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Third Strikers under Three Strikes and You're Out: Politics and Prosecutions

Abstract: Between 1994 and 2012, California's Three Strikes Law mandated that first and second strikes must be either violent or serious, but allowed any felony to qualify as a third strike. Moreover, defendants could have been struck out on a "wobbler" offense, which granted discretion to the District Attorney to determine whether the offense should be charged as a misdemeanor or a felony. Starting in 1994, hotly contested elections for California's District Attorneys often featured position taking on third strike cases with some candidates promising to strike out on any and all felonies while others positioned themselves away from felonies that were not serious or violent. As several legal scholars noted, some repeat offenders convicted of minor crimes for their third strike were sent away for life, while others received much lighter sentences. Disparities in the application of the law appeared to depend on geography among the 58 California jurisdictions. Using California Department of Corrections data and other county data we find a relationship between county ideology, county finances, and the number of third strike convicts incarcerated on a third strike from non-serious, non-violent offense and "wobbler" offenses.

Keywords: Three strikes law; prosecutorial discretion; "wobbler" offenses.

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1 Introduction

In November 1994 Californians passed Proposition 184, a "Three Strikes and You're Out" law (Three Strikes), which added sentence enhancements to recidivist criminals. The statute passed with overwhelming support promising Californians "longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent offenses" (CA Penal Code, §667 n.d.). In addition it sought to wrest control from judges, who, the proponents of the measure claimed, were skirting sentencing laws (Vitiello 1997a,b).

In so doing, it elevated the role of the prosecutor in sentencing, as the mandatory minimum sentencing scheme in the law would allow prosecutors some discretion which was at first denied to judges. California's version of the Three Strikes law is the most severe in the nation with its applicability to felonies not considered "violent" or "serious" in the penal code in the third strike. To trigger the law, the first and second strikes must be either violent or serious but the third strike needed only be considered a felony. Moreover, California's penal code includes "wobbler" offenses, which are misdemeanors that are elevated to felony status because of the defendant's prior record. Thus the law allowed prosecutors to determine whether the crime should be prosecuted as a misdemeanor or as a felony. Until the passage of Proposition 36 in 2012,¹ wobblers could be counted as third strikes if charged as felonies although they are neither violent nor serious. Several scholars in a variety of disciplines have discussed potential issues with mandatory minimum schemes and prosecutorial discretion, but to date none have explored the role of the prosecutor in California's law in the portion of the law that allowed for the greatest discretion, wobblers. It is this lacuna we begin to fill.

In this paper we explore the incidence of third strike-outs for non-serious and non-violent felonies and wobblers. We are interested in assessing the impact of prosecutorial discretion and the influence of political and county-wide factors on the incidence of strike-outs among the counties. Anecdotal and case study analysis suggests district attorneys campaign on the issue with promises of harsher or more lenient positions depending on the ideology of the county. Moreover, as the electoral politics literature tells us, legislators and elected executive offices respond to electoral pressures. This paper explores convictions on third strikes to determine whether there are significant differences among counties and if so, what factors contribute to these differences. As Bjerk (2007) notes, it is important to understand how prosecutorial discretion plays out with regard to mandatory minimum sentencing because "future policy must take into account the degree to which the effects of these guidelines will be affected by the mitigating actions available to agents within the court" (592). Moreover, if prosecutors have latitude in making decisions about charging, whether their decisions are made with equity is a question of importance. Did political pressures and county demographics influence prosecutorial behavior and thus affect the incidence of third strike convictions for non-serious non-violent crimes in California's counties?

While the law is plain on its surface, provisions within the law have made the application of "Three Strikes" anything but uniform. Research has demonstrated disparities in the application of the law among California's 58 county jurisdictions

¹ Proposition 36 significantly revised the Three Strikes law by requiring that a third strike be either a serious or violent felony.

(Bowers 2001; Chen 2012). As a result, some repeat offenders convicted of minor crimes for their third strike are sent away for life, while others receive much lighter sentences. While several studies note that particular counties appear to apply the law dependent on ideology of the district attorney, this paper makes a unique contribution to the literature by empirically examining all of California's counties where the prosecutors' discretion would be most evident, in non-serious and non-violent crimes. In addition to examining how ideology and party registration affect the incidence of non-serious, non-violent strike-outs, we assess the impact of county financial health on third strikeouts, as trials can be quite costly for counties as most third strike convictions are the result of trials. Few studies have included this measure leaving out an important and practical part of the calculus.²

2 The “Three Strikes and You’re Out” Law: History

California's recidivist statutes imposing up to life imprisonment were well established by 1994, the year the statutory initiative enacting Three Strikes became law, but the initiative took an even harder line approach to the problem (Olson 2000).³ Mike Reynolds began the campaign for the Three Strikes law following the murder of his daughter Kimber Reynolds in 1992, realizing success following the wide media coverage of the Polly Klaas murder. It qualified for the ballot as Proposition 184 within weeks (Barr 1995), and passed 72%–28% (Proposition 184: “Three Strikes” 1994). While a legislative statute may be amended at any time by a simple majority vote of the legislature, constitutionally, the legislature can only change a law enacted through popular initiative if approved by the electorate (Cal. Const. art. II, §10 n.d.). The electorate once rejected a change to the law in November 2004 under Proposition 66, 47%–53%,⁴ but eventually did so in November of 2012 under Proposition 36. Because of the difficulty in amending the law, and the anecdotal evidence pointing to the variability in its application under the part of the law that is the most extreme and unique, it is surprising that a more comprehensive study had not been conducted on this part of the law.

² Elsa Y. Chen (2008) explores the disparities in the convictions among ethnic and racial groups and finds a spastically significant difference among Blacks and Whites in the application of wobblers.

³ Two versions of Three Strikes became law. The legislative version was sponsored by Assembly member Bill Jones (R-Fresno) in the wake of the Polly Klaas murder and ensuing publicity. According to Barr (1995), California's legislators were nearly compelled to pass the bill and Governor Wilson signed it as “emergency legislation” in early March.

⁴ The Three Strikes law is codified in two places: as section 667 subdivisions (b) through (i) the version the Legislature enacted, and the initiative version, as section 1170.12. For a complete history of the law see (People v. Superior Court of San Diego County 1996).

2.1 Major Holdings of the “Three Strikes” Law

A strike is a prior conviction of a serious or violent felony.⁵ The effects of the law are cumulative. Penal Code Section 1170.12 requires that anyone convicted of any felony that has previously been convicted of a “violent or serious felony” must be sentenced to twice the number of years generally assigned for the current felony. Any defendant with two prior serious or violent felony convictions who was convicted of any third felony, including non-serious, non-violent was subject to an automatic sentence of three times the sentence for the current offense or twenty-five years to life, whichever was greater (CA Penal Code, §667 n.d.).⁶

Prosecutors have discretion to charge a defendant with either a misdemeanor or a felony for specified crimes, known as “wobblers.”⁷ About 140 violations

5 Serious felonies are listed under Penal Code Section 1192.7 (c), while violent felonies are listed under Penal Code Section 667.5 (c). The triggering third strike felony (current strike) must have occurred after the “Three Strikes” law became effective; however, the prior strike convictions could have occurred at any time. In both the cases discussed in the US Supreme Court, crimes convicted before 1994 count as strikes, even though the law had not yet been implemented. (CA Penal Code, §17 n.d.) (a) “A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions”

Felonies: (CA Penal Code, §18 n.d.) 18. “Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years; provided, however, every offense which is prescribed by any law of the state to be a felony punishable by imprisonment in any of the state prisons or by a fine, but without an alternate sentence to the county jail, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both.”

Misdemeanors: (CA Penal Code, §19 n.d.). “Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.”

The length of time and location of punishment determines whether someone is guilty of a misdemeanor or a felony (People v. Nguyen 1997). See People v. Nguyen (1997) 54 Cal. App. 4th 705 at 500. “Thus, it is the potential punishment for an offense that determines whether the offense is a felony or a misdemeanor. Under Pen. Code, Section 666, defendant’s offense was “punishable . . . by imprisonment in the state prison”

6 The Court need not take into account the length of time between the prior strikes and the third strike in order to strike out a defendant. Therefore, regardless of the number of years between the current and previous conviction, a defendant could face life in prison (The People v. The Superior Court of San Diego 1996).

7 In challenges to the law under the Eighth Amendment to the United States Constitution before the Supreme Court in 2003 both Leandro Andrade and Gary Ewing were sentenced under “wobblers” charged as felonies, petty theft with a prior (Section 666), elevating the misdemeanor to a felony and subject to sentences of twenty-five years to life for each count (*Lockyer v. Andrade* and

qualify as “wobblers” subject to alternative felony/misdemeanor punishment (Barr 1995).⁸ For example, petty theft, a misdemeanor, becomes a “wobbler” when the defendant has previously served a prison term for committing specified theft-related crimes. (CA Penal Code, §666 n.d.) If charged as a misdemeanor, petty theft is “punishable by [a] fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or both.” (CA Penal Code, §490 n.d.) Several additional crimes qualify as “wobblers” regardless of the criminal history of the defendant including grand theft, money laundering, receiving stolen property and assault with a deadly weapon. (*Ewing v. California* 2003). The dissent in the *Ewing* case described the “wobblers” classification as dependent “upon the nature of the offender, not the comparative seriousness of the offender’s conduct.”⁹ For purposes of the “Three Strikes” law, “wobblers” triggered a third strike when they were treated as felonies.

2.2 Discretion

The three strikes law was an attempt to limit the discretion available to trial courts, who the proponents of the measure argued, had undermined the mandatory minimum sentencing legislation in existence. As Franklin (2010) notes, under mandatory minimum sentences, discretion has been displaced “upstream from judges to prosecutors” (693). The law built greater discretion for the District Attorney pursuant to California Penal Code Section 1385 to move to dismiss or strike a prior felony conviction allegation “in the furtherance of

Ewing v. California, respectively 2003). Petty theft may be punished as a felony if the defendant “[has previously] been convicted of petit theft, grand theft, auto theft . . . , burglary, carjacking, robbery, or a felony violation of Section 496 [receiving stolen property] and . . . served a term therefore in any penal institution...” (CA Penal Code, §666 n.d.).

⁸ See Barr (1995) footnote 91. “Along with a number of obscure violations such as bribery of a sporting official, grand theft: dog, eavesdropping, and destruction of telephone lines, some common “wobblers” include: assault with a deadly weapon, theft of a credit card, cashing a check with insufficient funds, receiving stolen property, vandalism, solicitation ...” Also see Justice Stevens’ dissent in *Ewing*: “wobbler statutes cover a wide variety of criminal behavior, ranging from assault with a deadly weapon, Section 245, vehicular manslaughter, Section 193(c)(1), and money laundering, Section 186.10(a), to the defacement of property with graffiti, Section 594(b)(2)(A) (West Supp. 2002), or stealing more than \$100 worth of chickens, nuts, or avocados, Section 487(b)(1)(A) (West Supp. 2003); Section 489 (West 1999).” at 49–50. Also Gordon at note 3: Penal Code 245 (assault with a deadly weapon), 246 (shootings at inhabited buildings), 273.5(a) (abuse on a cohabitant), 461 (second degree burglary), 473 (forgery and counterfeiting).

⁹ Justice Stevens joined Justices Souter, Ginsburg and Breyer 538 U.S. 11 (2003) at 50.

justice,” or on the basis of insufficient evidence to allege the strike. District Attorneys establish internal policy as a guide for prosecutors as to when to charge a strike, when to refrain, as well as when to vacate a prior strike (Chen 2012). In pursuing a second or third strike, the prosecutor must “plead and prove each prior felony conviction.” Since the *People v. Superior Court of San Diego* (Romero 13 Cal. 4th 497, 1996) decision however, judges were included in exercising discretion in three strikes cases. Trial courts under California law may consider “those factors that direct similar sentencing decisions,” such as “the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, ... [and] the general objectives of sentencing” when exercising discretion [CA Penal Code, §1385 n.d.; *People v. Superior Court of San Diego County* (1996); *Ewing v. California* (2003)]. California trial courts can also strike previous strikes both with and absent the request of the prosecution. Thus, trial courts may avoid imposing a “Three Strikes” sentence in two ways: first, by reducing “wobblers” to misdemeanors (which do not qualify as triggering offenses), and second, by vacating allegations of prior serious or violent felony convictions (striking a strike) (Barr 1995). The latitude given prosecutors is similar and increasingly powerful under Section 17 b(4) and California appellate rulings, as district attorneys could recommend to the court and pursue “wobblers” for either the misdemeanor (and thus choosing not to trigger the strike) or the felony, subjecting the defendant to the possibility of a life sentence. The determination to pursue a “wobbler” as a misdemeanor would have meant the difference between one year incarceration and a lifetime. The resulting legal practice strengthened prosecutorial discretion, as trial courts are increasingly overturned when they reduce a sentence, and sustained when they do not upon challenge in the California Courts of Appeals. (*People v. Superior Court of San Diego County* 1996; Pillsbury 2003; Walsh 1999).¹⁰

10 Plea bargains within the scope of “Three Strikes” have increased the authority of prosecutors and in many cases hastened the third strike of defendants. Prosecutors seek plea bargains for several reasons including expediency, efficiency, cost effectiveness and the procurement of a guilty plea when the success of a trial may be questionable for the DA. With successful negotiations, the criminal justice system allows prosecutors to predetermine the sentence a particular defendant receives, treading on judicial functions. Olson argues this is particularly unfair to first strike defendants “because they may not understand the criminal justice system and would be unable to fully appreciate the consequences of pleading guilty.” (Olson 2000) First strike defendants will accept a felony plea in exchange for shorter sentences but then suffer more severe punishment upon conviction of a second or third offense. (Olson 2000) Zimring, Hawkins and Kamin find that prosecutors plea bargain on second strike cases but will go to trial in third strike cases (2001).

2.3 Prior Literature and Theoretical Expectations

Scholars in several disciplines have turned their attention the implementation of mandatory sentencing schemes passed to lessen the disparities in sentencing outcomes and prosecutorial use of discretion. The research finds that factors contributing to sentencing outcomes are quite nuanced and dependent on jurisdiction and social context (Free 2002; Bjerck 2007; Ulmer et al. 2007; Franklin 2010; Chen 2012). Research has explored how various factors have affected prosecutors' decisions to file charges and sentencing outcomes. These include studies exploring economics (Ulmer and Johnson 2004; Franklin 2010; Chen 2012), race (Free 2002; Kramer and Ulmer 2002; Farrell 2003; Ulmer et al. 2007; Bjerck 2007), sex (Bjerck 2007), and community ideology (Helms and Jacobs 2002; Weidner and Frase 2003). From these studies we learn that Blacks and Hispanics are more likely to face punitive sentencing than Whites. Free (2002) concludes that race affects prosecutors' decisions to seek the death penalty. Moreover, Bjerck (2007) finds that prosecutors exercise discretion to circumvent three strikes law, but were less likely to do so for Hispanics and in some cases Blacks. Ulmer et al. (2007) conclude that Blacks were no more likely to receive mandatory minimums, but Hispanics were "considerably more likely to receive mandatory minimums across the board" (450). However, their findings are nuanced as Whites were less likely to receive the mandatory minimums than Blacks in communities with higher concentrations of Black residents. Chen's research (2012) substantiates much of the existing research – when the minority population is large enough, they are more likely to receive harsher treatment (in the present case California's Three Strikes Law). Therefore she finds that the odds of Latinos receiving a three strikes sentences are greater with each percentage increase above the mean; conversely, as the population of African Americans is so much smaller, she does not find a similar effect. In addition, she finds that the odds of any offender receiving a Three Strikes sentence is higher where the percentage of Latinos is higher. Further research demonstrates that men are nearly 1½ times more likely to receive a mandatory sentence than women under most circumstances (Ulmer et al. 2007); however, this finding is unclear with regard to three strikes offenders and likely because of the low number of women in the samples.

Economics has a more complex role in the equation as it correlates with the predictors of crime. The theory behind these studies undergirds the belief that disadvantaged groups are more likely to receive harsher sentencing due to a perceived threat to those in power. However, Franklin (2010) finds more heterogeneous and impoverished communities experience increases in the odds of

case dismissal. These findings support Ulmer and Johnson (2004) who find that poverty rate in the community does not influence sentence length decisions.

With regard to Three Strikes, Bjerk (2007) finds that prosecutors are nearly two times more likely to prosecute three-strikes arrestees for lesser misdemeanor crimes, circumventing three strikes laws (593). Bjerk's (2007) study explores several states with three strikes laws in his data set, finding the probability of prosecution of a misdemeanor for defendants arrested for a third strike increases by 8%. He isolates California in his study noting that it has the broadest and most severe penalties in addition to the most number of defendants in the data, finding no significant differences between California and other states. This supports earlier research from the state level that court actors will go to some lengths to avoid mandatory minimum sentencing schemes finding them overly rigid (Tonry 1996). However, in a study of California's mandatory minimum sentencing initiative passed in the early 1980s, Kessler and Piehl (1998) find that mandatory minimums lead to more punitive sentencing as a result of the discretion inherent in the law, increasing sentence lengths. This literature paved the way for research on three strikes laws in California, for which to date Chen (2012) has the most comprehensive study in California.

Chen (2012) explores under what conditions prosecutorial discretion is evident and includes measures of political opinion and electoral pressures as well as county and individual demographics (see descriptions above). With regard to political responsiveness, Chen uses party registration to represent ideology of the county and finds that political conservatism as measured by voter registration to the Republican Party influences the extent to which three strikes is implemented in California, with the opposite finding for registration of Democrats. Her research is a good start to an important question but tells us much less about prosecutorial discretion than implied. Specifically, prosecutors exercise discretion in two distinctly different ways while prosecuting potential third strikers. As Wright (2009) notes, the job of prosecutor, while an executive office, is distinguishable from all other executive offices due to the narrowness of its focus. The DA's job is to prosecute crime. However, under California's Three Strikes law, non-serious and non-violent felonies could trigger a lifetime sentence; moreover, the determination to pursue a "wobbler" as a misdemeanor versus a felony would have meant the difference between a maximum of one year incarceration and up to a life sentence. If district attorneys were exercising discretion according to political forces, we would expect to see it most likely in cases of non-serious and non-violent felonies and wobblers.

Given the prospect of elections, the possibility of losing elections from a poor "win" record affects District Attorneys' decision making. Convictions are one way of measuring a district attorney's success (Ulmer and Johnson 2004). At the end

of their terms, district attorneys must face their constituents and ask to be reinstated in their jobs, just as executive and legislative officers must do. They are judged by their successes in office and their adherence to constituents' ideological positions. Therefore, from the public's vantage point, success in office for a prosecutor is quite simply percentage of cases won that went to trial and number of convictions. "Voters expect prosecutors to take the lead in addressing crime, and they expect legislators to give them the legal tools to do the job" (Wright 2009, 6). While it is very difficult to ascertain the number of cases that are *not tried* in an attempt to procure a conviction under fear of losing, it is well established that plea bargains serve the interests of both the DA and the defendant. The DA likely perceives that she will be served by adding a conviction to her record and spared a costly and losing trial. In addition, in cases that could become high profile disasters, district attorneys may prefer the plea bargain to avoid the publicity and possibility of disenchanting an electorate.

Alternatively, as California's Legislative Analyst's Office (2005) posited, D.A.s may have chosen to prosecute strikers for "non-serious, non-violent offenses that may be easier to prove in court knowing that the Three Strikes sentence enhancement will still apply. The extent to which this occurs is unknown." In accordance with California law, juries asked to make a determination of guilt are not informed of the strike status of a defendant or the possible punishments,¹¹ and therefore a decision to find for a guilty verdict in a felony case is easier than in a serious or violent felony case. Their report indicates that over half (56%) of strikers are incarcerated for non serious non violent felonies. However, the report concludes that counties' justice systems implement the law in various ways across the counties by prosecutors and judges. "In some counties, for example, prosecutors seek Three Strikes enhancements only in certain cases, such as for certain types of crimes that are particular problems in their county or where the current offense is serious or violent. In other counties, prosecutors seek Three Strikes enhancements in most eligible cases. Similarly, judges vary in how often they dismiss prior strikes, based on discretion afforded to them under the Romero decision." Their report shows that Kern County is 13 times more likely to trigger the Three Strikes law with an arrest than San Francisco. This is consistent with previous research which finds Kings and Kern Counties have the highest rates of Three Strikes usages while San Francisco and Alameda Counties have the lowest (Kieso 2005).

Candidates for DA announce their criminal justice philosophies; endorsing or rejecting certain policies, including, specific provisions of the "Three Strikes"

¹¹ Under the decision in *People v. Nichols*, 54 Cal.App.4th 21 (1997) jurors are not to be instructed on the penalties when deliberating on a case, nor are the jurors to be informed on prior criminal history. Therefore, jurors are instructed not to consider this in their deliberations and their votes.

law, as witnessed in the 2004 DA's race in San Francisco. District attorneys must campaign for election; they have become part of the constituent-dependent officialdom that Mayhew (1976) speaks of in his seminal work on Congressional members' behavior and the electoral connection. His thesis with regard to congressional members is that legislators' behavior is motivated by the prospect of reelection and that the pursuit of this goal affects the way they legislate, take positions on policy and interact with constituents. Both as candidates and elected officials, district attorneys must be concerned with the perception of their constituents as well as the special interests that may be impacted by their decisions in office. Examining prosecutors specifically, Gordon and Huber (2002) find that securing reelection is the most influential factor influencing prosecutorial behavior (see also Wright 2009). Martin and Podger (2004) explain, Kings County District Attorney Greg Strickland lost his reelection campaign in 1998 after angering the prison guards, who in retaliation, spent \$30,000 against him suggesting he was soft on crime. As Wright (2009) summarizes, prosecutors can assume the public pays attention to their choices because they work on questions that voters find salient – those affecting public safety. Moreover, local news will cover with frequency the day to day business of the DA's office.

The prosecutors' office is a hybrid of executive and judicial functions (Chemerinsky and Levenson 2008). The discretion exercised in “wobbler” cases and “Three Strike” cases and the attendant adjudications placed more emphasis on the DA's role in the judicial branch. In light of the diminution of trial court discretion, the electoral connection became increasingly problematic. In races from Kings County to San Francisco to Los Angeles and San Diego, candidates and incumbents face a constituency bent on choosing a district attorney candidate closest to their ideological positions, not necessarily on their adherence to California law (Marelius 2002). This helps explain why candidates running for the office may take official positions that are contrary to existing law, such as those in San Francisco:

“The candidates support medical marijuana, oppose the death penalty and favor limited use of California's “three-strikes” law, and their tough talk about punishing criminals -- the staple of elections for district attorney in most other places – is tempered with vows to rehabilitate, instead of merely lock up, miscreants” (Bulwa 2003).

Furthermore, district attorneys are subject to recall elections should their constituents find they are not adhering to favored policies. Marin County District Attorney Paula Kamena faced the threat of a recall campaign because she was accused of “inhumane” policies on medical marijuana. She was one of six district attorneys throughout the state targeted by advocates of medicinal marijuana (Fimrite 2001).

Given the pressures inherent in elected positions, the differences among the counties' ideological positions and the vagaries of elections, it stands to reason that counties vary greatly in their allegiance to the "Three Strikes" law and prosecutions of "wobblers" as a third strike specifically. What all this meant was that the jurisdiction of conviction might have been a good predictor of a defendant's chances of conviction under California's "Three Strikes" law. The result manifests as differing sentencing schemes in differing jurisdictions. The Bureau of Justice and National Institute of Justice (NIJ) found "a pronounced discrepancy in sentencing from county to county after the enactment of the "Three Strikes" law" among the twelve counties in California they studied.¹²

Anecdotal evidence supports the NIJ's findings. Olson (2000) cites evidence that Alameda County strikes "virtually all third strike offenses and charge the offenders as second strike defendants" while San Diego county has the highest conviction rates of second and third strikes per capita than any county.¹³ "[A] guy in Alameda County with a rock of cocaine who qualifies for 'Three Strikes' faces a maximum of three years and technically probation. If the guy drives down here to San Diego, it's 25 to life" (San Diego Superior Court Judge Thomas Whelan, cited in Gordon 2004). Following his election in 1996, San Francisco District Attorney Terence Hallinan asserted "We pretty much use three strikes [only] for vicious people ..." (Perry and Doland 1996). Other studies indicate that Sacramento is seven times more likely proportionately, to use three strikes than Alameda and San Francisco counties "that rarely use the law" (Males et al. 1999). In some counties, the implementation varied by District Attorney. Los Angeles DA Gil Garcetti instructed his deputy district attorneys to prosecute all "wobblers" as felonies (Berg 1994). However, his successor Steve Cooley instituted policy whereby defendants in non-serious nonviolent offenses were ineligible for a life sentence under the "Three Strikes" law (Barr 1995).

According to (Ricciardulli 2002), the drop in percentages of non violent offenses triggering a third strike discussed above is likely attributable to the change in prosecutors in Los Angeles, as it is the largest county in California and the source of the greatest percentage of "Three Strikes" defendants (see also Barr 1995). In their six county study Gerber et al. (2001) found that fewer

¹² See also (Olson 2000; Chiang 1996; Clark et al. 1997; Perry and Doland 1996; Gordon 2004) San Francisco has the lowest number of second and third strike felony convictions at 0.3 per 1,000 felony convictions; confirming San Diego's highest second and third strike felony convictions of any county in California, 35.3 per 1,000 felony convictions and San Francisco's lowest at 4.9 per 1000 felony convictions. A defendant is nine times more likely to be sentenced as a felon in San Diego than a defendant in San Francisco.

¹³ Policy by Alameda District Attorney Thomas J. Orloff instructed Alameda prosecutors to invoke the third strike only when the third strike charge is a serious or violent felony (Olson 2000).

felony complaints were filed, and a much lower proportion of felony arrests led to Superior Court prison sentences in San Francisco, Marin, and Alameda counties, which had the lowest voter support for Proposition 184. Moreover, the rate of prison sentences in high-support counties is “typically two to three times the rate in the low-support counties” (70).

Studies by Walsh (1999, 2007) support the assertion that prosecutors exercise their discretion in cases where defendants face third strikes for less than serious and violent felonies. Her study is of note as it is among the first to consider discretion as the focal point in three strikes analysis rather than crime control. Examining prosecutors' authority to strike prior strikes among all types of third strike offenders, she concludes that prosecutors do not treat offenders differently. However, she also notes that priors are stricken in those cases that involve less serious crime and when defendants have a reduced risk of recidivism (Walsh 1999, 16). Using survey data of 21 counties' District Attorneys she finds that 92% said they had used their discretionary authority to strike a strike, and 15 of these counties had established written guidelines for striking prior strikes (Walsh 1999, p. 16; see also Walsh 2007).

Given the differing ideologies and electoral settings of DAs among the counties, we expect the incidence of third strikes for non serious and non violent and wobblers to vary by county. It is to this inquiry we now turn.

3 Data

We gathered data for all of California's 58 counties for the years 2001–2010. For our analyses we chose two dependent variables to measure prosecutorial discretion – the number of prisoners incarcerated for “wobbler” third strike offenses by county, and the number of prisoners incarcerated for non-serious non-violent third strike offenses by county.¹⁴ Using non-serious, non-violent offenses

¹⁴ Our preferred dependent variable would be *the number of cases brought to trial* for third strike “wobbler” offenses tapping into prosecutorial charging decisions. Our initial efforts to procure information regarding District Attorney attempted prosecutions were met with dismal failure. As Walsh (1999) points out, while longitudinal databases existed in the 1980s that tracked individual offenders, budgetary concerns eliminated them, forcing researchers to turn to new data sources. California's counties and prosecutors' offices do not track attempted prosecutions or keep this data for public record. The only way to obtain this data would be to examine each and every charging document. To do this would require that we learn each name of each defendant and examine the full document per person per year per county – not only was this beyond our resource capabilities, it would require a Freedom of Information request for each document. Only Los Angeles County came close to providing us with the requested information. Counties are either reluctant to provide this information or do not have it recorded systematically in this manner. Given these difficulties, we chose to measure this concept by using a proxy measure.

and “wobbler” offense as measures of prosecutorial discretion requires some additional discussion. A non-serious, non-violent offense is a felony offense that qualified for a third strike under the law. The district attorney’s discretion only comes into play inside the courtroom. In order for a DA to have a non-serious, non-violent crime be counted as a third strike, they would have to substantiate the previous two strikes and fight any effort to vacate them, not an insignificant task. A wobbler offense could be prosecuted either as a misdemeanor or a felony, essentially at the sole discretion of the DA. Thus, these two third strike offense categories are conceptually and significantly different forms of discretion that require varying levels of effort inside the DA’s office and in the courtroom.

Each county makes an annual report to the California Department of Corrections and Rehabilitation that lists the number of third strike offenders incarcerated by specific classes of crimes (i.e., burglary 1st, petty theft with a prior conviction, penetration with an object, oral copulation, etc.). We consulted with a number of officials in DA offices to determine how each offense group would be classified, whether the crime would be considered serious or violent, non-serious or non-violent, or a “wobbler.” The DA offices consulted their recent statutory and sentencing guidelines and the offices gave consistent classifications of the crimes. A list of the offense groups reported by each county and how they were classified for the study is found in the Appendix (Table A1).

While the most populous counties by nature have significantly more individuals incarcerated on both non-serious and non-violent third strikes, it is unclear whether this increase is simply due to population size or some other factor. Accordingly, we converted the per county nonserious nonviolent and wobbler third strikers to per capita measures (e.g., # wobbler third strikers/# county population). Additionally, we obtained the overall incarceration rates by county and adjusted them to per capita measures. We use these overall per capita incarceration rates as a one control to account for potential influences on nonserious and nonviolent or wobbler incarceration rates in each county.

This paper is an initial attempt to resolve an ongoing controversy over the role of discretion and ideology in the implementation of the three strikes law. There are of course, other factors that come in to play when analyzing three strikes data. In some cases, judges may be exercising their discretion, yet as discussed above, when judges are overly meddlesome, appellate courts may overturn their decisions.

According to Wright (2009) judges are more likely not to assume the responsibility for monitoring and controlling the work of prosecutors. “The judge does not evaluate the prosecutors’ decision to decline prosecution and has nothing to say at all about the relative priorities on display in the mix

of cases that a prosecutor files” (9). There are also likely differences in crime patterns and therefore priorities of local law enforcement that may contribute to differences among the patterns of third strike-outs. It is also possible that juries, which likely represent the ideological leanings of a given county, may refuse to convict for a non-serious non-violent felony if they know there is a strike enhancement accompanying the conviction, as Loren Gordon (2004) quotes, “San Francisco has more liberal juries than other jurisdictions like Los Angeles or Orange County or San Diego, and jury nullification is something we have to look at” (508). While this may be true of very savvy and very liberal jurors, with the exception of San Francisco, as our measure of ideology indicates, no other California county is likely to encounter this type of behavior. Lawyers may not reveal information about criminal history, nor of the possible punishment for conviction, and further as noted on page 11, jurors are instructed not to consider this information if it is disclosed in their decision making. Further, in more conservative counties, jurors may find this an incentive to find for a guilty verdict.

In order to account for the different county specific characteristics, we introduce a range of control and independent variables in our analysis. We divide our independent variables into three main groups of pressures – district attorney election specific pressures, county specific pressures or constraints, and ideological support. District attorney election pressures include dummy variables for whether it was an election year, and whether the DA election was contested (approximately 35% of the elections over the 10-year period were contested), and the vote share of the election that the winning DA received in the election.

Each county also faces a diversity of resource constraints that could have an effect on the rate of incarcerations. These include the money the county receives and expends, the crime rate, and the total number of individuals incarcerated. For example, political authority for spending rests with the DA who is accountable to the voters (Wright 2009). In order to control for the overall crime rate, we obtained data on the total number of felony arrests from the California Department of Justice, and then adjusted them to per capita rates based on the county population. Following the lead of Gerber et al. (2001) we assume that arrest rates would not vary systematically as a result of Three Strikes by county, and therefore any differences among the counties are the results of events occurring after arrest. Nevertheless, we acknowledge that counties face different amounts of crime, most pertinent to our study are the number of felony arrests made in each county. Because the law is most concerned with felonies, whether serious or non-serious, violent or non-violent, this rate best captures the types of crimes we should control for

in a multivariate analysis. Other common crime rate estimates (e.g., property crime) are too specific to certain types crimes that using it for a control would not be appropriate.¹⁵

We also include a measure of county financial health. Theoretically this is to assess whether resource constraints force prosecutors to make decisions on where to allocate time and effort, including whether to pursue a third strike for a nonserious nonviolent or wobblers offense. Chemerinsky and Levenson (2008) posit that economic realities may play a role in prosecutorial decisions, but do not provide any empirical evidence to demonstrate a relationship. Baicker (2004) pursued this question with regard to capital cases, finding that financial health (measured by deficits) does not play a role in prosecutors' charging decisions in death penalty cases. She finds no statistically significant relationship between counties with equal deficit levels for capital conviction and those without.¹⁶ Her work follows the study of Baldus et al. (2002) on Nebraska, examining the relationship between death-charging decisions and budget constraints. While many scholars posit that a relationship exists, even if only at an anecdotal level, the death penalty is "different"¹⁷ for a host of reasons, and therefore this research should not be generalized to California's three strikes law. We obtained each year's county finance data from the California State Controller's office. The finance data for San Francisco is not comparable to the other counties because it operates jointly as a county and a city.

Finally, each county has a varying level of ideological or political support for striking out individuals. In order to account for political pressure within the county, we use a variety of measures. Here we consider the partisanship and ideology of county as persuasive. First and following Chen (2012), we used county voter registration data to determine the number of registered Republicans in the county. This measure captures the consistent strength of voters who identify as Republicans in each county. However, this fails to capture independents and decline to state voters who lean conservative. Therefore, we also use support for the Republican presidential candidate by county as additional support for conservative ideology; California has the largest number of "decline to state" voters

¹⁵ Alternatively, we could have tried to use National Crime Victimization Survey data to estimate the "crime climate" for each county and year. Unfortunately the sample size in each county, each year is not large enough to provide a reasonable estimate for each county-year with any level of confidence.

¹⁶ (Baicker 2004) finds the probability of having a capital conviction is 5.23 percent in counties with a deficit last period, and 5.12 percent in counties without (chi-squared test yielding a 70 percent probability that these are the same).

¹⁷ See *Furman v. Georgia*, 408 U.S. 238 (1972); a wealth of scholarship and case law demonstrates the greater costs inherent in death penalty cases and inmate housing across the country.

in the nation,¹⁸ thus this measure captures the impact of both undeclared and swing voters in addition to more conservative Democrats. Further, this has been the standard in political science, policy and public opinion research to measure ideology.¹⁹ As Wright, Erikson and McIver (1985) conclude “both partisan and ideological differences matter in the behavior of state electorates, and that they are differentially important depending upon the nature of the choices offered to the voters” (488).²⁰ We expect that this measure will fluctuate much more rapidly and widely than those who have declared a party affiliation. Using registration alone fails to address ideological positions of voters and underestimates the number of conservatives (Democrats, third party or decline to state). Using both measures in a statistical model allows us to tease out the difference in political support between consistent, base support and fluctuations in public opinion.

In addition, we examine county support for three initiatives concerning crime in California: the 2004 measure to amend the 3 Strikes Law (Proposition 66); the 2006 Jessica’s Law (Proposition 84) which created zones in which convicted sex offenders could not reside;²¹ and the 2012 measure to amend the Three Strikes Law (Proposition 36).²² Each of these measures captures some representation

18 According to California’s Secretary of State website documents, Decline to State (or no party affiliation) voters ranged from a low of 14.4% in 2000 to a high of 20.9% in 2012, utilizing 15 day closing reports from November http://www.sos.ca.gov/elections/elections_u.htm accessed 1/30/2013.

19 Seminal work by Wright et al. (1985) note that presidential election returns have also been used to measure state and congressional district liberalism/conservatism citing (Schwarz and Fenmore 1977; Erikson and Wright 1980; Schneider 1981; Nice 1983; Klingman and Lammers 1984).

20 See also Erikson, Robert S., Gerald C. Wright, and John R McIver. 1993. *Statehouse Democracy: Public Opinion and Policy in the American States*. Cambridge: Cambridge University Press.

21 Jessica’s Law prohibits sex offenders from living within 2,000 feet of any school and park, and mandate Global Positioning System (GPS) supervision for life; it also increases sentences for some sex crimes, including life sentences for some offenses that victimize children, and modifies the criteria for Sexually Violent Predators, thereby increasing the number of sex offenders who are eligible for a civil commitment to the California Department of Mental Health for treatment rather than being released on parole (California Department of Corrections 2013).

22 The description of Proposition 36 as published by the Secretary of State’s office after authorship by the Attorney General is included here: “Proposition 36 Revises the three strikes law to impose life sentence only when the new felony conviction is “serious or violent” and eliminates wobbler considerations from 3rd strikes; it also authorizes re-sentencing for offenders currently serving life sentences if their third strike conviction was not serious or violent and if the judge determines that the re-sentence does not pose unreasonable risk to public safety; Continues to impose a life sentence penalty if the third strike conviction was for “certain non-serious, non-violent sex or drug offenses or involved firearm possession;” Maintains the life sentence penalty for felons with “non-serious, non-violent third strike if prior convictions were for rape, murder, or child molestation” (Harris 2012).

Table 1: Descriptive statistics.

Variable	Mean	Standard deviation	Minimum	Maximum
Support for Proposition 184	72.9	8.3	42.7	84.0
Opposition to Proposition 66	53.1	8.4	30.5	64.9
Support for Proposition 84	69.7	6.2	47.5	83.6
Opposition to Proposition 36	33.9	8.0	15.5	48.0
Nonserious nonviolent third strikers	56.1	173.9	0	1295
Wobbler third strikers	37.1	117.9	0	883
Nonserious nonviolent third strikers per capita	5.880E-05	5.880E-05	5.880E-05	5.880E-05
Wobbler third strikers per capita	3.670E-05	4.450E-05	0	3.080E-04
DA contested election	35.517	47.898	0	100
DA election year	29.310	45.558	0	100
DA vote share	83.955	19.633	46.1	100
County population	618960	1386489	1178	9822121
Finances In	8.08E+08	1.88E+09	5.55E+06	1.52E+10
Finances Out	8.00E+08	1.86E+09	9.92E+06	1.51E+10
Finances In per capita	1820	1512	146	15498
Finances Out per capita	1788	1416	809	13121
Felony Arrests	8622	19377	14	148824
Felony Arrests per capita	0.015	0.005	0.007	0.043
Total Incarcerated	2851.6	7456.3	1.0	56799.0
Percent Registered Republican Voters	38.8	18.9	9.5	434.2
Republican support for president	49.2	13.4	13.7	72.5

of the county's desire to be "tough on crime." For these measures, we used the percent of the county vote either in support or against the proposition.

A summary of important variables by county is found in Table 1.

4 Method

In order to test our hypotheses about district attorneys use of discretion in third striker prosecutions, we estimate a multivariate statistical model. We chose to estimate this relationship using a cross-sectional, time series regression with panel corrected standard errors (xtpcse command in Stata 12). These parameter estimates can be interpreted like OLS estimates but the statistical model corrects for the problems inherent with panel data. Using this method, we can control for the independent effects of each year as well as estimate the fixed effects for each county. While we choose to only report the independent and control variables for all of the statistical models, the complete results, including estimates for counties and years, can be found in the Appendix.

Table 2: Determinants of non-serious non-violent third strikers per capita incarcerated by county from 2001–2010. Estimated using a cross-sectional time series linear regression with panel corrected standard errors in STATA 12 (xtpcse). Complete model estimates including the fixed effects estimates for years and counties can be found in Table A2 in the Appendix.

	Coefficient	S.E.	Coefficient	S.E.
DA election year	-3.46E-07	3.88E-06	3.59E-06	3.98E-06
DA contested election	2.63E-06	5.74E-06	2.93E-06	6.11E-06
DA vote share	1.31E-05	1.75E-05	1.41E-05	1.82E-05
Finances In per capita	9.31E-09	4.62E-09 **	-	-
Finances Out per capita	6.38E-09	8.13E-09	-	-
Felony Arrests per capita	-7.82E-04	9.00E-04	-1.73E-03	7.15E-04 **
Percent of population incarcerated	9.12E-03	3.79E-03 **	1.06E-02	3.59E-03 ***
Percent registered republican voters	1.32E-08	1.57E-08	1.60E-08	1.36E-08
Republican support for president	2.73E-06	7.85E-07 ***	2.09E-06	6.27E-07 ***
Constant	-1.11E-04	3.56E-05 ***	-7.19E-05	2.49E-05 ***
N	570		580	
Groups	57		58	
Obs per group	10		10	
Wald χ^2	31,368.75 ***		19,217.56 ***	
R ²	0.8407		0.8357	

*** $p < 0.01$, ** $p < 0.05$, * $p < 0.10$, ~ $p < 0.15$.

We estimate two independent models using the number of incarcerated non-serious, non-violent offenders per capita as the dependent variable. The first set of estimates controls for the financial health of the county, but the second set omits these data and allows us to expand our dataset to San Francisco.²³ The results are presented in Table 2 above. Although the implementation of the law began following Proposition 184's approval in 1994, we limit the data to the years mentioned above because of the changes in the law initiated by the various cases mentioned above, granting judges some modicum of latitude that occurred in the late 1990s.

The statistical models are both statistically significant (Wald $\chi^2 = 31368.75$, $p < 0.01$ & Wald $\chi^2 = 19217.56$, $p < 0.01$, respectively) with extremely high R² values (0.8407 and 0.8357, respectively). Both models provide support for our hypothesis that DAs look to their constituents in determining how to prosecute third strike offenses. That is to say that our measure of ideological support for the Republican presidential candidate is statistically significant and in the expected direction. It is interesting to note that the specifics of each DA election are not significant, suggesting that the competitiveness of the election may be less important than

²³ As noted previously, county finance data for San Francisco are not comparable to the other 57 California counties.

the current level of ideological support for three strikes in the county each year. This may also speak to the election campaigns within the various counties, as the candidates familiar with the constituents may not differentiate themselves along ideological lines if the county is predominantly conservative or less so. Conversely, DA elections may look more like Congressional elections in which case, incumbents win unless vulnerable. The first model also indicates that both the overall per capita incarceration rate and the financial intake of the county are related to increased numbers of individuals incarcerated for non-serious, non-violent third strikes. The second model indicates a negative relationship between felony arrests and nonserious and nonviolent third strikers, which is not present in the first model.

Following the previous pattern, we estimate two independent models using the number of third strikers per capita incarcerated on “wobbler” offenses as the dependent variable. As a reminder, the first set of estimates controls for the financial health of the county and the second set omits this data and includes San Francisco in the analysis. The results are presented in Table 3 below.

Both of the models are statistically significant (Wald $\chi^2=47161.09$, $p<0.01$ & Wald $\chi^2=12324.66$, $p<0.01$, respectively) with extremely high R^2 values (0.7664 and

Table 3: Determinants of “wobbler” third strikers incarcerated by county from 2001 to 2010. Estimated using a cross-sectional time series regression with panel corrected standard errors in STATA 12 (xtpcse). Complete model estimates including the fixed effects estimates for years and counties can be found in Table A3 in the Appendix.

	Coefficient	S.E.	Coefficient	S.E.
DA election year	-7.82E-07	3.16E-06	1.81E-06	3.38E-06
DA contested election	4.80E-07	5.80E-06	1.05E-06	6.10E-06
DA vote share	1.27E-05	1.80E-05	1.45E-05	1.86E-05
Finances In per capita	7.38E-09	4.30E-09	*	-
Finances Out per capita	9.73E-09	8.08E-09		-
Felony Arrests per capita	-5.74E-05	7.82E-04	-1.10E-03	6.22E-04 *
Percent of population incarcerated	6.77E-03	3.21E-03 **	8.20E-03	3.08E-03 ***
Percent registered republican voters	1.59E-08	1.43E-08	1.71E-08	1.35E-08
Republican support for president	1.91E-06	4.90E-07 ***	1.24E-06	4.57E-07 ***
Constant	-9.66E-05	2.83E-05 ***	-5.53E-05	1.89E-05 ***
N	570		580	
Groups	57		58	
Obs per group	10		10	
Wald χ^2	47161.09 ***		12324.66 ***	
R^2	0.7664		0.7546	

*** $p<0.01$, ** $p<0.05$, * $p<0.10$, ~ $p<0.15$.

0.7546, respectively). As in the previous models, the number of “wobbler” third strikers incarcerated per unit of population is positively related to the level of political support for the republican presidential candidate in both models. Once again, the DA election specific measures are not statistically significant. This adds additional support our hypothesis that DAs look to their constituent ideology when deciding to strike out offenders on “wobbler” offenses. The same variables that were significantly related to nonserious non violent third strikers were also related to the number of wobbler third strikers. That is to say that financial intake and percent of county population incarcerated are both statistically significant in the first model, and felony arrests and percent of county population incarcerated were significant in the second model.²⁴

In order to be completely rigorous and subject our findings to additional scrutiny, we follow the same procedures from the previous models, but include one additional measure of political support for each of the models. Three related propositions appeared on California voters’ ballots during the timeframe of the study data; Propositions 66, 84, and 36. As we described earlier, these propositions either attempted to alter the Three Strikes law, or in the case of Prop 84, were a measure of citizen support for tougher restrictions or penalties for offenders. We used vote share data from each county and estimated a series of models that control for public opinion on these particular issues. The results appear in Tables 4–6.

The statistical models are all significant, with very similar results. Our main variable of interest, Republican support for the presidential candidate, remains statistically significant throughout all of the models, as well as county financial intake, and the percent of the population that is incarcerated. The models become more interesting when we evaluate the relationship between third strikers and the proposition vote share in favor of being more tough on crime. In Table 4, we see that the level of opposition to Proposition 66, which would have overturned the three strikes law, is statistically related to an increased number of nonserious nonviolent and wobbler third strikers. This adds some support to our hypothesis that DAs vying for (re)election attempt to court their constituents’ preferences through their behavior. In Table 5, we see that support for Proposition 84 (Jessica’s Law) is statistically related to the number of nonserious nonviolent and wobbler third strikers, but not in the anticipated direction. Rather, support for Proposition 84 was related to a smaller number of nonserious nonviolent and wobbler third strikers in each county. Finally, Table 6 uses opposition to Proposition 36, which significantly revised the three strikes law to require that a third

²⁴ These results hold under alternative model specifications, including the potentially more theoretically appropriate seemingly unrelated regression (Zellner 1962; Johnston and DiNardo 1997)

Table 4: Determinants of “non-serious non-violent and wobbler” third strikers incarcerated by county including opposition to Proposition 66. Estimated using a cross-sectional time series regression with panel corrected standard errors in STATA 12 (xtpcse). Complete model estimates including the fixed effects estimates for years and counties can be found in Table A4 in the Appendix.

	Non-serious Non-violent		Wobblers		
	Coefficient	S.E.	Coefficient	S.E.	
DA election year	-3.46E-07	3.88E-06	-7.82E-07	3.16E-06	
DA contested election	2.63E-06	5.74E-06	4.80E-07	5.80E-06	
DA vote share	1.31E-05	1.75E-05	1.27E-05	1.80E-05	
Finances In per capita	9.31E-09	4.62E-09	** 7.38E-09	4.30E-09	*
Finances Out per capita	6.38E-09	8.13E-09	9.73E-09	8.08E-09	
Felony arrests per capita	-7.82E-04	9.00E-04	-5.74E-05	7.82E-04	
Percent of population incarcerated	9.12E-03	3.79E-03	** 6.77E-03	3.21E-03	**
Percent registered republican voters	1.32E-08	1.57E-08	1.59E-08	1.43E-08	
Republican support for president	2.73E-06	7.85E-07	*** 1.91E-06	4.90E-07	***
Percent against Proposition 66	2.10E-06	1.05E-06	** 1.44E-06	5.68E-07	**
Constant	-1.93E-04	2.46E-05	*** -1.53E-04	2.22E-05	***
N	570		570		
Groups	57		57		
Obs per group	10		10		
Wald χ^2	116,484.54	***	23,388.58	***	
R ²	0.8407		0.7664		

***p<0.01, **p<0.05, *p<0.10, ~p<0.15.

strike be either serious or violent. In these models, opposition to the proposition was not strongly statistically correlated with the number of non-serious non-violent or wobbler third strikers over the time period of the dataset. This likely demonstrates the sea change of support for prosecuting third strikers on a non-serious non-violent or wobbler offense over the past decade.

5 Conclusion

When we return to our initial question of interest, we find significant evidence that discretion was exercised by District Attorneys throughout California counties. While the literature on the California “Three Strikes” law is full of examples of how the law disproportionately affects different groups in different parts of the state, we have sought to explain this from the perspective of discretion on the part of the DA. Not all third strikes are the same. We offer our evidence of discretion

Table 5: Determinants of non-serious non-violent and “wobbler” third strikers incarcerated by county (adjusted for population), including support of Proposition 84 with county and year estimates. Estimated using a cross-sectional time series regression with panel corrected standard errors in STATA 12 (xtpcse). Complete model estimates including the fixed effects estimates for years and counties can be found in Table A5 in the Appendix.

	Non-serious Non-violent		Wobblers		
	Coefficient	S.E.	Coefficient	S.E.	
DA election year	-3.46E-07	3.88E-06	-7.82E-07	3.16E-06	
DA contested election	2.63E-06	5.74E-06	4.80E-07	5.80E-06	
DA vote share	1.31E-05	1.75E-05	1.27E-05	1.80E-05	
Finances In per capita	9.31E-09	4.62E-09	** 7.38E-09	4.30E-09	*
Finances Out per capita	6.38E-09	8.13E-09	9.73E-09	8.08E-09	
Felony arrests per capita	-7.82E-04	9.00E-04	-5.74E-05	7.82E-04	
Percent of population incarcerated	9.12E-03	3.79E-03	** 6.77E-03	3.21E-03	**
Percent registered republican voters	1.32E-08	1.57E-08	1.59E-08	1.43E-08	
Republican support for president	2.73E-06	7.85E-07	*** 1.91E-06	4.90E-07	***
Percent support for Proposition 84	-1.80E-06	7.61E-07	** -1.49E-06	5.12E-07	***
Constant	-2.10E-06	3.13E-05	-6.51E-06	2.66E-05	
N	570		570		
Groups	57		57		
Obs per group	10		10		
Wald χ^2	31,961.69	***	15,766.41	***	
R ²	0.8407		0.7664		

***p<0.01, **p<0.05, *p<0.10, ~p<0.15.

where DAs are most likely to exercise personal judgment, in the prosecution of non-serious, non-violent offenses and so called “wobbler” offenses.

Our research points to evidence that DA discretion played a role in California’s Three Strikes law, but not in terms of elections as predicted. Evidence of DA discretion was not present in the electoral variables we considered. Our results suggest that, independent of all other effects, the political leanings of the residents of the counties in which the prosecutor works are correlated with the number of third strike offenders serving extended (if not life) sentences for offenses that could have been prosecuted either as misdemeanors or felonies (wobblers) or were non-serious or non-violent. This finding is separate from the base level of support from registered Republican voters, which was not found to have a statistically significant relationship. As an elected official, DAs respond to the political climate in which they operate. While these are not partisan offices, they must demonstrate a record of action consistent with the preferences of their constituents. These decisions to prosecute a “wobbler” offense as a misdemeanor or a felony for defendants facing their third strike may be less about the actual offense and more about the prosecutor’s future.

Table 6: Determinants of non-serious non-violent and “wobbler” third strikers incarcerated by county (adjusted for population), including opposition to Proposition 36 with county and year estimates. Estimated using a cross-sectional time series regression with panel corrected standard errors in STATA 12 (xtpcse). Complete model estimates including the fixed effects estimates for years and counties can be found in Table A6 in the Appendix.

	Non-serious Non-violent		Wobblers		
	Coefficient	S.E.	Coefficient	S.E.	
DA election year	-3.46E-07	3.88E-06	-7.82E-07	3.16E-06	
DA contested election	2.63E-06	5.74E-06	4.80E-07	5.80E-06	
DA vote share	1.31E-05	1.75E-05	1.27E-05	1.80E-05	
Finances In per capita	9.31E-09	4.62E-09	** 7.38E-09	4.30E-09	
Finances Out per capita	6.38E-09	8.13E-09	9.73E-09	8.08E-09	*
Felony arrests per capita	-7.82E-04	9.00E-04	-5.74E-05	7.82E-04	
Percent of population incarcerated	9.12E-03	3.79E-03	** 6.77E-03	3.21E-03	**
Percent registered republican voters	1.32E-08	1.57E-08	1.59E-08	1.43E-08	
Republican support for president	2.73E-06	7.85E-07	*** 1.91E-06	4.90E-07	***
Percent opposed to Proposition 36	-1.25E-06	1.18E-06	-1.27E-06	6.70E-07	*
Constant	-8.38E-05	2.39E-05	*** -6.94E-05	2.32E-05	***
N	570		570		
Groups	57		57		
Obs per group	10		10		
Wald χ^2	26,073.93	***	38672.7	***	
R ²	0.8407		0.7664		

***p<0.01, **p<0.05, *p<0.10, ~p<0.15.

Not surprisingly, per capita incarceration rates were significantly related to these third strikers. Where relatively more of the population are incarcerated, we would expect to see more non-serious non-violent and wobbler third strikers.

What is interesting, is to have found a consistent relationship between per capita financial intake of the county and the number of non-serious non-violent or wobbler third strikers. As a steward of their office, DAs make decisions based on resource constraints. Here we find evidence that in the presence of increased per capita financial intake, counties tend towards higher rates of non-serious non-violent or wobbler third strikers. Where DAs and counties have more resources per capita, they are likely to choose to prosecute more cases that eventually lead to a third strike.

As noted above, in November 2012, California voters amended the Three Strikes law by passing Proposition 36. According to the Official Title and Summary, Proposition 36 “Revises the law to impose life sentence only when new felony conviction is serious or violent. The measure may authorize re-sentencing if the third strike conviction was not serious or violent (Harris 2012)”.

The measure passed with overwhelming support 69.3% to 30.7%. This suggests that despite the “get tough on crime” atmosphere in which Proposition 184 was passed, nearly 20 years later, Californians may be more interested in the state revenue saved than in the message that might be sent to would-be recidivists. As support for the measure indicates, conservatives and liberals alike had a reason to vote for Proposition 36, although those reasons may have differed. For liberals, the reasons for backing the initiative may have been to ensure that only the “worst” offenders are sent away for 25 years to life, while conservatives may have been swayed by the savings to California’s budget, and therefore California taxpayers, the measure was said to produce (Montgomery 2012). Either way, support for Proposition 36 sent a message to California’s prosecutors that justice should be served, but within budget.

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Appendix

Table A1: Classification of reported offense groups in study.

Offense Group	Non-serious Non-violent	Wobbler
Murder 1st	No	No
Murder 2nd	No	No
Manslaughter	No	No
Vehicular manslaughter	No	No
Robbery	No	No
Assault deadly weapon	No	No
Other assault/Battery	No	No
Arson	No	No
Rape	No	No
Lewd Act with child	No	No
Oral copulation	No	No
Sodomy	No	No
Penetration with object	No	No
Other sex offenses	No	No
Kidnapping	No	No
Burglary 1st	No	No
Burglary 2nd	Yes	Yes
Grand theft	Yes	Yes
Petty theft with prior	Yes	Yes
Receiving stolen property	Yes	Yes
Vehicle theft	Yes	Yes
Forgery/Fraud	Yes	Yes
Other property offenses	Yes	Yes
Hashish possession	Yes	Yes
Other marijuana offenses	Yes	Yes
CS+ (Controlled substance) possession	Yes	Yes
CS+ (Controlled substance) possess for sale, etc.	Yes	No
CS+ (Controlled substance) sales, etc.	Yes	No
CS+ (Controlled substance) manufacturing	Yes	No
CS+ (Controlled substance) other	Yes	No
Marij. possess for sale	Yes	No
Marijuana sales	Yes	No
Escape	Yes	No
Driving under the influence	Yes	No
Possession of weapon	Yes	No

Table A2: Complete model of the determinants of non-serious non-violent third strikers incarcerated by county (adjusted for population), including county and year estimates. Estimated using a cross-sectional time series regression with panel corrected standard errors in STATA 12 (xtpcse). Baseline reference county (Alameda) and year (2001) were chosen because they had the median number of non-serious non-violent third strikers in the dataset.

	Coefficient	S.E.	Coefficient	S.E.	
DA election year	-3.46E-07	3.88E-06	3.59E-06	3.98E-06	
DA contested election	2.63E-06	5.74E-06	2.93E-06	6.11E-06	
DA vote share	1.31E-05	1.75E-05	1.41E-05	1.82E-05	
Finances In per capita	9.31E-09	4.62E-09	**	-	
Finances Out per capita	6.38E-09	8.13E-09		-	
Felony arrests per capita	-7.82E-04	9.00E-04		-1.73E-03	7.15E-04
Percent of population incarcerated	9.12E-03	3.79E-03	**	1.06E-02	3.59E-03
Percent registered republican voters	1.32E-08	1.57E-08		1.60E-08	1.36E-08
Republican support for president	2.73E-06	7.85E-07	***	2.09E-06	6.27E-07
2002	7.11E-06	3.58E-06	**	5.01E-06	3.48E-06
2003	1.29E-06	1.05E-06		2.37E-06	8.00E-07
2004	-3.54E-06	2.05E-06	*	-2.64E-07	1.15E-06
2005	-2.88E-06	3.11E-06		2.83E-06	1.33E-06
2006	-5.09E-06	4.48E-06		-2.39E-06	3.86E-06
2007	-6.20E-06	3.57E-06	*	1.33E-06	1.14E-06
2008	1.97E-05	4.14E-06	***	2.16E-05	3.57E-06
2009	2.18E-05	4.28E-06	***	2.29E-05	3.59E-06
2010	2.47E-05	6.34E-06	***	2.20E-05	5.20E-06
Alpine	-2.11E-04	7.32E-05	***	-3.24E-05	1.63E-05
Amador	-8.12E-05	3.03E-05	***	-5.80E-05	2.27E-05
Butte	-8.43E-05	2.51E-05	***	-6.97E-05	1.93E-05
Calaveras	-1.02E-04	2.85E-05	***	-7.53E-05	2.31E-05
Colusa	-9.45E-05	3.51E-05	***	-5.65E-05	2.54E-05
Contracosta	-1.73E-05	1.10E-05	~	-8.64E-06	1.02E-05
Del Norte	-8.46E-05	2.95E-05	***	-5.27E-05	2.04E-05
el Dorado	-6.40E-05	2.85E-05	**	-3.96E-05	2.34E-05
Fresno	-3.99E-05	2.71E-05	~	-1.88E-05	1.93E-05
Glenn	-8.70E-05	3.82E-05	**	-4.06E-05	2.66E-05
Humboldt	-6.77E-05	1.43E-05	***	-5.46E-05	1.06E-05
Imperial	-4.16E-05	1.77E-05	**	-2.33E-05	1.36E-05
Inyo	-1.41E-04	3.26E-05	***	-9.46E-05	2.14E-05
Kern	1.24E-04	3.58E-05	***	1.53E-04	2.54E-05
Kings	3.30E-05	3.78E-05		4.58E-05	2.92E-05
Lake	-5.69E-05	2.48E-05	**	-4.05E-05	1.90E-05
Lassen	-1.01E-04	3.56E-05	***	-7.38E-05	2.80E-05
Los Angeles	7.18E-05	1.20E-05	***	7.72E-05	9.46E-06
Madera	-3.33E-05	3.14E-05		-1.59E-05	2.47E-05
Marin	8.90E-05	6.81E-06	***	9.17E-05	6.63E-06
Mariposa	-6.55E-05	3.32E-05	**	-2.56E-05	2.39E-05
Mendocino	-3.49E-05	1.29E-05	***	-1.46E-05	8.03E-06

(Table A2 Continued)

	Coefficient	S.E.		Coefficient	S.E.	
Merced	-1.92E-05	2.66E-05		5.45E-06	1.86E-05	
Modoc	-1.32E-04	4.98E-05	***	-7.72E-05	3.93E-05	**
Mono	-9.71E-05	2.75E-05	***	-5.30E-05	1.76E-05	***
Monterey	-3.87E-05	1.11E-05	***	-3.19E-05	8.47E-06	***
Napa	-3.79E-05	1.23E-05	***	-2.57E-05	1.02E-05	**
Nevada	-6.39E-05	2.33E-05	***	-4.69E-05	2.08E-05	**
Orange	-3.57E-05	2.52E-05		-2.29E-05	2.16E-05	
Placer	-5.42E-05	2.94E-05	*	-3.07E-05	2.34E-05	
Plumas	-1.24E-04	3.48E-05	***	-7.72E-05	2.37E-05	***
Riverside	-1.74E-05	2.53E-05		-2.65E-06	1.95E-05	
Sacramento	1.94E-05	2.23E-05		3.86E-05	1.63E-05	**
San Benito	-3.10E-05	1.60E-05	*	-2.03E-05	1.42E-05	
San Bernardino	5.04E-05	2.51E-05	**	6.76E-05	1.80E-05	***
San Diego	4.82E-06	2.06E-05		1.61E-05	1.65E-05	
San Francisco	-			4.46E-05	9.38E-06	***
San Joaquin	-5.47E-05	2.39E-05	**	-3.68E-05	1.69E-05	**
San Luis Obispo	-5.79E-05	2.22E-05	***	-4.05E-05	1.83E-05	**
San Mateo	1.40E-05	6.09E-06	**	1.34E-05	6.03E-06	**
Santa Barbara	-1.69E-05	1.66E-05		-3.89E-06	1.33E-05	
Santa Clara	6.12E-05	8.61E-06	***	6.66E-05	7.24E-06	***
Santa Cruz	4.22E-06	3.84E-06		7.22E-06	3.77E-06	*
Shasta	-8.18E-05	3.91E-05	**	-5.95E-05	2.99E-05	**
Sierra	-7.88E-05	6.00E-05		3.35E-06	4.96E-05	
Siskiyou	-8.30E-05	3.17E-05	***	-5.15E-05	2.27E-05	**
Solano	-5.41E-05	1.42E-05	***	-4.23E-05	1.03E-05	***
Sonoma	-1.25E-05	6.20E-06	**	-7.80E-06	6.12E-06	
Stanislaus	1.76E-05	2.71E-05		4.21E-05	1.94E-05	**
Sutter	-1.23E-04	3.37E-05	***	-9.86E-05	2.52E-05	***
Tehama	-4.53E-05	3.94E-05		-1.50E-05	2.87E-05	
Trinity	-1.33E-05	3.34E-05		3.47E-05	2.12E-05	~
Tulare	4.61E-06	3.47E-05		3.22E-05	2.47E-05	
Tuolumne	-9.04E-05	2.90E-05	***	-6.35E-05	2.12E-05	**
Ventura	-4.44E-05	1.97E-05	**	-3.24E-05	1.69E-05	*
Yolo	-3.25E-05	1.40E-05	**	-2.59E-05	1.04E-05	**
Yuba	-5.37E-05	4.01E-05		-1.95E-05	2.87E-05	
Constant	-1.11E-04	3.56E-05	***	-7.19E-05	2.49E-05	***
N	570			580		
Groups	57			58		
Obs per group	10			10		
Wald χ^2	31,368.75	***		19,217.56	***	
R ²	0.8407			0.8357		

***p<0.01, **p<0.05, *p<0.10, ~p<0.15.

Table A3: Complete model of the determinants of “wobbler” third strikers incarcerated by county (adjusted for population), including county and year estimates. Estimated using a cross-sectional time series regression with panel corrected standard errors in STATA 12 (xtpcse). Baseline reference county (Alameda) and year (2001) were chosen because they had the median number of “wobbler” third strikers in the dataset.

	Coefficient	S.E.	Coefficient	S.E.		
DA election year	-7.82E-07	3.16E-06	1.81E-06	3.38E-06		
DA contested election	4.80E-07	5.80E-06	1.05E-06	6.10E-06		
DA vote share	1.27E-05	1.80E-05	1.45E-05	1.86E-05		
Finances In per capita	7.38E-09	4.30E-09	*	-		
Finances Out per capita	9.73E-09	8.08E-09		-		
Felony arrests per capita	-5.74E-05	7.82E-04	-1.10E-03	6.22E-04	*	
Percent of population incarcerated	6.77E-03	3.21E-03	**	8.20E-03	3.08E-03	***
Percent registered republican voters	1.59E-08	1.43E-08		1.71E-08	1.35E-08	
Republican support for president	1.91E-06	4.90E-07	***	1.24E-06	4.57E-07	***
2002	4.11E-06	2.91E-06		3.41E-06	2.91E-06	
2003	-3.75E-07	9.14E-07		1.02E-06	6.91E-07	~
2004	-4.51E-06	1.39E-06	***	-8.41E-07	7.37E-07	
2005	-4.80E-06	2.46E-06	*	1.66E-06	8.24E-07	**
2006	-6.53E-06	3.74E-06	*	-1.80E-06	3.21E-06	
2007	-8.53E-06	3.16E-06	***	-2.10E-08	8.13E-07	
2008	1.23E-05	2.78E-06	***	1.47E-05	2.51E-06	***
2009	1.37E-05	2.60E-06	***	1.51E-05	2.38E-06	***
2010	1.65E-05	4.34E-06	***	1.55E-05	3.79E-06	***
Alpine	-2.10E-04	6.80E-05	***	-1.67E-05	1.17E-05	
Amador	-5.74E-05	1.75E-05	***	-3.23E-05	1.49E-05	**
Butte	-6.16E-05	1.45E-05	***	-4.58E-05	1.35E-05	***
Calaveras	-6.92E-05	1.83E-05	***	-4.21E-05	1.74E-05	**
Colusa	-5.66E-05	2.16E-05	***	-1.62E-05	1.75E-05	
Contracosta	-8.81E-06	8.08E-06		3.47E-08	8.67E-06	
Del Norte	-5.22E-05	1.69E-05	***	-1.76E-05	1.28E-05	
el Dorado	-4.17E-05	1.82E-05	**	-1.62E-05	1.79E-05	
Fresno	-3.32E-05	1.49E-05	**	-1.03E-05	1.14E-05	
Glenn	-8.31E-05	2.30E-05	***	-3.41E-05	1.61E-05	**
Humboldt	-4.69E-05	7.82E-06	***	-3.26E-05	7.29E-06	***
Imperial	-3.46E-05	1.19E-05	***	-1.52E-05	1.02E-05	~
Inyo	-1.06E-04	2.12E-05	***	-5.63E-05	1.46E-05	***
Kern	9.71E-05	2.03E-05	***	1.28E-04	1.51E-05	***
Kings	1.47E-05	2.24E-05		2.90E-05	1.92E-05	~
Lake	-4.51E-05	1.57E-05	***	-2.65E-05	1.29E-05	**
Lassen	-8.02E-05	2.09E-05	***	-5.15E-05	2.02E-05	**
Los Angeles	5.05E-05	7.41E-06	***	5.66E-05	6.66E-06	***
Madera	-3.38E-05	1.78E-05	*	-1.54E-05	1.63E-05	
Marin	7.07E-05	5.62E-06	***	7.31E-05	5.53E-06	***
Mariposa	-4.25E-05	2.06E-05	**	2.00E-07	1.56E-05	
Mendocino	-2.32E-05	8.81E-06	***	-8.54E-07	5.90E-06	

(Table A3 Continued)

	Coefficient	S.E.		Coefficient	S.E.	
Merced	-2.40E-05	1.54E-05	~	2.51E-06	1.11E-05	
Modoc	-8.57E-05	3.71E-05	**	-2.76E-05	3.30E-05	
Mono	-7.61E-05	2.09E-05	***	-2.88E-05	1.35E-05	**
Monterey	-3.26E-05	6.60E-06	***	-2.52E-05	5.84E-06	***
Napa	-3.03E-05	7.82E-06	***	-1.77E-05	7.86E-06	**
Nevada	-4.56E-05	1.60E-05	***	-2.83E-05	1.68E-05	*
Orange	-1.69E-05	1.59E-05		-3.95E-06	1.64E-05	
Placer	-5.10E-05	1.84E-05	***	-2.64E-05	1.70E-05	~
Plumas	-9.37E-05	2.37E-05	***	-4.36E-05	1.69E-05	***
Riverside	-1.92E-05	1.42E-05		-3.51E-06	1.26E-05	
Sacramento	-3.51E-06	1.28E-05		1.75E-05	9.41E-06	*
San Benito	-1.11E-05	1.07E-05		-9.96E-08	1.13E-05	
San Bernardino	3.45E-05	1.36E-05	**	5.31E-05	1.05E-05	***
San Diego	-2.66E-06	1.19E-05		9.11E-06	1.17E-05	
San Francisco	-			4.16E-05	8.54E-06	***
San Joaquin	-4.64E-05	1.33E-05	***	-2.70E-05	9.75E-06	***
San Luis Obispo	-4.42E-05	1.44E-05	***	-2.62E-05	1.40E-05	*
San Mateo	2.12E-05	4.95E-06	***	2.03E-05	5.17E-06	***
Santa Barbara	-1.15E-05	1.01E-05		2.12E-06	9.79E-06	
Santa Clara	3.96E-05	5.34E-06	***	4.53E-05	5.69E-06	***
Santa Cruz	2.25E-06	3.37E-06		5.49E-06	3.39E-06	~
Shasta	-7.54E-05	2.20E-05	***	-5.14E-05	1.86E-05	***
Sierra	-4.66E-05	5.24E-05		4.18E-05	4.66E-05	
Siskiyou	-8.85E-05	1.88E-05	***	-5.47E-05	1.49E-05	***
Solano	-4.02E-05	7.80E-06	***	-2.74E-05	6.45E-06	***
Sonoma	-8.67E-07	4.60E-06		4.17E-06	5.52E-06	
Stanislaus	-2.37E-07	1.56E-05		2.59E-05	1.21E-05	**
Sutter	-9.20E-05	1.92E-05	***	-6.60E-05	1.64E-05	***
Tehama	-4.19E-05	2.24E-05	*	-8.92E-06	1.76E-05	
Trinity	-1.04E-04	2.17E-05	***	-5.23E-05	1.15E-05	***
Tulare	-6.86E-06	1.95E-05		2.29E-05	1.47E-05	~
Tuolumne	-7.14E-05	1.72E-05	***	-4.27E-05	1.40E-05	***
Ventura	-2.28E-05	1.27E-05	*	-1.06E-05	1.31E-05	
Yolo	-2.12E-05	7.62E-06	***	-1.39E-05	6.11E-06	**
Yuba	-7.94E-05	2.24E-05	***	-4.20E-05	1.56E-05	***
Constant	-9.66E-05	2.83E-05	***	-5.53E-05	1.89E-05	***
N	570			580		
Groups	57			58		
Obs per group	10			10		
Wald χ^2	47,161.09	***		12,324.66	***	
R ²	0.7664			0.7546		

***p<0.01, **p<0.05, *p<0.10, ~p<0.15.

Table A4: Complete model of the determinants of non-serious non-violent and “wobbler” third strikers incarcerated by county (adjusted for population), including opposition to Proposition 66 with county and year estimates. Estimated using a cross-sectional time series regression with panel corrected standard errors in STATA 12 (xtpcse). Baseline reference county (Alameda) and year (2001) were chosen because they had the median number of “wobbler” third strikers in the dataset.

	Non-serious Non-violent		Wobblers		
	Coefficient	S.E.	Coefficient	S.E.	
DA election year	-3.46E-07	3.88E-06	-7.82E-07	3.16E-06	
DA contested election	2.63E-06	5.74E-06	4.80E-07	5.80E-06	
DA vote share	1.31E-05	1.75E-05	1.27E-05	1.80E-05	
Finances In per capita	9.31E-09	4.62E-09	** 7.38E-09	4.30E-09	*
Finances Out per capita	6.38E-09	8.13E-09	9.73E-09	8.08E-09	
Felony arrests per capita	-7.82E-04	9.00E-04	-5.74E-05	7.82E-04	
Percent of population incarcerated	9.12E-03	3.79E-03	** 6.77E-03	3.21E-03	**
Percent registered republican voters	1.32E-08	1.57E-08	1.59E-08	1.43E-08	
Republican support for president	2.73E-06	7.85E-07	*** 1.91E-06	4.90E-07	***
Percent against Proposition 66	2.10E-06	1.05E-06	** 1.44E-06	5.68E-07	**
2002	7.11E-06	3.58E-06	** 4.11E-06	2.91E-06	
2003	1.29E-06	1.05E-06	-3.75E-07	9.14E-07	
2004	-3.54E-06	2.05E-06	* -4.51E-06	1.39E-06	***
2005	-2.88E-06	3.11E-06	-4.80E-06	2.46E-06	*
2006	-5.09E-06	4.48E-06	-6.53E-06	3.74E-06	*
2007	-6.20E-06	3.57E-06	* -8.53E-06	3.16E-06	***
2008	1.97E-05	4.14E-06	*** 1.23E-05	2.78E-06	***
2009	2.18E-05	4.28E-06	*** 1.37E-05	2.60E-06	***
2010	2.47E-05	6.34E-06	*** 1.65E-05	4.34E-06	***
Alpine	-2.07E-04	7.43E-05	*** -2.07E-04	6.85E-05	***
Amador	-1.32E-04	1.04E-05	*** -9.24E-05	7.75E-06	***
Butte	-1.03E-04	1.64E-05	*** -7.42E-05	1.02E-05	***
Calaveras	-1.42E-04	1.58E-05	*** -9.71E-05	1.28E-05	***
Colusa	-1.44E-04	1.52E-05	*** -9.07E-05	1.25E-05	***
Contracosta	-4.06E-05	9.90E-06	*** -2.48E-05	7.88E-06	***
Del Norte	-1.04E-04	2.01E-05	*** -6.58E-05	1.21E-05	***
el Dorado	-1.14E-04	1.56E-05	*** -7.61E-05	1.29E-05	***
Fresno	-8.82E-05	3.94E-06	*** -6.62E-05	2.64E-06	***
Glenn	-1.26E-04	2.06E-05	*** -1.10E-04	1.43E-05	***
Humboldt	-6.25E-05	1.69E-05	*** -4.33E-05	9.16E-06	***
Imperial	-6.52E-05	1.04E-05	*** -5.07E-05	8.83E-06	***
Inyo	-1.78E-04	1.77E-05	*** -1.31E-04	1.43E-05	***
Kern	8.80E-05	1.85E-05	*** 7.26E-05	1.11E-05	***
Kings	-1.07E-05	1.90E-05	-1.52E-05	1.38E-05	
Lake	-8.04E-05	1.49E-05	*** -6.12E-05	1.11E-05	***
Lassen	-1.34E-04	2.14E-05	*** -1.02E-04	1.42E-05	***
Los Angeles	5.06E-05	5.71E-06	*** 3.60E-05	4.97E-06	***
Madera	-8.34E-05	1.19E-05	*** -6.81E-05	8.45E-06	***
Marin	8.74E-05	7.02E-06	*** 6.96E-05	5.69E-06	***

(Table A4 Continued)

	Non-serious Non-violent			Wobblers		
	Coefficient	S.E.		Coefficient	S.E.	
Mariposa	-1.09E-04	1.88E-05	***	-7.19E-05	1.36E-05	***
Mendocino	-3.47E-05	1.30E-05	***	-2.30E-05	8.85E-06	***
Merced	-5.95E-05	8.52E-06	***	-5.16E-05	6.50E-06	***
Modoc	-1.75E-04	3.54E-05	***	-1.15E-04	3.13E-05	***
Mono	-1.23E-04	2.01E-05	***	-9.36E-05	1.78E-05	***
Monterey	-4.16E-05	9.71E-06	***	-3.46E-05	5.90E-06	***
Napa	-7.10E-05	9.55E-06	***	-5.30E-05	6.70E-06	***
Nevada	-1.01E-04	1.59E-05	***	-7.10E-05	1.33E-05	***
Orange	-8.27E-05	1.36E-05	***	-4.91E-05	1.14E-05	***
Placer	-1.06E-04	1.36E-05	***	-8.61E-05	1.15E-05	***
Plumas	-1.53E-04	2.39E-05	***	-1.13E-04	1.89E-05	***
Riverside	-6.23E-05	7.51E-06	***	-4.99E-05	5.23E-06	***
Sacramento	-1.61E-05	8.55E-06	*	-2.78E-05	5.22E-06	***
San Benito	-5.94E-05	1.06E-05	***	-3.05E-05	8.75E-06	***
San Bernardino	-	-	-	-	-	-
San Diego	-3.26E-05	7.18E-06	***	-2.82E-05	5.96E-06	***
San Francisco	-	-	-	-	-	-
San Joaquin	-9.12E-05	6.23E-06	***	-7.14E-05	3.95E-06	***
San Luis Obispo	-7.34E-05	1.63E-05	***	-5.49E-05	1.18E-05	***
San Mateo	5.74E-07	7.41E-06		1.20E-05	5.51E-06	**
Santa Barbara	-2.38E-05	1.36E-05	*	-1.63E-05	8.64E-06	*
Santa Clara	4.36E-05	4.61E-06	***	2.75E-05	3.85E-06	***
Santa Cruz	1.45E-05	6.46E-06	**	9.29E-06	4.29E-06	**
Shasta	-1.10E-04	2.63E-05	***	-9.47E-05	1.52E-05	***
Sierra	-1.03E-04	5.34E-05	*	-6.30E-05	4.97E-05	
Siskiyou	-9.48E-05	2.61E-05	***	-9.66E-05	1.59E-05	***
Solano	-8.24E-05	2.29E-06	***	-5.96E-05	1.86E-06	***
Sonoma	-2.49E-05	5.82E-06	***	-9.35E-06	4.74E-06	**
Stanislaus	-1.89E-05	1.05E-05	*	-2.52E-05	7.67E-06	***
Sutter	-1.73E-04	1.10E-05	***	-1.26E-04	7.81E-06	***
Tehama	-7.65E-05	2.48E-05	***	-6.33E-05	1.51E-05	***
Trinity	-3.30E-05	2.53E-05		-1.18E-04	1.76E-05	***
Tulare	-4.87E-05	9.72E-06	***	-4.34E-05	6.45E-06	***
Tuolumne	-1.31E-04	1.13E-05	***	-9.94E-05	8.53E-06	***
Ventura	-9.02E-05	1.32E-05	***	-5.42E-05	1.02E-05	***
Yolo	-5.30E-05	5.29E-06	***	-3.53E-05	3.33E-06	***
Yuba	-9.84E-05	1.95E-05	***	-1.10E-04	1.11E-05	***
Constant	-1.93E-04	2.46E-05	***	-1.53E-04	2.22E-05	***
N	570			570		
Groups	57			57		
Obs per group	10			10		
Wald χ^2	116,484.54	***		23,388.58	***	
R ²	0.8407			0.7664		

***p<0.01, **p<0.05, *p<0.10, ~p<0.15.

Table A5: Complete model of the determinants of non-serious non-violent and “wobbler” third strikers incarcerated by county (adjusted for population), including support of Proposition 84 with county and year estimates. Estimated using a cross-sectional time series regression with panel corrected standard errors in STATA 12 (xtpcse). Baseline reference county (Alameda) and year (2001) were chosen because they had the median number of “wobbler” third strikers in the dataset.

	Non-serious Non-violent		Wobblers		
	Coefficient	S.E.	Coefficient	S.E.	
DA election year	-3.46E-07	3.88E-06	-7.82E-07	3.16E-06	
DA contested election	2.63E-06	5.74E-06	4.80E-07	5.80E-06	
DA vote share	1.31E-05	1.75E-05	1.27E-05	1.80E-05	
Finances In per capita	9.31E-09	4.62E-09	** 7.38E-09	4.30E-09	*
Finances Out per capita	6.38E-09	8.13E-09	9.73E-09	8.08E-09	
Felony arrests per capita	-7.82E-04	9.00E-04	-5.74E-05	7.82E-04	
Percent of population incarcerated	9.12E-03	3.79E-03	** 6.77E-03	3.21E-03	**
Percent registered republican voters	1.32E-08	1.57E-08	1.59E-08	1.43E-08	
Republican support for president	2.73E-06	7.85E-07	*** 1.91E-06	4.90E-07	***
Percent support for Proposition 84	-1.80E-06	7.61E-07	** -1.49E-06	5.12E-07	***
2002	7.11E-06	3.58E-06	** 4.11E-06	2.91E-06	
2003	1.29E-06	1.05E-06	-3.75E-07	9.14E-07	
2004	-3.54E-06	2.05E-06	* -4.51E-06	1.39E-06	***
2005	-2.88E-06	3.11E-06	-4.80E-06	2.46E-06	*
2006	-5.09E-06	4.48E-06	-6.53E-06	3.74E-06	*
2007	-6.20E-06	3.57E-06	* -8.53E-06	3.16E-06	***
2008	1.97E-05	4.14E-06	*** 1.23E-05	2.78E-06	***
2009	2.18E-05	4.28E-06	*** 1.37E-05	2.60E-06	***
2010	2.47E-05	6.34E-06	*** 1.65E-05	4.34E-06	***
Alpine	-2.10E-04	7.28E-05	*** -2.08E-04	6.77E-05	***
Amador	-6.65E-05	2.49E-05	*** -4.52E-05	1.41E-05	***
Butte	-7.64E-05	2.27E-05	*** -5.50E-05	1.34E-05	***
Calaveras	-8.25E-05	2.06E-05	*** -5.32E-05	1.31E-05	***
Colusa	-7.21E-05	2.61E-05	*** -3.80E-05	1.57E-05	**
Contracosta	-2.96E-06	5.85E-06	3.12E-06	4.80E-06	
Del Norte	-6.11E-05	2.11E-05	*** -3.27E-05	1.21E-05	***
el Dorado	-4.68E-05	2.14E-05	** -2.74E-05	1.36E-05	**
Fresno	-1.46E-05	1.88E-05	-1.22E-05	1.07E-05	
Glenn	-6.89E-05	3.12E-05	** -6.81E-05	1.87E-05	***
Humboldt	-6.40E-05	1.31E-05	*** -4.38E-05	7.22E-06	***
Imperial	-	-	-	-	
Inyo	-1.24E-04	2.58E-05	*** -9.17E-05	1.69E-05	***
Kern	1.54E-04	2.60E-05	*** 1.22E-04	1.53E-05	***
Kings	5.98E-05	3.22E-05	* 3.69E-05	2.17E-05	*
Lake	-4.33E-05	2.21E-05	** -3.37E-05	1.52E-05	**
Lassen	-7.69E-05	2.66E-05	*** -6.00E-05	1.57E-05	***
Los Angeles	9.22E-05	1.06E-05	*** 6.75E-05	8.94E-06	***
Madera	-6.69E-06	2.28E-05	-1.17E-05	1.34E-05	
Marin	8.82E-05	6.93E-06	*** 7.00E-05	5.75E-06	***

(Table A5 Continued)

	Non-serious Non-violent			Wobblers		
	Coefficient	S.E.		Coefficient	S.E.	
Mariposa	-4.88E-05	2.67E-05	*	-2.86E-05	1.63E-05	*
Mendocino	-3.60E-05	1.32E-05	***	-2.41E-05	9.02E-06	***
Merced	2.18E-06	1.87E-05		-6.27E-06	1.06E-05	
Modoc	-1.05E-04	4.06E-05	**	-6.33E-05	3.21E-05	**
Mono	-8.25E-05	2.17E-05	***	-6.40E-05	1.71E-05	***
Monterey	-1.95E-05	6.15E-06	***	-1.66E-05	4.90E-06	***
Napa	-2.66E-05	7.86E-06	***	-2.09E-05	5.01E-06	***
Nevada	-5.47E-05	1.97E-05	***	-3.80E-05	1.36E-05	***
Orange	-9.49E-06	1.56E-05		4.83E-06	1.04E-05	
Placer	-3.16E-05	2.02E-05	~	-3.22E-05	1.25E-05	**
Plumas	-1.08E-04	2.83E-05	***	-8.06E-05	1.93E-05	***
Riverside	1.81E-05	1.52E-05		1.03E-05	1.00E-05	
Sacramento	3.57E-05	1.72E-05	**	1.01E-05	9.92E-06	
San Benito	-8.96E-06	7.80E-06		7.23E-06	5.66E-06	
San Bernardino	8.07E-05	1.62E-05	***	5.97E-05	9.94E-06	***
San Diego	3.39E-05	1.12E-05	***	2.15E-05	7.51E-06	***
San Francisco	-	-		-	-	
San Joaquin	-2.76E-05	1.51E-05	*	-2.39E-05	8.86E-06	***
San Luis Obispo	-3.74E-05	1.43E-05	***	-2.72E-05	9.51E-06	***
San Mateo	2.37E-05	5.07E-06	***	2.93E-05	4.37E-06	***
Santa Barbara	-9.50E-06	1.38E-05		-5.42E-06	8.47E-06	
Santa Clara	6.99E-05	5.84E-06	***	4.67E-05	4.02E-06	***
Santa Cruz	-2.78E-06	5.92E-06		-3.56E-06	4.81E-06	
Shasta	-6.54E-05	3.44E-05	*	-6.19E-05	1.99E-05	***
Sierra	-6.14E-05	5.49E-05		-3.21E-05	4.95E-05	
Siskiyou	-6.65E-05	2.57E-05	**	-7.48E-05	1.52E-05	***
Solano	-3.02E-05	7.01E-06	***	-2.03E-05	4.64E-06	***
Sonoma	-1.97E-05	8.84E-06	**	-6.83E-06	6.19E-06	
Stanislaus	4.15E-05	1.81E-05	**	1.96E-05	9.96E-06	**
Sutter	-9.43E-05	2.35E-05	***	-6.82E-05	1.36E-05	***
Tehama	-2.80E-05	3.40E-05		-2.75E-05	1.99E-05	
Trinity	-4.33E-06	3.02E-05		-9.68E-05	1.96E-05	***
Tulare	2.83E-05	2.66E-05		1.28E-05	1.49E-05	
Tuolumne	-6.97E-05	2.11E-05	***	-5.42E-05	1.23E-05	***
Ventura	-2.43E-05	1.19E-05	**	-6.14E-06	7.96E-06	
Yolo	-2.65E-05	1.25E-05	**	-1.63E-05	7.15E-06	**
Yuba	-3.22E-05	3.35E-05		-6.15E-05	1.90E-05	***
Constant	-2.10E-06	3.13E-05		-6.51E-06	2.66E-05	
N		570			570	
Groups		57			57	
Obs per group		10			10	
Wald χ^2	31,961.69	***		15,766.41	***	
R ²	0.8407			0.7664		

***p<0.01, **p<0.05, *p<0.10, ~p<0.15.

Table A6: Complete model of the determinants of non-serious non-violent and “wobbler” third strikers incarcerated by county (adjusted for population), including opposition to Proposition 36 with county and year estimates. Estimated using a cross-sectional time series regression with panel corrected standard errors in STATA 12 (xtpcse). Baseline reference county (Alameda) and year (2001) were chosen because they had the median number of “wobbler” third strikers in the dataset.

	Non-serious Non-violent		Wobblers		
	Coefficient	S.E.	Coefficient	S.E.	
DA election year	-3.46E-07	3.88E-06	-7.82E-07	3.16E-06	
DA contested election	2.63E-06	5.74E-06	4.80E-07	5.80E-06	
DA vote share	1.31E-05	1.75E-05	1.27E-05	1.80E-05	
Finances In per capita	9.31E-09	4.62E-09	** 7.38E-09	4.30E-09	*
Finances Out per capita	6.38E-09	8.13E-09	9.73E-09	8.08E-09	
Felony arrests per capita	-7.82E-04	9.00E-04	-5.74E-05	7.82E-04	
Percent of population incarcerated	9.12E-03	3.79E-03	** 6.77E-03	3.21E-03	**
Percent registered republican voters	1.32E-08	1.57E-08	1.59E-08	1.43E-08	
Republican support for President	2.73E-06	7.85E-07	*** 1.91E-06	4.90E-07	***
Percent opposed to Proposition 36	-1.25E-06	1.18E-06	-1.27E-06	6.70E-07	*
2002	7.11E-06	3.58E-06	** 4.11E-06	2.91E-06	
2003	1.29E-06	1.05E-06	-3.75E-07	9.14E-07	
2004	-3.54E-06	2.05E-06	* -4.51E-06	1.39E-06	***
2005	-2.88E-06	3.11E-06	-4.80E-06	2.46E-06	*
2006	-5.09E-06	4.48E-06	-6.53E-06	3.74E-06	*
2007	-6.20E-06	3.57E-06	* -8.53E-06	3.16E-06	***
2008	1.97E-05	4.14E-06	*** 1.23E-05	2.78E-06	***
2009	2.18E-05	4.28E-06	*** 1.37E-05	2.60E-06	***
2010	2.47E-05	6.34E-06	*** 1.65E-05	4.34E-06	***
Alpine	-2.09E-04	7.25E-05	*** -2.08E-04	6.78E-05	***
Amador	-5.87E-05	1.04E-05	*** -3.46E-05	7.28E-06	***
Butte	-7.03E-05	1.32E-05	*** -4.73E-05	8.00E-06	***
Calaveras	-8.25E-05	1.64E-05	*** -4.98E-05	1.21E-05	***
Colusa	-6.39E-05	1.42E-05	*** -2.56E-05	1.15E-05	**
Contracosta	-9.32E-06	7.84E-06	-6.86E-07	6.67E-06	
Del Norte	-7.08E-05	1.89E-05	*** -3.82E-05	1.19E-05	***
el Dorado	-4.22E-05	1.45E-05	*** -1.96E-05	1.09E-05	*
Fresno	-1.07E-05	9.99E-06	-3.48E-06	7.16E-06	
Glenn	-6.04E-05	1.81E-05	*** -5.61E-05	1.29E-05	***
Humboldt	-6.50E-05	1.20E-05	*** -4.41E-05	6.65E-06	***
Imperial	-2.90E-05	1.01E-05	*** -2.18E-05	8.41E-06	***
Inyo	-1.19E-04	1.77E-05	*** -8.39E-05	1.43E-05	***
Kern	1.52E-04	1.63E-05	*** 1.26E-04	1.07E-05	***
Kings	6.43E-05	1.84E-05	*** 4.64E-05	1.39E-05	***
Lake	-4.27E-05	1.58E-05	*** -3.06E-05	1.21E-05	**
Lassen	-8.08E-05	1.82E-05	*** -5.95E-05	1.13E-05	***
Los Angeles	7.98E-05	8.24E-06	*** 5.87E-05	6.22E-06	***
Madera	-	-	-	-	
Marin	8.33E-05	8.89E-06	*** 6.49E-05	6.90E-06	***

(Table A6 Continued)

	Non-serious Non-violent			Wobblers		
	Coefficient	S.E.		Coefficient	S.E.	
Mariposa	-3.94E-05	2.00E-05	**	-1.59E-05	1.28E-05	
Mendocino	-3.46E-05	1.27E-05	***	-2.29E-05	8.75E-06	***
Merced	3.70E-06	1.19E-05		-7.88E-07	8.82E-06	
Modoc	-1.01E-04	3.61E-05	***	-5.44E-05	3.20E-05	*
Mono	-8.74E-05	2.16E-05	***	-6.63E-05	1.84E-05	***
Monterey	-3.38E-05	6.86E-06	***	-2.76E-05	4.35E-06	***
Napa	-2.79E-05	5.53E-06	***	-2.01E-05	4.50E-06	***
Nevada	-4.76E-05	1.35E-05	***	-2.91E-05	1.10E-05	***
Orange	-1.87E-05	1.26E-05	~	3.19E-07	9.36E-06	
Placer	-3.19E-05	1.28E-05	**	-2.83E-05	9.62E-06	***
Plumas	-1.05E-04	2.22E-05	***	-7.45E-05	1.79E-05	***
Riverside	7.36E-07	1.06E-05		-7.92E-07	5.81E-06	
Sacramento	3.44E-05	1.24E-05	***	1.17E-05	7.84E-06	~
San Benito	-1.80E-05	9.39E-06	*	2.09E-06	7.35E-06	
San Bernardino	7.06E-05	9.87E-06	***	5.51E-05	6.35E-06	***
San Diego	1.77E-05	9.78E-06	*	1.04E-05	5.94E-06	*
San Francisco	-	-		-	-	
San Joaquin	-3.65E-05	1.06E-05	***	-2.79E-05	6.71E-06	***
San Luis Obispo	-4.51E-05	1.24E-05	***	-3.13E-05	9.25E-06	***
San Mateo	1.63E-05	5.29E-06	***	2.35E-05	4.44E-06	***
Santa Barbara	-8.60E-06	9.26E-06		-3.16E-06	6.01E-06	
Santa Clara	6.49E-05	5.38E-06	***	4.32E-05	3.63E-06	***
Santa Cruz	5.97E-07	5.55E-06		-1.43E-06	4.02E-06	
Shasta	-5.54E-05	1.73E-05	***	-4.87E-05	1.11E-05	***
Sierra	-5.86E-05	4.81E-05		-2.60E-05	4.74E-05	
Siskiyou	-6.45E-05	1.55E-05	***	-6.97E-05	1.02E-05	***
Solano	-4.43E-05	6.20E-06	***	-3.03E-05	3.89E-06	***
Sonoma	-9.42E-06	4.67E-06	**	2.31E-06	4.00E-06	
Stanislaus	3.92E-05	1.11E-05	***	2.17E-05	8.02E-06	***
Sutter	-9.68E-05	1.15E-05	***	-6.54E-05	6.59E-06	***
Tehama	-1.92E-05	1.79E-05		-1.55E-05	1.21E-05	
Trinity	-5.03E-08	2.48E-05		-9.08E-05	1.73E-05	***
Tulare	3.54E-05	1.48E-05	**	2.44E-05	9.46E-06	***
Tuolumne	-7.60E-05	1.70E-05	***	-5.68E-05	1.08E-05	***
Ventura	-2.61E-05	9.59E-06	***	-4.31E-06	7.45E-06	
Yolo	-2.67E-05	9.52E-06	***	-1.54E-05	5.57E-06	***
Yuba	-3.15E-05	2.37E-05		-5.68E-05	1.45E-05	***
Constant	-8.38E-05	2.39E-05	***	-6.94E-05	2.32E-05	***
N		570			570	
Groups		57			57	
Obs per group		10			10	
Wald χ^2	26,073.93		***	38,672.7		***
R ²	0.8407			0.7664		

***p<0.01, **p<0.05, *p<0.10, ~p<0.15.

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