

TOO MUCH DEMOCRACY OR TOO MUCH CRIME?
LESSONS FROM CALIFORNIA'S THREE STRIKES LAW

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The most important theme in Punishment and Democracy, by Franklin Zimring, Gordon Hawkins and Sam Kamin, is that the form of direct democracy through citizen initiative that coincided with the implementation of California's 1994 three strikes law represents a dangerous example of growing populist influence over sentencing outcomes in America. Zimring, Hawkins and Kamin argue that the California practice of allowing citizens to vote on major policy initiatives puts criminal justice policy too directly under popular control. Instead the authors argue that sentencing decisions should be insulated from popular will by an interstitial layer of bureaucracy between the public and actual criminal justice decision-making. Traditionally, judges and parole boards have provided

this buffer. However, over the past thirty years, the power of parole boards has been eliminated or curtailed in many jurisdictions and the discretion of judges has been greatly reduced by sentencing guidelines commissions and mandatory sentencing schemes.

The major contribution of this book is that it raises the possibility that democracy can have undesirable effects on the operation of justice. However, the authors' arguments would be more persuasive if they had considered the implications of crime as well as punishment for democracy. Crime poses a serious threat to democratic institutions, both by undermining trust in government and by encouraging excessive criminal justice punishment. In the first section of this essay, I describe the California three strikes law and Zimring and his colleagues' evaluation of it. In subsequent sections I consider some of the limitations of their research, especially the implications of their decision to study punishment without seriously considering the negative implications of crime. I offer some concluding observations about crime, punishment and democratic institutions in a final section.

I. THE THREE STRIKES LAW AND PUNISHMENT

Penal laws that mandate enhanced penalties for recidivist offenders have a long history in the Anglo-American legal system and were common throughout the United States during most of the twentieth century. But while "three time loser" statutes have long been on the books in many states, they were rarely applied and received little attention or publicity until the early 1990s. The first conversion of habitual criminal statutes into the baseball parlance of "Three strikes and you're out" was passed in Washington State in 1993. But the Washington law covered only a highly select group of

serious felonies with a life sentence on the third conviction. An even narrower three strikes provision became part of federal crime legislation in 1994. In fact, while three strikes laws have been passed in about half of the states, the total impact of these laws outside of California has been negligible.

A Fresno photographer named Mike Reynolds, whose daughter had been a murder victim, first proposed the California Three Strikes Law (TSL). The California TSL has three provisions that both distinguish it from TSLs passed in other states and explain why it has been so much more consequential than other laws with similar titles. First, it applies large sentencing enhancements for second as well as third felony convictions. Second, it does not limit eligibility for the harshest sentences to those with criminal records for violent crimes but instead includes those with priors for the much more common crime of residential burglary. And finally, it greatly expands “the strike zone” by allowing the third strike, which leads to a 25-year-to-life term, to be *any* felony in the California Penal Code. Zimring and his colleagues argue (p. 5) that each of these three changes has the potential to significantly increase imprisonment rates, “but together they operate exponentially.”

Although the campaign to put the TSL on the California ballot was supported by the National Rifle Association and an influential California prison guard union, Zimring and his colleagues argue that its ultimate passage depended on the confluence of several relatively unique developments. Perhaps most importantly, in October 1993, a 12-year old girl named Polly Klaas was abducted from her Petaluma, California home by a twice-convicted violent offender who had recently been paroled from the state prison system. After a month of intensive media coverage, the ex-convict was apprehended, confessed to

sexually assaulting and murdering the young girl, and led investigators to her remains. In the wake of the Klaas murder, Pete Wilson, the Republican Governor of California, seized on the TSL as an important piece of crime-fighting legislation. At the same time, the Democratic-controlled state legislature, anxious to prevent the governor from using the crime issue to secure reelection, responded by agreeing to pass any crime legislation he proposed.

The TSL was actually passed by the legislature and signed into law by the Governor (as Chapter 12) on March 7, 1994; eight months before its passage as Initiative Number 184 by California voters. While Zimring and his colleagues do not make much of the timing of these events (noting only [p. 6] that the eventual passage of initiative 184 by voters in November 1994 was a “political afterthought”), the peculiar defects of the three strikes law can be attributed as much to the irresponsibility of the democratically elected politicians of California as to the excesses of direct citizen participation in sentencing; three strikes became law before the citizens of California overwhelmingly supported it through the initiative.

Much of the significance of the California TSL for Zimring and his colleagues is that it was created outside ordinary government channels and only later endorsed by the legislature and the governor. The bill received almost no analytic attention from either criminal justice professionals or academic experts prior to enactment. In large part, this was a result of the time pressures imposed by public reactions to the Polly Klaas murder case. Remarkably, neither the governor nor the legislature made any attempt to question or change the original TSL bill drafted by photographer Reynolds.

A. THE IMPACT OF THE THREE STRIKES LAW

The TSL singles out two groups for special treatment: a second-strike group with one prior conviction for a violent or “serious” offense, and a third-strike group with two or more previous special-category convictions. Zimring and his colleagues argue that because the sharp escalation in threatened punishment in the 1994 legislation applies only to members of these two categories, those who commit similar crimes but do not qualify for either category form a natural control group (i.e., they committed similar crimes, but faced no changes in the severity of threatened punishment).

To evaluate the impact of the TSL, the authors draw before and after samples of all persons arrested for felonies from the cities of San Diego, Los Angeles and San Francisco. The before samples of approximately 480 felony arrestees from each city are drawn from April 1993—before the passage of the TSL. The after samples of approximately 330 arrestees from each city are drawn for April 1994 (the first full month after the enactment of the TSL) and April 1995. Arrests rather than convictions are sampled because of a concern that the TSL might have affected conviction rates. Los Angeles is selected because it is the largest city in California; San Diego because it is the second largest and also because its citizens are among the most enthusiastic supporters of the TSL; San Francisco because it is among the largest of California cities and because its citizens are comparatively less supportive of the TSL. (The authors report that three-quarters of San Diego voters and nearly three-quarters of Los Angeles voters supported the TSL, while only 43 percent of San Francisco voters did.) In order to determine whether persons arrested for homicide have a different probability of qualifying as second- or third-strike offenders, the authors supplement the basic sample for each city

by drawing a random sample of 50 adult homicide arrests from Los Angeles and San Francisco and all 45 adult arrests for homicide in San Diego in 1993.

Zimring and his colleagues evaluate the TSL by examining (1) the role of the two-targeted groups in contributing to overall California crime rates, (2) the magnitude of change in punishment attributable to the new law, and (3) any evidence that the law affected future levels of criminal behavior. First, to measure the crime contributions of those identified under the TSL in California, the authors studied the samples of felony arrests from the three target cities in 1993, almost a year before the California TSL was implemented. The authors reason that using data prior to the passage of the TSL is important because the existence of the TSL might have reduced the subsequent criminal behavior of the two targeted groups. According to the authors, this analysis shows that offenders who qualify for the two- or three-strikes provisions are a relatively small proportion of all those who commit serious crime in California. The estimated proportion of felonies attributable to second-strike offenders is just over seven percent and the proportion of felonies attributable to third-strike offenders is just over three percent. Thus, both categories of targeted felonies together account for slightly more than ten percent of all California felonies in these three large cities.

Furthermore, Zimring and his colleagues find few differences between members of the targeted groups and other felons in terms of either the severity of their current offense or their background characteristics. In fact, the authors find that the offense charged at the current arrest is less likely to be a crime of violence for a third-strike defendant than for a defendant with no strikes at all. Accordingly, the authors conclude (p. 50) that

offenders singled out for aggravated punishment under the TSL are indistinguishable from other persons arrested for felonies in California.

Second, the relatively small proportion of offenders qualifying for TSL sentencing (about 10 percent) sets the parameters for the total impact that the TSL can have on imprisonment rates. Within these parameters, Zimring and his colleagues find significant statewide differences in the implementation levels for the second and third strike provisions of the law. Statewide, compared to third-strike offenders, second-strike offenders were about three-and-one-half times more likely to actually receive the recommended sentence. The authors reason that because the second strike penalty increases represent less drastic departures from prior practice than the third strike penalties, prosecutors were much more likely to pursue them. The TSL consistently increased both the chances of incarceration and the length of incarceration for eligible second-strike offenders. However, the application of the law was less consistent for third strikers. Instead, third strikers were no more likely to receive a prison sentence after the TSL was implemented. However, for those third strikers who did receive prison sentences, the average sentence length substantially increased.

And finally, a critical issue surrounding the California TSL law is of course the extent to which its enforcement actually reduced crime. Zimring and his colleagues reason that the law could reduce crime through either incapacitation or deterrent effects. On the assumption that the main TSL effect should be a reduction in the share of crime attributed to second and third strike offenders, the authors compare the proportion of crimes in the three cities attributable to the two targeted groups before and after the new law went into effect. They find that the proportion of arrestees who qualified as second-

strike offenders remained unchanged before and after the adoption of the TSL—indicating no incapacitation or deterrent effect. However, they also find that the proportion of third strike offenders drops from 4.3 percent to 3.5 percent after the law's passage. While this represents an absolute decline of only 0.8 percent, the drop in percentage terms amounts to more than an 18 percent decline. Zimring and his colleagues argue (p. 104) that the greater apparent effect of third than second strike intervention makes sense because the increase in threatened punishment was much higher for third than second strike offenders, and the publicity surrounding the third-strike provisions was much greater than the publicity for the second-strike provisions.

The authors offer three reasons to conclude that the post-law reductions in third-strike offenders are due to general deterrence rather than incapacitation effects. First, there was no measurable increase in the percentage of third-strike offenders who were incarcerated before and after the law. Second, the drop in the third strike share was as great just after the new law came into effect, as it was a year later (incapacitation effects might be expected to become larger over time). And finally, the effect was larger in San Francisco; with relatively low TSL enforcement, than in San Diego with high enforcement (after the passage of the TSL, only 21.7 percent of third-strike eligible arrests in San Francisco resulted in incarceration, compared to 52.7 percent in Los Angeles and 36.4 percent in San Diego).

To evaluate the consistency of the California TSL, the authors consider the well-known distinction between offender- and offense-centered sentencing. Offender-centered (or indeterminate) sentencing focuses on the offender's characteristics (especially criminal record) while offense-centered (or determinate) sentencing instead emphasizes

punishing the act committed. The authors argue that the TSL is an inconsistent hodgepodge of both sentencing strategies. For second strike offenders, the TSL is partly offense centered and partly offender centered. It is offense centered because defendants' current conviction provides the starting point for calculating their minimum punishment. (Whatever the felony of the current conviction, the minimum prison sentence must be twice the standard sentence for the crime.) But it is also offender centered in that offenders' prior record can triple the sentences they receive and make them mandatory. Thus, a defendant with a prior conviction for theft is not eligible for a three strikes enhancement, but a defendant with a prior record for burglary is.

For third strike offenders, the TSL is almost completely offender centered. No matter what the current felony, the appropriate sentence is 25-years-to-life and the minimum time served must be 20 years. Thus, an offender's current crime has an important effect on the length of imprisonment for a second-strike conviction (an offense centered, determinate sentencing consideration) but not for a third-strike conviction (because any California felony qualifies). The inconsistencies are even more jarring when combined with the mostly offense-centered provisions of the rest of the California penal code. With the combination of the prior code and the TSL, the existence of a single strike marks the boundary between discretion and mandatory imprisonment, while the existence of a second strike means the difference between a sentencing scheme in which the offender's current crime is of great importance (the prior code) and one in which it is irrelevant (the TSL). As demonstrated by the widely publicized case of the three strikes offender who received a 25-year sentence for stealing a slice of pizza (Washington Post

1995:A1), this system can produce life sentences for petty theft as well as aggravated murder.¹

When the TSL was passed, many criminal justice observers predicted that there would be huge increases in court trials and imprisonment as a result of the provisions for mandatory prosecution of thousands of cases that carried high minimum prison terms. But while the effects of the TSL have been substantial, a wholesale crisis has largely failed to materialize. To begin with, prosecutors have greatly reduced the potential impact of the TSL through plea bargaining concessions in second-strike cases and through highly selective prosecution in third-strike cases. As predicted by observers, defendants did request jury trials more frequently when prosecuted on third-strike charges, but prosecutors went forward with a very small proportion of these cases. The actual impact of TSL was also blunted by a court ruling two years after the TSL was enacted. In *People v. Superior Court (Romero)*, the California Supreme Court ruled that trial courts may ignore the aggravating impact of prior strikes in the interest of justice.

These adjustments to the TSL by prosecutors and judges have greatly lessened both its past impact and its likely future impact on prison populations. In fact, Zimring and his colleagues show that the proportion of second and third strike offenders who were imprisoned after the new law did not significantly increase the size of the California prison population. Thus, initial estimates of huge increases in prison population as a result of TSL did not prove to be correct. Nevertheless, Zimring and his colleagues point out that because the TSL has produced a steady stream of prisoners serving extremely long sentences, its impact will increase over time, reaching a maximum effect 15 to 20 years after the law's 1994 adoption. However, even these predictions are likely to be

changed by a consequential court decision delivered in 2001, after the publication of the book. In *Andrade v. California*, the Ninth Circuit U.S. Court of Appeals ruled that sending people convicted of minor offenses to jail for long sentences under California's TSL violates the constitutional prohibition on cruel and unusual punishment. The case was appealed to the U.S. Supreme Court by the California Attorney General's office and the Court has agreed to hear it.²

B. IMPLICATIONS OF THE THREE STRIKES LAW

Zimring and his colleagues argue that problems with the TSL fall into three main categories: structural characteristics of the California initiative system, the use of mandatory minimums, and popular biases toward the selection of excessive punishments. Two characteristics of the California initiative system that especially concern the authors are the fact that it reduces complex choices to simple yes-no votes and that many of the amendments passed by initiative (including Proposition 184) can only be changed by a supermajority (two-thirds vote) of both houses of the state legislature. The first characteristic forces voters to choose between accepting an initiative they may see as seriously flawed or voting to do nothing. The second characteristic means that once passed, potentially destructive initiatives such as the TSL are very difficult to undo. Zimring and his colleagues argue that mandatory minimum sentences generally push sentences up by (1) aggregating punishment to a single standard governed by an imagined worse case scenario, (2) making binding determinations of prison time early in the process instead of waiting until the need for strong condemnation and symbolic communication has lessened (which the authors refer to as "the dual currency

phenomenon”), and (3) focusing exclusively on the crime and other aggravating factors, rather than considering the offender’s individual characteristics. However, the requirement that once passed a law can only be changed by a super-majority in both legislative houses is not limited to laws enacted through the California initiative system. Chapter 12, the three strikes law that was approved by the governor and passed by the legislature before proposition 184 was submitted to California voters, also stipulated that it could only be changed by a super majority vote of both houses of the legislature.

Based on their analysis of the California TSL, Zimring and his colleagues conclude that a combination of mandatory penalty rules and the democratic selection of penalty levels are likely to result in excessive punishments. They claim that two policy changes could preclude this. One is to shift the power to set punishments to legal actors who are protected from direct democratic control. This has been accomplished in many states and the federal government by sentencing guideline commissions. Another possibility is to give judges wider discretion for the application of the law in individual cases. However, neither of these very different policy options is certain to produce the reduction in punishment levels that the authors seek. For example, the federal sentencing guidelines have been severely criticized for sentences considered by many observers to be excessive (Reitz 1993; Tonry 1996); and criticisms of overly punitive sentencing handed down by individual judges are also common (Gibson 1978; Myers 1988; but see Spohn 2002:106-116).

The authors argue that a prominent example of governmental efforts to insulate decision making from direct democratic control is the non-elected central banking systems that currently set fundamental monetary policies in all contemporary western

democracies. Thus, the United States Federal Reserve System, created in 1913, is accountable to no one. The authors claim that this peculiarly undemocratic institution is accepted primarily because more democratically responsive institutions would produce undesirable levels of inflation. They argue (p. 207-209) that a similar system of insulated delegation could result in moderation of penalty levels for criminal offenders without threatening the overall nature of representative democracy and that such a system might help foster a commitment to and respect for criminal justice expertise. However, the authors concede (p. 208) that because such a program would require the explicit displacement of democratic control, it is likely to be a “particularly hard sell.”

The analogy between criminal justice decision-making and monetary decision making is an interesting one because it demonstrates that undemocratic institutions can play important roles in democratic societies. Nevertheless, it is also clear that financial markets and criminal justice systems represent very different processes in the United States. Most notably, compared to criminal justice transactions, economic transactions are much more national in scope. Thus, while it makes perfect sense to talk about the national economy of the United States, talking about a national criminal justice system is not very meaningful. Since the founding of the United States, criminal justice processing has remained largely a local issue. Even national rules on criminal justice embodied in the United States constitution (e.g., protection against cruel and unusual punishment, the right not to testify against oneself) are often controversial and the idea of setting any type of national sentencing guidelines to enforce moderate sentencing standards seems unlikely for the foreseeable future. Still, the principle of relying on non-elected sentencing boards to set fundamental sentencing policies has some merit and might

actually be a realistic possibility at the state level—where it resembles some existing sentencing commissions.

Zimring and his colleagues conclude with two lessons from the TSL experience. First, the fact that California's version of the law had a much greater impact than the versions passed elsewhere, demonstrates how the loose coupling between the symbolism surrounding new laws and their actual operational impact can produce huge discrepancies among jurisdictions in the American system of justice. Second, the main safeguards against the kind of extreme legislation that the TSL represents is (1) the delegation of policy setting responsibilities to administrative and judicial agencies and (2) the careful separation of those who promulgate general principles concerning punishment (usually legislators) from those who determine penalties in particular cases (usually judges).

The authors point out that part of the reason that the California TSL was more consequential than other TSLs is that earlier laws had already weakened the traditional firewall between popular sentiment and individual sentencing decisions in California. They also note that the California TSL was passed during a period of great mistrust in government. Zimring and his colleagues argue that harsh punishments may be more likely to accompany periods of high mistrust in government because these are times when crime is likely to appear to be a bigger problem and when judges are more likely to be seen as overly lenient on offenders.

II. DEMOCRACY AND PUNISHMENT

One of the great strengths of this book is that it raises the possibility that there may be such a thing as “too much” democracy. The book's central thesis is that a decline in

the influence of legal experts and a shift of power into institutions more responsive to democratic pressures will result in more punitive sentencing practices, and uses the California TSL as an example. Relatively little prior research has examined connections between democratic institutions and levels of criminal justice punishment. In the absence of hard evidence such as that presented by Zimring and his associates, it is easy to assume that increasing democracy has nothing but positive implications.

Of course a concern about the excessive punishment of individuals in democratic systems has a long pedigree. Even a cursory reading of the U.S. Constitution shows the revolutionary generation's apprehension over connections between democratically-imposed criminal justice punishment and civil liberties, including references to cruel and unusual punishment (Eighth Amendment); the right to trial by jury, counsel and to confront your accusers (Sixth Amendment); freedom from multiple prosecutions and the right not to testify against oneself (Fifth Amendment); and the right to be free from unreasonable searches and seizures (Fourth Amendment).

The concern is also clear in the writings of some of the chief architects of the American republic. For example, James Madison (1941: 339) warned in the *Federalist* that “[i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.” Madison was concerned that permanent majorities at the state or local level would oppress minorities. His ingenious solution (1941:59-60) to this problem was to dilute the power of state and local authorities by thrusting them into a national political process. Madison reasoned that if they lacked majority status in this national political process, local majority groups could only obtain power at the national level by forging

coalitions with other groups—a process that Madison thought was difficult enough that it would greatly reduce the threat of the oppression of minorities by the majority.

Madison's argument for centralized national power has wielded a major influence over thinking about the balance between the power of the majority and the rights of minorities and has been supported especially by the instances in which the federal government has stepped in to protect individual rights from oppressive state laws—most notably and dramatically the steps taken by the federal government to protect the rights of the African American minority from often violent majority white supremacist factions in the southern states (Amar 1991; Stacy 1997).

Based on his influential observations about American democracy in the early 1830s, Alexis de Tocqueville (1956:119) also expresses serious concerns about the potential “tyranny of the majority.” In fact, de Tocqueville's concerns may be especially relevant to the California case. While Madison is most worried that “permanent majorities” at the state or local level might oppress minorities, de Tocqueville argues that the very process of majority rule—even when it does not represent a stable majority—carries dangers. He reasons (p. 114) that if we agree that any person possessing absolute power may misuse this power against others, then “why should not a majority be liable to the same reproach?” In fact, says de Tocqueville, majority rule is especially dangerous in the United States because its legal system bestows all power in the hands of those supported by majority vote. Thus he concludes (p. 115) that “the main evil of the present democratic institutions of the United States does not arise, as is often asserted in Europe, from their weakness, but from their irresistible strength.”

III. DEMOCRACY AND PUNISHMENT IN CALIFORNIA AND BEYOND

To oversimplify somewhat, this book combines a comprehensive treatment of a well-researched topic (the California Three Strikes law) with a far less comprehensive treatment of a little-researched topic (the connection between democracy and punishment). While the title of the book lists “punishment and democracy” first and “three strikes and you’re out” second, both the order in which these topics are examined and the amount of attention devoted to each are reversed in the book. Thus, the book’s first eight chapters provide a detailed assessment of the TSL while only the last three chapters examine its implications for punishment and democracy. A more accurate title for the book would put the three strikes law first and punishment and democracy afterward.

This is a disappointment because we already know a lot about the peculiar defects of the California TSL, but relatively little about the complex relations between punishment and democracy. Indeed, Zimring and his colleagues’ review of the TSL breaks little new ground. There is already an extensive literature on the California TSL and its effects on crime and punishment (Turner and Sundt 1995; Stolzenberg and D’Alessio 1997; Shichor 1997), and the authors themselves already published most of the arguments about the deleterious consequences of the California TSL in an earlier monograph (Zimring, Hawkins and Kamin 1999). By contrast, the discussion of punishment and democracy is important, innovative and breaks new theoretical ground. Unfortunately, it is far less detailed than the review that precedes it. And the power of the arguments being made about punishment and democracy are limited in several important ways.

Perhaps the most important limitation of the book is that it is a case study. True, California does have a larger prison system than any other state—even larger than any country in Europe. Moreover, California is widely recognized as a trendsetter for both the United States and the world in general. Nevertheless, California is also an exceptional case in many ways. The strongest evidence for this is the fact that 24 other states and the federal government also passed three strikes laws at about the same time, and none of these laws have produced the magnitude of imprisonment change that has been witnessed in California. In fact, the authors show that California accounts for more than 90 percent of all sentences under three strikes in the 26 U.S. jurisdictions with some form of three strikes law. Thus, while the three strikes law passed by the U.S. Congress in 1994 had an impact on the criminal sentences of 35 offenders in its first four and a half years, the California law passed the same year affected the criminal sentences of more than 40,000 offenders during the same period.

In the end, the authors themselves provide the strongest argument for the unique character of the California case. They take pains to explain (p. 193) that the California initiative system was exceptional, that the Governor's strategy of accepting a piece of legislation written by a political amateur was highly unusual, and that the decision of the state legislature dominated by members of the opposition party to nevertheless grant the governor a blanket approval of a legislative initiative was unprecedented.

But despite the evidence that the California case is an unusual one, the authors nevertheless offer (p. 203) strong conclusions about general connections between democracy and punishment: "it is apparent that the combination of mandatory penalty rules and the democratic selection of penalty levels will err on the high side...." The

important unanswered question is: Can we comfortably conclude that more direct forms of democracy will inevitably produce excessive punishment based on the California case alone?

While a definitive answer to this important policy question is well beyond the scope of this essay, it is certainly easy to offer cases that do not seem to fit such a prediction. To cite extreme examples, it seems unlikely that offering the citizens of countries like Iraq, North Korea, or Libya more democratic input into sentencing decisions would necessarily result in harsher criminal justice penalties. In fact, it seems likely that the long-term historical movement toward democratization in many contemporary industrialized nations has produced less rather than more punitive sentencing schemes. It is not even clear that the initiative process in California will universally produce excessively punitive sentencing laws. Only a few years after passing the three strikes law, California voters passed Proposition 36, which mandates treatment and prohibits incarceration, except under a very limited set of circumstances, for first and second time offenders convicted of drug possession (Legislative Analyst's Office 2000).

The scope of the book is also limited by the way the authors define democracy (p. 183): "a system of governance in which those who exercise government power are subject to the electoral control of citizens by majority vote." This definition limits the discussion mostly to differences in how closely punishment is tied to majority voting and pays little attention to other potentially important characteristics of democracy in America. To develop their argument, the authors distinguish four ways of setting public policy on sentencing that are increasingly removed from direct control by voters: *direct democracy* (where citizens impose punishments directly by majority vote); *representative*

democracy (where voters choose the persons who are entrusted with making punishment rules); *delegated authority* (where an elected legislature or executive delegates the power to set punishment rules and make decisions to nonelected legal agents); and *insulated delegation* (where additional steps are taken to further insulate those who make rules and decisions about punishment from voters).

Zimring and his colleagues next compare the extent to which voters directly control sentencing by classifying procedures used in the United States and the other six member nations of the G-7 in terms of these four categories. They demonstrate that direct democracy in making and applying sentencing laws is highly unusual. In general, all seven members of the G-7 rely on representative democracy to set the general provisions of sentencing laws and insulated delegation to impose individual sentences. The authors argue that the United States is increasingly moving to more direct forms of voter control of sentencing rules. Thus, in recent years the majority of American states have pushed criminal punishment toward direct democracy by providing for the initial election of trial judges (27 states) or periodic review of judges selected by state executives (11 states).

Zimring and his colleagues also point out that since 1980, 16 states in the U.S. have created sentencing commissions to set guidelines that reduce to varying degrees the options of sentencing judges. However, in terms of the level of democratic control exercised by governments, sentencing guidelines have different implications for general sentencing provisions and for particular applications. In terms of particular applications, sentencing commissions represent a move that makes the United States the most directly democratic of any of the G-7 nations. By contrast, sentencing commissions that formulate general provisions of sentencing are more isolated from direct democracy than

the use of democratically elected officials to formulate sentencing policy—the strategy used by every G-7 nation except the United States. Hence, sentencing guideline commissions have the paradoxical effect of making the U.S. more democratic than the other G-7 nations in terms of particular sentencing applications, but less democratic than the other G-7 nations in terms of general sentencing provisions.

Nevertheless, Zimring and his colleagues are correct in pointing out that directly setting punishment levels for offenders as was done by voters who supported the California TSL is totally unique among the group of G-7 nations. However, voting is only one of the characteristics of democracies that may affect punishment policy differently in the United States and elsewhere. For example, in a comparison of sentencing policies in the U.S. and the Federal Republic of Germany, Savelsberg (1994) develops a series of propositions to account for the fact that while crime rates increased in both Germany and the United States from the early 1970s to the early 1990s, the United States alone experienced record-breaking increases in imprisonment. Like Zimring and his associates, Savelsberg (1994:936) concludes that part of the difference in imprisonment trends in the two countries is due to the fact that “public sentiment ... enters criminal justice decision making much more directly in the United States than in Germany.”

But in addition to the directness of public access to criminal justice decision-making in the United States, Savelsberg points to several other major differences between the two nations that affect punishment decisions, including the fact that compared to Germany, the United States has much greater social inequality, racial conflict, and poverty. To the extent that these social cleavages are greater in the United States than in Germany,

Savelsberg reasons that they might help account for the more punitive reaction to crime in the U.S. case. Savelsberg also points to key differences between Germany and the U.S. with regard to the structure of political parties and the operation of academic institutions that may produce differing punishment outcomes. Thus, compared to political actors in the United States, German politicians are much more closely tied to political parties and are therefore less directly affected by individual voters. And compared to German academics, U.S. academics are more pragmatic, competitive, and closely tied to the idea of individual rights. Salvesberg reasons that these academic differences have made neoclassical general deterrence models, which support connections between punishment and crime, much more influential in the United States than in Germany.

In short, by focusing solely on the impact of voting directness on punishment levels, Zimring and his colleagues are naturally led to conclude that the way to remedy the kinds of damaging legislation represented by the California TSL is to set up non elected decision makers to serve as a buffer between criminal offenders and the public. But changing the voting aspect of the American system without considering the many other aspects of American democracy that contributed to the increasingly punitive laws exemplified by the California TSL, may well have unanticipated and even undesirable effects. In addition to the unique initiative system, the timing of the TSL law in California is likely a product of many other important forces, including economic issues, race relations, and levels of political legitimacy.

IV. CRIME IS PART OF THE PROBLEM

But even more important than the limitations imposed by studying only sentencing in California and restricting the analysis to the impact of voting directness is the authors' decision to ignore the effects of crime on the developments that led to the passage of the California TSL. In fact, the strategy of downplaying crime and its causes in discussions of legal policy has a long history in American criminology. Since Sutherland's (1947:1) well-known description of criminology as "the study of the making of laws, the breaking of laws, and reactions to the breaking of laws," the field has been divided into two major research camps: etiology and the sociology of law. In general, etiologists are concerned with why people break the law and sociologists of law are more concerned with how laws get created and enforced. This book is solidly in the sociology of law camp.

In an earlier work, the two lead authors of this book (Zimring and Hawkins 1997) make the argument that "crime is not the problem" when it comes to explaining criminal justice policy in America. Instead, they argue (p. xi) that when Americans assume that "rates of death and life-threatening injury from intentional attacks....are a byproduct of high levels of crime and large numbers of criminals....they are wrong." The authors go on to explain that rather than a general crime problem, America has a "lethal violence" problem. While most industrialized nations have property crime rates that are similar to those of the United States, it is only among much less common acts of lethal violent crime that America is exceptional.

But in the current book, the authors take this reasoning a step further by assuming that neither crime nor lethal violence should be taken very seriously when evaluating sentencing policy in America. Beginning with the book's title, the authors make it clear that their main focus is on punishment rather than crime and this choice is confirmed by

the fact that they devote less than four pages (pp. 152-55) to analyzing California and U.S. crime trends. In the following sections, I consider first the authors' justification for leaving crime trends out of their discussion of sentencing trends and then discuss three implications of this decision for their conclusions about punishment and democracy.

A. THE REALITY OF CRIME IN AMERICA

Zimring and his colleagues' main justification for paying little attention to crime in a book about punishment is their view that imprisonment rates and sentencing policies have been unrelated to crime rates in post-World War II America. Their argument is that imprisonment rates skyrocketed and sentencing policies became increasingly punitive after the 1970s, a period in which crime rates remained flat. The crime data they use to reach this conclusion is of two types: annual homicide trends for California and the United States from 1971 to 1995, and composite annual trends for California and the United States of six other index crimes (excluding homicide) from 1974 to 1996. Both comparisons have serious limitations. The composite trends are not very useful because they are dominated by nonviolent but common crimes like larceny and auto theft and therefore mask changes in violent but much less common crimes like robbery and rape. In fact, as the first two authors have argued elsewhere (Zimring and Hawkins 1997), it is potentially lethal violence that is most likely to have an impact on public concern about crime. Moreover, both the California and the U.S. series are misleading because they start in the early 1970s—at precisely the time that the largest percentage increases in crime in the post-World War II United States had already taken place.

Conclusions about crime and the timing of the California TSL are substantially different if we consider violent crime trends separately from property crimes and also take into account the fact that huge crime increases starting in the 1950s resulted in elevated crime rates that continued in California and elsewhere until the historic crime decreases that began in the early 1990s. I illustrate these differences with data on homicide and robbery, the two violent crimes for which we have the most valid official data. While some of the increase in crime rates during this period may well reflect changing police practices (O'Brien 1996), this is unlikely to be the case with murder and for the most part, robbery rates. Figure 1 compares homicide trends in California and the United States from 1951 to 1999 and Figure 2 shows the same trends for robbery. In Figure 1, I add a vertical bar at 1971 to indicate the first year that Zimring and his colleagues report homicide trend data and in Figure 2, I add a vertical bar at 1974, to indicate the first year that the authors report trend data for the other index crimes.

Figures 1 and 2 about here

Figure 1 shows that from 1960 to 1975, homicide rates in the United States nearly doubled. And the changes in rates were even more dramatic in California. From 1960 to 1980, homicide rates in California more than tripled--from 3.9 to 14.4 per 100,000. While it is true that California homicide rates were at about the same level in 1971 (8.0) as they were in 1997 (7.8), it is also true that one year before California voters passed the TSL (i.e., 1993), California homicide rates (12.9) were at their second highest level of the post-World War II period (the record high was in 1980). Rates in 1993 were nearly five and one-half times greater than they had been at the beginning of the series in 1952. Moreover, by the 1990s, homicide rates in urban California were among the highest in

the nation. A study by Lattimore et al. (1997:8) shows that among the 77 largest U.S. cities, Los Angeles ranked second in mean annual homicide rates from 1985 to 1994 (Oakland ranked 17th, San Diego 22nd, and San Francisco 27th).

The results are even more dramatic for robbery. Figure 2 shows that from 1960 to 1975, U.S. robbery rates nearly quadrupled (from 60.1 to 220.8) and California robbery rates nearly tripled (from 96.2 to 277.4). Robbery rates in California continued to increase throughout much of the 1970s and 1980s, reaching a fifty year high point in 1992—

tells much the same story for robbery. While California robbery rates were about the same in 1974 (249.1) as they were in 1997 (247.0), they reached their postwar peak in 1992 (418.1)--

By limiting their analysis of crime data to the years after 1971 and by combining violent and nonviolent crimes in their figures, Zimring and his colleagues discount the possibility that when California voters passed the three strikes law, they were justifiably reacting to strong concerns about rising violent crime rates. It is of course difficult to say what reference point citizens use in determining whether they live in communities with increasingly high rates of violent crime. But let us assume for the moment that people use as a reference point their childhood and arbitrarily fix this at ten years of age. This means that in 1993, California residents who were currently 20 years old, were experiencing homicide rates that were 23 percent higher than when they were ten years old (in 1983); residents who were 30 years old in 1993 were experiencing homicide rates that were 45 percent higher than when they were ten years old; 40-year old residents were experiencing homicide rates that were 249 percent higher; and 50-year old California residents were experiencing homicide rates that were 461 percent higher. In short, the

passage of the California TSL in 1994 came during a period when both national and California rates of violent crime had been increasing for nearly forty years and were at or near their postwar apex.

The decision by Zimring and his colleagues to leave crime rates out of their arguments about the California three strikes law has at least three serious implications for their conclusions about punishment and democracy.

B. IGNORING PUBLIC CONCERN ABOUT CRIME

Perhaps the most serious implication of not taking seriously the historically high violent crime rates in California preceding the passage of the TSL is that without high crime rates as a justification, it appears that the public that voted for the TSL was mostly irrational and vindictive. In fact, the authors assume that public concerns about crime, like crime rates themselves, bear little relationship to public sentencing preferences (p. 178): “public hostility toward criminals is a historic constant in stable democracies.” Hence, there is little need to explain varying levels of public concern about crime. But while it is true that actual crime rates are not perfectly correlated with public concern about crime as measured by opinion polls, there is also strong evidence that public attitudes toward crime increased dramatically from the low-crime decades of the 1950s and 1960s to the high crime decades of the 1980s and 1990s. For example, Savelsberg (1994:929) reports that the proportion of Americans believing that courts do not deal harshly enough with criminals increased from 48 percent in 1965 to 66 percent in 1972 to 85 percent in 1978. Moreover, it remained at high levels throughout the 1980s and early 1990s (Sourcebook 2000:128-29). Similarly, approval of the death penalty for persons

convicted of murder increased steadily from 42 percent in 1966 to 53 percent in 1972 to 66 percent in 1978 (Savelsberg 1994:930). It then remained above 70 percent throughout the 1980s and early 1990s (Sourcebook 2000:144).

By ignoring the real increases in violent crime that started in the 1960s and by downplaying the level of public concern about these increases, the authors essentially deny the reality of what is probably one of the most influential social movements in postwar American history: the victim's rights movement. Instead they view public concern about crime with distrust. For example, they conclude (p. 201) that "In choosing between more severe and less severe punishments, the citizen will usually choose the former, simply as a way of expressing hostility that tends neither to make distinctions among types of crime nor to express clear preferences for particular patterns of punishment." The authors go on to argue that the public's naïve and ill-informed concerns about crime make it an easy target for unscrupulous politicians (p. 175) "seeking to increase mistrust in government and to benefit from the high levels of mistrust that already exist." According to Zimring and his colleagues, these politicians use mistrust as a political strategy (p. 175), "making citizens feel unsafe and suggesting that government agents take the side of offenders, rather than victims...."

Interestingly, the authors' orientation to the citizenry and the legal system resemble observations made by de Tocqueville more than 150 years ago. Zimring and his colleagues, like de Tocqueville, see lawyers as an important buffer against the excesses of populist democracy. De Tocqueville argues (p. 124) that in a country lacking nobility, lawyers represent "a privileged body" and their frequent role in arbitrating disputes between citizens, "inspires them with a certain contempt for the judgment of the

multitude.” The arguments being made by Zimring and his colleagues are similar. The public cannot be trusted with direct control over sentencing because they are too easily influenced by emotional impulses. Instead legal experts (especially lawyers) and judges represent a critical counterbalance to the threats of populist democracy.

Because the authors do not take either crime or public concern about crime seriously, they need to explain why the California TSL arrived when it did. They offer a set of four interrelated explanations. First, they reason that perhaps it is more likely for government to act in a democratic society when there is greater citizen consensus about what course of action to take. Second, they consider the possibility that when citizens believe more strongly that measures available to the government can actually be effective, there is likely to be increasing levels of government activity. Third, they examine the possibility that crime issues are more likely to come to the forefront when there are few competing issues. And finally, they weigh the possibility that compared to government systems that place barriers between penal policy and public opinion, systems whose penal policy is more directly influenced by voters are more likely to experience high levels of political activity on crime.

These explanations for the timing of the California TSL are useful and raise several lines of inquiry that in themselves merit additional research. For example, the argument that democratic governments are more likely to enact major crime reduction legislation when there is greater consensus on what concrete measures to take could help explain why there seems to be a time lag between the dramatic rise in U.S. crime rates in the 1960s and the get tough on sentencing laws that began to surface more than a decade later.

However, by not taking crime and public concern about crime seriously, the authors ignore what is a much simpler explanation for the timing of the California TSL: Starting in the 1960s, there were huge violent crime increases in California and the rest of the nation; increases that were repeatedly linked to blocked economic and social opportunities, especially for African Americans. As these crime increases unfolded in the 1960s, Americans responded in part by passing sweeping new civil rights legislation and undertaking an unprecedented “war on poverty” (LaFree 1998:10). But as crime rates lingered into the 1970s, the public grew increasingly frustrated with earlier reform efforts and began supporting more punitive punishment strategies to reduce crime. The leading edge of this frustration was a highly influential victims’ rights movement that increasingly drew support from both the political right and left and became a consequential force in local and national politics. These concerns are well illustrated by a series of important victim’s rights issues including those that lead to the creation and enforcement of new laws involving rape (Borgida 1981; Loh 1981), spouse abuse (Langan and Innes 1986; Lerman 1986) and child abuse (Burgdorf 1980; Peters, Wyatt and Finkelhor 1986). Concerns expressed by members of the victim’s rights movement have led in part to the steep increases in imprisonment we have observed as well as to statutes in nearly every state aimed at providing tougher punishments for offenders.

Let me hasten to add that even if we acknowledge that crime rates in the nation and in California in the early 1990s were considerably higher than they had been in the 1960s and that levels of public concern about crime broadly reflect this fact, it does not make TSL a better law. On the contrary, Zimring and his colleagues show convincingly that the California TSL represents a low point in criminal justice legislative history. But by

recognizing the scope of crime increases and the depth of the public concern we can at least make the overwhelming public support for the TSL more understandable.

C. CONTROLLING CRIME

By ignoring crime in their discussion, Zimring and his colleagues are also tacitly assuming that we can do little to prevent or deter it. In fact, because the authors say so little about crime trends in the book, the reader is left with the impression that for the authors, crime represents an act that is mostly inexplicable and certainly impossible to control through varying social policies. Again, this assumption is generally in line with sociology of law perspectives that can be traced back to the 1960s and early 1970s (Becker 1963; Quinney 1973).

But it seems fair to say that at the beginning of the twenty-first century the state of criminology is not as gloomy as it once was (Sherman et al. 1997; Blumstein and Wallman 2000; LaFree 2000:296-298). Researchers (e.g., Visher and Weisburd 1997; Tonry and Farrington 1995) have become considerably more confident about the possibility that under the right circumstances, it is possible to reduce crime through public policy. Most importantly for the arguments being made in this book, there is strong evidence that increasing levels of imprisonment actually do reduce crime rates (Blumstein, Cohen and Nagin 1978; Farrington and Langan 1992; Useem, Liedka and Piehl forthcoming). Thus, in a recent analysis of crime and imprisonment rates, Spelman (2000:123) concludes that the prison build up was responsible for about one-fourth of the total crime drop in the 1990s. Similarly, Rosenfeld (2000:147-49) concludes that incarceration in the 1990s reduced the murder rate for those 25 years of age and older by

10 percent between 1980 and 1985, nearly 19 percent between 1985 and 1990, and over 26 percent between 1990 and 1995. In fact, the authors' own analysis of the California TSL provides evidence for a significant deterrent effect on the criminal behavior of third strike defendants, although the authors dismiss it (p. 105) as having a "tiny maximum impact" because it is limited to a narrow range of crimes.

The authors are clearly more interested in the TSL for the unnecessary harm it is causing to convicted offenders than to any crime-reducing potential it might have. In fact, given that the punishments established by the Proposition 184 version of the California TSL were the result of the uncoerced will of California voters participating in a democratic process, how can these punishment levels nevertheless be construed as excessive? Zimring and his colleagues argue that democratically-imposed punishments may nevertheless be judged excessive on two grounds. First, they claim that to be effective, punishment does not necessarily have to be as harsh as the community desires; it merely needs to be at least severe enough to not offend the community's sense of justice. In other words, the community will generally support a range of punishments for a particular offense. As long as the punishment actually assigned does not fall below the lowest point on this range, it will not offend the community's sense of justice. And second, they argue that when the public supports higher penalties in the belief that they will have greater deterrent or incapacitation effects than they actually will have, policy makers are justified in weighing the actual benefits of the higher punishment levels against the additional costs of punishment.

The authors also grapple with the problem of defining excessive punishment, providing three main guidelines. First, some punishments may be regarded as excessive

under the Eighth Amendment of the U.S. constitution if they are judged to be cruel. In fact, this is the justification provided in the *Andrade v California* (2001) case, in which an offender was sentenced to 50-years-to-life in prison after he was caught twice for shoplifting a total of nine videotapes from a local discount warehouse. Second, the authors argue that it is legitimate to judge punishment as excessive in terms of just deserts or proportionality arguments. Thus, a punishment can be judged as excessive when it is compared to the punishment exacted for other, greater crimes. And finally, the authors claim that a punishment can be judged excessive on functional or instrumental grounds. This would apply if the punishment is greater than what would be required to achieve deterrence, incapacitation or general prevention.

But while the emphasis on the harm caused by excessive punishments in the TSL is an important one, the authors say little about the equally important suffering of crime victims. This omission seems unfair because the authors themselves (p. 223) fault politicians for reducing punishment policy “to a zero-sum competition between crime victims and criminal offenders.” But while the politicians they criticize can be faulted for emphasizing the plight of victims to the exclusion of offenders, the arguments in this book can be criticized for emphasizing the plight of offenders to the exclusion of victims. In fact, there are two kinds of misery reflected in criminal justice statistics: the misery experienced by those enmeshed in the legal system and by those that depend on and care about them, and the misery of those victimized by those in the legal system and by those that depend on and care about them. The authors are concerned almost entirely with the negative impact of excessive punishments on offenders. The authors are right to ask whether it is appropriate that the single case of Polly Klaas should have had such a far-

reaching effect on those convicted of two or three felonies in the California criminal justice system but they never seriously address the equally appalling question of how it was possible for a twice-convicted violent offender to be free to kill an innocent 12-year old.

As the events leading up to the passage of the California TSL are described, the authors seem genuinely surprised at the level of public frustration with criminal justice experts in America. But from a crime victim's point of view, it is perhaps easier to understand. When street crime rates in the United States quadrupled in the 1960s and early 1970s, many criminology experts either ignored crime trends altogether, or denied that crime rates had actually increased. When criminological interest in controlling crime began to revive in the 1970s, the public was told that "nothing works" when it comes to rehabilitating offenders (Martinson 1974). As the public clamored for solutions to crime problems throughout the 1970s and 1980s, much criminological research focused instead on protecting the rights of defendants and offenders. It is still the case that crime victims are rarely compensated for their losses, are rarely included in a meaningful way in case processing decisions, and are not extended the same protections that are routinely provided to offenders. Perhaps it is partly this history that encourages the public to have little confidence in criminology experts and to support objectively misguided laws like the one passed in California in 1994. It seems plausible that the public is simply hoping that if the law is draconian enough, perhaps at least some of its effect will filter through into actual punishment increases. Such a reading of the California TSL proved to be exactly correct: it had a much greater impact on offenders than TSL laws passed in any other jurisdiction, but in the end, its long-term effects are likely to be relatively modest.

D. THE IMPACT OF CRIME ON TRUST AND DEMOCRACY

One of the most important arguments in this book is that the type of excessive punishment embodied by the California TSL is likely to occur in societies in which citizens have too much democratic control and too little trust in government. Zimring and his colleagues argue that the TSL is part of a more general populist assault on the size and mission of government that has dominated American politics during the last quarter of the twentieth century. They argue that soaring prison populations in California and elsewhere are a direct result of providing a distrustful public with the direct ability to formulate criminal justice policy. But because the authors have not developed an explanation of why public trust in government may have eroded over time, they are left with the conclusion that growing democratic control rather than diminishing trust in government best explains the timing of the TSL: “as more elements of punishment policy move closer to democratic control, punishment levels for common criminals will trend upward (p. 202).”

But if we take the huge increases in crime that preceded the California TSL more seriously, it would modify (and I believe strengthen) the authors’ arguments in three main ways. First, as I have argued above, crime rates are likely to have a direct effect on demands for punishment. Citizens in societies that are experiencing rapid increases in crime are more likely to support more punitive punishments. Second, crime rates are also likely to affect levels of public trust in government. While the exact relationship between crime and levels of trust remains uncertain, a good deal of prior research (Braithwaite 1989; Putnam 1993; Fukuyama 1995; LaFree 1998; Sherman 2001) supports the

conclusion that societies with high crime rates tend to be those with low levels of trust in government. This makes sense. Crime control is an important government function. Governments that appear unable to control crime are bound to lose some amount of public trust. Zimring and his associates correctly note that societies with low public trust are also more likely to favor excessive punishments for criminals, but because they do not take crime seriously, they have no method for explaining why public trust in the criminal justice system was so low in California prior to the passage of the TSL.

Finally, high crime rates may also directly affect agitation for the kind of direct democracy that is embodied by the California three strikes law. As violent crime rates in California continued to increase into the early 1990s, the public quite naturally took a more active interest in methods that would allow them to directly shape crime policy. Rapidly rising crime rates encourage people to give up their civil liberties to feel safer and more secure. This trade off is already apparent in the increased security measures being taken in the wake of the September 11th terrorist attacks in the United States. But it is more generally visible in countries as diverse as Colombia and Afghanistan, where high rates of murder and kidnapping over many years have driven many to seek more punitive forms of social control.

V. CONCLUSIONS

In the years since California passed the TSL, crime rates have dropped dramatically in California and in the rest of the nation (Blumstein and Wallman 2000; LaFree 1998). These rapid declines in crime form a kind of natural experiment about relations between crime and punishment. If Zimring and his associates are right—that crime has no effect

on public attitudes toward punishment and imprisonment rates—then public punitiveness toward offenders and high rates of imprisonment should continue on, unaffected by the declines. If on the other hand, crime rates do make a difference, then we should begin to see declines in public concern about crime, public support for punitive punishment, and eventually, in incarceration rates. There is evidence that this is exactly what is happening in recent years.

In National Opinion Research Center Polls conducted annually from 1973 to 2000, samples of Americans have been asked about spending on crime in the United States. From 1994 to 2000, the proportion of Americans who responded that the U.S. is spending too little on crime control fell from 75 percent to 59 percent (Sourcebook 2000:133). Similarly, in national Gallup Polls conducted annually from 1989 to 2000, the proportion of Americans who believe that there is more crime in the United States than there was the previous year plummeted from 89 percent in 1992 to 47 percent in 2000 (Sourcebook 2000:125). While public information about the crime drop is no doubt imperfect, it is clear that a growing proportion of the American public is aware of the drop.

And there is also evidence that the crime drop is having an impact on public attitudes toward punishment. As noted earlier, national surveys have shown that the proportion of Americans who believe that the courts do not deal harshly enough with criminals grew rapidly in the 1960s and 1970s, reaching 85 percent as recently as 1994 (Savelsberg 1994:929; Niemi, Mueller and Smith 1989:136). But these same surveys show that by 2000 this number had dropped to 68 percent (Sourcebook 2000:138-139)—about the same level it had been at before the prison construction boom began in the early 1970s (Savelsberg 1994:929). Similarly, the proportion of Americans who favor the death

penalty slipped from 74 percent in 1994 to 63 percent in the last six years of the twentieth century (Sourcebook 2000:144).

Of course compared to public attitudes about punishment, the powerful forces that have resulted in record-breaking levels of incarceration in the United States are likely to respond much more slowly to crime changes. Moreover, the increasingly large population of inmates serving long sentences means that any reduction in total prison population is likely to be slow. But there is recent evidence that imprisonment rates in the United States are finally leveling off and even declining. In the last six months of 2000, the population of inmates in U.S. state prisons declined by an estimated 6,200 inmates (Beck and Harrison 2001:1). While this decline (0.5 percent) is trivial compared to the massive build ups we have seen in the 1970s and 1980s, it is nevertheless the first measured decline in the state prison population since 1972. In fact, overall growth of the nation's prison population has been slowing steadily for the past six years. Thus, while the proportion of prisoners in state and federal institutions jumped by 8.7 percent in 1994, the increase was only 1.3 percent in 2000.

Zimring and his colleagues argue that too much democracy in California has resulted in a wasteful system of excessive punishment. I think it is more likely that too much crime in California has threatened democracy by reducing trust in the legal system and encouraging overly punitive punishment. The current decline in crime rates may soon make it possible to determine which of these explanations is correct.

REFERENCES

- Andrade v. California*, 01 CDOS 9423 (2001).
- Amar, Akhil Reed. 1991. "The Bill of Rights as Constitution." *Yale Law Journal* 100:1131-1239.
- Beck, Allen J. and Paige M. Harrison. 2001. "*Prisoners in 2000*." Washington, DC: U.S. Department of Justice.
- Beckett, Katherine. 1997. *Making Crime Pay: Law and Order in Contemporary American Politics*. New York: Oxford University Press.
- Becker, Howard S. 1963. *Outsiders: Studies in the Sociology of Deviance*. Glencoe, IL: Free Press.
- Blumstein, Alfred, Jacqueline Cohen and Daniel Nagin, eds. 1978. *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*. Washington, DC: National Academy of Sciences.
- Blumstein, Alfred and Joel Wallman, eds. 2000. *The Crime Drop in America*. Cambridge, UK: Cambridge University Press.
- Borgida, Eugene. 1981. "Legal Reform of Rape Laws." Pp. 211-41 in L. Bickman, ed. *Applied Social Psychology Annual*, Volume 2. Beverley Hills, CA: Sage.
- Braithwaite, John. 1989. *Crime, Shame and Reintegration*. Cambridge, UK: Cambridge University Press.
- Burgdorf, Karen. 1980. "Recognition and Reporting of Child Maltreatment." In *Findings from the National Study of the Incidence and Severity of Child Abuse and Neglect*. Washington, DC: National Center on Child Abuse and Neglect.
- California Department of Justice. 2001. *Criminal Justice Statistics Center*. <http://www.caag.state.ca.us/cjsc/keyfacts.htm>.
- De Tocqueville, Alexis. 1956 [1835]. *Democracy in America*. Edited by Richard D. Heffner. New York: Mentor Books.
- DiIulio, John J. 1995. "Arresting Ideas: Tougher Law Enforcement is Driving Down Urban Crime." *Policy Review* 74:12-16.
- Farrington, David P. and Patrick A. Langan. 1992. "Changes in Crime and Punishment in England and America in the 1980s." *Justice Quarterly* 9:5-31.

- Fukuyama, Francis. 1995. *Trust: The Social Virtues and the Creation of Prosperity*. New York: Free Press.
- Gibbs, Jack P. 1975. *Crime, Punishment and Deterrence*. New York: Elsevier.
- Gibson, James L. 1978. "Race as a Determinant of Criminal Sentences: A Methodological Critique and a Case Study." *Law and Society Review* 12:455-478.
- LaFree, Gary. 1998. *Losing Legitimacy: Street Crime and the Decline of Social Institutions in America*. Boulder, CO: Westview.
- . 2000. "Explaining the Crime Bust of the 1990s." *The Journal of Criminal Law and Criminology* 91:269-305.
- Langan, Patrick A. and Christopher A. Innes. 1986. *Preventing Domestic Violence Against Women*. U.S. Department of Justice: Bureau of Justice Statistics.
- Lattimore, Pamela K. James Trudeau, K. Jack Riley, Jordon Reiter, and Steven Edwards. 1997. *Homicide in Eight U.S. Cities: Trends, Context, and Policy Implications*. Washington, DC: National Institute of Justice.
- Legislative Analyst's Office. 2000. Implementing Proposition 36: Issues, Challenges, and Opportunities. December 14. <http://www.lao.ca.gov>.
- Lerman, Lisa G. 1986. "Prosecution of Wife Beaters: Institutional Obstacles and Innovations." In M. Lystad, ed. *Violence in the Home: Interdisciplinary Perspectives*. New York: Brunner/Mazel.
- Loh, Wallace D. 1981. "Q: What Has Reform of Rape Legislation Wrought? A: Truth in Criminal Labeling." *Journal of Social Issues* 37:28-52.
- Madison, James. 1941 [1787]. *The Federalist: A Commentary on the Constitution of the United States*. Introduction by Edward Mead Earle. New York: The Modern Library.
- Martinson, Robert. 1974. "What Works? Questions and Answers About Prison Reform," *Public Interest* 35:22-54.
- Myers, Martha. 1988. "Social Background and the Sentencing Behavior of Judges." *Criminology* 26:649-675.
- Niemi, Richard G., John Mueller, and Tom W. Smith. 1989. *Trends in Public Opinion: A Compendium of Survey Data*. New York: Greenwood Press.
- O'Brien, Robert M. 1996. Police Productivity and Crime Rates: 1973-1992, *Criminology* 34:183-208.

People v. Superior Court (Romero). 1996. 13 Cal. 4th 497, 917 P. 2d 628, 53 Cal. Rptr. 2d 789.

Peters, S.D., G. E. Wyatt, and D. Finkelhor. 1986. "Prevalence." In D. Finkelhor, S. Araji, L. Baron, A. Browne, S.D. Peters, and G.E. Wyatt, eds. *A Sourcebook on Child Sexual Abuse*. Newbury Park, CA: Sage.

Putnam, Robert. 1993. *Making Democracy Work: Civic Traditions in Modern Italy*. Princeton: Princeton University Press.

Quinney, Richard. 1973. *Critique of Legal Order*. Boston: Little Brown.

Reitz, Kevin. 1993. "Sentencing Facts: Travesties of Real-Offense Sentencing." *Stanford Law Review* 45:523-73.

Rosenfeld, Richard. 2000. "Patterns in Adult Homicide: 1980-1995." Pp. 130-163 in A. Blumstein and J. Wallman, eds. *The Crime Drop in America*. Cambridge, UK: Cambridge University Press.

Sanders, C.R., ed. 1990. *Marginal Conventions: Popular Culture, Mass Media and Social Deviance*. Bowling Green, OH: Bowling Green State University Press.

Savelsberg, Joachim J. 1994. Knowledge, Domination, and Criminal Punishment. *American Journal of Sociology* 99:911-43.

Sherman, Lawrence W. 2001. *Trust and Confidence in Criminal Justice*. Washington, DC: National Institute of Justice.

Sherman, Lawrence W., Denise Gottfredson, Doris MacKenzie, John Eck, Peter Reuter, and Shawn D. Bushway, eds. 1997. *Preventing Crime: What Works, What Doesn't, What's Promising*. www.preventingcrime.org.

Shichor, David. 1997. Three Strikes as a Public Policy: The Convergence of the New Penology and the McDonaldization of Punishment. *Crime and Delinquency* 43:470-93.

Spelman, William. 2000. The Limited Importance of Prison Expansion. Pp. 97-129 in A. Blumstein and J. Wallman, eds. *The Crime Drop in America*. Cambridge, UK: Cambridge University Press.

Spohn, Cassia C. 2002. *How do Judges Decide? The Search for Fairness and Justice in Punishment*. Thousand Oaks, CA: Sage.

Stacy, Tom. 1997. "States in a Federal System: Whose Interests Does Federalism Protect?" *Kansas Law Review* 45:1185-1217.

Stolzenberg, Lisa and Stewart J. D'Alessio. 1997. "Three Strikes and You're Out": The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates." *Crime and Delinquency* 43:457-70.

Sutherland, Edwin H. 1947. *Principles of Criminology*, 4th edition. Chicago: J.B. Lippincott.

Tonry, Michael. 1996. *Sentencing Matters*. New York: Oxford University Press.

Tonry, Michael and David P. Farrington. 1995. "Strategic Approaches to Crime Prevention." Pp. 1-20 in M. Tonry and D. Farrington, eds. *Building a Safer Society: Strategic Approaches to Crime Prevention*. Chicago: University of Chicago Press.

Turner, Michael G. and Jody L. Sundt. 1995. "Three Strikes and You're Out" Legislation: A National Assessment. *Federal Probation* 59:16-36.

Useem, Bert, Raymond V. Liedka, and Anne M. Piehl. Forthcoming. "Popular Support for the Prison Buildup." *Punishment and Society*.

Sourcebook of Criminal Justice Statistics, 1999. 2000. Department of Justice: Bureau of Justice Statistics.

Visher, Christy and David Weisburd. 1997. "Identifying What Works: Recent Trends in Crime Prevention Strategies." *Crime, Law and Social Change* 28:223:42.

Washington Post. 1995. "Three Strikes Tough on Courts Too: California's Sentencing Law Leads to Criminal Justice Logjam." March 8, Section A, p. A1.

-----, 2002. "Appeal Revives Debate over California Crime Law." May 5, Section A, p. A3.

Zimring, Franklin E. and Gordon Hawkins. 1997. *Crime is not the Problem: Lethal Violence in America*. New York: Oxford University Press.

Zimring, Franklin E., Gordon Hawkins and Sam Kamin. 1999. *Crime and Punishment in California: The Impact of Three Strikes and You're Out*. Berkeley, CA: Institute of Government Studies Press.

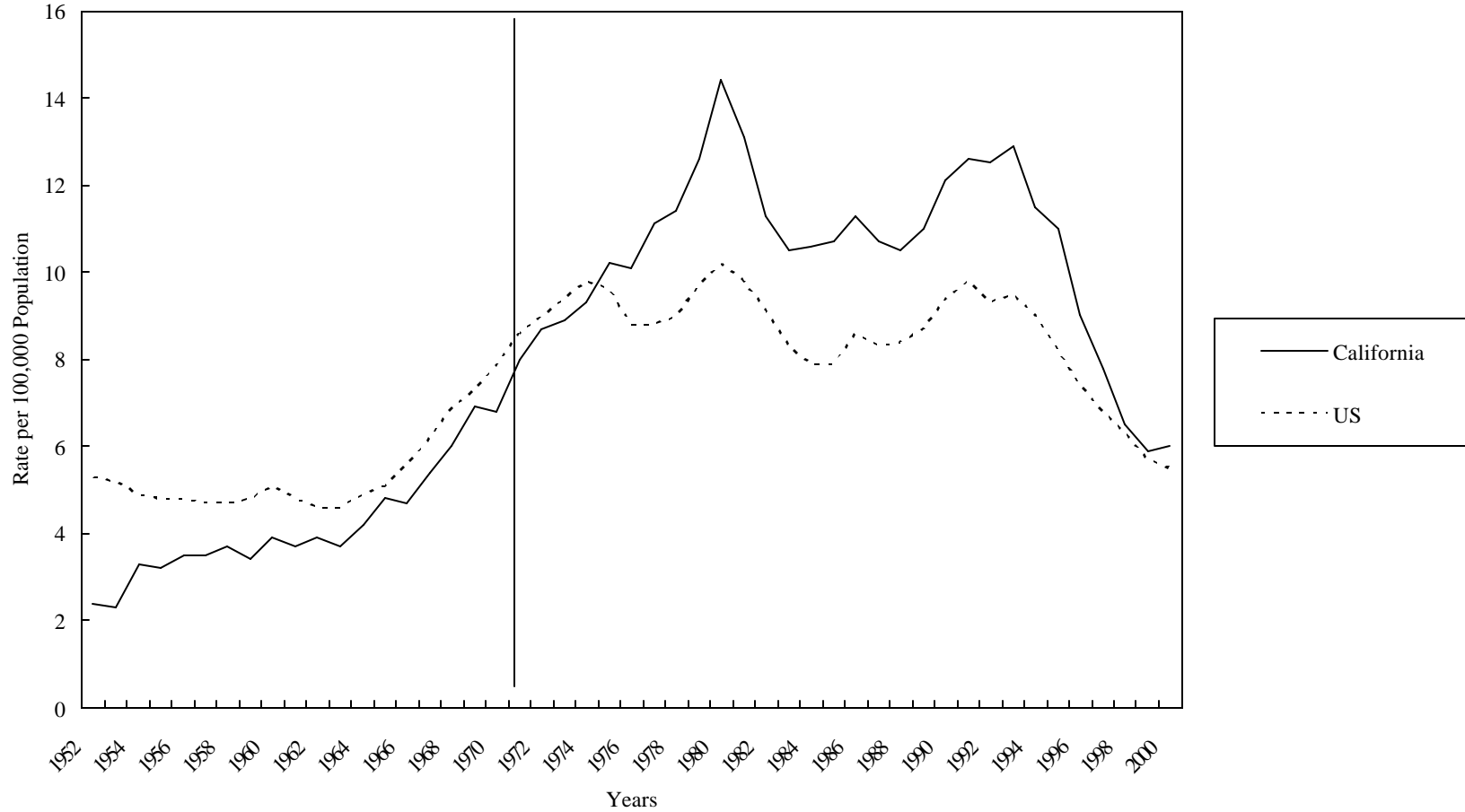
ENDNOTES

¹ In fact, this case well illustrates the discrepancy: the California man who stole the slice of pizza had four prior convictions (DiIulio 1995).

² *Lockyer v. Andrade* is set for oral argument in tandem with *Ewing v. California*, another three strikes case involving an offender whose third strike was a relatively minor crime.

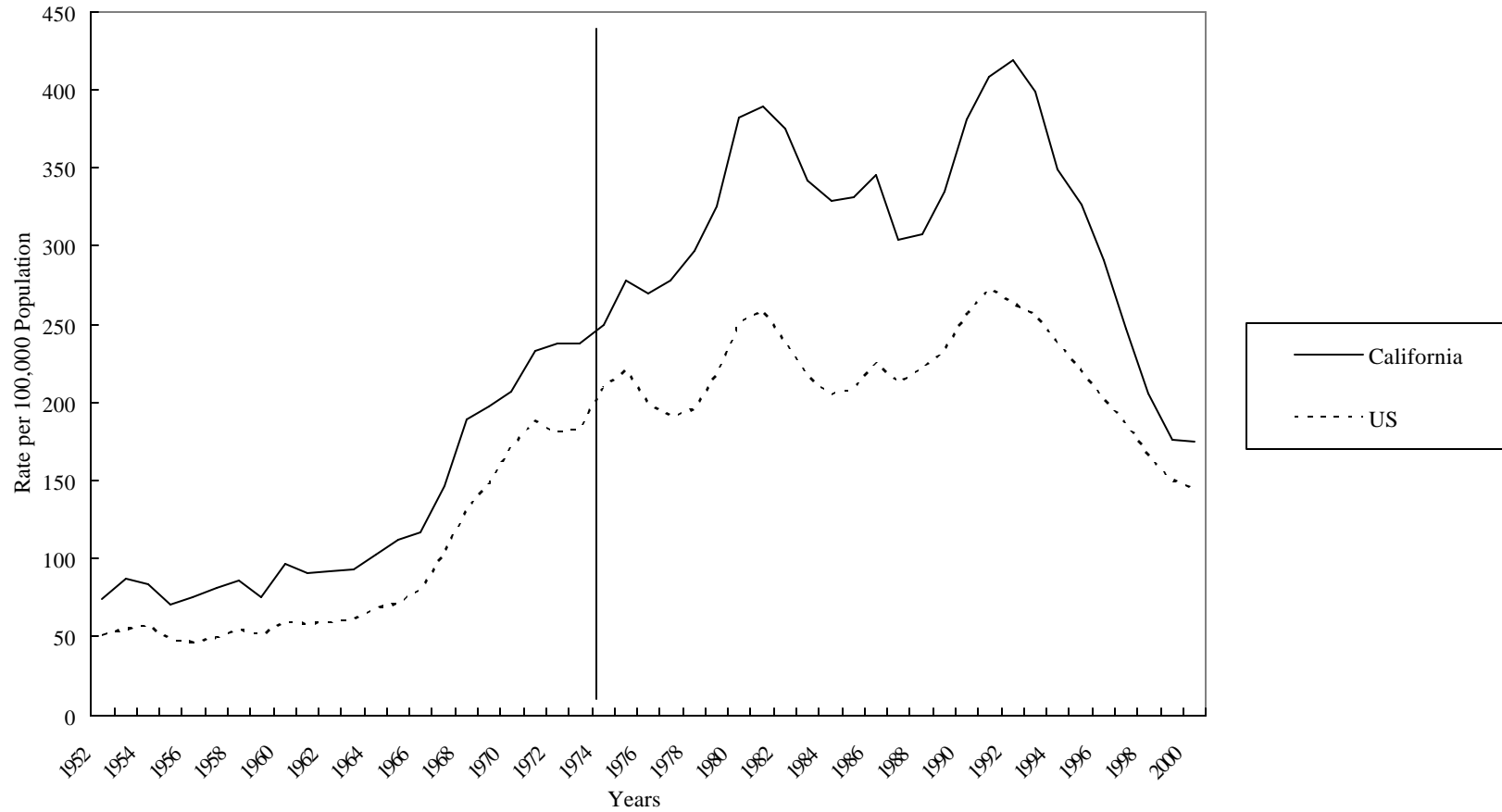
At the time this review was being prepared, the Court was scheduled to hear oral arguments in November 2002 (Washington Post 2002:A3).

Figure 1. Homicide Rates, California and the United States, 1952-2000



Note: U.S. data from the Federal Bureau of Investigation, "Crime in the United States," Uniform Crime Reports Manual, 1952 to 1999. (Washington, DC: Government Printing Office). California data from California Department of Justice, 2001. Criminal Justice Statistics Center. <http://www.caag.ca.us/cjsc/keyfacts.htm>.

Figure 2. Robbery Rates, California and the United States, 1952-2000



Note: U.S. data from the Federal Bureau of Investigation, "Crime in the United States," Uniform Crime Reports Manual, 1952 to 1999. (Washington, DC: Government Printing Office). California data from California Department of Justice. 2001. Criminal Justice Statistics Center. <http://www.caag.ca.us/cjsc/keyfacts.htm>.

