work in this field a lot. So, we know the statistics off the top of our heads. Sixty-eight percent of the people arrested for powder cocaine Federally are non-white. That would not solve the racial disparity between crack and powder. It would simply lower the powder amount to five grams of powder cocaine, which again are the low level, you know, users and small-time dealers who are largely non-white.

Federally, 68 percent of the people being sentenced for powder cocaine are non-white. So, again, it would not solve the racial part of the problem.

So, I guess those are the two points I want to make. And, of course, it's hard as you sat there and listened to us politely -- it was hard to sit here and politely listen to some of what you've said because, yes, we come up with our own biases. We're also very entrenched in this issue. We've done a lot of research.

I have fully supported the incarceration of my brother. I testified before Congress, saying it was the best thing that ever happened to him, but it still does not mean that the judge should not have had any discretion in the sentencing. It does not mean that people who have never laid eyes on him or any other defendant should be making sentences.

**MR. MOFFITT:** All I would like to say to you is if you look at the history of drug legislation in this country, you will



find that there are racial components that existed in the original prohibition of drugs. You will find that opium, for instance, was attached to the Chinese, and most of the legislative debates about that discuss the yellow menace.

Marijuana, for instance, was attached to Mexican Americans, and marijuana was prohibited on those terms. Cocaine has a long history of being attached to African Americans, and perhaps just to give you some anecdotal information, part of the reason apparently Southern sheriffs went from the use of .32 caliber firearms to .38 caliber firearms was the reported feeling that they could not kill cocaine-crazed African Americans with .32 firearms.

There is a long history and a component of race around drug legislation in this country that has existed since the turn of the century. So, when we speak about crack and powder cocaine, we don't speak on a blank slate, I would suggest, that just happened recently.

The history is detailed in the book by Dr. David Mustel from Harvard University and detailed in many other books. For instance, a book called "Against Excess", and "America's Longest War".

So, to talk about this, what I am concerned about, and what I have to tell you is I am not concerned about getting longer sentences for anyone. We don't have any problem with giving people long sentences in this country. We give longer sentences than any country in our heritage and tradition.

The question here is whether these long sentences are just and appropriate and solve the problem that we're here to address, and I would suggest that they don't, and I think you cannot detach America from its history, and we cannot deny that history in our discussions about the present.

**CHAIRPERSON BERRY:** Okay. Last comment? Yes?

**MR. YOUNG:** Well, I welcome the opportunity to respond to Commissioner Horner. I don't know if this goes outside the rules of what you're supposed to do in Washington on these things or not, but, you know, it was kind of clear to me, when I sat in earlier, that if one was putting people into categories, one might say, from your comments, that you are on the other side of an issue. Whether that's fair or not is irrelevant, because what I want to say is: I think you've opened the door. Your comments opened the door to a very useful line of discussion, and I just want to give two examples, which I think would benefit the debate that goes on in other agencies and other institutions in this city immensely.

And I think people, whatever their persuasions are, should welcome the invitation you made to be direct in their comments and to get some issues out.

The first of the two sort of responses I have, just to make the point of how I welcome your comments, is, *well, yes, of course, this is a complex issue, and I'm glad to hear you say that.* The problem has been that so many people in authority and positions of responsibility have regarded crime issues as simple

with one solution.

And there is a basis for fear. I've tried to say that. But fear has never been the best decider of public policy, you know, in war, in peace, or on any other issue, and I'm going to get personal again.

I grew up in the era when polio was an epidemic in this country. I sometimes think that the current war on crime is somewhat akin to had our political leadership then stood up and said: *We ought to be afraid of polio; it's killing our children and putting people in terrible machines for the rest of their lives. Build hospitals! Build hospitals! Build hospitals!*

But, instead, because of what was known and our belief in science, the money went into research, and that was the response, of course, that led to the solution. I think that in the crime area, there are many, many opportunities to similarly move beyond fear and simplistic solutions to inquire as to what might be done to solve those problems, and that's my second response.

You invited one of those. When you mentioned your concern, you mentioned my reference to the children in my neighborhood and said most of them grew up probably with two parents and in pretty stable homes -- and God knows I don't want to argue about that factually. It might be an interesting research project, but I understand the perspective, and I think in large, that's correct.

My response is that for the children who are in single

parent or otherwise difficult situated homes or non-homes in the inner cities, in rural or urban poverty areas, the question should be: *How do we substitute for the lack of the resources that we have in the stable neighborhoods?* And the answer that we seem to be giving more and more, through three strikes and you're out, and particularly now through the current sweeping juvenile law revision is, *for those people, we will substitute by bringing the full force of the criminal law and criminal punishment to bear.* My point is, that's not what we would do if we had the same problems in our neighborhood.

And I think that this is a very positive invitation that you've made: that what needs to be done is to examine the deficiencies and ask, *How do you respond to those deficiencies?*

Sometimes, it will be through the use of criminal law, policing and even incarceration. That much is true. But in other instances, and the example of poor children without adequate homes or who are the subject of abuse and neglect, the responses have got to come from other places than the criminal justice system. That's what I think you invite us to move toward, and I hope the Commission will go in that direction.

**COMMISSIONER HORNER:** And we could follow up that discussion with a discussion of the contention you just made that the question is how do we substitute for the lack of a stable home, and I would say let us ask how we can demand the creation of stable homes, but we could have a talk about that.

**MR. YOUNG:** We would not be talking about building

prisons and filling them with three strike offenders. We would be talking about other issues, and what I said earlier in my comments on laws that seem to be fair on their face when they result in disparate outcomes. I would say then that what needs to be done is to examine other responses that produce better or equally good results without the civil rights implications that those laws have.

Thank you.

**CHAIRPERSON BERRY:** Okay. Thank you, Commissioner Horner, for stimulating these responses, and we will revisit this issue again, and I want to thank the panel. Thank you all very much.

(End of Briefing)

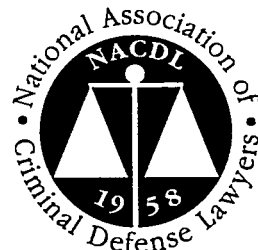
Attachment 1

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July 16, 1996

Mary K. Mathews  
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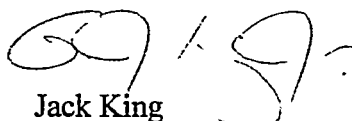
Dear Ms. Mathews:

On behalf of William Moffitt and the National Association of Criminal Defense Lawyers, I want to thank the Commission for inviting Mr. Moffitt to share his thoughts on "three strikes" sentencing June 12. As you probably are aware, it is the position of NACDL that this type of inflexible punishment scheme is not only unjust, but counter-productive in reducing violent crime.

Second, it has come to Mr. Moffitt's attention that H.R. 3565, the proposed Violent Youth Predator Act of 1996 being marked up today, would make "serious" juvenile drug offenses federal armed career criminal predicate offenses. The armed career offender statute, 18 U.S.C. 924(e), is the federal "three strikes" law. Thus, a youth caught possessing five or more grams of cocaine base ("crack"), more or less a film canister full, would be one strike on his way toward an adult sentence of not less than 15 years and up to life imprisonment. However one feels about the dangers of damages of cocaine, simple possession of a small amount of drugs is a non-violent offense. Providing that a juvenile drug offense be considered a career criminal strike is particularly repugnant to the interests of justice.

Mr. Moffitt has asked me to send you a copy of Sec. 110 of H.R. 3565, which he would like included as an appendix to his written remarks of June 12. A copy of that section is enclosed.

Sincerely yours,

  
Jack King  
Director, Public Affairs

Enclosure  
cc: William B. Moffitt, Esq.

.....  
**EXECUTIVE DIRECTOR**  
Stuart M. Stadler

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104TH CONGRESS  
2D SESSION

# H. R. 3565

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IN THE HOUSE OF REPRESENTATIVES Block Grants for s,

Mr. MCCOLLUM (for himself and Mr. HYDE, Mr. CUNNINGHAM, Mr. COBLE, one assistant to  
Mr. BUYER, Mr. HEINEMAN, and Mr. BRYANT of Tennessee) introduced work on juve crim  
the following bill; which was referred to the Committee on

6/4/96

## A BILL

To amend title 18, United States Code, with respect to  
juvenile offenders; and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Violent Youth Predator  
5 Act of 1996".

6 SEC. 2. FINDINGS.

7 The Congress finds the following:

1 (1) in the heading of such section, by striking  
2 "magistrate" and inserting "judicial officer"; and  
3 (2) by striking "magistrate" each place it ap-  
4 pears and inserting "judicial officer".

5 SEC. 110. SERIOUS JUVENILE DELINQUENCY DRUG TRAF-  
6 FICKING ADJUDICATIONS AS ARMED CAREER  
7 CRIMINAL ACT PREDICATES.

8 Section 924(e)(2)(A) of title 18, United States Code,  
9 is amended—

10 (1) by striking "or" at the end of clause (i);  
11 (2) by inserting "or" at the end of clause (ii);  
12 and

13 (3) by adding at the end the following:

14 "H (iii) any act of juvenile delinquency  
15 that if committed by an adult would be a  
16 serious drug offense described in this para-  
17 graph;"

18 SEC. 111. CLERICAL AMENDMENTS TO TABLE OF SECTIONS  
19 FOR CHAPTER.

20 The table of sections at the beginning of chapter 403  
21 of title 18, United States Code, is amended to read as  
22 follows:

23 "CHAPTER 403—JUVENILE DELINQUENCY

"Sec.

"5031. Definitions.

"5032. Delinquency proceedings or criminal prosecutions in district courts.

"5033. Custody prior to appearance before judicial officer.

"5034. Duties of judicial officer.



## Attachment 2

### *California's New Three-Strikes Law: Benefits, Costs, and Alternatives*

Public outrage over crime has found political expression in the proposal and enactment of various laws mandating lengthy sentences for repeat felons. Put forward under the slogan "three strikes and you're out," these laws generally prescribe that felons found guilty of a third serious crime be locked up for 25 years to life. The California law, which went into effect in March 1994, may be the most sweeping of these. Although the first two "strikes" accrue for serious felonies, the crime that triggers the life sentence can be any felony. Furthermore, the law doubles sentences for a second strike, requires that these extended sentences be served in prison (rather than in jail or on probation), and limits "good time" earned during prison to 20 percent of the sentence given (rather than 50 percent, as under the previous law).

In November, Californians will vote on Proposition 184, an initiative essentially identical to the new three-strikes law.[1] Should Californians approve the initiative and so ratify the legislature's action? Or should they reject it, sending the message that legislators should reconsider the new law, perhaps in favor of an alternative mandatory-sentencing measure? What about other states? Should they follow California's lead?

In reaching a decision, Californians will naturally be affected by a variety of subjective factors, for example, fear of crime, sympathy for victims and their families, and anger at violent criminals. But voters should also have access to hard evidence regarding the implications of the law: How much crime reduction can they expect from the three-strikes law? And how much will it cost? What about the alternatives? And where will the money come from?

RAND undertook to answer these questions. An interdisciplinary team of researchers constructed and ran analytic models taking advantage of data on arrest rates, time served, prison populations, and length of criminal careers. The models predicted how populations of offenders on the street and in prison would change under the differing sentencing provisions of the new law and under various alternatives, relative to the previous law. Using data on these populations, the researchers determined crime rates and costs. The latter were analyzed in conjunction with an ongoing RAND assessment of California's budgetary future. The findings, in a nutshell, were as follows:

- Both the benefits and the costs of the new law will be substantial.
- Alternatives can be devised that would achieve most or all of the benefits at less cost.
- California's budget is so constrained that it is unlikely that the new law will be fully implemented.

#### **What Will Be the Benefits and Costs of the New Law?**

If fully implemented as written, the new law will reduce serious felonies committed by adults[2] in California between 22 and 34 percent. About a third of the felonies eliminated will be violent crimes such as murder, rape, and assaults causing great bodily injury. The other two-thirds will be felonies that are less violent or nonviolent but still serious, including less injurious assaults, most robberies, and burglaries of residences.

This reduction in crime will be bought at a cost of an extra \$4.5 billion to \$6.5 billion per year in current dollars. The intent of the three-strikes law is, of course, to lock up repeat offenders longer, and that requires the construction and operation of more prisons. Some police and court costs may be saved in not having to deal so often with such offenders once they are locked up, but greater prison costs overwhelm such savings.

#### **What About the Alternatives?**

The new three-strikes law has been criticized by some for casting too wide a net. It is argued that the public is not really as concerned about minor felonies or even residential burglaries as it is about truly violent crimes and that it will not want to pay to keep less violent felons locked up. Indeed, the RAND analysis showed that, more often than not, the third strike will accrue for a minor felony such as motor vehicle theft, as opposed to one of the serious crimes mentioned above.

In view of the width of the "net" and the power of the less-publicized provisions of the new law, could an alternative be constructed in which some benefit would be sacrificed to achieve great savings? What if there were no third-strike provision? Or, what if the extended sentences applied only if a violent felony were committed? What about one of the alternatives considered by the legislature, the "Rainey bill," which would have been harsher on violent felons and more lenient on others? Finally, what would happen if the state got rid of "strikes" and instead guaranteed that those convicted of a serious crime serve their full sentence? In other words, what about adopting a law that sends all those convicted of a serious felony to prison, eliminates "good time" for such felons so that they must serve their full term, and shifts some minor felons from prison to probation?

Figures 1 and 2 compare the benefits and costs of the new law and these alternatives, relative to the old law. As you might expect, for the most part, the more focused alternatives would be both less costly than the new law and less effective at reducing crime.[3 ] But some of them would not be much less effective. For example, the second-strike-only alternative would be 85 percent as effective as the new law. This has an interesting implication: Only 15 percent of the new law's crime reduction effect will come from its most publicized provision—the third strike.

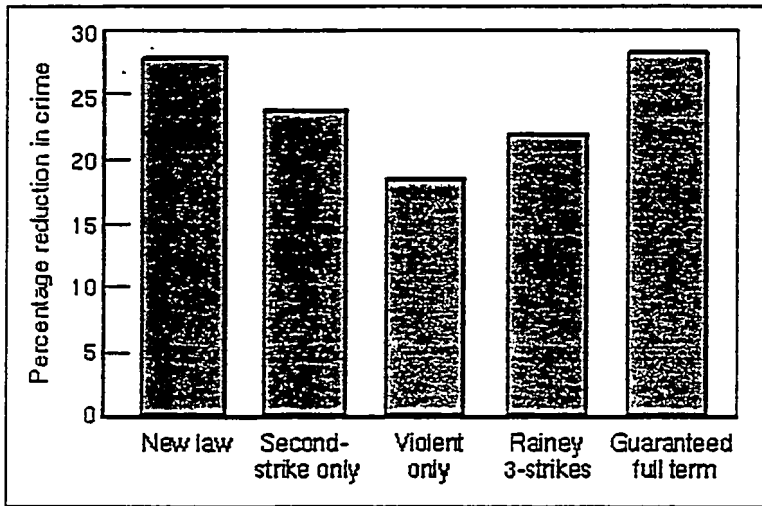


Figure 1—Percentage reduction in serious crime from new law and alternatives

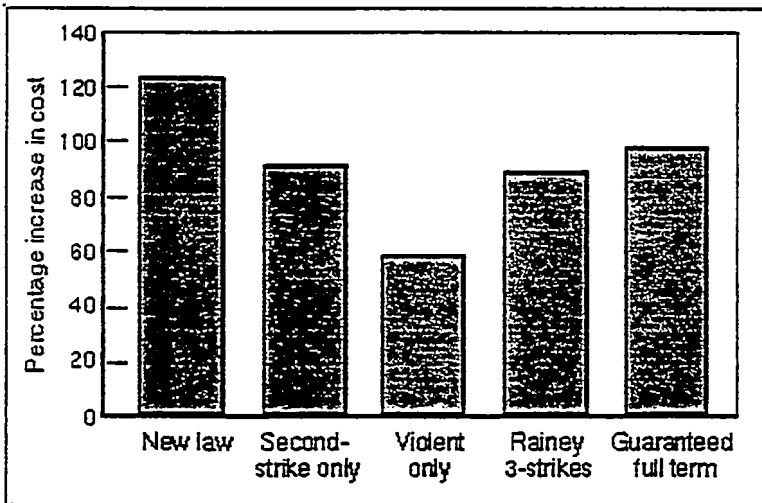


Figure 2—Percentage increase in cost from new law and alternatives

But for all the alternatives to the new law, the cost would drop more than the effectiveness. For example,

applying the new law's penalties only to violent felons would save half its extra cost but retain two-thirds of its effectiveness.

Cost-effectiveness, though, is not necessarily the most important criterion. To some people, a reduction in serious crime on the order of 30 percent would be attractive no matter what the cost. However, it seems unlikely that anyone would want to pay more for that than they had to. In this context, the guaranteed-full-term alternative could be of interest, for it would be just as effective as the new law at substantially lower cost. The advantages of this alternative point up the shortcomings of the new law: The full-term alternative would increase sentences for all serious offenders—even first-timers who are near the beginning of their criminal careers—and pay for it by not imprisoning many minor felons. The new law, in contrast, does not crack down on first-time serious offenders. Instead, it expends large amounts of money keeping older criminals—including many convicted of minor offenses—locked up. Data on criminal careers suggest that the term of imprisonment for many of these older offenders will last beyond the point at which they would resume a life of crime if released, meaning that costs will be incurred for no crime-reduction benefit.

### Where Will the Money Come From?

The money to finance three strikes will have to come from somewhere. The choices, however, are limited. Figure 3 shows the current allocation of expenditures from the state's general fund. Proposition 98 locked into the state constitution a minimum level of spending on K-12 education that is expected to increase dramatically in the coming years—from 36 percent of the general fund now to 47 percent in 2002. Health and welfare costs have been going up for a long time and show no signs of leveling off. The new three-strikes law will double the fraction of the general fund consumed by the Department of Corrections. Clearly, these increases will put enormous pressure on everything else the state spends money on (see Figure 4). That includes, most prominently, college education, but also a variety of other services ranging from controlling environmental pollution through managing parks and fighting brush fires to regulating insurance and other industries.

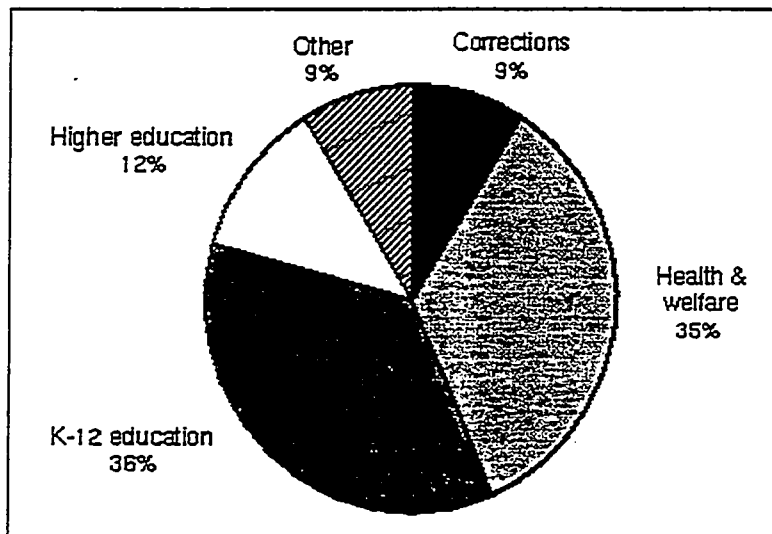
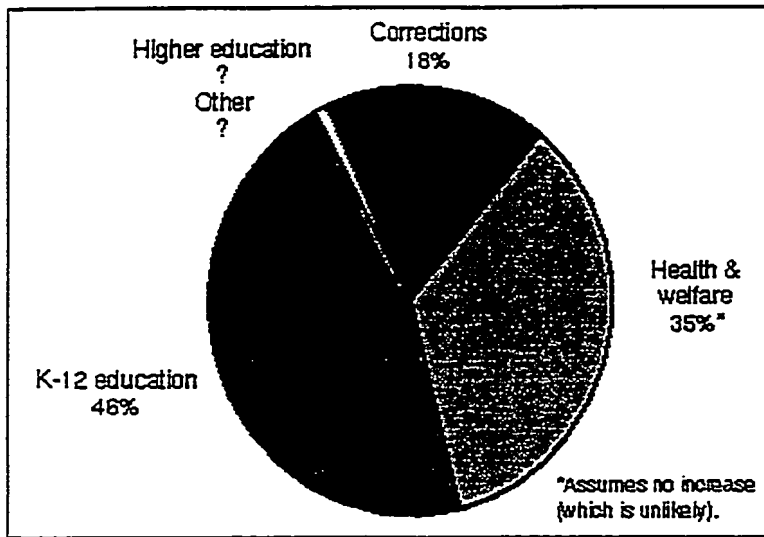


Figure 3—Distribution of California General-Fund Appropriations, FY94



**Figure 4—Budgetary Squeeze on Higher Education and Other Services, FY02**

It seems unlikely that Californians will put up with drastic reductions in these services, but increased taxes are decidedly unpopular. Clearly, something's got to give. It may be the three-strikes law itself. Criminal justice officials may simply not have the money to fully implement it. If that turns out to be the case, the new law will have less effect on serious crime than that estimated here. How much less is impossible to predict.

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[1] Passage of the law in initiative form will prevent repeal or amendment (other than to further the law's purpose) by the legislature.

[2] Juvenile offenders will not be affected by this law. They now account for about one-sixth of all arrests for violent crimes.

[3] For these figures, we take the estimated benefit and cost of the new law from the middle of the ranges given above—28 percent and \$5.5 billion.

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RAND research briefs summarize research that has been more fully documented elsewhere. This research brief describes work done using RAND's own funds and is documented in Peter W. Greenwood et al., *Three Strikes and You're Out: Estimated Costs and Benefits of California's New Mandatory-Sentencing Law*, MR-509-RC, 1994, 87 pp., \$13.00, which is available from RAND Distribution Services, Telephone: 310-451-7002; FAX: 310-451-6915; or Internet: [order@rand.org](mailto:order@rand.org). The budgetary analysis is based on research by Stephen J. Carroll. RAND is a nonprofit institution that seeks to improve public policy through research and analysis. RAND's publications do not necessarily reflect the opinions or policies of its research sponsors.