Washington's Three Strikes Law

PUBLIC SAFETY & COST IMPLICATIONS OF LIFE WITHOUT PAROLE

Columbia Legal Services

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The Persistent Offender Accountability Act defines a "persistent offender" as an individual convicted of any felony considered a "most serious offense" who has previously been convicted on at least two separate occasions, in any state, of offenses that under Washington law would be "most serious." "Most serious offenses" include all class A felonies and a number of specifically enumerated class B felonies. Criminal solicitation of or criminal conspiracy to commit a class A felony, any class B felony with a finding of sexual motivation not otherwise included, any felony with a deadly weapon verdict, and any attempt to commit a strike offense also constitute "most serious offenses."[8]

EXECUTIVE SUMMARY

Washington's three strikes law—under which courts must sentence "persistent offenders" to life in prison without the possibility of parole—was the first of its kind in the nation.[1] Proponents of the law believed it would "[i]mprove public safety by placing the most dangerous criminals in prison" and "[r]educe the number of serious, repeat offenders by tougher sentencing."[2] The law was approved by Washington voters in 1993 as Initiative 593, becoming what is known as the Persistent Offender Accountability Act.[3] The prediction in Washington, as in other states that enacted three strikes laws in the mid-1990's, was that crime rates would be drastically reduced as a result of these laws, either through incapacitating the most habitual offenders, or by deterring those who might otherwise commit crimes.[4]

However, the predicted reductions in crime rates have not materialized. Studies comparing trends in crime rates of states that passed three strikes laws in the mid 1990's with states that did not enact such laws show no statistically significant difference attributable to the new laws.[5] In both groups of states, crime rates dropped by similar amounts during the period after such laws were passed.[6] In reality, crime rates were on the decline in Washington and across the nation before the three strikes law was passed in 1993.[7]

This report examines the three strikes law in Washington and those sentenced under it to determine how Washington's limited criminal justice resources are best deployed. It relies on empirical

data and meta-analyses conducted on both the state and national levels, as well as information about the 229 people who, as of 2009, are serving life in prison without the possibility of parole in Washington under the three strikes law.[9] Such information provides guidance on areas of need in the prevention arena, including services related to mental illness, chemical dependency, homelessness, and education. The report concludes that, without sacrificing public safety and in fact while actually improving it, Washington's criminal justice resources can and should be re-allocated to focus more on prevention and rehabilitation measures and less on the high-cost, low-return life sentences for certain offenders.

"Our resources are misspent, our punishments too severe, our sentences too long."[10]

The Honorable Anthony M. Kennedy,
U.S. Supreme Court Justice

RECOMMENDATIONS

- Creation of a system of review for three strikes offenders to allow for the potential of release for those who no longer pose a threat to the public;
- Elimination of the least serious offenses from the list of strikes;
- Expansion of the compassionate release program to include three strikes offenders who are elderly or incapacitated and therefore are at very low risk of reoffending; and
- Reinvestment of savings from these reforms in prevention and rehabilitation efforts to lower crime rates overall and create safer communities.

Lessons Learned From Washington's Three Strikers

There are a variety of social factors, such as age, education level, presence of mental illness, history of substance abuse, and homelessness, that correlate with criminal behavior, including repeat criminal behavior. Because life in prison without the possibility of parole is the mandatory sentence under the three strikes law, courts do not have the opportunity to consider factors that support a conclusion that life without parole is not an appropriate sentence under the circumstances in a given case. This report examines the existence and prevalence of such factors in three strikes cases by reviewing and analyzing court records, records from Department of Corrections (DOC) files, and information provided by three strikes offenders. The results of that examination are set forth below. In particular, this report documents that certain social characteristics that positively correlate with recidivism are highly prevalent in the three strikes population.

These characteristics cannot and should not be considered excuses for criminal acts. But consideration of these factors is important to inform our criminal justice policy and help determine whether our sentencing laws, such as three strikes provisions, are effective in achieving the goals of our criminal justice policies and practices.

AGE

Age is a salient factor among three strikes cases. Roughly ten percent of all three strikers were convicted of at least one strike offense committed prior to their eighteenth birthdays. (See chart, p. 9) In each case, although still under 18, they were tried in adult court and likely incarcerated with adults. The fact that these youth went on to reoffend is perhaps not surprising. A November 2007 Centers for Disease Control report concluded that laws allowing youth to be tried in adult court "have generally resulted in increased arrest for subsequent crimes, including violent crime among juveniles who were transferred compared with those retained in the juvenile justice system. To the extent that transfer policies are implemented to reduce violent or other criminal behavior, available evidence indicates that they do more harm than good."[11]

In reviewing the three strikes law it is important to consider not only whether the treatment of these youth as adults at the time of the first strike offense was appropriate, but also whether there may have been opportunities for prevention that were missed prior to any strike offense. The social histories of these young men are telling.[12] In every one of these cases there is evidence of substance abuse and 64% of those with strike offenses as juveniles have mental health issues. A further look into the lives of these individuals reveals histories of childhood institutionalization in foster care, group homes, and juvenile detention, as well as high rates of those who suffered from child abuse.

For those convicted initially as youth, treatment options available in the juvenile system may have proven effective at preventing recidivism. In fact, some of the most successful interventions are accomplished in the juvenile arena. For example, functional family therapy has been shown to reduce recidivism by 18.1%, and counseling or psychotherapy reduces recidivism by 16.6%.[13]

MENTAL ILLNESS

People who are mentally ill have more frequent encounters with the legal system than their peers. People with serious mental illness are three times more likely to be found in prisons and jails than in hospitals.[14] Studies show that mentally ill offenders have a higher rate of violent recidivism, and nationally over half of prisoners with mental illness report three or more prior convictions.[15] According to the DOC, at least 15% of Washington's prisoners are considered to be seriously mentally ill.[16] This number is likely higher among the three strikes population. Half of all three strikers have either been determined to be seriously mentally ill by DOC, self-report mental illness, or have other indications of mental illness in their records.

Providing treatment to mentally ill offenders can dramatically decrease recidivism. According to studies, housing mentally ill prisoners in therapeutic communities reduces recidivism by 20.8%.[17] The Washington State Institute for Public Policy (WSIPP) has further found that participation in the DOC's program for dangerously mentally ill offenders decreased recidivism by 20.7%.[18] Providing cognitive behavioral therapy to prisoners also reduces recidivism by 6.9%, and evidence-based treatment of mentally ill prisoners has been shown to decrease recidivism by 22%.[19] In addition, providing housing supports to mentally ill offenders upon release reduces recidivism rates by 5%.[20]

SUBSTANCE ABUSE

There is a well-recognized connection between criminal activity and substance abuse.[21] The DOC reports that at least three-quarters of Washington's prison population has a chemical dependency problem.[22] Nationally, 16.7% of crimes are committed to obtain money to buy drugs and 30% of people convicted of crimes report using drugs at the time of their offense.[23] Reports from three strikers confirm this data. A significant number of three strikes offenders report that their crimes were drug related—either committed in an effort to obtain drugs or money to buy drugs, or committed while under the influence of drugs or alcohol. Many also report that they would not have been involved in the criminal activity were it not for their addictions.

Not only is history of substance abuse an overwhelmingly common characteristic of those sentenced under the three strikes law, but so is the inability to access substance abuse treatment. Although there is evidence of substance abuse problems for 91% of three strikers, for 77% of those individuals there is no evidence of substance abuse treatment in their files, including during previous terms of incarceration. Yet, according to the DOC, "[i]n the absence of treatment, 75 percent of untreated offenders return to crime within 30 days of release to the community."[24]

Data produced by WSIPP indicates that providing drug treatment to prisoners, both in outpatient clinics and through therapeutic communities, reduces recidivism by 6.4%, and providing treatment upon release results in an 8.3% reduction in recidivism.[25]

"Persons with mental disorders, chemical dependency disorders, or co-occurring mental and substance abuse disorders are disproportionately more likely to be confined in a correctional institution, become homeless, become involved with child protective services or involved in a dependency proceeding, or lose those state and federal benefits to which they may be entitled as a result of their disorders."[26]

- Washington State Legislature

HOMELESSNESS

Homelessness is another factor that is likely connected to recidivism, especially where homelessness co-occurs with either substance abuse or mental illness.[27] Although documentation of homelessness is rare, for cases where evidence related to housing history is available, 62% have been homeless at some point in their lives, and 78% of those report homelessness at the time they committed one of their strike offenses. Among those with a history of homelessness, there is evidence of mental illness in 63% of the cases and evidence of substance abuse in 95%. Homeless inmates with co-occurring serious mental illness and substance-related disorders are more likely to have multiple episodes of incarceration than inmates without these characteristics.[28]

Research suggests that homelessness alone increases the risk of recidivism by 27%.[29] "In Washington State, 19 percent of offenders released from prison or jail reported being homeless or transient for at least one month in the six months prior to their incarceration."[30]

EDUCATION

Of those three strikes offenders for whom an education level is known, 75% did not complete high school, and many dropped out before the ninth grade, some as early as elementary school.[31] This data is key because education level is considered a reliable indicator of recidivism. Lower education level is directly related to the probability of incarceration, and studies reveal that higher levels of education result in lower rates of recidivism.[32]

In fact, studies suggest that participation in an education program in prison reduces recidivism in a statistically significant way.[33] An analysis conducted by WSIPP found that providing education programs to youth in the juvenile offender system reduces recidivism by 19.4%. In the adult system, providing vocational education to prisoners lowers recidivism by 9.8%, while providing them with basic education reduces recidivism by 8.3%.[34] Educational programs generally have been shown to reduce recidivism by 12 to 50%.[35]

VETERANS

Many of these issues also overlap with the growing need to provide community support for veterans. At least 16% of three strikers have served in the United States Armed Forces. The high incidence of chemical dependency, mental illness and homelessness among the veteran prisoner population is well documented.[36] These issues are evident in the three strikes population as well. Approximately 95% of three strikers who are known to be veterans have a history of substance abuse, 57% have evidence of mental illness, and all who have evidence of mental illness also have a history of substance abuse. There is also evidence of homelessness in 57% of those cases.

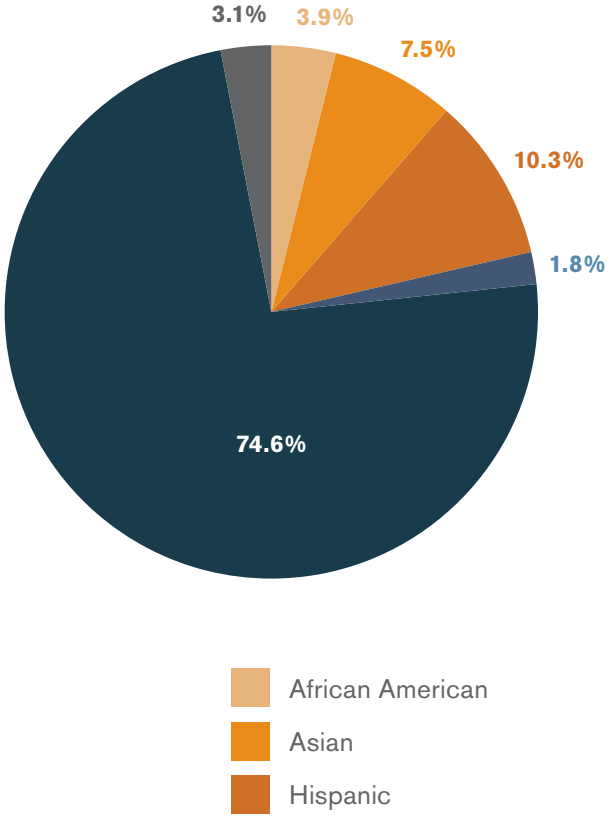
DISPROPORTIONATE MINORITY CONTACT

In addition to the social data documented above, it is also important to note that the three strikes law has had a disproportionate impact on Washington's communities of color. Approximately 53% of three strikers are from minority racial groups, while minority groups make up only 25.4% of the state's population. The greatest disparity exists for the African American community. Almost 40% of three strikes offenders sentenced are African American, while only 3.9% of the state's population is African American. The next

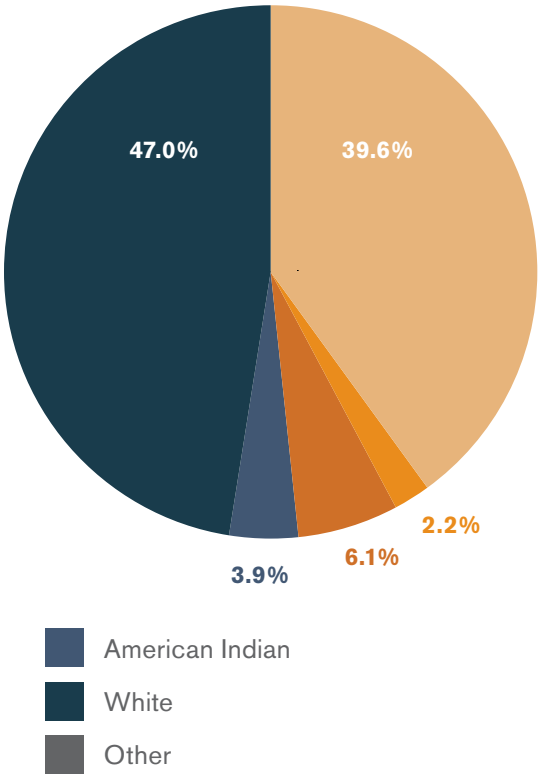
highest disparity is for American Indians, who are represented among three strikers at a rate more than two and a half times greater than the general population.[37]

This disproportionality is unsurprising in light of a 2010 finding by the United States Court of Appeals for the Ninth Circuit that racial disproportionality in Washington's criminal justice system is widespread, resulting in the overrepresentation of minority groups at all levels of the criminal justice system. The State did not dispute the evidence on racial disproportionality in that case. Though the decision was subsequently overturned on other grounds, the racial disparity evidence relied upon in the original decision remains valid. This research finds that the racial disproportionality cannot be explained by factors other than discrimination on account of race.[38]

WASHINGTON'S POPULATION BY RACE



WASHINGTON'S THREE STRIKES POPULATION BY RACE



Implications of the Three Strikes Law

A CHOICE BETWEEN INCARCERATION AND PREVENTION

In recent years funding for preventative programs has been diverted to the costs of incarcerating individuals under long term sentencing. With increasingly limited tax dollars available, the reality—particularly in the current budgetary climate—is that policy makers must make a choice between funding preventative programs and continuing to incarcerate individuals under long-term sentencing laws such as three strikes.

COSTS TO THE STATE

As a result of the mandatory sentence of life in prison without the possibility of parole, all three strikers will likely grow old and die in prison. Along with the decision to impose such sentences comes the cost of an aging prison population, whose growth rate Washington's Sentencing Guidelines Commission (the Commission) has characterized as "daunting."[39] Among three strikers, 110 inmates—48%—are over 50 years old, and the average age of three strikers is 49 years. By 2021, even with no new offenders sentenced under the three strikes law, the number of three strikers over age 50 will increase to 195.

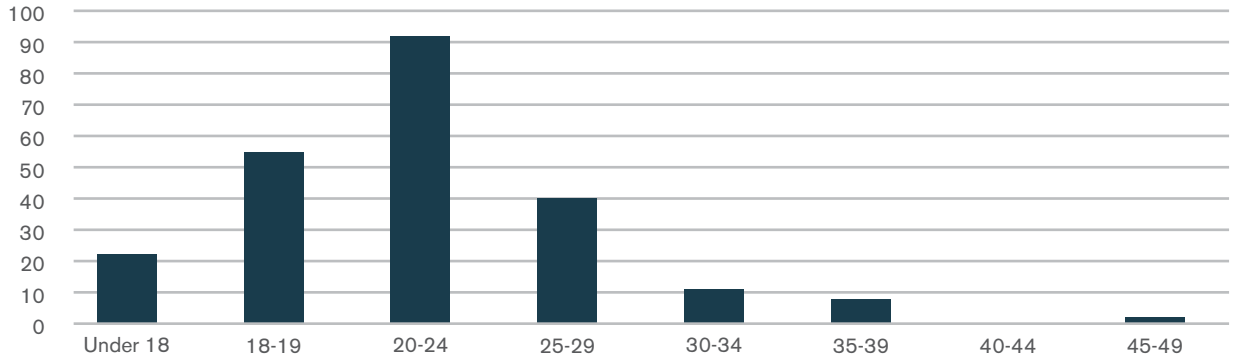
As a result of the needs of the elderly, in 2001 the Commission estimated that it cost over $98,000 per year to incarcerate an elderly prisoner—more than four times the cost of incarceration for the average prisoner. The Commission found this cost discrepancy "even more troubling when weighed against [the] minimal incapacitative benefit" of imprisoning the elderly.[40] Research shows that criminal activity peaks during the teenage years and generally drops off after about age 50.[41]

While in the general population people are not considered elderly until age 65,[42] Washington agencies consider prisoners to be elderly at 50 years old reasoning that "inmates tend to become 'elderly' earlier than their non-incarcerated counterparts and when inmates are ill, they tend to be more severely stricken than others."[43] Several factors contribute to the early aging of prisoners including "[s]ubstance abuse, poverty, lack of access to preventative care, and the stress of incarceration."[44] These issues create health problems in prisoners ordinarily seen in people in the community who are ten to fifteen years older.[45]

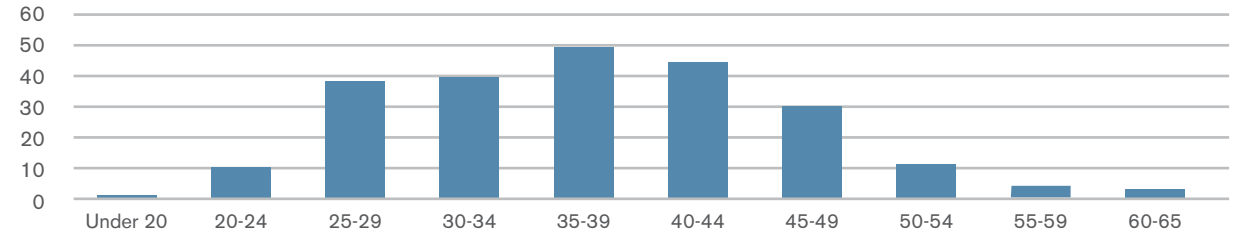
The costs of housing a growing elderly population are not only expensive, but also unnecessary. Rates of recidivism decrease substantially with age, indicating that imprisonment for the purpose of incapacitation serves public safety less and less as an offender ages. In fact, age is generally considered one of the most accurate predictors of recidivism.[46] Studies reveal that, while 45% of those between the ages of 18 and 29 years return to prison within a year, only 3.2% of those aged 55 and above reoffend in the same time period.[47]

Washington-specific data also reveals that age is negatively correlated with felony, violent felony and drug-related recidivism.[48] Approximately 80% of all three strikers were under the age of 45 at the time of their third strike, and all but 18 of them were under 50 years of age. Findings that indicate elderly prisoners are unlikely to reoffend as well as the extraordinary costs of incarcerating the elderly are important considerations for reform of Washington's three strikes law.

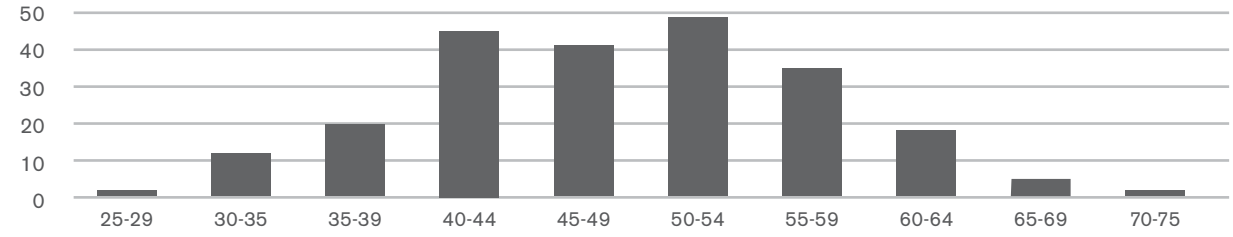
AGE OF THREE STRIKES OFFENDERS AT FIRST STRIKE



AGE OF THREE STRIKES OFFENDERS AT THIRD STRIKE



CURRENT AGE OF THREE STRIKES OFFENDERS



OTHER CRIMINAL JUSTICE COSTS

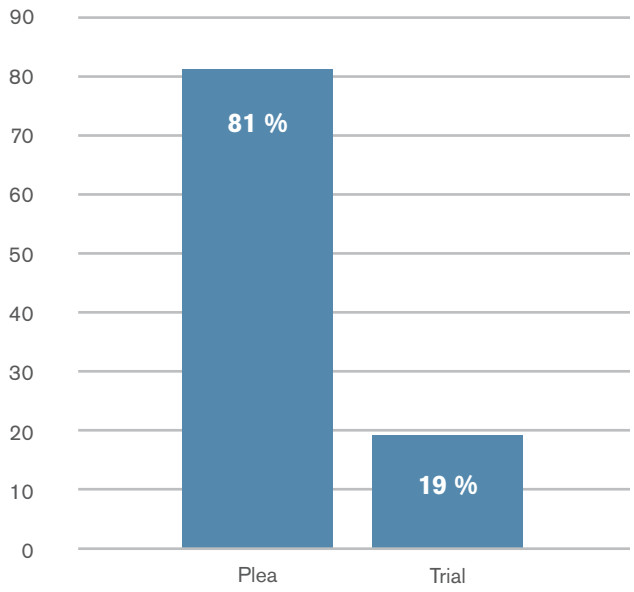
The costs of the three strikes law go beyond incarceration in state prison facilities. For counties, the costs include the expense of trials that may not have occurred but for the risk of a strike conviction.[49] Before the three strikes law was passed, 19% of defendants convicted of a strike offense went to trial. After passage of the law the number of trials drastically increased, with 63% of those convicted of strike offenses now choosing to go to trial. That number is even higher for the third strike, with 81% of strikers choosing trial over pleas in third strike cases where the stakes are higher. These trial rates are far higher than in Washington criminal cases as a whole, where only 4.7% of cases go to trial.[50] The high number of three strikes defendants going to trial has enormous cost repercussions for counties, as going to trial involves significantly more costs per case in the form of prosecutor time and resources, public defense expenses, judicial time and resources, general court costs, juror expenses, and pre-trial detention.

PREVENTION: A COST BENEFIT ANALYSIS

Washington State should continually attempt to appropriately balance the goals of incapacitation, deterrence, and crime prevention. Washington should strive to create a system that protects society from those who pose a risk, while conserving public resources by allowing for release of those who do not. The current three strikes law does not accomplish this and should be changed.

Recent studies indicate that spending money on prevention is justified not only because of the significant reductions in recidivism and corresponding increases in public safety, but also due to the economic benefit per dollar spent. For instance, investments in vocational education in prison produce

PLEA V. TRIAL BEFORE THREE STRIKES LAW

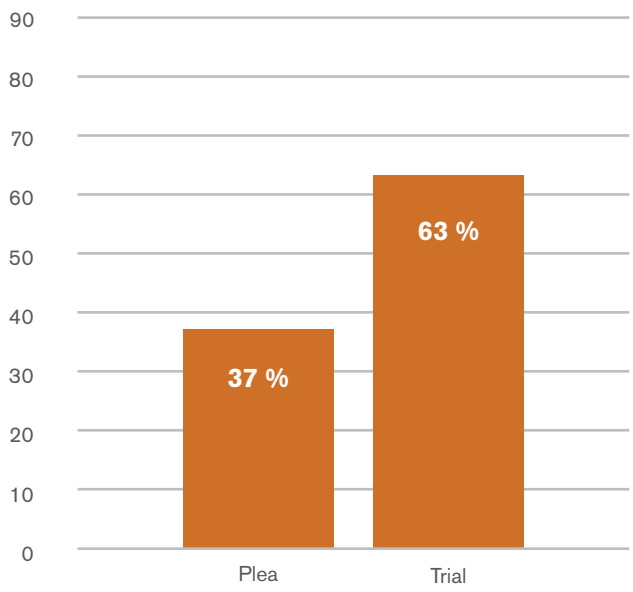


a cost benefit of $20,714 per participant, and in basic education for prisoners there is a $17,636 per participant cost benefit.[51] Treatment programs also save the state money in the long run. WSIPP has estimated that the cost benefit of providing cognitive behavioral therapy is $15,361 per participant, for drug treatment in prison there is a cost benefit of $12,715, and for drug treatment in the community the cost benefit is $11,856.[52] WSIPP's "economic analysis for Washington indicates that evidence-based—and reasonably priced—programs that achieve even relatively small reductions in crime can produce attractive returns on investment."[53]

"Results from a Zogby International poll released in April, 2006, show the public's support for protecting public safety through better programming: 87 percent of Americans favor rehabilitative services for prisoners as opposed to punishment only."[54]

- The Commission on Safety and Abuse in America's Prisons

PLEA V. TRIAL AFTER THREE STRIKES LAW



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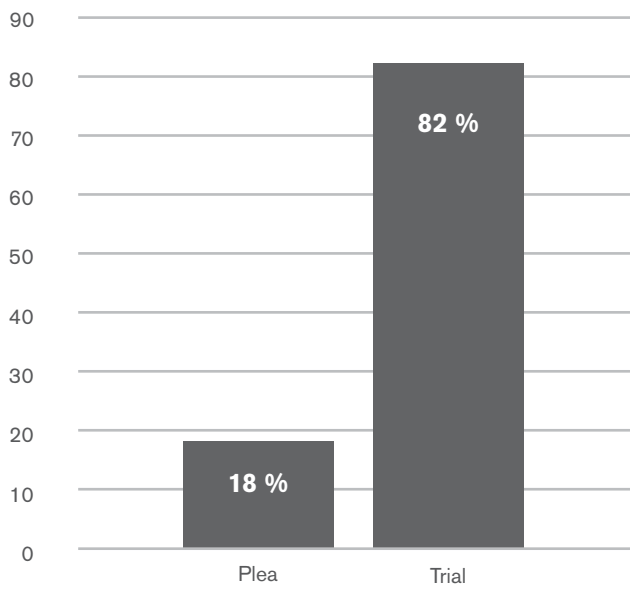

Recommendations

Washington should reform the three strikes law so that state resources are deployed to maximize returns by no longer incarcerating those who do not pose a threat to public safety and by reinvesting in prevention. Toward that end, we make four suggestions:

1. CREATE A "SECOND LOOK" SYSTEM OF REVIEW FOR THREE STRIKERS

Washington should enact a "second look" provision for three strikers, to allow for review of the life sentence after the offender has served a designated period of time.[55] The review process would create no guarantees and would allow for release only where the offender is no longer a risk to society.

The second look review should be conducted by an independent panel made up of members of the judiciary and/or professionals with expertise in criminal law, mental health, and other factors relevant to risk assessment and rehabilitation. The review should be conducted at a predetermined time, which may be based on the crime of conviction, but in any event should take place within 15 years of the original sentence. If release is not granted, the prisoner should be able to reapply for subsequent review. This review process should be sufficiently robust to allow for reconsideration of sentencing factors along with evidence of rehabilitation and likelihood of recidivism. Given the low education levels and prevalence of mental illness among the three strikes population, the panel should have discretion to appoint counsel for the review hearing to ensure a full and accurate record for review. The panel should consider all relevant factors including, but not limited to:

- Crimes of strike convictions;
- Aggravating and mitigating factors or circumstances related to the strike offenses;
- Input from the victim or victim's family;
- Risk to public safety;
- The amount of time already served and the age of the prisoner;
- Record of conduct in prison;
- Participation in available rehabilitative programs; and
- Evidence of the offender's ability to successfully reenter society.

The reviewer should also consider factors such as mental illness, developmental disabilities, and chemical dependency not only in relation to the underlying crime, but also in reviewing the individual's successes or failures during his term of incarceration.

"People change. Shouldn't we recognize that change in the law? And shouldn't we allow an opportunity on a case by case basis to look for the guys who really have changed?"[56]

- Adam Kline, Washington State Senator,
Statement During Hearing in Support of Legislation that
Would Provide Review in Certain Three Strikes Cases

"It is not a just sentence. It is disproportionate to the harm that was done to the community."[57]

- Dan Satterberg, King County Prosecuting Attorney,
Testimony to the Washington State Legislature in Support of Legislation
that Would Provide Review in Certain Three Strikes Cases

Consideration should also be given to the lack of programming available for three strikers who are often at the bottom of the list for programming due to the length of their sentences–this could result in a dearth of evidence of rehabilitation due not to a lack of desire, but rather to a lack of opportunity.

Because there are relatively few three strikes offenders and the staggered frequency by which they would become eligible for review, there would be limited costs associated with the implementation of a review process. These costs would be especially low considering that they would be offset by the savings gained in the cost of incarceration for those who would earn release.

The mandatory sentence of life in prison without the possibility of parole fails to account for the possibility of change. After decades in prison, either as a result of maturity, rehabilitation, or both, an individual is likely to dramatically change such that "the original sentence imposed may no longer be justifiable."[61]

If creation of a broad system of review is not immediately feasible, however, Washington should at a minimum enact a law allowing for review for those three strikers serving life without parole who have been convicted of the least serious offenses. This would serve as a preliminary step toward greater reform of the law.

2. ELIMINATE THE LEAST SERIOUS FELONIES FROM THE LIST OF STRIKE OFFENSES

Some of the crimes included in the list of strike offenses encompass wide-ranging behavior, which could involve neither violence nor physical injury.[58] Washington should take another look at strike offenses to ensure that only the most serious behavior is subject to such a severe sentence.

In the absence of the three strikes law, the vast majority of those sentenced as three strikers would be serving sentences far shorter than life.[59] This is especially true for the least serious strike offenses. Though the sentences would be shorter than life in these cases were they removed from the list of most serious offenses, even without the three strikes law, current law requires that offenders with multiple convictions be sentenced to long periods of incarceration. Further, in cases where the standard sentencing range is deemed insufficient, judges have the discretion to depart upward from the standard range to sentence an offender more appropriately, for new cases and upon resentencing of former three strikers.[60] In short, no one would be getting off easy. Removing the least serious crimes from the list of

most serious offenses subject to the three strikes law would result in cost savings by reducing the cost of life sentences in lower level cases while continuing to ensure appropriate deterrence for repeat offenders.

3. AMEND THE COMPASSIONATE RELEASE STATUTE TO REVERSE EXCLUSIONS BASED ON SENTENCE LENGTH

Washington law allows for compassionate release for inmates who are "currently physically incapacitated due to age or [] medical condition or [are] expected to be so at the time of release."[62] Although DOC's compassionate release program includes safeguards to ensure that individuals who pose a risk to society are not released, three strikes offenders are not eligible for this program because they are sentenced to life without the possibility of parole.[63]

Given the extremely low risk of recidivism among elderly and physically incapacitated people, the prohibition on compassionate release of those serving life in prison without the possibility of parole is unnecessary. It is also extremely costly. The DOC projects as many as 44 offenders could be released under the current program between 2009 and 2011 at a cost savings of up to $1.5 million.[64] Given the number of three strikers who are already elderly, and the coming expense of their continued incarceration, Washington lawmakers should expand this program to include consideration for three strikes offenders.

Prisoners are not eligible to receive federal medical benefits during their incarceration.[65] Therefore, the state bears the entire burden of caring for elderly and infirm prisoners. However, upon release, ex-offenders are eligible for federal programs such as Medicare, Medicaid, and veterans benefits, where applicable, which offset the costs to the state. Further, for those granted release under this program, some of the cost would shift to prisoners' family members to provide care and housing for sick and elderly relatives. Expansion of the compassionate release program could save the state hundreds of thousands, if not millions, of dollars biennially.[66]

4. REINVEST SAVINGS STEMMING FROM REFORM IN PREVENTION AND REHABILITATION EFFORTS

Implementing a system of review for three strikes offenders will result in large cost savings to the state. Those savings should be reinvested in three ways: (1) prevention efforts; (2) increased access to rehabilitative programming; and (3) reentry resources and planning.

First, even modest investments in mental health and chemical dependency treatment, education, homelessness prevention, and other social services can result in billions of dollars of savings to the state and to victims in criminal justice costs and make our communities safer.[67]

Second, correctional policies that create barriers to programming opportunities that would support rehabilitation must be revised to encourage rehabilitation and preparation for release. The lack of opportunities to engage in positive programming and the absence of a system of review "undermines the incentive for reform and sends an inconsistent

"There are realistic limits to efforts at rehabilitation. We must try, however, to bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach."[68]

- The Honorable Anthony M. Kennedy, U.S. Supreme Court Justice

message to persons in prison regarding how to spend their years behind bars."[69] While three strikes offenders who are eligible for review are serving their sentences, they should be given the same priority as other offenders for employment, education, and treatment programs. This should include basic skills education for everyone, and substance abuse and mental health treatment for those who need it. Such programs have been shown to reduce recidivism significantly and save money.[70] These programs help offenders develop skills to manage issues that may have contributed to their past criminal activity. Further, increasing opportunities for rehabilitation will bolster the ability of individuals to successfully reenter society.

Finally, savings should be invested in community based reentry supports, many of which overlap with preventative programming. As offenders near the date of their review and potential release, careful consideration should be given to services they will need upon release. Three strikers who are granted release under a review system should be provided job training before their release and should be connected with available resources in the community, including housing, chemical dependency and mental health treatment providers, education, and potential employers.

Implementing these recommendations will help to rebalance the criminal justice system in a way that continues to ensure public safety, saves state resources, and creates a more just sentencing scheme.

1) RCW 9.94A.555; STATE OF WASHINGTON SENTENCING GUIDELINES COMMISSION, A COMPREHENSIVE REVIEW AND EVALUATION OF SENTENCING POLICY IN WASHINGTON STATE: 2000 – 2001 12 (2001) [hereinafter SENTENCING POLICY].

2) Wash Leg. Serv., Ch. 1, § 1 (2)(a)&(b) (1994); RCW 9.94A.555.

3) Wash Leg. Serv., Ch. 1, § 2 (1994); RCW 9.94A.555.

4) VINCENT SCHIRALDI, ET AL., THE JUSTICE POLICY INSTITUTE, THREE STRIKES AND YOU'RE OUT: AN EXAMINATION OF THE IMPACT OF 3-STRIKE LAWS 10 YEARS AFTER THEIR ENACTMENT 8 (2004).

5) JAMES AUSTIN, ET AL., "THREE STRIKES AND YOU'RE OUT" THE IMPLEMENTATION AND IMPACT OF STRIKE LAWS 104 (National Institute of Justice, U.S. Department of Justice, 1998).

6) SCHIRALDI, *supra* note 4, at 8.

7) Elsa Y. Chen, *Impacts of "Three Strikes and You're Out" on Crime Trends in California and Throughout the United States*, 24 J. CONTEMP. CRIM. JUST. 345, 346 (2008); AUSTIN, *supra* note 5, at 104.

8) RCW 9.94A.030(36)(a); RCW 9.94A.030(31). Also considered a "most serious offense" is any felony offense in effect prior to December 2, 1993 that is "comparable to a most serious offense" under current law, and any federal or out-of-state offense that "under the laws of this state would be classified as a most serious offense." RCW 9.94A.030(31)(u). As of 1997, prior convictions for "indecent liberties" are considered "most serious offenses," with qualifications detailed in RCW 9.94A.030(31)(v). In 2008, the legislature added to the list of "most serious offenses" any out-of-state conviction for a felony offense with a finding of sexual motivation, if the minimum sentence imposed was ten years or more. RCW 9.94A.030(31)(w). In 1996, the definition of "persistent offender" was amended to include two-strike sex offenders. Thus, individuals convicted of "most serious offenses" qualify as "persistent offenders" when they have only two, rather than three, separate convictions for any of the following offenses: "(A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree"; or an attempt to commit any of the offenses here listed. RCW 9.94A.030(36)(b). For the purposes of this report, however, we are only analyzing those sentenced under the three strikes provision of the Persistent Offender Accountability Act.

9) The data and statistics related to offenders serving sentences under the three strikes law are based on our review of the following: data obtained from the Sentencing Guidelines Commission; court records of three strikes offenders; correctional records of three strikes offenders; information provided by three strikes offenders; appellate decisions; and media reports. The number of offenders currently incarcerated includes those sentenced under the three strikes law as of the end of the 2009 fiscal year, less: those sentenced for Aggravated Murder in the First Degree as a third strike because they would receive a mandatory sentence of life in prison without the possibility of parole on that conviction alone; those resentenced or released after appeal, personal restraint petition, or through clemency; duplicate entries for those sentenced more than once under the law; and those who are deceased.

10) The Honorable Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (August 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_09-09-03.html.

11) Robert Han, Ph.D. et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, Vol. 56/RR-9 at 1 (Nov. 30, 2007) (emphasis added). In Washington, youth may be tried as adults through the declination process. For some crimes, treatment of youth age 16 or over as adults is automatic. RCW 13.40.110.

12) There are only three female three strikes offenders in Washington. All of the strikers who have strikes for crimes committed as juveniles are male.

13) ELIZABETH K. DRAKE, STEVE AOS, & MARNA G. MILLER, WASH. ST. INST. FOR PUB. POL'Y, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE CRIME AND CRIMINAL JUSTICE COSTS: IMPLICATIONS IN WASHINGTON STATE 186-187 (2009) [hereinafter POLICY OPTIONS].

14) E. FULLER TORREY, M.D., ET AL., NAT'L SHERIFFS' ASS'N & TREATMENT ADVOCACY CTR., MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 1, Table 1 (2010).

15) PAULA M. DITTON, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., MENTAL HEALTH TREATMENT OF INMATES AND PROBATIONERS 5 (1999); *id*; *see also id.* at 1 ("About 53 percent of mentally ill inmates were in prison for a violent offense" as of midyear 1998.); DORIS E. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 7 (2006) ("State prisoners who had a mental health problem (61%) were more likely than State prisoners without (56%) to have a current or past violent offense . . . . Among repeat offenders, an estimated 47% of State prisoners who had a mental health problem were violent recidivists, compared to 39% of State prisoners without a mental health problem.").

16) ST. OF WASH. DEP'T OF CORRS., STRATEGIC PLAN: FISCAL YEARS 2005-2011 4 (on file with author) [hereinafter STRATEGIC PLAN].

17) *See*, e.g. STEVE AOS, ET AL., WASH. ST. INST. FOR PUB. POL'Y, EVIDENCE-BASED ADULT CORRECTIONS PROGRAMS: WHAT WORKS AND WHAT DOES NOT 3 (2006). *Id.* (estimating a reduction in recidivism of 27.4 percent where mentally ill prisoners are housed in therapeutic communities.); *see also* STEVE AOS, ET AL., WASH. ST. INST. FOR PUB. POL'Y, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES 9 (2006).

18) POLICY OPTIONS, *supra* note 13, at 184.

19) *Id.*; STEVE AOS, ET AL., WASH. ST. INST. FOR PUB. POL'Y, EVIDENCE-BASED TREATMENT OF ALCOHOL, DRUG, AND MENTAL HEALTH DISORDERS: POTENTIAL BENEFITS, COSTS, AND FISCAL IMPACTS FOR WASHINGTON STATE 4 (2006).

20) MARNA MILLER & IRENE NGUGI, WASH. ST. INST. FOR PUB. POL'Y, IMPACTS OF HOUSING SUPPORTS: PERSONS WITH MENTAL ILLNESS AND EX-OFFENDERS 2 (2009) [hereinafter IMPACTS OF HOUSING SUPPORTS].

21) *See, e.g.*, FACT SHEET: DRUG-RELATED CRIME, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS. 1 (1994) ("Drug use and crime are common aspects of a deviant lifestyle. The likelihood and frequency of involvement in illegal activity is increased because drug users may not participate in the legitimate economy and are exposed to situations that encourage crime.") [hereinafter DRUG RELATED CRIME]; *id.* at 1-2 (drug users are more likely than non-users to commit crimes).

22) STRATEGIC PLAN, *supra* note 16, at 4.

23) DRUG-RELATED CRIME, *supra* note 21, at 3 ("Offenders often commit offenses to support their drug habit."); DORIS J. WILSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., DRUG USE, TESTING AND TREATMENT IN JAILS 2 (revised Sept. 29, 2000) ("Nearly 1 in 6 convicted jail inmates commit crimes to get money for drugs."); CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., SUBSTANCE ABUSE AND TREATMENT, STATE AND FEDERAL PRISONERS 1997, 1 (1999) ("In 1997 … about 1 in 6 of [all state and federal prisoners] reported committing their offense to obtain money for drugs."). *See, e.g.*, WILSON, *supra*, at 2 (36 percent of jail inmates were using illegal drugs at the time of offense); MUMOLA, *supra*, at 1 (in 1997, 51 percent of prisoners in the United States "reported the use of alcohol or drugs while committing their offense."); *id.* (in 1997: "37% of State prisoners were drinking at the time of their offense."); DRUG-RELATED CRIME, *supra* note 21, at 2-3 ("Incarcerated offenders were often under the influence of drugs at the time of the offense."); JEREMY TRAVIS ET AL., URBAN INST. JUST. POLICY CENTER, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 25 (2001) ("[M]ore than half of state prisoners report that they were using drugs or alcohol when they committed the offense that led to their incarceration.").

24) ST. OF WASH. DEP'T OF CORRS., THE DOC RE-ENTRY INITIATIVE: SMART ON CRIME 7 (2006) [hereinafter RE-ENTRY INITIATIVE].

25) POLICY OPTIONS, *supra* note 13, at 184-185.

26) Mental and Substance Abuse Disorders Act, 2005 Wash. Laws, pg. 2340, ch. 504, § 101.

27) The link between homelessness and criminal activity is not fully known, but some available statistics indicate that there is a connection. *See* NINO RODRIGUEZ & BRENNER BROWN, VERA INST. OF JUST., PREVENTING HOMELESSNESS AMONG PEOPLE LEAVING PRISON 4 (2003) ("According to a study by the federal Bureau of Justice Statistics, 12 percent of state prisoners were homeless at the time of their arrest, and the Interagency Council on the Homeless has reported that 18 percent of all homeless people have spent time in a state or federal prison. Moreover, among parolees who have been reincarcerated, 19 percent were homeless upon their arrest."). The relationship between homelessness and crime appears to be especially strong for the mentally ill; "[m]entally ill State prison inmates were more than twice as likely as other inmates to report living on the street or in a shelter in the 12 months prior to arrest (20% compared to 9%)." DITTON, *supra* note 15, at 1. *See also id.* at 5 ("Mentally ill offenders reported high rates of homelessness, unemployment, alcohol and drug use, and physical and sexual abuse prior to their current incarceration."); Dale E. McNiel, Ph.D., et al., *Incarceration Associated With Homelessness, Mental Disorder, and Co-occurring Substance Abuse*, 56 PSYCHIATRIC SERVICES 840, 840-41 (2005).

28) McNiel, *supra* note 27, at 843.

29) *Id.*

30) IMPACTS OF HOUSING SUPPORTS, *supra* note 20, at 2.

31) According to the Department of Corrections "[a]s of October 31, 2005, only 18 percent of offenders had verified high school diplomas and 47 percent had General Education Development (GED) certificates." RE-ENTRY INITIATIVE, *supra* note 24, at 4.

32) BETH A. COLGAN, TEACHING A PRISONER TO FISH: GETTING TOUGH ON CRIME BY PREPARING PRISONERS TO REENTER SOCIETY, 5 Sea. J. Soc. Justice 293, 298 (2006) (citing CAROLINE WOLF HARLOW, PH.D., U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., EDUCATION AND CORRECTIONAL POPULATIONS 2 (revised April 15, 2003)); ALLEN J. BECK, PH.D. & BERNARD E. SHIPLEY, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., RECIDIVISM OF PRISONERS RELEASED IN 1983 1 (1989).

33) *See* BECK, *supra* note 32, at 5.

34) POLICY OPTIONS, *supra* note 13, at 184, 187.

35) See Washington Joint Task Force on Offenders Programs, Sentencing & Supervision, Report & Recommendation to the Washington State Legislature (Nov. 2006); AUDREY BAZOS & JESSICA HAUSMAN, UCLA SCH. OF PUB. POL'Y AND SOC. RESEARCH, CORRECTIONAL EDUCATION AS A CRIME CONTROL PROGRAM 3 (2004) (citing P.M. HARRISON & A.J. BECK, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., PRISONERS IN 2002 (2002)).

36) Judge Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 357, 362 (2009).

37) U.S. Census Bureau, Washington Quickfacts, at http://quickfacts.census.gov/qfd/states/53000.html.

38) *Farrakhan v. Gregoire*, 590 F.3d 989, 1009-10 (9th Cir. 2010), *overruled en banc*, 623 F.3d 990 (9th Cir. 2010).

39) SENTENCING POLICY, *supra* note 1, at 62-63.

40) SENTENCING POLICY, *supra* note 1, at 62-63.

41) U.S. Dept. of Justice, Federal Bureau of Investigation, Crime in the United States, 2009: Table 38 – Arrests by Age (2010), *available at* http://www2.fbi.gov/ucr/cius2009/data/table_38.html.

42) TINA CHIU, VERA INST. OF JUST., IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE, CENTER ON SENTENCING AND AGING CORRECTIONS 4 (2010).

43) SENTENCING POLICY, *supra* note 1, at 62-63.

44) Timothy Curtin, *The Continuing Problem of America's Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 ELDER L.J. 474, 475 (2007).

45) *Id.*

46) *See, e.g.*, Ronald H. Aday, *Aging Prisoners: Crisis in American Corrections* 212 (Praeger Publishers 2003).

47) *Id.*

48) ELIZABETH DRAKE, STEVE AOS, & ROBERT BARNOSKI, WASH. ST. INST. FOR PUB. POL'Y, WASHINGTON'S OFFENDER ACCOUNTABILITY ACT: FINAL REPORT ON RECIDIVISM OUTCOMES Exhibit D (2010).

49) Data on plea information was largely unavailable for out of state strike convictions. Therefore those strikes are excluded from the data in this section. Likewise, the few cases where state conviction records did not indicate whether an individual pled or went to trial are also excluded from the data set.

50) See Washington State Courts, Superior Court Annual Caseload Reports, at http://www.courts.wa.gov/caseload/?fa=caseload.showIndex&level=s&freq=a&tab=criminal.

51) THE COMM'N ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 12 (2006).

52) POLICY OPTIONS, *supra* note 13, at 184.

53) *Id.* at 184-85.

54) *Id.* at 194.

55) The recommendations in this section are based largely on a draft proposal by the American Law Institute, an independent and highly respected organization producing model statutes and other influential legal works, which at the time of publication was finalizing revisions to the Model Penal Code related to sentencing reforms. See American Law Institute, Model Penal Code: Sentencing, Discussion Draft No. 3 (March 29, 2010). The American Law institute describes itself as "the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The Institute (made up of 4000 lawyers, judges, and law professors of the highest qualifications) drafts, discusses, revises, and publishes Restatements of the Law, model statutes, and principles of law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education." (at http://www.ali.org/index.cfm?fuseaction=about.overview).

56) *An Act Relating to Persistent Offenders: Hearing on SB 5236 Before the Senate Judiciary Comm.*, 2011 Leg., 62nd Sess. (Wash. 2011) (statement of Sen. Adam Kline, Chair, Sen. Judiciary Comm.).

57) *An Act Relating to Persistent Offenders: Hearing on SB 5236 Before the Senate Judiciary Comm.*, 2011 Leg., 62nd Sess. (Wash. 2011) (statement of Dan Satterberg, King County Prosecuting Attorney).

58) *See*, SENTENCING POLICY, *supra* note 1, at 15.

59) Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT. REP. 27, 29 (2010) (discussing California's three-strikes law) [hereinafter *Expansion of Life Without Parole*].

60) RCW 9.94A.535.

61) Margaret Colgate Love, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 FED. SENT. REP. 211, 212 (2009); *see Expansion of Life Without Parole, supra* note 59, at 36.

62) RCW 9.94A.728 (3)(a)(ii).

63) *See*, DOC Policy 350.270, *Extraordinary Medical Placement*, § III; RCW 9.94A.728 (3)(b).

64) CHIU, *supra* note 42, at 9.

65) 42 U.S.C. § 1396d(a)(27)(A); 42 C.F.R. § 435.1008.

66) *See*, SENTENCING POLICY, *supra* note 1, at 62-63.

67) Kennedy, *supra* note 10.

68) POLICY OPTIONS, *supra* note 13, at 184-89.

69) *Expansion of Life Without Parole, supra* note 59, at 36.

70) POLICY OPTIONS, *supra* note 13, at 184-85.

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