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THE CALIFORNIA THREE STRIKES LAW: A VIOLATION OF INTERNATIONAL LAW AND A POSSIBLE IMPEDEMENT TO EXTRADITION

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Introduction

California’s habitual offender “three strikes” law may serve its purpose of keeping violent criminals off the streets of California, but may do so by pushing them onto the streets of foreign nations. Any intelligent habitual offender in California should flee from the United States after committing a three strikes triggering offense with the hope that, even if found in a foreign state, that state will hold that the three strikes law is cruel, inhuman or degrading treatment or punishment in violation of international law and will refuse to extradite the suspect.

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back to the United States. California’s legislature should modify the three strikes law in order to avoid possible extradition conflicts.

The purpose of this article is not to argue that recidivism laws *per se* violate U.S. Constitutional law or international law. Forty states now have some form of mandatory minimum sentencing for habitual offenders\(^1\) and the United States Supreme Court has held that recidivism laws are not *per se* unconstitutional. In *Spencer v. Texas*, the Court noted that recidivism laws throughout the United States have been sustained against contentions that they violated constitutional provisions dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, and equal protection.\(^2\) Furthermore, the purpose of this article is not to argue that California’s three strikes law violates the Eighth Amendment prohibition against cruel and unusual punishment. The Supreme Court’s holdings in *Ewing v. California*\(^3\) and *Lockyer v. Andrade*\(^4\) in 2003 make it clear that it will be nearly impossible to sustain such an argument.\(^5\)

Rather, the purpose of this article is to argue that California’s three strikes law may be viewed by other countries as a violation of international law and must be modified to avoid extradition conflicts with foreign states. Specifically, California’s three strikes law may be deemed to violate the prohibitions against arbitrary detention and cruel, inhuman or degrading treatment or punishment contained in the International Covenant on Civil and Political Rights ("ICCPR"), the Convention Against Torture ("CAT"), the Universal Declaration of Human Rights ("Universal Declaration"), and the European Convention on Human Rights ("European

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Convention”).

United Kingdom case law such as R v. Offen, R. v. Lang & Ors, and Argentine case law such as Gramajo support the proposition that the California law may be viewed as a violation of international law. In an extradition context, countries may find that the three strikes law violates international law and may refuse to extradite a suspect back to the United States who will face the three strikes penalty, because by doing so, the extraditing country may then be deemed to have violated international law. This potential conflict is illustrated by cases decided by the European Court of Human Rights (“European Court”), including Soering v. United Kingdom and Kirkwood v. United Kingdom.

In order to avoid this extradition conflict, the California legislature should amend the three strikes law in four ways. First, the law should be changed to include a time limit on the number of years a felony may count against the defendant as a strike. Second, the list of serious and violent felonies that count as strikes should include fewer crimes. Third, only a serious or violent felony should count as the “triggering strike.” Finally, felonies committed while a defendant was a minor should not be counted as strikes.

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8 See R. v. Lang, [2005] EWCA (Crim) 2864, [3] (Eng.).


Section I addresses the history of the three strikes law, and the Supreme Court’s rejection of the argument that the three strikes law violates the Eighth Amendment. Section II explains why other countries may find that California’s three strikes law violates international human rights law, and discusses foreign decisions on disproportionate treatment in sentencing. Section III addresses extradition, including extradition requests made to foreign states by the United States that have been granted, extradition requests that have been refused, and the likelihood that an extradition request in which a suspect will face sentencing under the three strikes law may be refused. Section IV discusses amendments that the California legislature should make to the three strikes law in order to avoid a potential conflict with foreign states over extradition.

I. Background of California’s Three Strikes Law and the Supreme Court’s Rulings that the Three Strikes Law does not Violate the Eighth Amendment

Between 1993 and 1995, twenty-four states and the federal government enacted new recidivism laws, but most of these laws are not nearly as harsh as California’s three strikes law.\(^{13}\) The California law, enacted in 1994, was created to “ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent crimes.”\(^{14}\) The goal of the three strikes law is to reduce crime through deterrence and incapacitation.\(^{15}\)

Under the three strikes law, when a defendant is convicted of any felony, and he has previously been convicted of one “serious” or “violent” felony,\(^ {16}\) the court must sentence the


\(^{14}\) Cal. Penal Code § 667(b) (West 1999).

\(^{15}\) Ewing, 538 U.S. at 14.

\(^{16}\) Cal. Penal Code §§ 667.5 and 1192.7 (West Supp. 2002).
defendant to twice the term that he normally would have received for the current felony. \(^\text{17}\) Also under the three strikes law, when a defendant is convicted of any felony, and he has previously been convicted of two or more serious or violent felonies, the court will impose a sentence ranging from a minimum of 25 years to life. \(^\text{18}\) The defendant does not become eligible for parole under the two strikes law until the defendant has served at least 80 percent of his sentence, and does not become eligible for parole under the three strikes law until the defendant has served at least 25 years. \(^\text{19}\) The California three strikes law is much harsher than previous recidivism laws in the state. Prior to 1994, recidivists in California served an average of three to four additional (recidivist-related) years in prison, with 90 percent serving less than an additional seven to eight years. \(^\text{20}\)

Felonies which may trigger application of the three strikes law include “wobblers,” which are offenses that may be classified by the prosecutor or trial judge as either felonies or misdemeanors. \(^\text{21}\) Serious or violent crimes committed as a juvenile also count as “strikes,” \(^\text{22}\) and a single past criminal act can result in two strikes. \(^\text{23}\) In addition, a felony committed at any point in one’s life may count as a strike, regardless of how many years have passed since the felony was committed. \(^\text{24}\) However, California trial courts, either on motion by the prosecution or \textit{sua sponte}, may choose not to count prior felonies as strikes when considering whether to charge or sentence the defendant under the two or three strikes law. \(^\text{25}\)

\(^{17}\) \textit{Cal. Penal Code} §§ 667(e)(1) and 1170.12(c)(1) (West Supp. 2002).
\(^{19}\) \textit{In Re} Adrian Ben Cervera, 16 P. 3d 176 (Cal. 2001).
\(^{20}\) \textit{Ewing}, 538 U.S. at 44.
\(^{21}\) \textit{Id.} at 17-18.
\(^{25}\) \textit{Ewing}, 538 U.S. at 17 (citing \textit{People v. Superior Court (Romero)}, 917 P. 2d 628, 647-648 (1996)).
The three strikes law is arbitrary and often results in disproportionate sentences. The law can be attacked as arbitrary on three grounds: 1) the nature of the bright line rule which triggers the three strikes law; 2) the impact of wobbler statutes on the application of three strikes; and 3) the inappropriate emphasis on the order in which the offenses were committed.

First, the California law is arbitrary because the California legislature chose to create a bright line rule by only punishing those who had committed felonies. Implicit in this line-drawing is the assumption that these crimes are more serious or violent than misdemeanors; however, the distinction between crimes that are classified as felonies and those that are classified as misdemeanors is itself often arbitrary (e.g. “…the line dividing felony theft from petty larceny, a line usually based on the value of the property taken, varies markedly from one state to another.”)\(^\text{26}\)

Second, the three strikes law is arbitrary because “wobbler” statutes classify the exact same criminal conduct as either a felony or a misdemeanor, depending only upon the discretion of the prosecutor and trial judge.\(^\text{27}\) For example, wobbler crimes include defacement of property with graffiti or stealing more than $100 worth of chicken, nuts or avocados. A prosecutor may decide to classify these crimes as felonies, which would trigger a third strike. In contrast, a defendant would not receive a third strike for reckless driving causing bodily injury, or selling poisoned alcohol, because these are pure misdemeanors.\(^\text{28}\) Petty theft falls into a subsection of wobblers. If the defendant commits petty theft and has previously committed a prior theft, then the petty theft charge becomes a wobbler, and the prosecutor may classify the theft as either a felony or misdemeanor. However, if the defendant commits petty theft and has previously committed a murder and a rape, but no prior property crime, then the petty theft does not become

\(^{26}\text{Ewing, 538 U.S. at 48 (citing Rummel, 45 U.S. at 284).}\)

\(^{27}\text{Ewing, 538 U.S. at 48-49.}\)

\(^{28}\text{Id. at 49-50.}\)
a wobbler, but can only be counted as a misdemeanor.\textsuperscript{29} Therefore, the theft would not count as a third strike and the defendant would not be sentenced to 25 years to life.

Third, the three strikes law is arbitrary because the order in which a defendant committed the crimes is relevant in determining if he will receive a third strike, since the third strike does not have to be a serious or violent felony. For example, suppose the defendant committed a theft and two burglaries in the following order: i) theft, ii) burglary, iii) burglary. On the defendant’s second burglary conviction he would not receive the three strikes enhancement, because the theft charge cannot count as a felony, since there was no prior theft. On the second burglary charge, the defendant would receive double the penalty for burglary, since the first burglary charge counts as a prior strike. In contrast, suppose the defendant had committed a theft and two burglaries in the following order: i) burglary, ii) burglary, iii) theft. In this case, on the second burglary charge, the defendant would receive twice the penalty for burglary and on the third conviction for theft, the defendant could receive 25 years to life, since now the theft charge is theft with a prior so the prosecutor may count it as a felony.\textsuperscript{30} The result is completely arbitrary. A defendant who starts with less serious crimes and graduates to more serious crimes does not receive 25 years to life, but a defendant who starts with more serious crimes and moves on to less serious crimes does receive the three strikes sentence.

Since 1980, the United States Supreme Court has addressed six cases in which the duration of imprisonment was attacked on grounds that it violated the Eighth Amendment prohibition against cruel and unusual punishment.\textsuperscript{31} The Supreme Court has held since 1910 that

\begin{itemize}
\item \textsuperscript{29} \textit{Id.} at 49.
\item \textsuperscript{30} \textit{ZIMRING ET AL, supra} note 13, at 10, tbl. 1.2.
\end{itemize}
the Eighth Amendment is applicable to non-capital sentences, as well as to capital sentences, finding that a non-capital sentence that is “grossly disproportionate” to the severity of the crime constitutes cruel and unusual punishment. However, the Court has repeatedly held that “outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.” For example, Justice Rehnquist noted in *Rummel v. Estelle* that a defendant convicted of life imprisonment for a parking violation may have a successful Eighth Amendment case. In *Harmelin v. Michigan*, Justices Kennedy, Souter and O’Conner affirmed that the Eighth Amendment contains a “narrow proportionality rule” that “applies to noncapital offenses.” Yet, there is also disagreement within the Court on this issue, as Justice Scalia joined by Justice Rehnquist, who apparently changed his mind since *Rummel*, stated that even a narrow proportionality rule does not exist.

Of the six cases where the defendant claimed that the sentence was grossly disproportionate, the only case in which the Court found that the sentence violated the Eighth Amendment was in *Solem v. Helm*, a case involving a life without parole sentence for the triggering offense of issuing a no-account check for $100. The defendant had previously been convicted of six non-violent felonies. Justice Powell, writing for the majority, looked at three factors to determine whether the sentence was disproportionate: 1) the gravity of the offense and the harshness of the penalty; 2) sentences imposed on other criminals in the same jurisdiction for

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34 *Id.* at 272.
35 *Id.* at 263.
36 *Id.* at 274, n. 11.
38 *Id.* at 997.
39 *Id.* at 965.
40 *Solem*, 463 U.S. at 277.
41 *Id.* at 281-283.
42 *Id.* at 279.
more serious crimes; and 3) sentences imposed on other criminals in other jurisdictions for the same crimes.\textsuperscript{43} The Court has not considered all of these factors in determining whether a three strikes sentence violates the Eighth Amendment since \textit{Solem}.\textsuperscript{44}

The Supreme Court’s holding in \textit{Solem}, finding that a non-capital offense violated the Eighth Amendment, was clearly an abnormality in the Supreme Court’s decisions. In 2003, the Court held in \textit{Ewing v. California}\textsuperscript{45} that a sentence of 25 years to life under the three strikes law for a triggering offense of stealing three golf clubs, worth about $1,200 in total, was not grossly disproportionate to the severity of the crime.\textsuperscript{46} The defendant had previously been convicted of several felonies, including theft and burglary.\textsuperscript{47} The defendant’s current charge was classified as grand theft, because the defendant stole more than $400.\textsuperscript{48} Grand theft is a wobbler, so either the prosecutor or the trial court could have counted the theft as a misdemeanor, and the defendant would not have been convicted of 25 years to life.\textsuperscript{49} Both the trial court and the Supreme Court refused to classify the theft as a misdemeanor and refused to strike any of the previous felonies when considering whether Ewing should receive the harsh three strikes punishment.\textsuperscript{50} Instead of using Justice Powell’s test posed in \textit{Solem} to determine whether a sentence is grossly disproportionate, the Supreme Court instead relied on the test from \textit{Harmelin}.\textsuperscript{51} This test required the Court to first determine whether the defendant met the threshold of gross disproportionality when comparing the crime committed with the sentence imposed before

\textsuperscript{43} \textit{Id.} at 292.
\textsuperscript{44} \textit{E.g.} the \textit{Solem} test was not used in \textit{Ewing v. California} or in \textit{Lockyer v. Andrade}.
\textsuperscript{45} \textit{Ewing}, 538 U.S. at 11.
\textsuperscript{46} \textit{Id.} at 30-31.
\textsuperscript{47} \textit{Id.} at 18-20.
\textsuperscript{48} \textit{CAL. PENAL CODE ANN.} § 487(a).
\textsuperscript{49} \textit{Ewing}, at 19-20, 28-29.
\textsuperscript{50} \textit{Id.} at 20.
\textsuperscript{51} \textit{Id.} at 30.
examining the other two *Solem* factors. The Court found that Ewing did not meet the threshold of gross disproportionality and upheld Ewing’s sentence of 25 years to life, finding that the long sentence was “justified by the State’s public safety interest in incapacitating and deterring recidivist felons.”

In March 2003, in an even more controversial case than *Ewing*, the Supreme Court held in *Lockyer v. Andrade* that 50 years to life was not a grossly disproportionate sentence for the theft from two stores of a total of $153.54 worth of videotapes. The two thefts, classified as misdemeanors, became subject to California’s “wobbler rule” because the defendant had committed prior property crimes. Neither the prosecutor nor the trial court used its discretion to reduce these wobblers to the status of misdemeanors. The jury found the defendant eligible for the three strikes penalty and the trial judge sentenced the defendant to two consecutive 25 year terms. The U.S. Supreme Court affirmed the ruling of the California court, holding that it did not violate the principle of proportionality to force the defendant to serve the terms consecutively. Before the case was decided by the Supreme Court, Erwin Chemerinsky, Andrade’s lawyer, declared, “I can't help but keep in mind if I lose, then it's doubtful that there's going to be any successful challenges to the three strikes law.” Along these lines, Justice Souter, joined in his dissent by Justices Stevens, Ginsburg, and Breyer, stated that if the

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52 *Harmelin*, 501 U.S. at 1005.
53 *Ewing*, 538 U.S. at 29.
54 *Lockyer*, 538 U.S. at 63.
55 Id. at 66, 70, 77.
56 Id. at 67.
57 Id. at 67-68.
58 Id. at 77.
defendant’s case was not one of the rare sentences of gross disproportionality prohibited by the Eighth Amendment, then the principle prohibiting gross disproportionality had no meaning.\textsuperscript{60}

The Supreme Court’s pattern of rejecting defendants’ claims that their sentences are grossly disproportionate and thus a violation of the Eighth Amendment indicates that the Court most likely will not find in future cases that the three strikes law as applied to particular defendants violates the Eighth Amendment. Even more unlikely would be the possibility of the Court one day holding that the three strikes law violates the Eighth Amendment \textit{per se}. Instead of arguing in court that the three strikes law, or the three strikes law as applied to particular defendants, violates the Eighth Amendment, proponents of modifying the three strikes law should take Justice O’Conner’s advice in \textit{Ewing} and direct their attention to the California legislature.\textsuperscript{61} Advocates of modification should argue to the California legislature that the three strikes law may be viewed by other countries as a violation of the international prohibition against disproportionate sentencing, which is derived from both the prohibitions against cruel, inhumane or degrading treatment or punishment and arbitrary detention. In order to avoid violating international law,\textsuperscript{62} the requested country may choose not to extradite a suspect who will be sentenced under the three strikes law.

\section*{II. The Three Strikes Law May be Viewed by Foreign States as a Violation of International Human Rights Law}

Although it is now nearly impossible for a defendant to prevail on a claim that the three strikes law violates the Eighth Amendment, proponents of modification should argue to the

\textsuperscript{60} \textit{Lockyer}, 538 U.S. at 83 (Souter, J., dissenting).

\textsuperscript{61} \textit{Ewing}, 538 U.S. at 28 (“To be sure, California’s law has sparked controversy….This criticism is appropriately directed at the legislature….“)

\textsuperscript{62} See \textit{Soering} v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989);
California legislature that the California law should be modified because other countries may hold that the three strikes law violates international law, and this could result in extradition conflicts. In making this argument, attorneys should look to decisions from the European Court of Human Rights, a criminal court in the United Kingdom, and the Argentine Supreme Court, which all may be used to support the proposition that the California three strikes law may be deemed to be a violation of international law.\textsuperscript{63} The United States demonstrated its willingness to submit itself to international law in this area when it ratified the ICCPR\textsuperscript{64} and the CAT\textsuperscript{65} in the early 1990s. Although these two treaties are non-self-executing,\textsuperscript{66} and therefore not the source of rights that litigants may invoke in U.S. courts, the United States still has an international obligation to comply with both,\textsuperscript{67} and foreign states may invoke these instruments in their bilateral relationships with the United States.

The three strikes law may be viewed by other countries as a violation of both the international prohibition against torture and other cruel, inhumane, or degrading treatment or punishment, as well as the prohibition against arbitrary detention. Article 1 of the CAT, Article 5 of the Universal Declaration and Article 7 of the ICCPR, all state, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”\textsuperscript{68} Article 3 of the European Convention includes a similar prohibition.\textsuperscript{69} Under the CAT, torture includes severe mental pain or suffering intentionally inflicted upon a person as punishment for a crime.\textsuperscript{70}

\textsuperscript{64} ICCPR, supra note 6.
\textsuperscript{65} CAT, supra note 6.
\textsuperscript{66} Declarations made by U.S. attached to ICCPR and CAT.
\textsuperscript{67} THOMAS BUERGENTHAL \& HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL (2006).
\textsuperscript{68} CAT, supra note 6, art. 1; Universal Declaration, supra note 6, art. 5; ICCPR, supra note 6, art. 7.
\textsuperscript{69} European Convention, supra note 6.
\textsuperscript{70} CAT, supra note 6, art 1.
The three strikes law may also be viewed as a violation of Article 9 of the Universal Declaration and Article 9 of the ICCPR, which state, “No one shall be subjected to arbitrary arrest or detention.” Article 5 of the European Convention includes a similar provision. Detention is arbitrary if it is not pursuant to the law. As noted in the Restatement (Third) of Foreign Relations Law, detention may also be arbitrary even if it is pursuant to the law, but if “it is incompatible with the principles of justice or with the dignity of the human person.” The U.N. Human Rights Committee has stated that arbitrariness includes, “elements of inappropriateness, injustice and lack of predictability.”

Foreign courts may find that the California three strikes law violates international law because foreign courts have ruled that their own countries’ recidivism laws, which are not nearly as harsh as the California three strikes law, still violate the prohibition in international law against disproportionate sentences when they are applied to certain defendants. One of the most striking decisions to declare that a sentence imposed under a recidivism law violates international human rights law is R v. Offen and other cases (No. 2), decided by the United Kingdom criminal appellate court in 2000. In R v. Offen, Lord Woolf CJ held that the U.K.’s recidivism laws as applied to two defendants violated articles 3 and 5 of the European Convention. Article 3 prohibits torture and inhumane or degrading treatment or punishment. Article 5 states that every person has the right to liberty and security of person, and that no one shall be deprived of his liberty except in certain cases, such as the lawful detention of a person

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71 Universal Declaration, supra note 6, art.9; ICCPR, supra note 6, art. 9.
72 European Convention, supra note 6, art.5.
75 R v. Offen and other cases, [2000] 1 W.L.R. 253 (Eng.).
76 Id. at para. 97, 103, 104.
77 European Convention, supra note 6, art. 3.
after conviction by a competent court. The European Convention is incorporated into the U.K. Human Rights Act of 1998. Section 3 of the Human Rights Act imposes a duty on the courts in the United Kingdom to construe legislation which affects human rights in a manner which conforms to the Convention whenever this is possible.

The recidivism law addressed in *R v. Offen* was contained in section 2 of the Crime (Sentences) Act of 1997. Under section 2, the court must impose a life sentence if a defendant: 1) is convicted of a serious offense committed after commencement of this section, 2) was at least 18 years old when he committed this offense and at least 21 years old when convicted of this offense, and 3) has previously been convicted of a serious offense. Under the 1997 Act, the court may refrain from issuing a life sentence if there are exceptional circumstances relating to either of the offenses or to the offender.

In *Offen*, the appellate court examined the sentences of life imprisonment imposed upon defendants Mathew Offen and Darren McKeown, and this court held that a sentence of life imprisonment as applied to these two defendants violated articles 3 and 5 of the European Convention. In 1999, defendant Mathew Offen was sentenced to life imprisonment under section 2 of the 1997 Act, after pleading guilty to robbery involving the use of an imitation gun. He was previously convicted of robbery with an imitation gun and of two thefts. Various medical reports stated that the defendant was schizophrenic, was suffering from depression, and

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78 European Convention, *supra* note 6, art. 5.
79 *Offen*, 1 W.L.R. 253, [92].
80 Crime (Sentences) Act, 1997, c. 43, § 2 (Eng.).
81 Serious offenses included the following: attempt to commit murder; conspiracy to commit murder; incitement to murder; soliciting murder; manslaughter; wounding, or causing grievous bodily harm with intent; rape or attempt to commit rape; intercourse with a girl under 13; possession of a firearm with an intent to injure; use of a firearm to resist arrest; carrying a firearm with criminal intent; and robbery with a gun or imitation gun. *Id.*
82 *Id.*
83 *Id.*
84 See *Offen*, 1 W.L.R. 253, [97], [103]-[104].
85 *Id.* paras. 8, 9.
86 *Id.* paras. 8, 103.
has pseudo-psychiatric voices in his head.\textsuperscript{87} Medical reports presented to the judge also stated that the defendant posed a low risk of danger to the public.\textsuperscript{88} The trial judge sentenced Offen to life in prison under section 2 of the 1997 Act, but stated that he believed it was unlikely that Parliament had this sort of case in mind when it passed the 1997 Act.\textsuperscript{89}

In \textit{Offen}, the appellate court also examined the case of Darren McKeown. The trial court had convicted McKeown in 2000 on a charge of causing grievous bodily harm with intent.\textsuperscript{90} In 1990, the defendant had been sentenced to two years of detention in a youth offenders institution for a conviction of wounding with intent when the defendant was 16 years old.\textsuperscript{91} A pre-sentence report noted that the defendant posed a low risk to the public.\textsuperscript{92} The defendant was sentenced to life imprisonment for his second conviction under section 2 of the 1997 Act.\textsuperscript{93} The trial judge said that he would have sentenced the defendant to a determinate term of three years if he could, but a life sentence was the only term he was allowed to impose by law.\textsuperscript{94}

It has been argued that the purpose of the Crimes (Sentences) Act of 1997 was not to increase imprisonment time in order to punish offenders, but to defer the release date of the offender if it is determined that the offender poses a significant risk to the public.\textsuperscript{95} In construing section 2 of the 1997 Act in accordance with the obligation imposed on the court under section 3(1) of the Human Rights Act, the appellate court in \textit{Offen} held that section 2 of the 1997 Act did not violate articles 3 and 5 of the European Convention \textit{per se}.\textsuperscript{96} Rather, the appellate court stated that trial courts imposed disproportionate sentences because they were interpreting the

\begin{footnotes}
\textsuperscript{87} Id. paras. 16, 18.
\textsuperscript{88} Id. para. 16.
\textsuperscript{89} Id. para. 16.
\textsuperscript{90} Id. para. 22.
\textsuperscript{91} Id. paras. 22, 29.
\textsuperscript{92} Id. para. 30.
\textsuperscript{93} Id. para. 22.
\textsuperscript{94} Id. paras, 23, 32.
\textsuperscript{95} Id. para. 92.
\textsuperscript{96} Id. para. 100.
\end{footnotes}
exceptional circumstances provision of section 2 too narrowly.\textsuperscript{97} Thus, the appellate court found that this narrow interpretation of section 2, which resulted in life imprisonment for those who did not constitute a significant risk to the public, created the violation of articles 3 and 5 of the European Convention.\textsuperscript{98} The Court essentially stated that each case should be examined on a case by case basis. The sentencing court should take into account all the circumstances relating to the offender’s record, particularly looking at whether the offenses committed are similar to each other or if there is a long period that elapsed between the offenses during which time the offender had not committed other offenses.\textsuperscript{99} If it is determined that the offender does not pose a significant risk of harm to the public, then the court should find that the offender’s case is exceptional and the judge should not sentence the defendant to life imprisonment.\textsuperscript{100}

In the cases of both Offen and McKeown, the appellate court held that the defendants did not pose a significant risk to the public, and that the defendants fell into the exception to section 2 of the 1997 Act.\textsuperscript{101} The Court reduced the sentences of both defendants from life imprisonment to a determinate sentence of three years.\textsuperscript{102}

The U.K. recidivism law addressed in \textit{R. v. Offen} was not nearly as harsh as the California three strikes law. First, the list of serious offenses under section 2 of the 1997 Act is shorter than the list of serious or violent crimes under the California three strikes law. For example, serious felonies in the United Kingdom did not include arson or carjacking, which may be classified as either serious or violent felonies under California law. Second, under a different section of the 1997 U.K. recidivism law, which is still in force today, a defendant could be

\textsuperscript{97} See id., paras. 95, 97-99.
\textsuperscript{98} Id.
\textsuperscript{99} Id. para. 97.
\textsuperscript{100} See id., paras. 97-99.
\textsuperscript{101} Id. paras. 103, 104.
\textsuperscript{102} Id.
sentenced to as little as seven years for committing three class A drug trafficking offenses.\textsuperscript{103} Under California law, the defendant would face a minimum of 25 years to life for three class A drug trafficking convictions. Third, under the 1997 Act, a defendant could be sentenced to as little as three years imprisonment after being convicted of three burglaries.\textsuperscript{104} This provision of the 1997 Act is also still in force in the United Kingdom today. In California, the defendant would face a minimum of 25 years to life for convictions for three burglaries.

The U.K. criminal appeals court found in \textit{Offen} that the British recidivism law, which was not as harsh as the California three strikes law, violated international human rights law as applied. Therefore, it is logical to assume that if a British court had the opportunity to decide whether the California three strikes law violates international law, it would similarly find that the exceedingly harsh California law also violates international human rights law. British courts will have the opportunity to make this determination in an extradition context, which will be discussed in further detail below.

The U.K. Crime Sentences Act of 1997 was replaced by the Power of Criminal Courts (Sentencing) Act of 2000.\textsuperscript{105} The recidivism statute in the 2000 Act was nearly identical to the recidivism statute in the 1997 Act.\textsuperscript{106} In 2003, Parliament enacted the Criminal Justice Act,

\textsuperscript{103} Under section 3 of the Crimes (Sentences) Act 1997, the court must impose a minimum prison term of seven years when 1) A defendant is convicted of a Class A drug trafficking offense committed after the commencement of this section, 2) At the time this offense was committed, the defendant was 18 or over, 3) The defendant had previously been convicted of two other class A drug trafficking offenses, and 4) One of the other offenses was committed after the defendant had been convicted of the other. The court may choose not to sentence the defendant to a minimum seven year term if the court finds that based on the particular circumstances relating to the offense of the offender, it would be unjust to do so.

\textsuperscript{104} Under Section 4 of the Power of Crimes (Sentences) Act 1997, the court must impose a minimum prison term of three years when 1) A person is convicted of a domestic burglary committed after commencement of this section, 2) At the time when the burglary was committed, the defendant was 18 or over, 3) The defendant had previously been convicted of two other domestic burglaries, and 4) One of these burglaries was committed after the defendant had been convicted of the other, and both of the burglaries were committed after commencement of this section. The court may decide not to impose this minimum term if it finds that under the particular circumstances relating to the defendant or the offense, it would be unjust for the court to impose the three year sentence.

\textsuperscript{105} Powers of Criminal Courts (Sentencing) Act, 2000 (U.K.).

\textsuperscript{106} \textit{Id.}, c.3, § 109.
which repealed the recidivism statutes contained in the 1997 and 2000 Acts and replaced them with new “dangerous offender” provisions. \(^{107}\) The dangerous offender provisions only apply to offenses committed after April 4, 2005, while the automatic life sentence provisions contained in the 1997 and 2000 Acts still apply to offenses committed before April 4, 2005. \(^{108}\) The 2003 Act no longer contains a discrete recidivism statute imposing life imprisonment on a defendant who is convicted of a serious offense and was previously convicted of a serious offense. Instead, a previous conviction is only used as an aggravating factor in determining whether a life sentence is appropriate for someone who commits a serious offense. \(^{109}\)

Under section 225 of the 2003 Act, a court must impose life imprisonment if a defendant: 1) is at least 18 years old when convicted of the current offense, 2) is convicted of a serious offense which carries a maximum sentence of life imprisonment, 3) the court believes that the defendant poses a significant risk of serious harm to members of the public by committing future specified offenses, 4) the court believes that the seriousness of the offense, or of the offense and one or more offenses associated with it, is such as to justify the imposition of a life imprisonment sentence. \(^{110}\) Serious offenses which carry a maximum sentence of life imprisonment include, *inter alia*, manslaughter, kidnapping, soliciting murder and rape, among others. \(^{111}\) Under the 2003 Act, if all of the above criteria are met, and the current offense carries a minimum of a 10 year sentence but does not carry a maximum of a life sentence, the court must impose a sentence of imprisonment for public protection. \(^{112}\) Serious offenses which are punishable by at least 10 years imprisonment but less that life imprisonment include, *inter alia*, cruelty to children,

\(^{107}\) Criminal Justice Act, 2003, c. 4, § 225-229, c. 9, § 303 (U.K.).

\(^{108}\) See R. v. Lang, [2005] EWCA (Crim) 2864, [3] (Eng.).

\(^{109}\) Criminal Justice Act § 229(3).

\(^{110}\) Criminal Justice Act, c. 4, § 225.


\(^{112}\) Criminal Justice Act § 225.
possession of a firearm with an intent to cause fear of violence, and burglary with intent to inflict grievous bodily harm on a person or do unlawful damage to a building or anything in it. When considering whether the defendant poses a significant risk of serious harm to the public of committing future offenses, section 229(3) states that if the defendant has been convicted of committing one or more specified offenses in the past, there is a rebuttable presumption that the defendant is a dangerous offender, and thus a sentence of life imprisonment or imprisonment for public protection is appropriate. There is current legislation before Parliament to repeal the rebuttable presumption of dangerousness that arises when a defendant has been convicted of a previous specified offense.

There is virtually no difference between the sentence of life imprisonment and the sentence for public protection. For both the life sentence and the sentence of imprisonment for public protection, the court must set a minimum term that the defendant must serve before the defendant becomes eligible for parole. The parole board will not release the defendant until it considers the defendant to no longer pose a significant risk of serious harm to the public. Under both the sentence for life imprisonment and the sentence for public protection, the defendant may remain in prison for the duration of his life.

Although the 2003 Act may appear to be harsher than the California three strikes law, the reality is quite different. First, in the United Kingdom, a conviction for a previous offense is only one of the many factors the court considers in determining whether the defendant is a dangerous offender.

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113 Id. § 224, sched. 15, pts. 1, 2; SENTENCING GUIDELINES, supra note 109.
114 Criminal Justice Act § 229(3).
116 Lang, EWCA (Crim) 2864, [8].
117 Id.
118 See id.
119 See id.
offender, and thus subject to a sentence of life imprisonment, but it is not dispositive factor.\textsuperscript{120} Even if the defendant has a previous conviction, if the court does not find that the defendant poses a significant risk of committing serious future harm against the public, the court cannot impose a sentence of life imprisonment or imprisonment for public protection. In contrast, in California, a previous conviction is not viewed as merely one of the many factors the court considers in determining whether a life imprisonment sentence is justified. Rather, if a defendant in California commits a felony and was previously convicted of committing two serious of violent felonies, the defendant may be sentenced to 25 years to life, and the Supreme Court will not find that the sentence is unconstitutional except in “exceedingly rare” circumstances.\textsuperscript{121}

Case law decided by the U.K. after the 2003 Act was enacted illustrates the application of the dangerous offender provisions. In \textit{R. v. Lang & Ors}, defendant Abdi was convicted of a robbery and was sentenced to life imprisonment because he was previously convicted of two robberies.\textsuperscript{122} The criminal appellate court overturned this conviction.\textsuperscript{123} The appellate court found that even though the defendant had committed at least one prior specified offense under the 2003 Act, there was no evidence of any sort that the defendant posed a significant risk of serious harm to the public of committing future offenses.\textsuperscript{124} The court noted that there was no evidence of serious or psychological harm to any of the previous victims, and that the crimes were committed in an order of diminishing seriousness, since a knife was not carried during the

\textsuperscript{120} See e.g. \textit{id.} paras. 37-47. Even though defendant Abdi had two previous convictions for robbery, the appellate court held that a life sentence was not appropriate because the defendant did not pose a significant risk of serious harm to the public of committing future specified offenses.

\textsuperscript{121} \textit{Rummel}, 445 U.S. at 272.

\textsuperscript{122} \textit{Lang}, EWCA (Crim) 2864, [37]-[47].

\textsuperscript{123} \textit{id.} para. 47.

\textsuperscript{124} \textit{id.}
current offense. The criminal appellate court reversed the life sentence and sentenced Abdi to four years of imprisonment.

The Lang decision and the Offen decision mentioned above illustrate that U.K. courts give much less weight to prior convictions than do U.S. courts in determining whether a life sentence is justified. U.K. courts are more concerned with examining all facts surrounding the current offense and the history of the offender and any other relevant facts that can help it make an informed decision on whether the offender is dangerous and thus, deserves a life sentence. In contrast, the California law is primarily concerned with whether or not the defendant committed previous offenses. All other inquiries into the dangerousness of the offender or whether a life sentence even serves the professed incapacitation goal of the three strikes law are sometimes not considered at all. Although California courts are required to consider the future prospects of a defendant when deciding whether to strike a strike, in reality, defendants who cannot realistically be said to pose a significant risk to the public are still sentenced under the three strikes law. For example, when the Supreme Court decided Andrade, it concluded that a 50 year to life sentence was justified for a theft-triggering offense because the defendant had previously been convicted of serious or violent felonies. The Supreme Court did not put forth any type of legitimate argument articulating why a 50 year minimum sentence was necessary in order to serve the purpose of incapacitation. Justice Souter in his dissent pointed out that even if a sentence of 25 years to life was necessary to incapacitate Andrade, he argued that the majority simply could not justify a sentence of 50 years to life. A 50 year to life sentence implies that the defendant is twice as dangerous as other repeat offenders who receive a 25 year to life term. Justice Souter noted:

125 Id.
126 Id.
Andrade did not somehow become twice as dangerous to society when he stole the second handful of videotapes; his dangerousness may justify treating one minor felony as serious and warranting long incapacitation, but a second such felony does not disclose greater danger warranting substantially longer incapacitation. Since the defendant's condition has not changed between the two closely related thefts, the incapacitation penalty is not open to the simple arithmetic of multiplying the punishment by two, without resulting in gross disproportion even under the State's chosen benchmark.\textsuperscript{128}

Justice Souter also pointed out that the defendant’s first term of imprisonment will end, at the earliest, in 25 years and the second 25 minimum term will start immediately. This sentence means that the majority assumes that in 25 years, Andrade will still be dangerous and cannot be released for another 25 years. It is clear from the sentence imposed in Andrade that the Supreme Court did not seriously consider whether the defendant posed a risk to society that merited incarceration for a possible life term. As Justice Souter stated,

Whether or not one accepts the State’s choice of penalogical policy [of incapacitation] as constitutionally sound, that policy cannot reasonably justify the imposition of a consecutive 25-year minimum for a second minor felony committed soon after the first triggering offense…no one could seriously argue that the second theft of videotapes provided any basis to think that Andrade would be so dangerous after 25 years, the date on which the consecutive sentence would begin to run, as to require at least 25 years more….In sum, the argument that repeating a trivial crime justifies doubling a 25-year minimum incapacitation sentence based on a threat to the public does not raise a seriously debatable point on which judgments might reasonably differ. The argument is irrational, and the state court’s acceptance of it in response to a facially gross disproportion between triggering offense and penalty was unreasonable….\textsuperscript{129}

When the U.S. Supreme Court decided \textit{Andrade}, it did not discuss any of the factors the \textit{Lang} court discussed when it made its determination of whether Abdi was a dangerous offender who required life imprisonment. For example, the Supreme Court did not discuss the fact that the defendant did not physically or psychologically hurt anyone when he stole the $150 worth of videotapes. The Supreme Court also did not note that Andrade’s offenses moved from more serious offenses, such as residential burglary, to less serious offenses, such as petty theft. Instead,

\textsuperscript{128} \textit{Lockyer}, 538 U.S. at 82 (Souter, J., dissenting).
\textsuperscript{129} \textit{Lockyer}, 538 U.S. at 81-82 (Souter, J., dissenting).
the Supreme Court simply noted that the defendant had two triggering offenses of petty theft with a prior and two or more serious or violent felonies, and thus qualified for a 50 year to life sentence. In deciding that the case qualified for a three strikes penalty, the Court only looked at Andrade’s previous and current convictions and compared those to the convictions and sentences imposed on the defendants in *Rummel, Solem* and *Harmelin*. There was absolutely no discussion in the Supreme Court’s opinion regarding whether the incapacitation goal of the three strikes law required the 50 year to life sentence imposed on *Andrade*.

The 2003 U.K. Act is also not as harsh as California’s three strike law in several other ways. First, in the United Kingdom, a defendant would never have received a sentence of life imprisonment or imprisonment for public protection in cases like *Ewing v. California* or *Lockyer v. Andrade*. Under the 2003 Act, in order to impose a sentence of life imprisonment, the current offense must carry a maximum sentence of life imprisonment.  

In the case of imprisonment for public protection, the current offense must carry a maximum sentence of at least 10 years.  

In both *Ewing* and *Andrade*, the defendants committed triggering offenses of theft and grand theft, which, in the United Kingdom, only carry a maximum sentence of seven years imprisonment.  

Therefore, in the United Kingdom, Ewing and Andrade would have received sentences of seven years for their thefts, as opposed to sentences of 25 years to life and 50 years to life. Second, in the United Kingdom, in half of all cases where a defendant receives a sentence of imprisonment for public protection, which has the potential of carrying a life sentence, the defendant received a

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130 *Criminal Justice Act, § 225.*

131 *Id., §§ 224, 225.*

132 *Theft Act, 1968, c. 60, § 7 (U.K.), available at* http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1204238. There is no distinction made in the 1968 Act between theft and grand theft, as there is in California law.
mandatory minimum term of 20 months or less.\textsuperscript{133} In contrast, under the California three strikes law, when a defendant receives a sentence of 25 years to life, the defendant must serve a minimum of 25 years before he may be released on parole.\textsuperscript{134}

The \textit{Offen} court held that the U.K.’s 1997 recidivism law, which was not as harsh as the California three strikes law, violated international law as applied because it was being used to sentence defendants to life imprisonment who did not pose a significant risk of danger to the public. The 2003 U.K. Act also requires the U.K. courts to find that the defendant poses a significant risk of serious harm to the public before they sentence the defendant to life imprisonment or imprisonment for public protection under the dangerous offender provisions of the Act. In contrast, as illustrated above in \textit{Andrade}, California courts and the U.S. Supreme Court do sentence defendants to a minimum of 25 years to life even when the defendants do not pose a significant risk of serious future harm to the public. The \textit{Offen} court specifically stated that it violates international human rights law to sentence a defendant to life imprisonment with the possibility of parole under the 1997 Act who does not pose a significant risk of future harm to the public. Therefore, it is likely that in an extradition context, British courts would similarly find that a sentence of 25 years to life under the three strikes law violates international human rights law because it may be imposed by Californian courts without an adequate finding as to whether the defendant poses a significant risk of serious future harm to the public.

Although the \textit{Offen} and \textit{Lang} courts did not find that the U.K. recidivism and life imprisonment laws violated international or domestic law \textit{per se}, other countries have found that recidivism laws which are not nearly as harsh as the California three strikes law or the U.K.

\textsuperscript{133} Memorandum submitted by the Parole Board to the House of Commons, \textit{available at} http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/467/467we34.htm (last visited Feb. 25, 2008).
\textsuperscript{134} \textit{In Re Cervera}, 16 P. 3d 176.
recidivism law do violate international law *per se*. In September 2006, the Argentine Supreme Court held in *Gramajo* that Argentina’s version of the three strikes law violated the Argentine Constitution, Article 9 of the American Convention on Human Rights ("American Convention"),135 Article 7 of the ICCPR,136 and the CAT. The prohibition against disproportionate sentences has been derived both from the prohibition against arbitrary detention, expressed in Article 7 of the ICCPR, and from the prohibition against cruel, inhuman or degrading treatment or punishment.137

Argentina’s recidivism laws were contained in Article 52 and 53 of Argentina’s Penal Code, which were read in conjunction with Articles 13 and 26 of the Penal Code.138 Under Articles 52 and 53, a person was considered to be a recidivist and was subject to imprisonment for 5 years to life if: 1) the person had served four or more prison sentences, and at least one of these sentences was for a period of more than three years; or 2) the person had served five or more prison sentences, and each of these prison sentences was for three years or less. The court was allowed to consider the moral personality of the defendant, the nature of the act, the motives of the defendant and other relevant circumstances and had the discretion to suspend the extra imprisonment of five years to life on one occasion for each defendant.139 If the court decided to order the five year to life sentence, the defendant would become eligible for parole after five years. The parole period would continue for five years after the defendant was released. It is

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135 American Convention on Human Rights art.9, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 [hereinafter American Convention]. Article 9 of the American Convention states, “No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.”
136 ICCPR, supra note 6. Article 7 of the ICCPR states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
138 COD. PEN. art. 13, 26, 53, 53.
139 COD. PEN. art. 26 and 52.
interesting to note that Argentina’s Supreme Court found that a recidivism law which is not nearly as harsh as California’s three strikes law nevertheless violates international law. It is logical to assume then that if the Argentine Supreme Court had the opportunity to do so it would similarly find that that the exceedingly lengthy California three strikes law also violates international law. The Argentine government will have the opportunity to make such a ruling in an extradition context, when faced with the question of whether to extradite a suspect back to the United States who would face the three strikes punishment.

III: The Three Strikes Law is a Possible Impediment to Extradition

“Extradition in contemporary practice means a formal process by which a person is surrendered by one state to another based on a treaty, reciprocity, or comity.”\(^{140}\) The United States has bilateral extradition treaties with at least 105 other countries.\(^{141}\) Extradition treaties all include provisions which dictate when a country may refuse to extradite a suspect back to the requesting country. However, even if the requested country determines that an extradition would not violate the extradition treaty, the requested country may still refuse to extradite a suspect back to the United States if doing so would violate a human rights treaty. In *Soering v. United Kingdom*, the European Court of Human Rights held that the defendant should not be extradited back to the United States because the extradition would violate the European Convention on Human Rights.\(^{142}\) Subsequent case law in both the United Kingdom and in Latin America indicate that countries may, in certain cases, be reluctant to extradite a suspect back to the United States if that suspect will face the California three strikes penalty.


\(^{141}\) *Id.* at 925, App. II.

Foreign countries have recognized that the punishments imposed in the United States are exceedingly harsh and at least 20 countries have refused to extradite suspects to the United States who may face the death penalty. Some countries, such as Mexico, have in the past refused to extradite when a suspect may face life imprisonment. Some judges have expressed their concern over extraditing to the United States when the punishment was less than life imprisonment, but was believed to be disproportionate to the crime committed. Even though the U.S. Supreme Court has, on numerous occasions, rejected the claim that the three strikes law as applied to particular defendants violates the Eighth Amendment prohibition against cruel and unusual punishment, the Supreme Court’s opinion is not controlling in foreign extradition cases. If a foreign state decides that the three strikes law does violate the prohibition against cruel and unusual punishment under international law, it may refuse to extradite the suspect to the United States, regardless of the fact that the U.S. Supreme Court does not find the three strikes law to be a violation of the Eighth Amendment.

If the United States requests the extradition of a suspect who may face the three strikes penalty, a foreign country may refuse extradition on at least two grounds. First, the country may refuse extradition if the extradition treaty specifically states that the requested country may not extradite a suspect if that person will face the possibility of life imprisonment. For example, the United States--Venezuela extradition treaty provides that extradition requests may be refused for crimes punishable by death or life imprisonment. Second, the country may refuse extradition if it has ratified or acceded to a treaty such as the European Convention, the ICCPR or the CAT.

144 *Id.* at 2.
all of which prohibit cruel, inhuman or degrading treatment or punishment and two of which prohibit arbitrary detention. 147

The United States uses a non-inquiry method when deciding whether to extradite a person to a foreign country. 148 Under the non-inquiry method, the United States will not inquire into the practices of other countries and the treatment the defendant will receive in the requesting country. 149 In contrast, other courts throughout the world, including European and Canadian courts, have on numerous occasions inquired into the treatment that the suspect will receive in the requesting country before deciding whether to extradite the suspect. 150 Suppose a defendant who would be subject to the three strikes sentencing scheme escapes to Europe and the United States requests his extradition. If the requested country is one that inquires into the treatment that the suspect will receive in the United States, and if the requested country determines that the three strikes law will violate the international prohibitions against arbitrary detention or cruel, inhuman or degrading treatment or punishment, then the requested country may refuse to extradite.

Sometimes foreign courts have inquired into the sentencing a defendant would receive in the United States and have found that the sentence is not severe enough to warrant a refusal to extradite. For example, Minister of Justice of Canada v. Jamieson 151 addressed the extradition case of a defendant who had committed a first time drug offense and had escaped to Canada. If extradited back to the United States, Jamieson would have received a sentence of 20 years without the possibility of parole. 152

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147 CAT, supra note 6, art. 1, European Convention, supra note 6, arts. 3, 5, ICCPR, supra note 6, arts. 7, 9.
148 BASSIOUNI, supra note 137, at 569.
149 Id.
150 Id. at 584-586.
151 Jamieson I [1992] 73 C.C.C. 3d 460 (Que. C.A.) (Can.).
The executive decision in Canada on whether to extradite a suspect is subject to the provisions of the Canadian Charter of Rights and Freedoms. In any extradition analysis, the executive branch will consider Article 7 of the Charter, which states, “Everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The executive branch will consider Article 7 in light of Article 12 of the Charter, which states, “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.” In order to determine if a suspect should be extradited, the Canadian courts have asked whether the sentence “shocks the conscience” or is “simply unacceptable.” Although the Supreme Court of Canada ultimately held that Jamieson should be extradited, three judges in the lower courts who heard this case found that this sentence would “shock the conscience” and that the defendant should not be extradited. Although so far the Canadian courts have tended to extradite suspects back to the United States, regardless of whether the suspects would face longer sentences than they would have faced in Canada, the controversy within the Canadian courts over what kind of punishment would “shock the conscience” indicates that test is still malleable and uncertain. Therefore, there is a possibility that one day the Canadian Supreme Court will find that a sentence of 25 years to life in certain circumstances may “shock the conscience” and the court may refuse to extradite a suspect facing the three strikes penalty back to the United States.

In contrast to Jamieson, Soering v. United Kingdom is a well-known extradition case in which the European Court held that extraditing the defendant back to the United States would violate the international prohibition against torture and inhuman or degrading treatment or punishment. The European Court specifically held that if a requested country had substantial

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153 Mitchell, supra note 142, at 144.
155 Mitchell, supra note 142, at 177.
grounds for believing that the suspect, if extradited, would face a real risk of being subjected to
torture or to inhumane or degrading treatment or punishment in the requesting country, and the
requested country chooses to extradite the suspect, then the requested country will be deemed to
have violated the European Convention.\footnote{Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 22, 34 (1989).}

Soering, a West German national, was accused of killing his girlfriend’s parents in
Virginia.\footnote{Id. at 4.} Soering was indicted by a grand jury of capital murder.\footnote{Id. at 5.} Soering escaped to the
United Kingdom, and the U.S. government requested Soering’s extradition to the United States,
under the terms of the 1972 extradition treaty between the United States and the United
Kingdom.\footnote{Id.} The United Kingdom-United States treaty states, “If the offense for which
extradition is requested is punishable under the relevant law of the requesting Party, but the
relevant law of the requested Party does not provide for the death penalty in a similar case,
extradition may be refused unless the requesting party gives assurances satisfactory to the
requested party that the death penalty will not be carried out.”\footnote{Extradition Treaty, U.S.-U.K., art. 7, Mar. 31, 2003, 2003 U.S.T. Lexis 129.}

By the time \textit{Soering} was decided, the United Kingdom had already abolished the death
penalty.\footnote{Murder (Abolition of Death Penalty Act) 1965 suspended the death penalty in the UK.} The United Kingdom sought assurances from the United States that the death penalty
would not be imposed on Soering if the United Kingdom extradited Soering to the United
the time of sentencing, a representation would be made that the United Kingdom does not want
the death penalty imposed or carried out.\footnote{Id. at 6.} However, Updike stated that he still intended to seek
the death penalty in Soering’s case.\textsuperscript{164} The Secretary of State of the United Kingdom signed a warrant ordering Soering’s extradition to the United States.\textsuperscript{165}

Soering then appealed to the European Commission on Human Rights, alleging that his extradition and the ensuing “death row phenomenon” he would face in Virginia would violate, 
\textit{inter alia}, article 3 of the European Convention.\textsuperscript{166} Soering did not allege that the death penalty itself violated international law, since the European Convention does not prohibit the death penalty. The death row phenomenon refers to the long period of time that convicts on death row typically wait before they are executed, while enduring an “ever-present and mounting anguish of awaiting execution.”\textsuperscript{167}

The Commission referred the case to the European Court on Human Rights and the European Court agreed with Soering, finding that the death row phenomenon constitutes inhumane and degrading treatment and punishment contrary to article 3. The court found that the United Kingdom would be liable for committing a violation of article 3 if they extradited Soering to the United States, even though the death row phenomenon would take place in the United States, and not in the jurisdiction of the United Kingdom.\textsuperscript{168}

Some countries may choose not to extradite suspects to the United States who will face the three strikes law, even though the European Court has never specifically addressed the issue of whether a harsh mandatory sentencing law like the three strikes law violates the European Convention. Since there is uncertainty in this area, some countries may choose to refuse extradition, rather than be condemned by the European Court as violating the European Convention. The \textit{Soering} court also stated, “the Convention is a living instrument which…must

\\textsuperscript{164} Id. at 6.
\textsuperscript{165} Id. at 7.
\textsuperscript{166} Id. at 18; see European Convention, supra note 6.
\textsuperscript{167} Id. at 28.
\textsuperscript{168} Id. at 21, 22.
be interpreted in the light of present-day conditions’; and, in assessing whether a given treatment or punishment is to be regarded as inhumane or degrading for the purposes of article 3, ‘the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.’”\(^\text{169}\) If the European Court finds that commonly accepted standards of members of the Council of Europe have rejected such harsh punishments, such as the sentence imposed by the three strikes law, then the Court may one day find that extraditing a suspect back to the United States where that person could face the three strikes law sentence does in fact violate the Convention.

By examining the U.K. decision in *Offen* in conjunction with the European Court decision in *Soering*, it becomes even clearer that some countries, like the United Kingdom, may not extradite a suspect to the United States if that person would face sentencing under California’s three strikes law. When convicted under the U.K. mandatory sentencing laws in place at the time of the decision, Offen received a life sentence because he had committed a serious offense and was previously convicted of another serious offense. In the United Kingdom, a defendant who is given a sentence of life imprisonment serves an average of 9 or 14 years, depending on the crime committed.\(^\text{170}\) The U.K. court found that a life imprisonment sentence, which probably would have resulted in 14 years of real time imprisonment or less, violated Articles 3 and 5 of the European Convention because Offen did not pose a significant risk of harm to the public. Article 3 prohibits inhumane or degrading treatment or punishment and Article 5 prohibits arbitrary detention.

Suppose that instead of committing the robberies and thefts in the United Kingdom, Offen had committed the crimes in California. Under the three strikes law, the two robberies are

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\(^{169}\) *Id.* at 25 (citing Tymer v United Kingdom, 2 E.H.R.R. 1 para.31).

\(^{170}\) [http://news.bbc.co.uk/2/hi/uk_news/magazine/5086978.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/5086978.stm)

“serious” felonies and theft with a prior is a wobbler, which could be counted as a felony and as the triggering strike. Under the three strikes law, Offen would have received a sentence of 25 years to life, with no possibility of parole until after serving 25 years.

Suppose that after committing the crimes in California, Offen fled to the United Kingdom, at which point the United States requested his extradition. In Soering, the European Court held that the United Kingdom will be deemed to have violated the European Convention if it extradites a person to another country in which that person may face inhumane or degrading treatment or punishment. Obviously, since the British court found that 9 to 14 years of real time imprisonment for Offen violates international human rights law because the defendant did not pose a significant risk to the public, the British court would similarly find that a minimum real time sentence of 25 years imprisonment for that same defendant is, a fortiori, a disproportionate punishment and a violation of Articles 3 and 5 of the European Convention. Therefore, one can argue that if the United States had requested Offen’s extradition, there is a good chance that the United Kingdom would have refused extradition, in order to avoid violating the European Convention.

Although countries outside of Europe are not required to abide by the European Convention, 152 countries have signed, ratified or acceded to the ICCPR and 72 countries have signed, ratified or acceded to the CAT.171 Both of these treaties have similar provisions to Article 3 of the European Convention. ICCPR article 7 states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The ICCPR also has an article similar to article 5 of the European Convention. Article 9 of the ICCPR states, “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or

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detention.” In 1991, the U.N. Human Rights Committee for the ICCPR held that it may be a violation of the ICCPR for a country to extradite a person to the United States if there is a “real risk” that the person’s rights under the ICCPR will be violated in the United States.\(^\text{172}\) Therefore, just as it would be a violation of the European Convention for a European country to extradite a suspect to the United States where that person may face cruel, inhuman or degrading treatment or punishment or arbitrary detention, it would also be a violation of the ICCPR for a country that has acceded to or ratified the ICCPR to extradite a suspect to the United States if that suspect would face cruel, inhuman or degrading treatment or punishment or arbitrary detention.

For example, suppose a suspect who faces the three strikes penalty in California has escaped from California and is found in Argentina. Argentina will probably not be able to deny extradition on the basis of its extradition treaty with the United States. This treaty only states that Argentina may not extradite a suspect to the United States if the suspect faces the death penalty, unless the United States gives assurances that the suspect will not face the death penalty, or if the death penalty is faced, that it will not be imposed.\(^\text{173}\) This extradition treaty does not mention that a person will not be extradited to the United States if the person faces the possibility of life imprisonment, or a disproportionate sentence that is less than life imprisonment.

Although Argentina will not be able to use the extradition treaty to refuse extradition, it may refuse extradition by finding that the three strikes law violates the CAT and the ICCPR, and that if Argentina extradites a person to a country where that suspect will be subjected to cruel,


inhumane or degrading treatment or punishment or to arbitrary detention, then Argentina will also have violated these two treaties. In addition, if Argentina concludes that the three strikes penalty violates the CAT and the ICCPR, then it will have also concluded that the three strikes penalty violates the Argentine Constitution, since these two treaties are incorporated into the Constitution and have the same force as any other constitutional law. Argentina may very well find that the three strikes law violates the CAT and the ICCPR, since it found that its own version of the three strikes law, which was not nearly as harsh as the California law, violates the prohibition against cruel, inhuman or degrading treatment or punishment expressed in Article 7 of the ICCPR and in the CAT.\textsuperscript{174}

Some countries may choose to seek assurances from the United States that that the U.S. government will not charge nor impose the three strikes punishment. It is extremely unlikely that the United States will ever give such an assurance, since the United States often balks at giving assurances that it will not seek nor impose the death penalty and rarely gives assurances that it will not seek nor impose life imprisonment.\textsuperscript{175} If a country seeks an assurance from the United States that it will not seek nor impose the three strikes law, and the United States actually gives this assurance, there is a possibility that the requested country will not put faith in this assurance and will therefore choose not to extradite the suspect anyway.

For example, in \textit{Kirkwood v. United Kingdom}, a case which was decided by the European Commission on Human Rights four years before the European Court on Human Rights addressed the extradition of Soering, the United States requested the extradition of a suspected


\textsuperscript{175} See Labardini, \textit{supra} note 140.
murderer who had escaped to the United Kingdom.\textsuperscript{176} Kirkwood argued that he would face death row if extradited and that the death row phenomenon is inhuman and degrading treatment or punishment under the European Convention. The U.S. Department of Justice gave assurances that it would not seek the death penalty, so the European Commission found that it would not violate the European Convention to extradite Kirkwood. When Kirkwood arrived in California, the District Attorney in San Francisco prosecuted Kirkwood according to a procedure that could have lead to the death penalty. The Department of Justice then said that the Federal Government could not bind the state of California and the D.A. of San Francisco. Although eventually the prosecutor chose not to pursue the death penalty, the court did not rule that the assurance the Department of Justice made was binding. \textit{Kirkwood} had an enormous impact on the European Court when it decided not to extradite Soering 4 years later.\textsuperscript{177} \textit{Kirkwood} intensified the lack of trust in assurances given by the U.S. government. Even if the United States one day gives an assurance that it will not seek the three strikes penalty for a suspect, countries may not put faith in this assurance after \textit{Kirkwood}, and the requested country may refuse extradition.

\textbf{IV. Modification of the Three Strikes Law}

There are two possible routes that the U.S. government can take to comply with international law. The Supreme Court can completely abrogate California’s three strikes law, as Argentina did in 2006 with its version of the three strikes law, and as the U.N. Committee on the Rights of the Child urged Western Australia to do with its version of a mandatory sentencing law.\textsuperscript{178} The U.S. Supreme Court is not likely to abolish the California law, considering the

\textsuperscript{176} \textsc{Bassiouni, supra} note 137, at 585 (discussing Kirkwood v UK, Application No. 10479-1983, European Commission of HR 1985).
\textsuperscript{177} \textsc{Bassiouni, supra} note 137, at 585.
Court’s recent holdings in *Ewing* and *Andrade*. A much more viable solution is for the California legislature to modify the current version of the law to bring it in line with international standards. While California need not hold itself hostage to the views of foreign judges, the closer California moves to international norms the more likely it will enjoy international cooperation in extradition.

First, the law should be changed to include a time limit on the number of years a felony may count against the defendant as a strike. For example, in France, certain prior felonies may only be counted as strikes against that person for 10 years after the previous sentence expired.\(^{179}\) Second, the crimes included within the list of serious or violent felonies should be greatly narrowed. For example, serious felonies should not include property offenses. Some of the most disproportionate sentences resulting from the three strikes law have included offenders convicted of property offenses.\(^{180}\) Countries around the world have recognized that mandatory minimum sentencing for property offenders raises serious concerns regarding disproportionate sentencing. For example, in 2001, the Northern Territory of Australia abolished its mandatory minimum sentencing for property offenses.

Third, only a serious or violent felony should count as the “triggering strike.” According to the California Department of Corrections, over 65% of the offenders serving a sentence under the California two or three strikes law were convicted on a non-violent triggering offense.\(^{181}\) Finally, felonies committed while a defendant was a minor should not be counted as strikes. The voice of the international community, as expressed through the European Court of Human Rights and the United Nations, does not look favorably upon states treating children as adults for purposes of sentencing. In discussing imprisonment, the European Court stated in *Weeks v.*

\(^{179}\) C. PEN. 132-9 (Fr.).
\(^{180}\) *E.g. Lockyer*, 538 U.S. at 63.
\(^{181}\) California Department of Corrections, available at http://www.cdc.ca.gov/
United Kingdom that in order to determine if there was an Article 3 violation of the European Convention’s prohibition against inhumane or degrading treatment or punishment, the Court may consider the age of the offender.\textsuperscript{182} The European Court stated that a punitive sentence of a 17 year old to life imprisonment for armed robbery may raise “serious doubts as to its compatibility with Article 3 of the Convention.”\textsuperscript{183} Similarly, the United Nations Committee on the Rights of the Child criticized Western Australia’s recidivism law and urged that state to “consider raising the minimum age of criminal responsibility to an internationally acceptable level.”\textsuperscript{184} In Western Australia, as in the United States, crimes that the defendant committed while a juvenile count as prior strikes. In addition, in Western Australia, the juvenile may be sentenced to a minimum of twelve months of prison, even if at the time of conviction the defendant was still a minor.\textsuperscript{185} Making the afore-mentioned changes to California’s three strikes law should alleviate possible extradition conflicts which may arise under the current version of the three strikes law.

V. Conclusion

The grossly disproportionate sentences which are often imposed under California’s three strikes law may be viewed by other countries as a violation of the international prohibitions against arbitrary detention and cruel, inhumane or degrading treatment or punishment. As such, the three strikes law may serve as an impediment to extradition. Making modifications to California’s three strikes law may have two possible positive consequences for the United States in the international community. First, if California makes these changes, it will add a little more credibility to the U.S.’s claim that it defends and supports the human rights of its citizens. Second, making these modifications should result in the avoidance of numerous extradition

\textsuperscript{183} Id.
\textsuperscript{185} Western Australia Crim Code sec 401(4).
conflicts and will save time and money in foreign states when these states are deciding whether to extradite a suspect to the United States. If California makes these modifications, then the three strikes law will be similar to the recidivism laws of other countries, such as the United Kingdom and France. Foreign states will be more likely to extradite a suspect to the United States if the punishment imposed is one that is aligned with global standards of sentencing.