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# Three Strikes as a Public Policy: The Convergence of the New Penology and the McDonaldization of Punishment

David Shichor

*This article analyzes the theoretical principles of the recently legislated "three strikes and you're out" laws. In many respects, these are related to the "new penology" that shifted the focus of criminological and penological interest from the individual offender toward the control of aggregates. Furthermore, the analysis relates the three-strikes measures to the cultural model of the "McDonaldization" of society in which the principles of the fast-food restaurant dominate many aspects of American society. These principles include efficiency, calculability, predictability, and control mainly by non-human technology. The analysis in this article, which focuses especially on the three-strikes law in California, suggests that three-strikes laws can be viewed as a part of the McDonaldization trend.*

## INTRODUCTION

Street crime has become one of the major public concerns in the United States during the past two decades. In response to it, several "war on crime" campaigns have been waged since the 1970s, and there is a growing public demand to get "tough on crime" and to get even tougher on violent and repeating criminals. The crime issue has become a focal point of almost all political campaigns and a rallying cry for politicians that fits into the general conservative political climate that has become prominent since the 1970s. Also, crime has become a dominant theme in the media, and, in turn, presentations of crime have influenced criminal justice policies (Sanders and Lyon 1995; Surette 1996). These trends led to the "war on drugs," more and longer prison sentences, the rapid growth of the prison population, the

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overcrowding of correctional facilities, and the steep increase in correctional costs. Irwin and Austin (1994) referred to these developments as the "imprisonment binge" and noted that, at the end of the 1980s, 39 states were under court order to "cap" their prison populations unless the holding capacities of their prisons were increased. In the spring of 1994, the U.S. prison population passed the 1 million mark and the nation gained the dubious honor of having the highest incarceration rate in the world. By 1996, the U.S. jail and prison population was around the 1.5 million mark.

In spite of the chronic problems of overcrowding and the bulging correctional costs and budget shortages, the pursuit of penal policies of deterrence-incapacitation continues unabated (Shichor 1987). In 1994, as an incremental step toward increasingly punitive crime policies (Saint-Germain and Calamia 1996), the Violent Crime Control and Law Enforcement Act, also known as the Federal Crime Bill, was enacted by Congress. Among other things, this law "mandates life in prison for criminals convicted of three violent felonies or drug offenses if the third conviction is a federal crime" (Lewis 1994, p. 6). It became labeled, using the popular baseball lingo, as the "three strikes and you're out" law. Several states followed suit and enacted similar measures.<sup>1</sup> One of those mentioned most often was the California mandatory sentencing law, which came into effect in March 1994 and prescribes that "felons found guilty of a third serious crime be locked up for 25 years to life." It stipulates the following:

Although the first two "strikes" accrue for serious felonies, the crime that triggers the life sentence can be for any felony. Furthermore, the law doubles sentences for a second strike, requires that these extended sentences be served in prison (rather than in jail or on probation), and limits "good time" earned during prison to 20 percent of the sentence given (rather than 50 percent, as under the previous law). (Greenwood, Rydell, Abrahamse, Caulkins, Chiesa, Model, and Klein 1994, p. xi)

It is not clear yet how the further implementation of the California law will be affected by the recent state supreme court ruling that judges have the discretion to overlook prior convictions in three-strikes cases (Dolan and Perry 1996).

This article focuses on the "three-strikes" laws in general with particular emphasis on the California measure because that law has been the most scrutinized and quoted in the professional literature so far. Although there are differences in some of the details among the various three-strikes laws, their main aims and principles are similar.

Several scholars maintain that recent penal thinking and the ensuing policies have gone through a major paradigm change. According to them, a

“new penology” has emerged shifting the traditional penological concern that focused on the individual offender to an actuarial model focusing on the management of aggregates. Feeley and Simon (1992) argued that this change “facilitates development of a vision or a model of a new type of criminal that embraces increased reliance on imprisonment . . . that shifts away from concern with punishing individuals to managing aggregates of dangerous groups” (p. 449).

The analysis to follow examines three-strikes laws in relation to the new penology and in relation to their connections to a more general sociocultural orientation, identified by Ritzer (1993) as the “McDonaldization” of society, based on the rationalization process suggested by Max Weber (one of the pioneers of sociological thought), that is embodied in the model of fast-food restaurants (Weber 1968). Although these two models have many similar and mutually supportive characteristics that define current criminal justice policies, they diverge in some of the details.

### *THREE STRIKES AND THE NEW PENOLOGY*

In a widely cited article, Feeley and Simon (1992) claimed that the conservative turn in the social and penal ideology of the 1970s and 1980s led to a new trend in penology that involves changes in three major aspects:

1. The emergence of new discourses: In particular, the language of probability and risk increasingly replaces earlier discourses of clinical diagnosis and retributive judgment.
2. The formation of new objectives: [T]he increasing primacy [is] given to the efficient control of internal system processes in place of the traditional objectives of rehabilitation and crime control.
3. The deployment of new techniques: These techniques target offenders as an aggregate in place of traditional techniques for individualizing or creating equity. (p. 450)

Three-strikes measures are one manifestation of these changes. Their language employs terms such as “high-risk offenders” or “strikeable offenses,” and their objectives center around efficient control of the operation of the criminal justice system.

Feeley and Simon (1992) contrasted the new trend with what they called the “old penology” based on American law focusing on individuals and in which penal sanctioning “has been aimed at individual-based theories of punishment.” By contrast, the new penology is “concerned with techniques to identify, classify, and manage groupings sorted by dangerousness” (pp. 451-52). This approach is more concerned with responses to social harm

“based on aggregations and statistical averages” than with the punishment and treatment tailored to individual perpetrators (Alschuler 1990, pp. 15-16). Accordingly, certain subpopulations, which are identified by officials as “high-rate offenders,” “career criminals,” or “habitual offenders” and by social scientists as the “underclass” or the “truly disadvantaged,” are to be singled out for special surveillance, aggregate management, and selective incapacitation (Hagan 1995). This view has centered on criminal justice policies that are in accord with an orientation of penal administrators that is focused on managerial goals (Garland 1990). As a consequence, “Sanctioning rates are determined by the ways in which official actors use strategic discretion to manage their domains of action and only indirectly by reform or socioeconomic imperatives” (Sutton 1987, p. 613). Henry and Milaonovic (1996) described this new penology as a “discourse based on utilitarian considerations rather than on moral ones” (p. 114).

In an earlier work, Cohen (1985) reviewed some of the results of this move toward “containment and coercion” (p. 108). Among other things, he foresaw “increasing rates of imprisonment,” “increasing severity of punishment,” “a widening net of criminalization,” and “greater publicity given to street crimes.” He pointed out that the new direction that abandoned rehabilitation as an objective in favor of the management of controlled groups has created a bifurcation of penal policies. The “hard” side of the control system became harsher, resulting in more incarceration, longer prison stays, and determinate and mandatory sentences for “hard core,” “career,” and “dangerous” offenders, whereas the less serious offenders (Cohen referred to them as “deviants”) were to be handled by the “soft end” of the system, mostly in community settings under various surveillance practices often referred to as “intermediate sanctions.” These measures are more severe than traditional probation but less restrictive than incarceration; they include home arrest and intensive probation often monitored by electronic surveillance systems, boot camps, and drug rehabilitation programs (Morris and Tonry 1990). These policies have led to “net widening” because the extended use of intermediate sanctions has brought people who otherwise would have been handled informally under some type of supervision or into formal correctional programs.

The change from penal policies aimed at punishment and rehabilitation of individuals to the management and control of certain categories of people has followed the pessimism expressed about the criminal justice system’s ability to change offenders, making them into law-abiding citizens (Gottfredson and Hirschi 1990; Martinson 1974). In this vein, Bottoms (1980) noted that “the abandonment of the rehabilitative ethic has led to a widespread abandonment of hope” (p. 20) because the idea of rehabilitation was an expression of optimism about human nature and about the ability of social organizations to

bring out the positive in people. The new penology takes for granted that a high level of criminal behavior will continue to occur, and its concern is how to manage the criminal justice system efficiently rather than to effect major changes in crime rates or to bring about rehabilitation of a significant number of offenders.

The new penology has rekindled the historical notion of "dangerous classes" that traditionally has been linked to the urban poor.<sup>2</sup> Feeley and Simon (1992) claimed that the new penology is oriented toward the management of a "permanently dangerous population" (p. 463). Their description of this population parallels Wilson's (1987) depiction of the "underclass," which, because of the social realities of capitalist industrial societies in which production is based on a high level of technology and a reduction of manual labor, became a marginal population, unemployable, lacking in adequate education and marketable skills, and without any real prospects or hope to change its situation. This approach bears a similarity to the Marxist concept of the "lumpenproletariat," an exploited and potentially dangerous class whose members lack class consciousness and, instead of fighting the ruling class to change their inferior social and economic conditions, prey mainly on their poor working-class compatriots (Bonger [1916] 1969).

The new penal approach, focusing on the control and management of specific aggregates, has made increasing use of actuarial methods that rely heavily on statistical decision theory, operations research techniques, and system analysis to devise and implement penal policies (Simon 1988). These reflect the positivist orientation in criminology that concentrates on "methods, techniques, or rules of procedure" rather than on "substantive theory or perspectives" (Gottfredson and Hirschi 1987, p. 10).<sup>3</sup> This trend was reinforced in Alfred Blumstein's presidential address to the members of the American Society of Criminology in which he saw as one of the most important missions of criminological researchers "the generation of knowledge that is useful in dealing with crime and the operation of the criminal justice system (i.e., relevance) and then helping public officials to use that knowledge intelligently and effectively (rationality)" (Blumstein 1993, p. 1).

Three-strikes laws have historical roots in American penology (Feeley and Kamin 1996; Zeigler and Del Carmen 1996; Turner, Sundt, Applegate, and Cullen 1995). They are based on the penal principle of incapacitation. The rationale behind this principle is that "some crimes are produced exclusively by exceptional people, as some commodities are. If some of these people are incapacitated, production is reduced" (Van den Haag 1975, p. 53). In theory, three-strikes laws were meant to target repeating violent and dangerous felons, similar to "selective incapacitation" strategies that "target a small group of convicted offenders, those who are predicted to commit serious

crimes at high rates, for incarceration" (Visher 1987, p. 513). Implicitly, three-strikes laws also involve the probability and risk assessment of certain aggregates and the "management" (through long prison sentences) of those high-risk groups that are considered to be the most harmful to society.

In one respect, however, three-strikes laws do not seem to be in tune with the new penology, which, according to Feeley and Simon (1992), in addition to focusing on the management and control of "a permanently dangerous population," is concerned with "maintaining the system at a minimum cost" (p. 463). Three-strikes legislation does not put a major emphasis on dealing with the material consequences of its implementation.<sup>4</sup> In this regard, Simon and Feeley (1994) criticized the three-strikes measures, stating, "This spate of three-strikes laws as well as other types of mandatory sentences can easily be characterized as mindless 'spending sprees' or 'throwing money at a problem' without likelihood of benefit" (p. 13). However, advocates may claim that indirectly, through the reduction of serious crimes that is expected as a result of the implementation of these measures and the ensuing "bifurcation" according to which intermediate punishments, therapies, fines, or even release are applied to categories of offenders classified as less serious criminals (including many white-collar crime offenders), certain concern with correctional cost is implied.

The new penology's approach of controlling "permanently dangerous people," depicted as potentially habitual criminals often connected with the drug scene, is related to a sociocultural atmosphere in which phenomena similar to moral panics may easily emerge (Cohen 1973). There is a pervasive public perception, reinforced by the mass media, that these dangerous offenders "pose a threat to the society and to the moral order. . . . Therefore, 'something should be done' about them and their behavior" (Goode and Ben-Yehuda 1994, p. 31). This "something" usually is the increased severity of punishment. One major reflection of this trend is the legislation of three-strikes laws. But in addition, the contention of this article is that these measures also are related to, and are characteristic of, the social control policies that may be derived from the McDonaldization model of society.

### *THE MCDONALDIZATION OF PUNISHMENT*

In a recent book, Ritzer (1993) used the analogy of fast-food establishments to characterize and analyze the social and cultural ethos of modern technological societies, particularly that of the United States. He defined McDonaldization as "the process by which the principles of the fast-food restaurant are coming to dominate more and more sectors of American society

as well as the rest of the world" (p. 1). This process also has a major impact on the social control policies of these societies. The theoretical underpinnings of the three-strikes measures, their definitions of strikeable offenses, and the wide-scale public support of these types of legislation are closely related to, and are influenced by, McDonaldization.

In this model, which is based on the Weberian concept of "formal rationality" (Weber 1968), there are four basic dimensions of the fast-food industry: efficiency, calculability, predictability, and control. Efficiency refers to the tendency to choose the optimum means to a given end, calculability is identified as the tendency to quantify and calculate every product and to use quantity as a measure of quality, predictability has to do with the preference to know what to expect in all situations at all times, and control involves the replacement of human technology with nonhuman technology in a way that goods, services, products, and workers are better controlled. Ritzer (1993) suggested that there are various degrees of McDonaldization and that some phenomena are more McDonaldized than others. As mentioned previously, the contention of this article is that three-strikes laws are promoting punishment policies in accordance with this model.

### *Efficiency and Penal Policy*

Efficiency in the context of three strikes can be defined as the achievement of the maximum possible incapacitation effect for dangerous offenders. Incapacitation can be seen as an indicator of efficiency because offenders are prevented during their prison sentences from causing harm in their outside communities. The issue of serious street crime is a valance issue, "one that elicits a single, strong, fairly emotional response and does not have an adversarial quality" (Fattah 1986, p. 3). There is general consensus that something has to be done about this major social problem, and this widely held public concern is exploited by politicians who want to show their commitment to fighting crime by proposing extreme punishments in order to be elected. Thus, the "solution" to the "growing" problem of "serious" crime is the adoption of incapacitation as the leading penal policy, that is, applying more and longer prison sentences to a larger variety of offenses and offenders. This policy is seen by many legislators, public officials, and large segments of the public as efficient because, if followed properly, it should deprive offenders of the opportunity to commit additional harm against innocent victims during their incarcerations. Three-strikes laws make incapacitation mandatory and long lasting; therefore, many consider them as a major step in the "search for a far better means to an end than would be employed under ordinary circumstances" (Ritzer 1993, p. 35), a hallmark of efficiency. One



of this policy's major attractions is that, like the new penology, it focuses on a specific discredited group, the "dangerous" violent criminals who are mainly from lower class backgrounds. Therefore, by incapacitating these offenders who are responsible for a disproportionately high percentage of violent crimes, this measure is seen as potentially very efficient. An additional expectation is that three-strikes laws will have an increased deterrent effect (both specific and general) as a result of the increase in the severity of punishment. Theoretically, the deterrence factor coupled with incapacitation should enhance preventive efficiency; thus, this measure carries the promise that a substantial reduction of crime rates can be achieved. Indeed, the RAND Corporation's analysis of the long-term impact of California's three-strikes measure predicts a 22% to 34% decline in serious felonies (Greenwood et al. 1994).<sup>5</sup> But a major question remains: At what price will this decline be achieved, if at all?

### *Calculability*

According to commonsense thinking, three-strikes laws make punishment easily calculable. In a three-strikes sentence, as in other mandatory and determinate sentences, the release date is calculable at the time of the sentencing because only a limited good time range is stipulated in the law. The calculation of the sentence is based on the seriousness of the offense and the prior record of the offender. The "sentencing guideline grid" used in Minnesota often is mentioned as an example of calculable sentences. The Minnesota Sentencing Commission has "established a ten-category scale for ranking offenses and a seven-point scale measuring prior convictions. Combining these two dimensions provides a seventy-cell matrix. For each cell in the matrix, the commission established presumptive sentences" (Goodstein and Hepburn 1985, p. 77).

Zimring and Hawkins (1991) referred to this sentencing method as the "mechanical approach" (p. 161) to determining punishment. It severely limits judicial discretion and provides a sterling example of calculability both for policy makers and for the general public. Three-strikes measures work on the same principle as does the Minnesota grid with the addition of the mandatory component, which enhances the calculability of the punishment even more.

Calculability also implies that quantity becomes the indicator of quality.<sup>6</sup> In terms of punishment, the fact that three-strikes laws increase substantially the length of punishment for "dangerous" criminals is an indicator for many politicians, officials, and citizens that the "quality" of justice is improved. Also, the severe reduction of prisoners' good time included in these measures (e.g., for a second strike, offenders in California have to serve at least 80%

of their sentences instead of 50% as before) increases the calculability of punishment by lessening the disparities of time served among inmates. This feature of three-strikes laws seems to satisfy often-voiced demands for "truth in sentencing" because the time convicted offenders will serve in prison is known from the beginning and supposedly will increase the deterrent effect of punishment by substantially lengthening the sentences.

### *Predictability*

Prediction is one of the aims of science. The method of scientific inquiry, based on the principle of rationality that provides predictive ability, is highly valued in modern societies. In them, government authorities try to base public policies on rational foundations to be able to predict and control what is going to happen in the future. Thus, McDonaldization follows a highly rational model:

Rationalization involves the increasing effort to ensure predictability from one time or place to another. In a rational society, people prefer to know what to expect in all settings and at all times. . . . In order to ensure predictability over time and place, a rational society emphasizes such things as discipline, order, systematization, formalization, routine, consistency, and methodical operation. (Ritzer 1993, p. 83)

The importance of prediction in criminal justice is underscored by Gottfredson (1987), who asserted that prediction is "often a requisite to control and is central to the application of scientific methods to understand and control crime. If one seeks to control crime behavior, one needs first [to] be able to predict it" (p. 6).

Three-strikes laws are assumed to provide a high level of predictability regarding the nature and extent of penal sanctions because, by curtailing judicial discretion, the punishment is known and, consequently, the variations in sentences among jurisdictions and among individual judges are reduced or eliminated. Thus, theoretically, these measures are in line with the retributive ideal of uniformity of punishment.

### *Control*

McDonaldization involves the increased control over production and products, especially through the substitution of nonhuman for human technology (Ritzer 1993). Three-strikes laws increase substantially the control over sentencing, especially when they use prepared formulas such as Minnesota's sentencing guidelines grid for the determination of punishment. This

practice follows the formal legal theory of sentencing, which suggests that "sentencing is primarily determined by legal variables" (Dixon 1995, p. 1157). According to this model, imposition of a sentence can be accomplished easily by a computer program when relevant items of information such as the offense or prior criminal history are entered in the computer and the sentence is automatically meted out. The fact that upon conviction the sentence is mandatory and determined is supposed to give a great deal of control over the punishment into the hands of legislators and prosecutors and, as seen, is supposed to limit considerably the courts' discretion. This development is a major shift in the power structure of the criminal justice system. Many judges are frustrated by their loss of discretion and resent the fact that they have little say regarding the nature and amount of punishment. In most cases, their involvement in sentencing hardly amounts to more than a rubber stamp on law enforcement and prosecutorial decision making that determines the charges that will be leveled against defendants.

Mechanical control and nonhuman technology are applied not only to the determination of sentences but also to the location and conditions of punishment (e.g., the security level of prisons, the type of intermediate sentences). This is a part of the growing trend toward the application of nonhuman technology such as electronic surveillance, urinalysis, computer-based offender-tracking systems, or electronic monitoring as well as the use of other technical devices such as hydraulic doors or other automated security systems in prisons<sup>7</sup> in penal practice.

The extension of control by nonhuman technology started with the modernization of punishment and the emergence of the penitentiary. Bentham's 19th-century Panopticon was planned to incorporate into its architectural design a mechanism for a "totalizing surveillance" (Simon 1993, p. 4) that allowed for the reduction of correctional personnel. Garland (1990) pointed out that in the Panopticon "the power relations involved are, in a sense, automated and objective. They are an effect of the distribution of places and visibility and do not depend upon the strength or intentions of those who occupy these positions" (p. 146). According to Foucault (1977), the major impact of the Panopticon was "to introduce in the inmate a state of conscious and permanent visibility that assure the automatic functioning of power" (p. 201). He used the term "panopticism" to refer to the mechanical maximization of surveillance in prison.

Stryker's (1989) analysis of the "technocratization of law" in modern capitalist societies has direct relevance to the issue at hand. She emphasized the reliance of the modern state on science and predicted that the "advanced capitalist state will increasingly incorporate scientific-technical expertise" (p. 341). Furthermore, she pointed out that the reliance on technological

methods has a depoliticizing effect and converts questions of policy goals to questions of efficacy of means. This development is characteristic of the McDonaldization process including the penal policies that have culminated in the legislation of three-strikes laws.

### *THE IRRATIONAL CONSEQUENCES OF MCDONALDIZATION IN PENOLOGY*

Three-strikes laws and McDonaldization are phenomena of modernization that put a high value on rationality. However, although McDonaldization represents rationalism (i.e., scientific approach, positivism, modernity), it also leads to irrational consequences. Borrowing from Weber's (1968) concept of the "iron cage of rationality," Ritzer (1993) referred to these consequences as the "irrationality of rationality" (p. 12). In the case of McDonaldization, irrationalities may result in inefficiency, incalculability, unpredictability, and lack of control, which may have serious effects on penal policies and practices.

#### *Inefficiency*

One of the inefficiencies of fast-food sites is that although they are meant to be "fast," often long lines of people have to wait to be served (Ritzer 1993). In the criminal justice system, three-strikes laws contribute to the clogging up of courts and the overcrowding of confinement facilities. The measure also seems to have had a major impact on the number of cases that go to trial. In California before the new law came into effect in March 1994, about 90% to 94% of all criminal cases were settled through plea bargaining. But in the summer of that year, Santa Clara County projected a 160% increase in the number of criminal trials (Cushman 1996). In an assessment of the preliminary impacts of the three-strikes implementation for the first eight months, the California Legislative Analyst's Office (1995b) found a 144% increase in jury trials in Los Angeles County. In San Diego County, it is expected that there will be a 300% increase in jury trials. The decline in plea bargaining is the result of the mandatory aspect of the three-strikes law. Many offenders feel that they cannot gain much from a negotiated settlement under the new law and that it is preferable to exercise their constitutional right to jury trials without increasing their risks of substantially more severe sentences. The increase in the number of trials not only has affected the three-strikes cases but also has caused delays in nonstrike criminal and civil cases. For example, the Los Angeles district attorney transferred a large number of

attorneys who previously were handling white-collar cases to work on three-strikes offenses.

The growing backlog in the courts also has had an impact on county jails because more suspects are detained for longer periods of time prior to their trials (McCarthy 1995). Although some early studies indicate that the expected effects are evolving at a slower pace than as projected (Cushman 1996), there is a strong potential for major "gridlocks" in jails. The California Legislative Analyst's Office (1995b) elaborated on this situation:

Because offenders charged under the "three-strikes" law face significant prison sentences, most counties set bail for second-strike offenders at twice the usual amount and refuse bail for third-strike offenders. These bail charges, coupled with more offenders taking their cases to trial, result in more offenders being incarcerated in county jails. (p. 5)

Another efficiency issue is concerned with the type of offenders handled by the three-strikes law. This law was enacted to curb violent crime, or at least "serious" crime, through the incapacitation of "dangerous" and violent criminals. However, early findings in California indicate that most offenders prosecuted and convicted under this measure have been brought into the system for nonviolent offenses (California Legislative Analyst's Office 1995b). Furthermore, this measure inevitably will increase the numbers of elderly inmates in prisons because of the long terms mandated in this legislation.<sup>8</sup> In 1994, inmates age 50 years or older represented about 4% of the California prison population, but it was estimated that by 2005 they will constitute around 12% of the inmates (National Council on Crime and Delinquency 1994). Studies of crime patterns indicate that violent predatory crime tends to decline sharply with age (Shichor and Kobrin 1978); thus, a rapidly growing segment of the prison population will be confined in spite of the facts that its members pose little danger to society and that keeping them in prison is unlikely to reduce the volume of crime (Benekos and Merlo 1995). This is an ineffective use of limited criminal justice resources.

Also, the cost of implementation of the three-strikes law is related to effectiveness in that incarceration is an expensive correctional option. Although the three-strikes law is presented as a rational measure to curb serious crime and to punish serious habitual offenders, it may be a very expensive or even wasteful policy (O'Connell 1995), a suggestion that certainly merits a careful cost-benefit analysis. Ritzer (1993, p. 123) cited the columnist Richard Cohen, who observed that rational systems are not less expensive than other systems; indeed, they may cost more. According to all indications, the three-strikes law will increase considerably the cost of criminal justice operations because (a) more people will be detained in jails, (b) the increase

in the number of trials will necessitate the building of more courts and the hiring of more judges and other court personnel, (c) the number of long-term prisoners will grow and so more prisons will have to be built, (d) the growing number of elderly prisoners will need additional (and more expensive) health care than prisons usually provide (Merianos, Marquart, Dampouse, and Herbert 1997), and (e) welfare agencies will have to support a larger number of dependents of incarcerated felons for longer periods of time than ever before.<sup>9</sup>

It is a major concern that rapidly increasing correctional expenditures will have detrimental effects on other public services. For example, Greenwood et al. (1994) projected that, in California, "to support the implementation of the law, total spending for higher education and other services would have to fall by more than 40 percent over the next 8 years" (p. 34).

### *Incalculability*

The outcomes of three-strikes cases, which were supposedly easily calculable, often are not so. Concerning mandatory laws, Blumstein, Cohen, Martin, and Tonry (1983) observed that they are "vulnerable to circumvention because they are inflexible and require imposition of penalties that judges and prosecutors may believe to be inappropriate in individual cases" (p. 179). The situation is similar in jurisdictions that use sentencing guidelines that "do not assure the elimination or even the reduction of sentencing disparity" (Kramer and Ulmer 1996, p. 81).

This observation seems to be valid regarding three-strikes laws as well. One reason is that they are not being applied uniformly by prosecutors in the different jurisdictions. Cushman (1996) and Feeley and Kamin (1996) documented differences among California counties in the extent of use of this measure. Also, there have been many instances in which the incalculability of punishment has been demonstrated in jurisdictions where the three-strikes law was widely applied. For example, because of overcrowding of jails by detainees who were reluctant to plea bargain, many minor offenders have been released early from jail, and a large number of misdemeanants have not even been prosecuted. Thus, the calculability of punishment for minor offenders has been neglected and even sacrificed for that of three-strikes offenders. In other instances, some arrests that could have been qualified as three-strikes cases have been processed as parole violations rather than new offenses and, thus, were not considered as felonies (Spiegel 1994). In other cases, prosecutors and judges have ignored some previous felonies or redefined them as nonstrike offenses (Colvin and Rohrllich 1994). The recent

California Supreme Court ruling, mentioned earlier, that gives judges the discretion to overlook a defendant's prior convictions (Dolan and Perry 1996) is a reinforcement of the authority of the courts to determine the punishment of convicted offenders and to curb somewhat the gains of the prosecutors' influence on sentencing.

As noted, the quantity of punishment delivered (i.e., the length of incarceration) has been touted as a major virtue of three-strikes measures, whereas its effects on other aspects of social life and culture have not been considered to be important. For example, little concern has been paid to the concept of justice that requires a balance between the seriousness of the crime and the severity of punishment. In 1994, a California offender was sentenced to prison for 25 years to life for grabbing a slice of pepperoni pizza from a youngster (this sentence was reduced in January 1997, and he will be released by 1999). Another offender received 30 years to life for stealing a video recorder and a coin collection. Still another three-striker got 25 years to life for stealing a package of meat worth \$5.62, apparently to feed his family (Slater 1995). More recently, a heroin addict with a record of previous theft-related offenses was sentenced to 25 years to life for stealing two pair of jeans worth \$80 from a store (Abrahamson and Maharaj 1996). These and similar cases pose serious questions concerning the proportionality of punishment even though the offenders had prior felony convictions. One Los Angeles County Superior Court judge declared in this regard, "I refuse to dispense injustice" (Colvin and Rohrllich 1994, p. 40). Similarly, another aspect of justice, equal treatment, is being neglected because three-strikes measures focus almost exclusively on street crimes that usually are committed by poor offenders. Meanwhile, crimes of the middle and upper classes either are not affected or will be handled even more leniently than before because the criminal justice system that is overoccupied by predatory street crimes will have diminishing resources to deal with them. Geis's (1996) comments in this regard are well taken: "The failure to extend the 'three strikes and you're out' policy to white-collar offenders provides persuasive evidence of the class bias that fuels this viciously punitive policy" (p. 244). Thus, the implementation of this measure will increase perceptions, which already are pervasive among many, that the criminal justice system is biased, discriminatory, and unjust.

Another factor that adds to the incalculability of this measure is that it is not applied uniformly. Data pertaining to the first six months of implementation compiled by the Los Angeles Public Defender's Office indicate that minorities with criminal histories comparable to those of White offenders were being charged under the three-strikes law at 17 times the rate of Whites (Donziger 1996).

Although many citizens see the long sentences meted out under the three-strikes law as indicators of "high-quality" justice, there are others who will raise questions concerning justice, just desert, and injustice in American society. Some will consider this measure as an expression of the "triumph of vengeance over retribution" (Haas 1994, p. 127) when vengeance becomes institutionalized as a public policy (Shichor and Sechrest 1996).

### *Unpredictability*

Several of the issues concerning predictability resemble those that emerged in relation to efficiency and calculability. For various reasons, the outcomes of three-strikes cases are not as clearly predictable as they were intended to be, based on this law's mandatory and determinate nature. For example, in some instances victims refuse to testify when the convictions would carry sentences of long-term incarceration under the three-strikes law ("California Judge Refuses" 1994). In other cases, juries may fail to convict for the same reason. Forst (1983) cited studies of mandatory sentencing laws that found that

they tend to induce dismissals, acquittals, and other outcomes that make the laws ineffective, so that the longer average sentences for those convicted are approximately offset by increases in the number of persons not convicted and sentenced. Thus, sentence disparity actually increases under mandatory sentencing. (p. 179)

As noted previously, because of jail overcrowding caused by the growing numbers of detainees waiting for trials, many sheriff departments release minor offenders early to ease the situation. Sometimes this is done because of court orders that limit facility crowding. According to court sources, in Los Angeles County, misdemeanor offenders sentenced to one year in jail are serving on the average only 19 days (Lindner 1995). Thus, the implementation of the three-strikes law, instead of increasing the predictability of punishment, may have an opposite impact in nonstrike cases. Moreover, as has been seen, the outcome of a case under this law may be entirely different from what was foreseen because juries may refuse to convict, authorities may refuse to press a felony charge, or the courts may not count previous felonies. Also, by decreasing considerably the number of plea bargains and by increasing the number of jury trials, a larger number of outcomes may become unpredictable. Although plea bargaining should not be considered as the best method of dispensing justice, it does provide a certain level of predictability, being an almost permanent fixture of the criminal justice process. Thus, it seems that in many instances, including three-strike laws, instead of increas-



ing the predictability of punishment as they were meant to do, determinate and mandatory sentences may contribute to unpredictability.

Similarly, by placing the emphasis on the predictability of "aggregate control and system management rather than individual success and failure" (Feeley and Simon 1992, p. 455), three-strikes laws cannot predict, and are not interested in predicting, the effects of the punishment on individual convicts, and they may waste a great deal of money, time, and effort on false positives by keeping those who would not cause further harm to society incarcerated for long periods of time. Farrington (1987) pointed out, concerning prediction of criminal behavior, that "it is inevitably difficult to predict a rare phenomenon such as [the] high rate of offending, and it seems both unjust and inefficient to apply penal measures to persons who neither deserve nor need them" (p. 91). Three-strikes legislation was based on the assumption that the high rate of criminal behavior of "dangerous" offenders already has been proven; however, many times it is dependent on how the offenders' criminal records are being used by the prosecution and the courts. Although the predictability of the outcome of three-strikes measures is focused only on the punishment factor, the predictability of other outcomes that are influenced by the punishment does not seem to constitute a genuine concern for those who advocate such measures.

Finally, because the application of three-strikes laws may vary from one jurisdiction to another, the extent and accuracy of predictability also may vary among jurisdictions, as was the case concerning the calculability of punishment.

In short, like the case with many other public policies, the implementation of three-strikes laws is likely to lead to many unintended consequences that may defeat some of the very same purposes that the laws were supposed to fulfill.

### *Lack of Control*

Rational systems often can spin out of the control of those who devise and use them (Ritzer 1993). Sentencing based on an almost automatic decision-making system drastically reduces the court's authority to consider particular circumstances of offenses and individual differences among offenders. However, there are experts who maintain that to render a high quality of justice, a certain degree of judicial discretion is essential. The dilemma of sentencing under a mandatory system of punishment was noted by Tonry (1996):

The quality of justice is impoverished when sentencing laws or guidelines, in the interest of treating like cases alike, make it difficult or impossible for judges to treat different cases differently. The quality of justice and public respect for legal institutions likewise are diminished when judges, forced to choose

between their oaths to do justice and to enforce the law, participate in disingenuous circumvention of mandatory minimum sentence laws and rigid guidelines in order to do justice. (pp. 165-66)

There also is the issue of "hidden discretion"; that is, whereas the court's decision-making power in the imposition of punishment is severely curtailed, the discretion of law enforcement, and especially that of the prosecution, increases greatly. The charges brought against a suspect will be determined by these agencies. The major discretionary decision in many instances will be whether a case should be filed as a misdemeanor or a felony, which bears directly on the application of three-strikes laws. The changes in the locus of discretion in the criminal justice process mean that decision making will become less visible than before because courts are an open forum, and their decisions, even in plea bargaining cases, can be scrutinized and monitored much more easily than the ones made by law enforcement and the prosecution behind closed doors. Consequently, the ability of the judicial system to control the imposition and administration of the law will be affected. In many instances, the lack of control will stem not from the latitude in sentencing but rather from the growing discretionary powers given to agencies in the pretrial stages of the criminal justice process. Because of the reduced visibility of decision making in the determination of charges, in many cases sentencing disparities among jurisdictions may become even greater in spite of the promise of increased control over such differences under three-strikes laws.

Another related aspect of control, namely ensuring that the most "dangerous" offenders who are the most harmful to society will be the ones incapacitated for long periods of time, also is not fulfilled. Many three-strikes cases involve property offenders and drug abusers rather than vicious, violent criminals.

In sum, the promise of a high level of control over punishment, which was one of the major aims of mandatory and determinate sentencing including three-strikes laws (the other was the increase in the severity of punishment), can spin out of control and result in unintended and unforeseen consequences.

## *CONCLUSION*

The three-strikes laws that have spread recently in the United States are a reaction to a moral panic that has swept the country since the late 1970s. On the public policy level, these measures can be viewed as being related to the new penology trend. They are based on the concern for managing aggregates of "dangerous" people rather than being concerned with rendering justice,

protecting the community, or attempting to rehabilitate individual offenders. The emphasis is on rational criminal justice operations that apply management methods based on statistical estimates of patterns of crimes and future inmate populations, risk indicators of future criminal behavior, operations research, and system analysis.

Three-strikes laws also are in line with the modern sociocultural ethos of McDonaldization (Ritzer 1993), a model built on the principles of rationality embodying an attitude that "it is possible to calculate and purposively manipulate the environment" (Chirot 1994, p. 63). However, the quest for extreme rationality can lead to irrationalities in the practical workings of this model (Weber 1968; Ritzer 1993). Often, the application of three-strikes laws results in inefficiency of the criminal justice process, punishments are not always clearly calculable, predictability of outcomes may be negatively affected by rational procedures, and the system may lose control over the nature of punishment. In short, as is the case with many other public policies, three-strikes laws could lead to a host of unintended consequences that may defeat the purposes for which they were intended. Probably, the greatest irrationality of the penal policy represented by three-strikes laws is their tremendous economic cost. Various studies have indicated that three-strikes laws will cost such sums of public money that they can hardly be characterized as rational on the basis of any cost-benefit calculation. In fact, these laws may seriously endanger the quality, or even the existence, of some important and essential social programs such as support for higher education, welfare, environmental protection, or cultural programs and may have a negative impact on the quality of life for millions of people (see Greenwood et al. 1994). In sum, it seems that, as Ritzer (1993) claimed, modern contemporary society is locked into the "iron cage of rationality," which is characterized by policies made on a rational basis that lead to irrational consequences. This is demonstrated in current penal policies given that punishment "relies on meanings and symbols and representations that construe its own actions and weave them into the belief systems, sensibilities, and cultural narratives of the social actors and audiences involved" (Garland 1991, pp. 192-93).

Some advocates of these measures, especially politicians such as California's attorney general (who is a potential Republican candidate for governor in 1998), attribute the major part of the decline in the crime rates in 1994 to the application of the state's three-strikes law (Ingram 1995). However, others maintain that mandatory sentences have not made the streets safer (e.g., O'Connell 1995) and that although Americans are proud of their personal freedoms and their constitutional rights, many of them do not feel free to walk the streets of their own neighborhoods.

The general results of three-strikes laws remain to be analyzed. Future studies will have to evaluate a wide range of policy-related issues in addition to the crime rates. They also will have to gauge public perceptions regarding crime including the fear of crime, the readiness to continue costly incapacitation policies, and the willingness to deal with societal problems related to crime and social control. As Mauer (1994) pointed out, the "overriding problem with this legislation is that it is diverting our attention from a serious discussion of how the nation could go about addressing the crime problem in a comprehensive way" (p. 12). Finally, there should be some concern with theoretical and ethical issues such as justice and injustice, the proportionality of punishment, the amplification of crime in the media, the symbolic meanings of three-strikes laws, the racial aspects of the application of these measures, and the degree of punitiveness that a free society can tolerate.

## NOTES

1. In a review of three-strikes laws nationwide, Turner, Sundt, Applegate, and Cullen (1995) found that 37 jurisdictions had proposed three-strikes legislation by 1995; out of these 37 jurisdictions, 15 actually enacted such laws, which are not exactly the same in all the jurisdictions.

2. Citizens in 19th-century England distinguished between the "deserving" and the "undeserving" poor. The undeserving urban poor were seen as paupers or the "criminal class." The Poor Laws of 1834 were enacted to regulate the growing population of the urban poor in large industrial cities (Tobias 1972). Also in America during the colonial period, there was a negative public attitude toward certain types of poor people, especially "vagrants." For example, the Poor Law of North Carolina in 1754 was titled "An Act for the Restraint of Vagrants and for Making Provisions for the Poor." A 1699 Massachusetts law was titled "An Act for Suppressing and Punishing Rogues, Vagabonds, Common Beggars . . . and Also for Setting the Poor to Work." Workhouses were established in several colonies with their primary function being to prevent vagrants from endangering the peace of the towns. Later, in the 19th century, there also was public sentiment against the "paupers" who were held responsible for their own situations and who were seen by many people as potential criminals (Rothman 1971). Wilson (1987) and most other social scientists relate the development of "underclass" or "dangerous classes" to the social arrangements of modern industrialized societies and do not imply that members of these classes are responsible for their own predicaments.

3. There is a contrast between "substantive rationalization" of the law, which "means the intrusion of economic, sociological, and ethical criteria upon formal-rational reasoning and decision making" (Savelsberg 1992, pp. 1346-47), and "technocratization," which is "the movement toward exclusive use of causal reasoning by scientific-technical experts to make and administer state policy" (Stryker 1989, p. 342). Both the new penology and McDonaldization are based on technocratization.

4. Cost estimates of three-strikes implementation indicate that in California, correctional expenses by 2002 will double their share in the general budget from 9% to 18% (Greenwood et al. 1994). The California Legislative Analyst's Office (1995a, p. 7) forecasted that the costs for the California Department of Corrections in 1999-2000 would be about \$5 billion (in 1994-95 dollars), an increase of nearly 60% in five years. These projections come on top of the increase

in correctional expenses that has occurred during the "imprisonment binge" of the 1980s. During that period, "Absolute spending on corrections has increased 217 percent, far outstripping any other segment of the criminal justice system. . . . During the past decade, state spending in corrections was the fastest-growing category of all state spending categories" (Irwin and Austin 1994, p. 13).

5. Three-strikes measures do not focus on the celerity and certainty of punishment. Although they try to make sure that convicted offenders will receive harsher sentences, they do not focus on the apprehension rate. Regarding the celerity of punishment, indications are that this law may slow down rather than accelerate the criminal justice process.

6. The tendency to use quantity as a measure of quality is a characteristic of American culture that has a global influence and is seen by many as the model of modern society (see Kuisel 1993).

7. An example of this type of control is the maximum-security prison in Pelican Bay, California, that was opened in the late 1980s and was designed to hold the most dangerous prisoners in the state. The prison is subject to several lawsuits claiming that its confinement conditions violate the Eighth Amendment prohibition against "cruel and unusual punishment."

8. The definitions of "elderly offenders" or "elderly prisoners" are not standard. Several studies dealing with elderly offenders have followed Shichor and Kobrin's (1978) definition of age 55 years or older, whereas others have used 65 years of age as an indicator of "older." There are some correctional statistics that group "older" prisoners into a category of "age 40 years or older."

9. The California Legislative Analyst's Office (1995b) calculated that to maintain the current 182% occupancy rate in California prisons, the state will have to build 15 prisons at a cost of about \$4.5 billion by 1999. Greenwood et al. (1994) estimated that the implementation of the three-strikes law in the same state will cost between \$4.5 billion and \$6.5 billion per year. Mandatory sentences for "habitual offenders" cost extraordinarily large sums of money in other states as well.

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