California's Three Strikes Law—Should A Juvenile Adjudication Be A Ball Or A Strike?*

California's Three Strikes sentencing law counts non-jury trial juvenile adjudications as strikes to enlarge sentences for current felony convictions. This Comment discusses the due process and equal protection issues raised by Three Strikes's use of juvenile adjudications as strikes. This Comment concludes that Three Strikes will withstand a due process challenge. Also, an equal protection challenge based on the procedural differences between the criminal and juvenile justice systems will likely fail. However, some meritorious equal protection claims may arise. The Comment ends with recommended statutory changes.

The nightmare began for Polly Klaas's parents on October 1, 1993. An armed intruder abducted twelve-year-old Polly from her home in Petaluma, California as her mother slept in an adjoining bedroom.[1] The intruder surprised Polly and her two friends who were spending the night when he entered Polly's bedroom brandishing a knife. The man bound Polly's two friends and took Polly away. By the time the girls broke free and alerted Polly's mother, the man and Polly were gone. After an extensive search, police found Polly's dead body on December 4, 1993. The man charged with kidnapping and murdering Polly, Richard Allen Davis, was a twice-convicted kidnapper. Davis had been paroled in June 1993, after serving eight years of a sixteen-year sentence.[2]

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1. Christine Spolar, *California Town Cries as Polly Klaas is Found: Twice-Convicted Suspect Faces Murder, Kidnapping Charges in Abduction of 12-Year-Old*, WASH. POST, Dec. 6, 1993, at A6.

2. *Id.*

The Polly Klaas story led to the legislature's speedy enactment of California's toughest anti-crime law.[3] On March 7, 1994, just three months after the arrest of Richard Allen Davis, the California Legislature passed Assembly Bill 971.[4] This bill, which amended section 667 of the California Penal Code, created a mandatory sentencing structure for recidivists. The bill, known as the "Three Strikes and You're Out" law, passed as an emergency statute and took immediate effect.[5]

On November 8, 1994, California voters also voiced their concern about crime by passing Proposition 184.[6] Proposition 184, also known

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3. Vlae Kershner & Greg Lucas, *'Three Strikes' Signed Into Law/Wilson Says 'Career Criminals' Will Become 'Career Inmates'*, S.F. CHRON., Mar. 8, 1994, at A1. The Klaas family allowed politicians to use Polly's funeral to promote the Three Strikes anti-crime bill. This promotion resulted in the quick passage of the Three Strikes bill, which had been bogged down in committee for the past year. *Id.*

4. CAL. PENAL CODE § 667 (West Supp. 1995). The senate approved the bill by a vote of 29 to 7. Dana Wilkie, *Senate OKs Tough '3 Strikes'; Wilson Says He'll Sign It, But Initiative Effort Will Go Forward*, SAN DIEGO UNION-TRIB., Mar. 4, 1994, at A1. The assembly approved the bill by a vote of 59 to 10. Dan Morain, *'Three Strikes' Bills Sweep State Assembly*, L.A. TIMES, Feb. 1, 1994, at A1.

5. CAL. PENAL CODE § 667. Section Two of Assembly Bill 971 provides:

> This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:
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> In order to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious or violent felony offenses, and to protect the public from the imminent threat posed by those repeat felony offenders, it is necessary that this act take effect immediately.

1994 Cal. Legis. Serv. ch. 12 (West).

6. CAL. PENAL CODE § 1170.12 (West Supp. 1995). The initiative passed overwhelmingly with 71.9% voter approval. Tom Dressiar, *Few Surprises in Voting*, L.A. DAILY J., Nov. 10, 1994, at 8.

While a public perception of increased violent crime existed, the reality was the crime rate in 1993 was the lowest since 1980 in all categories of offenses except for violent juvenile crime. James Fox, *Three Strikes and You're Out—A Prosecutor's Perspective*, CAL. CRIM. DEF. PRAC. REP., Nov. 1994, at 411.

Although the crime rate was going down prior to the passage of Three Strikes, a Rand report suggests Three Strikes will further reduce the crime rate. Specifically, the Rand report concluded:

> "[T]hree strikes" will reduce the number of serious crimes committed in California an average of 338,000 a year over the next quarter century, which is 28 percent below the number of serious crimes expected in the absence of the law. At an annual projected cost (in current dollars) of $5.5 billion for new prisons and prison operations, that works out to $16,300 for every serious crime prevented. Put another way, every $5 million in spending under the law is projected to prevent 1 murder, 20 rapes, 55 robberies, 120 cases of aggravated assault, 110 burglaries, and 5 cases of arson.

Jonathan Marshall, *Balancing the Three Strikes Equation: The Benefits of Locking Up Career Criminals May Be Sufficient to Justify the Cost*, CAL. LAWYER, Feb. 1995, at 56, 57-58.

as "Three Strikes and You're Out," added section 1170.12 to the Penal Code and was similar to Assembly Bill 971.[7]

Both Three Strikes provisions implemented the following mandatory sentencing scheme. When a defendant who has a prior conviction[8] for a "serious" or "violent" felony[9] is subsequently convicted of another felony,[10] he or she receives double the term of punishment for the

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The Rand study's predictions may prove to be accurate as the state crime rate dropped overall by 6.5% in 1994, with a 6.3% drop in violent crimes. Editorials, *Crime: Good News and Bad; Even Though the Overall Crime Rate Is Declining, Juvenile Crime Is Continuing to Rise, and That's a Troubling Statistic*, FRESNO BEE, July 18, 1995, at B4. California Attorney General Dan Lungren attributed some of the drop to Three Strikes. However, other factors may also be responsible for the drop. For example, the number of males aged 20 to 30 years old declined. This group has typically been the most prone to violent crime. *Id.*

While the general crime rate has declined, the juvenile crime rate has increased dramatically over the past decade. Between 1984 and 1994 the juvenile crime rate for violent crimes, which includes rape and homicide, increased by 53%. *Id.* Under Three Strikes, the possibility that the commission of a violent or serious felony by a juvenile may count as a strike in the future, even when the juvenile is adjudicated in the juvenile system, has arguably not had a deterrent effect thus far.

7. See *infra* notes 11, 12, 13, 97, 99, 177, 178, and 179 for the text of the statutes.

8. The use of prior convictions under Penal Code § 667 has been consistently upheld under ex post facto challenges. *See* People v. Brady, 34 Cal. App. 4th 65, 40 Cal. Rptr. 2d 207 (1995); People v. Sipe, 36 Cal. App. 4th 468, 42 Cal. Rptr. 2d 266 (1995); People v. Reed, 33 Cal. App. 4th 1608, 40 Cal. Rptr. 2d 47; People v. Hatcher, 33 Cal. App. 4th 1526, 39 Cal. Rptr. 2d 801 (1995). As the *Sipe* court observed, with recidivist statutes the greater penalties for the current offense are imposed because of the defendant's habitual criminal status. 36 Cal. App. 4th at 479, 42 Cal. Rptr 2d at 271. The current punishment is levied for the current offense, not as punishment for the prior offenses. *Id.* Ex post facto challenges under § 1170.12 would presumably also fail as the language regarding the use of prior convictions is similar to § 667. *Reed*, 33 Cal. App. 4th at 1609 n.2, 40 Cal. Rptr. 2d at 47 n.2.

Ex post facto laws are prohibited under both the United States and California Constitutions. U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . ex post facto law."); CAL. CONST. art. I, § 9 (An "ex post facto law . . . may not be passed.").

9. CAL. PENAL CODE §§ 667(d)(1), 1170.12(b)(1) (West Supp. 1995). Both Three Strikes statutes define prior strike convictions as violent felonies listed in § 667.5 of the Penal Code and serious felonies listed in § 1192.7 of the Penal Code. *Id.* Violent felonies in § 667.5 include murder, rape, and arson. CAL. PENAL CODE § 667.5 (West 1988 & Supp. 1995). Serious felonies listed in § 1192.7 include mayhem, kidnapping, and burglary of an inhabited dwelling house. CAL. PENAL CODE § 1192.7(c) (West 1982 & Supp. 1995). See *infra* note 102 for the list of violent felonies in § 667.5 and note 103 for the list of serious felonies in § 1192.7 of the Penal Code.

10. For example, Frankie Roy Kingery was recently sentenced to 25 years to life for stealing two packages of cigarettes valued at less than $5. *Cigarettes Cost Thief 25 Years Under 3 Strikes*, FRESNO BEE, Aug. 12, 1995, at B7. However, during the

current felony conviction.[11] If a defendant who is charged with any felony has two or more prior "serious" or "violent" felony convictions, then the term of punishment for the current felony conviction is increased to twenty-five years to life.[12] Both Three Strikes provisions

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cigarette theft Kingery did draw a knife on a store employee who tried to prevent the crime. Pursuant to a plea agreement, Kingery pled guilty to petty theft and the prosecutors dropped the knife charge. Kingery fell under the Three Strikes sentencing scheme because of his past violent behavior that resulted in convictions for strike offenses. *Id.*

A study of the Three Strikes law by the Legislative Analysts' office found that since March 1994, 70% of the second and third strike cases filed were against defendants arrested for non-violent and non-serious felonies. Hallye Jordan, *Three Strikes Hit Mostly Non-Violent*, L.A. DAILY J., Jan. 9, 1995, at 1, 10. However, Three Strikes sentencing may not be imposed on all charged non-violent felonies. If the current charged felony is a "wobbler," a crime that may be treated as a felony or misdemeanor under § 17 of the California Penal Code, the court still has the power to reduce the felony charge to a misdemeanor. If the charge is reduced to a misdemeanor, the case is removed from the reach of Three Strikes because only a current *felony* conviction triggers the Three Strikes sentencing scheme. People v. Superior Court (Perez), 38 Cal. App. 4th 347, 45 Cal. Rptr. 2d 107 (1995) (affirming trial court's action in reducing a felony for receiving stolen property to a misdemeanor); People v. Trausch, 36 Cal. App. 4th 1239, 42 Cal. Rptr. 2d 836 (1995) (affirming trial court's reduction of felony second degree burglary for breaking a bakery window and stealing a cake to a misdemeanor charge).

"Wobblers" arise under § 17 of the Penal Code, which provides:

> (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.
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> (b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:
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> (1) After a judgment imposing a punishment other than imprisonment in the state prison.
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> . . . .
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> (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

CAL. PENAL CODE § 17 (West 1982 & Supp. 1994).

11. CAL. PENAL CODE §§ 667(e)(1), 1170.12(c)(1) (West Supp. 1995). These sections provide, "If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction." *Id.*

12. CAL. PENAL CODE §§ 667(e)(2)(A), 1170.12(c)(2)(A) (West Supp. 1995). The text of § 667 states:

> If a defendant has two or more prior felony convictions as defined in subdivision (d) [this subdivision defines juvenile adjudications as priors] that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:
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> (i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.
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> (ii) Imprisonment in the state prison for 25 years.

also ensure that a convicted felon serves at least eighty percent of his or her sentence by limiting the credits a convict can receive for good behavior and participation to one-fifth of the total term of imprisonment.[13]

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1995).

Section 1170.12(c)(2)(A) provides:

If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b) [juvenile adjudications are listed in paragraph (3) of subdivision (b) and are therefore excluded in this situation], that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five years, or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

CAL. PENAL CODE § 1170.12(c)(2)(A) (West Supp. 1995).

13. CAL. PENAL CODE §§ 667(c)(5), 1170.12(a)(5) (West Supp. 1995). These sections state, "The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison." *Id.*

Although Three Strikes seems to clearly command the defendant serve 80% of the sentence, there are ways around this outcome. Regina Edwards, a 43-year-old prisoner in the final stages of AIDS, was sentenced to 32 months for petty theft with a prior under Three Strikes based on her prior strike conviction. Anne Krueger, *Dying Felon to Be Freed Despite 3 Strikes*, SAN DIEGO UNION-TRIB., Aug. 8, 1995, at B3. Under Three Strikes, Edwards would be required to serve at least 25 months of her sentence. Edwards sought early release in June 1995, but the court denied her request pursuant to Three Strikes. Subsequently, the Deputy District Attorney agreed to drop the prior strike allegation, which made Edwards eligible for release because Edwards had only six months to live. Thereafter, a San Diego County Superior Court Judge granted Edwards's release request. *Id.*

Currently, there is a bill before the California Senate that would provide for compassionate release for those with terminal illnesses including those prisoners sentenced under Three Strikes. Anne Krueger, *Dying Woman Due Release in '3-Strikes' Case*, SAN DIEGO UNION-TRIB., Aug. 4, 1995, at A1.

A particularly controversial part of the Three Strikes statutes relates to juvenile adjudications.[14] Under both provisions, a juvenile adjudication counts as a prior felony conviction if the person committed a listed felony offense when he or she was sixteen years of age or older, was found a "fit and proper subject" for the juvenile court, and was adjudged a ward of the juvenile court.[15] Opponents of Three Strikes claim that using juvenile adjudications as strikes violates the United States and California Constitutions.[16] Using a juvenile adjudication as a strike arguably violates a person's due process rights because in the juvenile court system a juvenile does not have a right to a jury trial.[17]

The legal community has developed different approaches to deal with this issue. In San Francisco, the Public Defender has directed his deputies to request jury trials in juvenile proceedings.[18] Santa Clara County Judge Leonard Sprinkles has advised defense attorneys that he is inclined to give juveniles who are sixteen years of age or older jury trials because of Three Strikes.[19] However, another Santa Clara County judge, Allen Danner, has said he will refuse to allow juveniles to have jury trials because no statutory ground exists for allowing juveniles to

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14. Hallye Jordan, *Constitutional Challenges Set for '3 Strikes': Neither Side Satisfied*, L.A. DAILY J., Mar. 8, 1994, at 1. California State Attorney General Dan Lungren expressed concern that the juvenile adjudication portion of Three Strikes may be ruled unconstitutional. Lungren said, "I have to admit that it's one of those things I could argue on either side . . . . It's 50-50 on what a court would do." Rick Orlov, *Lungren Forms Task Force to Aid in Enforcing 'Three Strikes' Law*, L.A. DAILY NEWS, Mar. 12, 1994, at N4.

In this Comment, a juvenile adjudication refers to a finding of delinquency in the juvenile court. A finding of delinquency is the juvenile court's counterpart to a felony conviction.

15. CAL. PENAL CODE §§ 667(d)(3), 1170.12(b)(3)(C) (West Supp. 1995). See *infra* note 99 for the text of these provisions.

16. "[S]ome attorneys worry that the new law will deny youngsters due process rights because juveniles are not tried before a jury, but an offense may count as a 'strike.'" Dean E. Murphy & Andrea Ford, *A Scramble to Scrutinize '3 Strikes' Law*, L.A. TIMES, Mar. 11, 1994, at B3.

17. Jordan, *supra* note 14, at 1. The United States Supreme Court has held that a juvenile does not have a constitutional right to a jury trial. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). In California, youths found to be fit and proper subjects for the juvenile court system are not afforded a right to trial by jury under the California Constitution. *In re* Daedler, 194 Cal. 320, 228 P. 467 (1924).

18. Dan Morain, *Citing '3 Strikes,' Lawyers to Shun Plea Bargains*, L.A. TIMES, Mar. 9, 1994, at A1.

19. Charles Finney, *'Three Strikes' Hits Hard in Juvenile Court*, L.A. DAILY J., Apr. 8, 1994, at 1. A juvenile adjudication only counts as a strike when several conditions are met—one of which is the juvenile prior must have been committed when the defendant was at least 16 years old. CAL. PENAL CODE §§ 667(d)(3)(A), 1170.12(b)(3)(A) (West Supp. 1995). See *infra* note 99 for the text of these sections.

have jury trials in the juvenile court system.[20] In addition, the Alameda County District Attorney has said he will not enforce the juvenile strike provision because he believes it is unconstitutional.[21] In contrast, other prosecutors have stated that they plan to use juvenile adjudications as strikes as required by the Three Strikes laws.[22]

The courts and legislature need to resolve the uncertainties in Three Strikes. Today, treatment of juvenile adjudications under California's Three Strikes laws varies by county and courtroom. The legal consequences of a person's actions should be based on culpability, not geographic location.

This Comment discusses the legal questions raised by the juvenile adjudication portion of the Three Strikes provisions and makes suggestions to the legislature on how these issues should be handled. Part I of this Comment provides background information on the procedural development of the juvenile justice system in the United States and California. In Part II, California law on the use of juvenile adjudications in sentencing before the enactment of Three Strikes is discussed. Part III provides a detailed analysis of the juvenile adjudication portions of the Three Strikes provisions. The constitutional issues concerning the use of juvenile adjudications to increase sentences are addressed in Part IV. Part V provides a summary of recommendations to the legislature.

I. AN OVERVIEW OF THE DEVELOPMENT OF THE JUVENILE JUSTICE SYSTEM

The juvenile court system, which originated in this country at the end of the last century, was established to rehabilitate and treat children.[23] Advocates justified the system's lack of constitutionally prescribed,

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20. Finney, *supra* note 19, at 4. Section 707 of the Welfare and Institutions Code vests the power to raise the issue of whether a juvenile should be certified to a criminal proceeding in the prosecutor. CAL. WELF. & INST. CODE § 707 (West 1984 & Supp. 1995). *See infra* notes 65-67 and accompanying text.

21. Morain, *supra* note 18, at A1.

22. *Id.* at A15. While some prosecutors plan to use juvenile adjudications as strikes, it may be difficult to prove prior juvenile adjudications because juvenile court records are subsequently sealed. Moreover, the juvenile court disposes of most juvenile cases informally. *Id.*

23. *In re* Gault, 387 U.S. 1, 14-16 (1967).

procedural safeguards by emphasizing its non-adversarial purposes.[24] The state was said to be proceeding as *parens patriae*.[25] The juveniles were deemed to have a right to custody, that is to have someone take care of them, but not a right to liberty.[26] Thus, the system did not violate any of the child's rights because the child had none. Instead, the juvenile courts provided the child with the custody to which he or she was entitled.[27] By classifying the juvenile proceedings as civil, instead of criminal, the states did not have to provide the same procedural safeguards before depriving a juvenile of his or her liberty.[28]

Despite the noble motives of the juvenile court system's architects, the system fell short of achieving its objectives. In 1967, the United States Supreme Court stated, in *In re Gault*, that the absence of due process principles in juvenile proceedings had frequently resulted in arbitrariness and unfairness.[29] These results caused the Court to rule that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court."[30] Accordingly, the Court held that the Due Process Clause of the Fourteenth Amendment required juveniles to be provided with the same rights as adults in a criminal trial with respect to the right to receive adequate notice of the charges, the right to have counsel, the right against self-incrimination, and the right to confront one's accusers.[31]

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24. *Id.* at 16.

25. *Id.* "Parens patriae . . . refers traditionally to role of [the] state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). *But see Gault*, 387 U.S. at 16 (Original meaning of *in loco parentis* was derived from chancery practice where state's power to act was designed to protect a child's property interest. No historical precedent indicates use of the doctrine in criminal law.).

26. *Gault*, 387 U.S. at 17 n.21.

27. *Id.* at 17.

28. *Id.* at 12-17.

29. *Id.* at 17-21 (a 15-year-old boy was committed to a state school for making lewd phone calls while on a six-month probation for being in the company of a boy who stole a lady's purse).

30. *Id.* at 28. The Court noted that a boy charged with misconduct may be committed to an institution for years. Labeling the institution an Industrial School, the Court observed, was of no constitutional consequence. The boy's life became institutionalized upon confinement. Parents and friends were replaced by guards, custodians, state employees, and delinquents who had committed serious to minor crimes. Based on these facts, the Court held that "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'" *Id.* at 27-28.

31. *Id.* at 33, 36, 55, 56. The Court noted that if the youth had been over 18, he would have been afforded substantial rights under Arizona's laws and the United States Constitution. The juvenile justice system did not afford the boy many of these rights. The Court observed, "So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than

In 1970, the United States Supreme Court further expanded the due process requirements of the juvenile justice system.[32] In *In re Winship*, the Court noted that juvenile and criminal proceedings were similar because a juvenile ward, like an adult convict, could lose his or her liberty for many years.[33] Accordingly, the Court held that due process required an offense to be proved beyond a reasonable doubt in juvenile adjudications.[34]

One year later, the Supreme Court addressed the issue of a right to a jury trial in juvenile court in *McKeiver v. Pennsylvania*.[35] The *McKeiver* Court observed that although the Sixth and Fourteenth Amendments to the Constitution guaranteed the right to a jury trial in all criminal proceedings, the cases establishing this right had not decided the issue of a juvenile's right to a jury trial in juvenile court.[36] In analyzing this issue, the *McKeiver* Court began by noting that due process is satisfied in juvenile proceedings as long as the proceeding is fundamentally fair.[37] The *McKeiver* Court observed that when the *Gault* and *Winship* Courts applied the fundamental fairness standard, they emphasized fact finding procedures.[38] A jury trial, according to the *McKeiver* Court, was not required for accurate fact finding.[39]

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cliché can provide." *Id.* at 29-30.

32. *In re* Winship, 397 U.S. 358 (1970) (minor charged as delinquent for taking money from a woman's pocketbook).

33. *Id.* at 365-68.

34. *Id.* at 368. The Court held, "In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*." *Id.*

35. 403 U.S. 528 (1971) (per curiam). In *McKeiver*, a 16-year-old boy was charged with robbery, larceny, and receiving stolen property. He appealed the juvenile court finding of delinquency because he was not afforded a right to trial by jury. McKeiver argued he was entitled to a jury trial because the juvenile court proceedings were substantially similar to a criminal trial. For example, McKeiver pointed out that juvenile courtrooms were open to the press and public most of the time. Also, juvenile detention cells were like a prison. Additionally, McKeiver suggested a finding of delinquency attached a stigma similar to that of a criminal conviction. *Id.* at 541-42.

36. *Id.* at 540-41.

37. *Id.* at 543.

38. *Id.* The Court then noted that the application of the fundamental fairness standard in *Gault* and *Winship* resulted in the requirements of notice, counsel, confrontation, cross-examination, and proof beyond a reasonable doubt in juvenile adjudications. *Id.*

39. *Id.* The Court observed that while the jury system had many values, the justice system has been content with use of other methods to find facts. The Court pointed out that juries were not required in many fact finding proceedings, including equity cases and

In reaching this conclusion, the *McKeiver* Court pointed out that the right to a trial by jury in state criminal proceedings, established in *Duncan v. Louisiana*, was not applied retrospectively.[40] If the integrity of bench trial results was at issue, the *McKeiver* Court opined that *Duncan* would have been applied retrospectively.[41] Moreover, the *McKeiver* Court stated that the use of a jury trial in the juvenile system "would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner."[42]

The *McKeiver* Court described the unique features of Pennsylvania's juvenile justice system by distinguishing it from the adult criminal system. According to the Court, the distinguishing characteristics included the following: that the juvenile courts used better diagnostic and rehabilitative services than their adult counterparts; that a declaration of delinquency in the juvenile court was significantly less onerous than a criminal conviction;[43] and that the juvenile system was set up, in theory, to provide intimate, informal, and protective proceedings that are aimed at rehabilitation and not punishment.[44] The *McKeiver* Court concluded that the addition of a jury trial would transform juvenile proceedings into fully adversarial proceedings with the traditional delay, formality, and clamor of the adult criminal system.[45]

Based on the points outlined above, the *McKeiver* Court held, under the fundamental fairness test, that a right to trial by jury was not

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military trials. *Id.*

40. *Id.* The *McKeiver* Court observed:

> In *Duncan* the Court stated, "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." In *DeStefano*, for this reason and others, the Court refrained from retrospective application of *Duncan*, an action it surely would have not taken had it felt that the integrity of the result was seriously at issue.

Id. (citation omitted) (citing Duncan v. Louisiana, 391 U.S. 145, 158 (1968)).

41. *Id.*

42. *Id.* at 547. Although the Court did not find a jury was constitutionally required, it did observe that "[t]oo often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged." *Id.* at 544. The Court cited a study indicating that, at the time, one-half of the judges had not received undergraduate degrees. *Id.* at 544 n.4.

43. *Id.* at 539-40. This observation was actually made by Justice Roberts of the Pennsylvania court. The *McKeiver* Court wrote a two-page summary of Justice Roberts's "instructive" opinion. *Id.* at 538-40.

44. *Id.* at 544 n.5. The Court observed that a constitutional right to a jury trial in juvenile proceedings might end the "idealistic prospect of an intimate, informal protective proceeding." *Id.* at 545.

45. *Id.* at 550.

constitutionally required in juvenile adjudications.[46] However, the *McKeiver* Court also ruled that the states could choose whether to provide the right to trial by jury in their own juvenile justice systems.[47]

California has chosen to deny juveniles the right to a jury trial in the juvenile court system, even though the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all."[48] In the 1924 case of *In re Daedler*,[49] the California Supreme Court held that a juvenile had no inherent right to a jury trial under juvenile court law. The court based its decision on two points. First, after tracing the origins of the juvenile court system to feudal England, the court cited several English cases and concluded that no basis for providing a jury trial for juveniles existed under English common law.[50] Second, the court stated that an inherent right to a trial by jury existed only in the penal process.[51] The court observed that the juvenile system, with its beneficial and merciful terms, was not penal in character.[52] In a more recent case, the California Supreme Court again characterized the

46. *Id.* at 545. However, the Court's holding seemed somewhat tentative. The Court stated: "Despite all these disappointments, all these failures, and all these shortcomings, we conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement." *Id.* The Court also suggested if criminal procedures were required in juvenile court, there would be no need for two different systems. The Court concluded that "[p]erhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." *Id.* at 551.

47. *Id.* at 547. The Court stated that if a "State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no impediment to its installing a system embracing that feature." *Id.*

Although *McKeiver* appeared to halt the trend of requiring juveniles to be afforded procedural due process rights in the juvenile justice system, this setback did not last long. In 1975, the Supreme Court continued expanding the due process requirements associated with juvenile adjudications by holding the double jeopardy bar applies in juvenile adjudications. Breed v. Jones, 421 U.S. 519, 541 (1975). See *infra* note 225 for a discussion of this case.

48. CAL. CONST. art. I, § 16.

49. 194 Cal. 320, 228 P. 467 (1924) (14-year-old adjudged a ward of juvenile court for committing first degree murder).

50. *Id.* at 324-25, 228 P. at 469. In England, under the doctrine of *parens patriae*, the crown had "supreme guardianship and supervision over infants" and the court of equity had jurisdiction over minors for all matters. *Id.*

51. *Id.* at 326, 228 P. at 469.

52. *Id.* at 332, 228 P. at 472. The *Daedler* court also noted that a juvenile adjudication did not equal a criminal prosecution and the juvenile system's goals were reform and training, not punishment. *Id.* at 326, 228 P. at 469.

juvenile system as non-penal by describing the system's objectives as treatment and rehabilitation.[53]

The California Supreme Court has not reconsidered the rationale for denying juveniles the right to trial by jury since its *Daedler* decision. However, in the 1984 case of *In re Javier A.*,[54] the Court of Appeal for the Second District urged the California Supreme Court to reconsider its prior decision. In *Javier A.*, a juvenile court found that Javier had committed three counts of attempted murder and had used a firearm.[55] The court stated that Javier had been denied his inviolate right to a trial by jury that is guaranteed by the California Constitution.[56] The court determined that Javier had a right to a jury trial based on a prior California Supreme Court holding.[57] In *People v. One 1941 Chevrolet Coupe*,[58] the California Supreme Court held that a person was entitled to a jury trial in the California courts if the person would have had this right in England in 1850 (the year California became a state).

After examining the English justice system, the *Javier A.* court concluded that the *Daedler* court erred in finding that juvenile delin-

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53. *In re* Eric J., 25 Cal. 3d 522, 601 P.2d 549, 159 Cal. Rptr. 317 (1979). *But see* CAL. WELF. & INST. CODE § 202 (West Supp. 1995) (delinquent minors shall receive guidance that "may include punishment").

54. 159 Cal. App. 3d 913, 206 Cal. Rptr. 386 (1984). The court stated:

> [W]e . . . conclude appellant was denied his "inviolate" right to jury trial under article I, section 16 of the California Constitution. Only because of the compulsion of *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 20 Cal. Rptr. 321, 369 P.2d 937, do we refrain from reversing and remanding for a new trial where Javier would enjoy the right to trial by jury. Instead we can only urge the Supreme Court to reconsider the 60-year-old decision which upheld the constitutionality of denying jury trials in juvenile proceedings.

Id. at 919, 206 Cal. Rptr. at 388-89.

In *Auto Equity Sales, Inc. v. Superior Court*, the California Supreme Court held: "Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California." Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 455, 369 P.2d 937, 939-40, 20 Cal. Rptr. 321, 323-24 (1962).

55. *Javier A.*, 159 Cal. App. 3d at 920-21, 206 Cal. Rptr. at 390.

56. *Id.* at 919, 206 Cal. Rptr. at 388.

57. *Id.* at 929-30, 206 Cal. Rptr. at 396-97 (citing People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832 (1951)).

58. 37 Cal. 2d 283, 286-87, 231 P.2d 832, 835 (1951). The test to determine jury trial rights announced in *One 1941 Chevrolet Coupe* is:

> The right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the Constitution was adopted. The common law at the time the Constitution was adopted includes not only the *lex non scripta* but also the written statutes enacted by Parliament. . . . It is necessary, therefore, to ascertain what was the rule of the English common law upon this subject in 1850.

Id. (citations omitted).

quency proceedings were equitable in England in 1850.[59] The *Javier A.* court stated that in England, in 1850, a juvenile could not be adjudged a ward of the court for committing a felony without the right to a trial by jury.[60] Therefore, the court observed that the California Constitution guaranteed juveniles who are alleged to have committed felony offenses the right to a jury trial.[61]

The *Javier A.* court also observed that juvenile proceedings in California had become increasingly adversarial. The court stated:

> If we are correct in our conclusion the California juvenile court system has now evolved into a specie of "criminal prosecution," the right to jury trial would be guaranteed not only by article I, section 16 of the California Constitution but by Amendments Six and Fourteen of the United States Constitution as well.[62]

However, constrained by the principle of stare decisis, the *Javier A.* court reluctantly held that a juvenile may be denied a right to a trial by jury in juvenile adjudications.[63] Instead of reversing and remanding the case, the court could only "urge the Supreme Court" to reconsider the

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59. *Javier A.*, 159 Cal. App. 3d at 950, 206 Cal. Rptr. at 411.

60. *Id.* at 948, 206 Cal. Rptr. at 410. After a lengthy analysis of English cases and Parliamentary Acts, the court stated:

> We are now in a position to summarize the status of the juvenile delinquent's right to jury trial in 1850 England. Youngsters charged with a limited class of minor criminal conduct could be deprived of liberty for a maximum of three months without a jury trial. But those charged with felonious conduct (and most lesser criminal acts) were entitled to trial by jury.

Id.

61. *Id.* at 949, 206 Cal. Rptr. at 411.

62. *Id.* at 967, 206 Cal. Rptr. at 424. The court reached the conclusion that juvenile adjudications had become a type of criminal proceeding based on the following observations. First, the state's sole purpose in administering a juvenile law system was no longer to act as a guardian in the best interest of the child. The juvenile law also aimed to protect the public from the children. (California subsequently expanded the purpose of the juvenile system to include punishment. *See supra* note 53.) Second, the *Javier A.* court noted that juvenile proceedings now required many of the same procedural safeguards as a criminal trial (*i.e.*, the right to counsel and to cross examine witnesses). Third, the court observed that a finding of delinquency had become similar to a criminal conviction. A juvenile was incarcerated and deprived of liberty just like an adult criminal. Because of these changes the court urged the California Supreme Court to re-evaluate whether the juvenile adjudications had become criminal proceedings. *Id.* at 956-66, 206 Cal. Rptr. at 416-24.

63. The court stated, "Only because of the compulsion of *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 20 Cal. Rptr. 321, 369 P.2d 937, do we refrain from reversing and remanding for a new trial . . . ." *Id.* at 919, 206 Cal. Rptr. at 388-89. See *supra* note 54 for the holding of *Auto Equity Sales, Inc.*

sixty-year-old decision that upheld the constitutionality of denying jury trials in juvenile proceedings.[64]

Despite the *Javier A.* court's plea, the California Supreme Court has yet to reconsider a juvenile's right to a jury trial. Consequently, no right to trial by jury presently exists in the California juvenile justice system. In addition, the California courts have held that a juvenile cannot waive the right to treatment in the juvenile justice system in order to obtain the right to trial by jury at a criminal trial. The Fifth District Court of Appeal held that a minor's due process and equal protection rights were not violated when the court denied her waiver of her right to be treated as a juvenile.[65] The court noted that under section 707 of the Welfare and Institutions Code, an investigation into a minor's fitness for a juvenile adjudication commences upon motion of the petitioner.[66] The petitioner, the court stated, was intended by the legislature to mean the prosecuting attorney.[67] Thus, only the prosecuting attorney could raise the fitness issue and, therefore, the minor had no right to opt to be tried as an adult, thereby gaining the right to a trial by jury.

II. USE OF JUVENILE ADJUDICATIONS IN SENTENCING BEFORE THREE STRIKES

Before the passage of Three Strikes, prior juvenile adjudications[68]

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64. *Javier A.*, 159 Cal. App. 3d at 975, 206 Cal. Rptr. at 430. Justice Fieldhouse agreed with the reasoning and analysis of the majority opinion. However, he dissented because he believed when significant social and legal changes occur gradually after a seminal case, courts are not bound to slavishly follow an outdated precedent. *Id.* at 975-76, 206 Cal. Rptr. at 430.

65. *In re* Anna Marie S., 99 Cal. App. 3d 869, 160 Cal. Rptr. 495 (1979) (Anna Marie was found to have driven a vehicle without the owner's consent). The court held that Anna Marie had not been deprived of fundamental due process because she had no constitutional right to a jury. In addition, her equal protection claim failed. The court held that a rational basis existed for denying juveniles the right to waive juvenile court jurisdiction and thereby obtain a criminal trial, even though adults subject to the juvenile court's jurisdiction can exercise a jurisdictional waiver. The court observed that the state had a legitimate interest in establishing procedures to rehabilitate juveniles. *Id.* at 872-73, 160 Cal. Rptr. at 497-98.

66. *Id.* at 871, 160 Cal. Rptr. at 496-97.

67. *Id.* at 871-72, 160 Cal. Rptr. at 496-97.

68. Juvenile adjudications, findings of delinquency, and the phrase "adjudged a ward of the court," for purposes of this Comment, refer to the situation where a juvenile is found to have violated a law or ordinance by a juvenile court. The California Juvenile Courts have jurisdiction over anyone under 18 years of age who violates a law or ordinance and the court may adjudge the person to be a ward of the court. CAL. WELF. & INST. CODE § 602 (West 1984 & Supp. 1995). See *infra* note 109 for the text of § 602.

In contrast, a juvenile conviction refers to a conviction in an adult criminal court. When a juvenile commits a crime and the juvenile court finds the juvenile is not a fit

could not be used to enhance[69] a sentence in California. In 1982, Californians amended their Constitution to increase the penalties for habitual offenders by passing Proposition 8, also known as the California Victims' Bill of Rights.[70] Part of this proposition mandated that any prior felony conviction of an adult or juvenile in a criminal proceeding was to be used to enhance sentences in any subsequent criminal proceeding.[71] To date, the California Supreme Court has not addressed the issue of whether a juvenile adjudication counts as a prior felony conviction for purposes of enhancement under this provision. However, the California courts of appeal have consistently interpreted the Victims' Bill of Rights as excluding the use of juvenile adjudications to enhance adult sentences.

In *People v. West*,[72] the Court of Appeal for the Third District considered whether a court could enhance a defendant's sentence based on two prior juvenile adjudications. At the time, section 667 of the Penal Code mandated a five-year sentence enhancement for each prior felony conviction.[73] Therefore, the *West* court focused on whether the Victims' Bill of Rights' use of the term "prior juvenile felony conviction" supported the use of a prior juvenile adjudication to enhance the defendant's sentence under Penal Code section 667.

The *West* court examined several sections of the Welfare and Institutions Code to determine the meaning of juvenile felony convictions. The court noted that section 203 of the Code provided that "'[a]n order adjudging a minor to be a ward of the juvenile court shall not be

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and proper subject for juvenile court law, the juvenile court will refer the case to a court of general jurisdiction. CAL. WELF. & INST. CODE § 707 (West 1984 & Supp. 1995). *See infra* note 108 and accompanying text.

69. "'Enhancement' means an additional term of imprisonment added to the base term." CAL. R. CT. 405(c). "'Base term' is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed." CAL. R. CT. 405(b).

70. CAL. CONST. art. I, § 28(f). This clause of the Victims' Bill of Rights provides: "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding." *Id.*

71. *Id.*

72. 154 Cal. App. 3d 100, 201 Cal. Rptr. 63 (1984). The court of appeal considered whether the trial court erred in enhancing the defendant's robbery and assault charge based on prior juvenile adjudications of criminal misconduct. *Id.*

73. *Id.* at 106, 201 Cal. Rptr. at 66.

deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding.'"[74] Also, the court stated that under section 707.1 of the Welfare and Institutions Code, a court may certify a juvenile aged sixteen years or older to a court of criminal jurisdiction. A juvenile tried in criminal court as an adult might suffer a felony conviction.[75] The *West* court harmonized these provisions with the Victims' Bill of Rights by limiting the definition of prior juvenile felony convictions to convictions suffered by a juvenile certified to a criminal court. Accordingly, the *West* court held that juvenile adjudications did not constitute prior felony convictions for sentence enhancement purposes under section 667 of the Penal Code.[76]

Similarly, in *In re Anthony R.*,[77] the Court of Appeal for the Fifth District considered the use of prior juvenile adjudications in sentencing under the Victims' Bill of Rights and section 666 of the Penal Code.[78] As in *West*, the *Anthony R.* court rejected the argument that the Victims' Bill of Rights transformed juvenile court adjudications into criminal convictions for sentence enhancement purposes.[79] The court stated that "[w]e do not believe it was the intent of the drafters of Proposition 8 to abrogate a linchpin of the Juvenile Court Law—the distinction between a criminal conviction and a juvenile adjudication."[80]

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74. *Id.* at 107, 201 Cal. Rptr. at 68 (quoting CAL. WELF. & INST. CODE § 203). The juvenile court hears the evidence, makes a finding, and determines the proper disposition of the case. CAL. WELF. & INST. CODE § 702 (West 1982 & Supp. 1995).

75. *West*, 154 Cal. App. 3d at 108, 201 Cal. Rptr. at 68.

76. *Id.* at 110, 201 Cal. Rptr. at 69. The court also noted it was not questioning whether the electorate had the power to pass an initiative that required juvenile adjudications to be used for enhancement purposes. *Id.*

77. 154 Cal. App. 3d 772, 201 Cal. Rptr. 299 (1984).

78. The court noted that section 666 of the Penal Code at that time stated:

> Every person who, having been convicted of petit theft, grand theft, burglary, or robbery and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for such offense, is subsequently *convicted* of petit theft, then the person *convicted* of such subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

Anthony R., 154 Cal. App. 3d at 774, 201 Cal. Rptr. at 299-300 (quoting CAL. PENAL CODE § 666) (emphasis added by court).

79. *Id.* at 775, 201 Cal. Rptr. at 300 (Anthony had a prior conviction for petty theft in juvenile court).

80. *Id.* at 778, 201 Cal. Rptr. at 302. The California Supreme Court discussed the distinctions between juvenile adjudications and criminal convictions in a case decided on November 14, 1983. *In re* Joseph B., 34 Cal. 3d 952, 671 P.2d 852, 196 Cal. Rptr. 348 (1983). The court observed that "minors charged with violations of the Juvenile Court Law are not 'defendants.' They do not 'plead guilty,' but admit the allegations of a petition." *Id.* at 955, 671 P.2d at 852, 196 Cal. Rptr. at 350. The court also held that juvenile adjudications were not criminal convictions. *Id. But see In re* Kenneth H., 33 Cal. 3d 616, 659 P.2d 1156, 189 Cal. Rptr. 867 (1983), discussed *infra* notes 81-83 and accompanying text. The court decided *Kenneth H.* on March 24, 1983. *Id.*

To date, the California Supreme Court has not directly addressed the issue of the use of juvenile adjudications to impose sentence enhancements. However, the court did discuss the issue in dictum in the 1983 case of *In re Kenneth H.*[81] This case involved a statutory provision that required juvenile courts to declare whether a juvenile's offense would be a misdemeanor or a felony if the case was tried in a criminal court.[82] In noting that this declaration had become more significant because the Victims' Bill of Rights required courts to use prior felony convictions, but not prior misdemeanor convictions, to enhance sentences, the California Supreme Court indicated it might condone the use of juvenile adjudications for sentence enhancement purposes.[83]

Although the California courts could not use past juvenile *adjudications* to enhance criminal sentences, they could use past *criminal* convictions of juveniles for sentence enhancement purposes. The Fourth District Court of Appeal held that a defendant's sentence could be increased based on his prior criminal conviction at age fifteen in a Wyoming state court of general jurisdiction.[84] California law at the time did not allow fifteen-year-olds to be tried in a criminal court.[85] However, the court held that the prior conviction counted for sentence enhancement purposes because Wyoming had tried the fifteen-year-old as an adult in a criminal proceeding. The *Blakenship* court ruled that

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81. 33 Cal. 3d 616, 659 P.2d 1156, 189 Cal. Rptr. 867 (1983) (case remanded for a ruling on whether burglary offense was a misdemeanor or felony).

82. The relevant portion of the statute provides: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." CAL. WELF. & INST. CODE § 702 (West 1982 & Supp. 1995).

83. *Kenneth H.*, 33 Cal. 3d at 619 n.3, 659 P.2d at 1158 n.3, 189 Cal. Rptr. at 869 n.3. The California Supreme Court stated: "[T]he potential for prejudice from a finding of felony status has been increased by passage of Proposition 8, which provides that any prior felony conviction, whether adult or juvenile, 'shall . . . be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding.'" *Id.* (quoting CAL. CONST. art. I, § 28(f)).

84. People v. Blakenship, 167 Cal. App. 3d 840, 213 Cal. Rptr. 666 (1985). The court rejected Blakenship's equal protection challenge and upheld the use of the Wyoming murder conviction, even though Blakenship was 15 years old at the time of the offense, because he was tried in a criminal proceeding. *Id.* at 854, 213 Cal. Rptr. at 675.

85. The California law has changed in this area since *Blakenship*. California recently enacted legislation that lowered the age at which juveniles can be tried in a criminal court from 16 to 14 years old. *See* CAL. WELF. & INST. CODE §§ 707(d)-(e) (West 1984 & Supp. 1995).

the Victims' Bill of Rights applied to all juveniles tried and convicted as adults.[86] In *People v. Jacob*, the Court of Appeal for the Second District also held that a court may enhance a sentence based on a prior juvenile conviction in a criminal court.[87]

While California law did not allow courts to impose an enhancement based on a prior juvenile adjudication, courts could consider a prior juvenile adjudication in determining the base term of a sentence. The California Rules of Court define the base term as "the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed."[88] An aggravating factor or circumstance may justify the imposition of the upper prison term.[89] Numerous prior convictions, numerous juvenile adjudications, or crimes of increasing seriousness are all considered aggravating circumstances.[90] However, "[s]election of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation."[91] The California courts have consistently upheld the consideration of juvenile adjudications as an aggravating factor under these rules.[92]

In addition to considering a juvenile adjudication as an aggravating circumstance, the activity underlying the juvenile adjudication may also be considered in determining whether to impose the death penalty under Penal Code section 190.3, subdivision (b).[93] This provision directs the

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86. *Blakenship*, 167 Cal. App. 3d at 852, 213 Cal. Rptr. at 674. The court noted that the Victims' Bill of Rights did not exempt juveniles who were convicted in criminal courts in foreign jurisdictions. *Id.*

87. People v. Jacob, 174 Cal. App. 3d 1166, 220 Cal. Rptr. 520 (1985) (holding that the accused's prior conviction as a juvenile counted, even though expunged when the accused received an honorable discharge from California Youth Authority, because the accused was tried as an adult).

88. CAL. R. CT. 405(b).

89. "'Aggravation' or 'circumstances in aggravation' means facts which justify the imposition of the upper prison term . . . ." CAL. R. CT. 405(d).

90. "Circumstances in aggravation include: . . . The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings [that] are numerous or of increasing seriousness." CAL. R. CT. 421(b)(2).

91. CAL. R. CT. 420(b).

92. *See* People v. Ramos, 106 Cal. App. 3d 591, 609, 165 Cal. Rptr. 179, 189-90 (1980) (upholding the imposition of the upper term where defendant had two juvenile adjudications for possession of alcoholic beverages in a car and prior adult convictions for petty theft and driving without a license); People v. Berry, 117 Cal. App. 3d 184, 172 Cal. Rptr. 756 (1981) (holding that consideration of a prior juvenile adjudication as an aggravating factor did not violate due process); People v. Hubbell, 108 Cal. App. 3d 253, 258, 166 Cal. Rptr. 466, 469 (1980) (recognizing that although the purpose of the juvenile system is to reform, the subsequent use of a juvenile adjudication as an aggravating factor is constitutionally permissible and statutorily required).

93. *See* CAL. PENAL CODE § 190.3(b) (West 1982 & Supp. 1995).

fact finder to consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" in determining the penalty.[94] In considering the use of juvenile adjudications under this provision, the California Supreme Court noted that the settled law is "that any criminal activity involving force or violence comes within the purview of section 190.3, factor (b), irrespective of the offender's age" or the fact that the juvenile was adjudged a ward of the court.[95] The court acknowledged Welfare and Institutions Code section 203's proscription on the use of juvenile adjudications as criminal convictions for any purpose, but the court asserted that under Penal Code section 190.3 the relevant fact is the underlying conduct, not the resulting adjudication.[96]

In summary, before the passage of Three Strikes, juvenile adjudications were not used to enhance sentences. If a juvenile was convicted in a criminal proceeding, the prior conviction could be used to enhance a current sentence. While the sentencing court could not impose an enhancement based on prior juvenile adjudications, the court could consider prior juvenile adjudications as an aggravating factor in determining whether to impose the upper term of a determinate sentence. Additionally, fact finders could consider the conduct underlying a juvenile adjudication in deciding whether to impose the death penalty.

III. THE USE OF JUVENILE ADJUDICATIONS IN SENTENCING UNDER THE THREE STRIKES LAWS

In passing the Three Strikes provisions, the legislature and voters' stated intent was to ensure longer prison sentences and greater punishments for repeat felons.[97] The Three Strikes provisions in sections 667

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94. *Id.*

95. People v. Cox, 53 Cal. 3d 618, 687, 809 P.2d 351, 393, 280 Cal. Rptr. 692, 734 (1991), *cert. denied*, 505 U.S. 1062 (1992).

96. *Id.*

97. CAL. PENAL CODE §§ 667(b), 1170.12 (West Supp. 1995). Section 667(b) declares: "It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." CAL. PENAL CODE § 667(b) (West Supp. 1995).

The historical and statutory notes of § 1170.12 indicate that the following statement preceded the text of this section in Proposition 184: "It is the intent of the People of the

and 1170.12 of the Penal Code are similar in many respects. Each provides the same general sentencing guidelines and definitions of prior offenses that count as strikes.[98] Both Three Strikes provisions also expressly provide that a juvenile adjudication constitutes a felony conviction when four conditions exist.[99]

First, the person must have committed the prior offense when he or she was sixteen years of age or older.[100] Second, the offense must be listed in section 707(b) of the Welfare and Institutions Code,[101] listed

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State of California in enacting this measure to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." CAL. PENAL CODE § 1170.12 (West Supp. 1995).

98. CAL. PENAL CODE §§ 667(c)-(d), 1170.12(a)-(b) (West Supp. 1995).

99. CAL. PENAL CODE §§ 667(d)(3), 1170.12(b)(3) (West Supp. 1995). These provisions are essentially the same. Section 667(d)(3) specifically states:

> A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:
>
> (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.
>
> (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.
>
> (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.
>
> (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

CAL. PENAL CODE § 667(d)(3) (West Supp. 1995).

100. Both statutes require that "[t]he juvenile was 16 years of age or older at the time he or she committed the prior offense." CAL. PENAL CODE §§ 667(d)(3)(A), 1170.12(b)(3)(A) (West Supp. 1995).

101. CAL. PENAL CODE §§ 667(d)(3)(B), 1170.12(b)(3)(B)(i) (West Supp. 1995). The following offenses are listed in § 707(b) of the Welfare and Institutions Code and count as strikes:

> (1) Murder.
> (2) Arson [of an inhabited structure or property].
> (3) Robbery while armed with a dangerous or deadly weapon.
> (4) Rape with force or violence or threat of great bodily harm.
> (5) Sodomy by force, violence, duress, menace, or threat of great bodily harm.
> (6) Lewd or lascivious act as provided in subdivision (b) of Section 288 of the Penal Code.
> (7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm.
> (8) Any offense specified in . . . Section 289 of the Penal Code.
> (9) Kidnapping for ransom.
> (10) Kidnapping for purpose of robbery.
> (11) Kidnapping with bodily harm.
> (12) Attempted murder.
> (13) Assault with a firearm or destructive device.
> (14) Assault by any means of force likely to produce great bodily injury.
> (15) Discharge of a firearm into an inhabited or occupied building.
> (16) Any offense described in Section 1203.09 of the Penal Code.

as a "violent" felony in section 667.5 of the Penal Code,[102] or listed

(17) Any offense described in Section 12022.5 of the Penal Code.
(18) Any felony offense in which the minor personally used a weapon listed in subdivision (a) of Section 12020 of the Penal Code.
(19) Any felony offense described in Section 136.1 or 137 of the Penal Code.
(20) Manufacturing, compounding, or selling one-half ounce or more of any salt or solution of a controlled substance specified in subdivision (e) of Section 11055 of the Health and Safety Code.
(21) Any violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code, which would also constitute a felony violation of subdivision (b) of Section 186.22 of the Penal Code.
(22) Escape, by the use of force or violence, from any county juvenile hall, home, ranch, camp, or forestry camp in violation of subdivision (b) of Section 871 where great bodily injury is intentionally inflicted upon an employee of the juvenile facility during the commission of the escape.
(23) Torture as described in Sections 206 and 206.1 of the Penal Code.
(24) Aggravated mayhem, as described in Section 205 of the Penal Code.
(25) Carjacking, as described in Section 215 of the Penal Code, while armed with a dangerous or deadly weapon.
(26) Kidnapping, as punishable in subdivision (d) of Section 208 of the Penal Code.
(27) Kidnapping, as punishable in Section 209.5 of the Penal Code.
(28) The offense described in subdivision (c) of Section 12034 of the Penal Code.
(29) The offense described in Section 12308 of the Penal Code.

CAL. WELF. & INST. CODE § 707(b) (West 1984 & Supp. 1995).

102. Section 667.5 of the Penal Code lists the following offenses as violent felonies:
(1) Murder or voluntary manslaughter.
(2) Mayhem.
(3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.
(4) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
(5) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
(6) Lewd acts on a child under the age of 14 years as defined in Section 288.
(7) Any felony punishable by death or imprisonment in the state prison for life.
(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5 or 12022.55.
(9) Any robbery perpetrated in an inhabited dwelling house, vessel, as defined in Section 21 of the Harbors and Navigation Code, which is inhabited and designed for habitation, an inhabited floating home as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, an inhabited trailer coach, as defined in the Vehicle Code, or in the inhabited portion of any other building, wherein it is charged and proved that the defendant personally used

as a "serious" felony in section 1192.7[103] of the Penal Code.[104]

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a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of that robbery.
(10) Arson in violation of subdivision (a) of Section 451.
(11) The offense defined in subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
(12) Attempted murder.
(13) A violation of Section 12308.
(14) Kidnapping, in violation of subdivision (b) of Section 207.
(15) Kidnapping, as punished in subdivision (b) of Section 208.
(16) Continuous sexual abuse of a child, in violation of Section 288.5.
(17) Carjacking, as defined in subdivision (a) of Section 215, if it is charged and proved that the defendant personally used a dangerous or deadly weapon as provided in subdivision (b) of Section 12022 in the commission of the carjacking.

CAL. PENAL CODE § 667.5(c) (West 1988 & Supp. 1995).

103. The following crimes are listed as serious offenses in § 1192.7(c) of the Penal Code and count as strikes under the Three Strikes provisions:

(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any other felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary of an inhabited dwelling house, or trailer coach as defined by the Vehicle Code, or inhabited portion of any other building; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug, as described in paragraph (2) of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines, as described in subparagraph (A) of paragraph (1) of subdivision (f) of Section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code; (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) carjacking; any attempt to commit a crime listed in this subdivision other than an assault; and (20) any conspiracy to commit an offense described in paragraph (24) as it applies to Section 11370.4 of the Health and Safety Code where the defendant conspirator was substantial-

While the Penal Code offense lists largely overlap with the Welfare and Institutions Code list, a few offenses appear only in the Welfare and Institutions Code[105] and some appear only in the Penal Code.[106]

Third, the juvenile court must have found the juvenile to be a "fit and proper subject" for the juvenile justice system.[107] Subdivision (c) of section 707 of the Welfare and Institutions Code outlines the standard and procedure used to decide if a juvenile is "fit and proper." Under section 707, if a juvenile aged sixteen years or older allegedly commits a crime listed within section 707, the petitioner may move for a fitness investigation. A juvenile alleged to have committed an offense listed in subdivision (b) of section 707, is presumed to be "unfit." The court then assigns a probation officer to investigate the juvenile's behavior and social history and the officer forwards the report to the judge. The juvenile and the petitioner may also submit evidence to the court. Next, the court evaluates all the evidence and determines whether the

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ly involved in the planning, direction, or financing of the underlying offense. CAL. PENAL CODE § 1192.7(c) (West 1982 & Supp. 1995).

104. CAL. PENAL CODE §§ 667(d)(3)(C), 1170.12(b)(3)(C) (West Supp. 1995). Ironically, both provisions limit strike offenses to those listed in the referenced section as of June 30, 1993. CAL. PENAL CODE §§ 667(h), 1170.12 (West Supp. 1995) (accompanying historical and statutory notes). Thus, offenses added after June 30, 1993, like carjacking (CAL. PENAL CODE §§ 667.5(c)(17), 1192.7(c)(27) (West Supp. 1995); CAL. WELF. & INST. CODE § 707(b)(25) (West 1984 & Supp. 1995)), arguably do not count as strike offenses for future sentencing. However, given that the purpose of Three Strikes is to increase penalties for habitual offenders who have committed serious or violent felonies in the past, a court would likely hold this was merely a drafting error. *See* People v. Pieters, 52 Cal. 3d 894, 898-99, 802 P.2d 420, 422-23, 276 Cal. Rptr. 918, 920 (1991) (noting the literal meaning of a statute shall not be given effect when doing so would result in absurd consequences that were not intended by the legislature). See *supra* note 97 for the text setting forth the purpose of Three Strikes.

105. For example, selling a controlled substance to a minor is a strike offense for both minors and adults. However, selling a controlled substance to an adult is only a strike offense if committed by a minor. *See* CAL. WELF. & INST. CODE § 707(b)(20) (West 1984 & Supp. 1995) (which lists "[m]anufacturing, compounding, or selling one-half ounce or more of any salt or solution of a controlled substance" as an offense without specifying whether the intended buyer or seller is a juvenile or adult). *See supra* note 101. *Cf.* CAL. PENAL CODE § 1192.7(c)(24) (West 1982 & Supp. 1995) (which defines a serious felony as "selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give *to a minor* any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug.") (emphasis added). *See supra* note 103.

106. Burglary of an inhabited building appears in subdivision (c)(18) of § 1192.7 of the Penal Code but not in subdivision (b) of § 707 of the Welfare and Institutions Code. See *supra* note 103 for text of subdivision (c)(18) of § 1192.7 of the Penal Code.

107. CAL. PENAL CODE §§ 667(d)(3), 1170.12(b)(3) (West Supp. 1995). See *supra* note 99 for text of these sections.

presumption of unfitness has been rebutted. If the court finds the juvenile would be amenable to rehabilitation, he or she is deemed a "fit and proper" subject for the juvenile court.[108]

Finally, the Three Strikes provisions also require that the juvenile was "adjudged a ward of the juvenile court . . . because the person committed an offense listed in subdivision (b) of section 707 of the Welfare and Institutions Code."[109] This provision arguably limits the offenses that count as strikes to those listed in section 707(b) of the Welfare and Institutions Code for the reasons stated below.

Under Three Strikes, a juvenile adjudication must meet all four of the criteria listed above to count as a felony conviction. Many strike offenses appear in the Penal Code sections and section 707(b) of the Welfare and Institutions Code. However, several offenses appear only in the Penal Code sections.[110] Thus, if a juvenile committed a Penal Code only offense, such as robbery of an inhabited building, the juvenile would obviously not have been "adjudged a ward of the court" for committing "an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code."[111] Therefore, only juvenile adjudications for offenses delineated in section 707(b) of the Welfare and Institutions Code should count as strikes.[112] Because juveniles who commit section 707(b) offenses are presumed "unfit," only juveniles who

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108. CAL. WELF. & INST. CODE § 707(c) (West 1984 & Supp. 1995). The criteria considered in evaluating the minor's fitness include:

> (1) The degree of criminal sophistication exhibited by the minor.
> (2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.
> (3) The minor's previous delinquent history.
> (4) Success of previous attempts by the juvenile court to rehabilitate the minor.
> (5) The circumstances and gravity of the offenses alleged in the petition to have been committed by the minor.

Id.

109. CAL. PENAL CODE §§ 667(d)(3)(D), 1170.12(b)(3)(D) (West Supp. 1995). Section 602 of the Welfare and Institutions Code provides:

> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

CAL. WELF. & INST. CODE § 602 (West 1984 & Supp. 1995).

110. These offenses include voluntary manslaughter and robbery of an inhabited dwelling. CAL. PENAL CODE §§ 667.5(c), 1192.7(c) (West Supp. 1995).

111. CAL. PENAL CODE §§ 667(d)(3)(D), 1170.12(b)(3)(D) (West Supp. 1995).

112. Alex Ricciardulli, *Three-Strikes, and You're Out!*, FORUM, June 1994, at 110, 111.

overcome this presumption and are found to be "fit and proper" will have their prior juvenile adjudications count under Three Strikes.[113]

An interpretation of Three Strikes that limits the strike offenses to those listed in the pertinent part of the Welfare and Institutions Code is consistent with the rules of statutory construction. First, the court's primary duty in interpreting a statute is to determine the lawmaker's intent.[114] The language of the provisions and the official ballot are considered "indicia" of the voters' intent.[115] The legislative analysts' analysis of Proposition 184 (Penal Code section 1170.12), published in the California Ballot Pamphlet, stated that "specified crimes committed by a minor . . . count as a previous conviction" and "[t]hese specified crimes generally include the same crimes defined as serious and violent felonies."[116] Because the offenses listed in Section 707(b) of the Welfare and Institutions Code overlap with or "generally include" the "violent" and "serious" offenses listed in Penal Code sections 667.5 and 1192.7, the ballot pamphlet and text of Penal Code section 1170.12 support an inference that the voters intended only those crimes listed in section 707(b) of the Welfare and Institutions Code to count as juvenile strike offenses. Second, the courts have repeatedly held that when a statute can reasonably be interpreted in two different ways, the court

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113. Albert J. Menaster, the deputy in charge of the appellate branch of the Los Angeles County Public Defender's Office, asserts that defense counsel "should argue that an express finding of fitness is required to trigger this statute." Albert J. Menaster, *18 Ways to Avoid 3 Strikes*, FORUM, June 1994, at 102, 107. Menaster also noted that the Los Angeles District Attorney's policy is to file a strike prior even in the absence of an express finding of fitness. He stated that this policy "simply ignores the portion of the statute requiring the minor to have been *found fit* by the juvenile court." *Id.*

It should also be noted that if a juvenile fails to rebut the presumption that he or she is not a fit and proper subject for juvenile court, the juvenile will be certified to a court of general jurisdiction where he or she may suffer a felony conviction. If this juvenile suffers a conviction for a serious or violent felony, this conviction would count as a strike under Three Strikes. Of course, if the juvenile is tried in a court of general jurisdiction, the juvenile will receive the same full panoply of rights an adult is afforded. Thus, the issues discussed in this Comment would not arise.

114. People v. Jones, 5 Cal. 4th 1142, 1146, 857 P.2d 1163, 1164, 22 Cal. Rptr. 2d 753, 754 (1993).

115. When a proposition is ambiguous, the court may also consider the analysis and arguments in the ballot pamphlet as indicia of the voters' intent. Legislature v. Eu, 54 Cal. 3d 492, 504, 816 P.2d 1309, 1315, 286 Cal. Rptr. 283, 289 (1991).

116. LEGIS. ANALYST, CAL. BALLOT PAMPHLET, ANALYSIS OF PROPOSITION 184, GEN. ELECTION 33 (Nov. 8, 1994).

must use the construction that favors the accused.[117] An interpretation of the Three Strikes provisions limiting the list of juvenile strike offenses to those in the Welfare and Institutions Code would favor the accused.

One could argue that the courts should interpret the Three Strikes statutes as including the Penal Code offenses as juvenile priors because excluding Penal Code offenses as juvenile priors would render the references to the Penal Code in these parts of the statutes meaningless. Both Three Strikes provisions expressly state that a prior juvenile adjudication constitutes a felony for sentencing purposes if the offense was one listed as "violent" or "serious" within the Penal Code provisions.[118] The courts have held that, if possible, effect should be given to every word of a statute that defines an offense.[119] However, interpreting these statutes in that manner requires the courts to ignore the words in the statutes that mandate the person be adjudged a ward of the juvenile court because of the commission of a Welfare and Institutions Code section 707(b) offense. Both interpretations result in superfluous words. Limiting the list of juvenile strike offenses is, however, consistent with the voters' intent. Accordingly, only prior juvenile adjudications for offenses listed in section 707(b) of the Welfare and Institutions Code should count as prior felony convictions under Three Strikes.

If a juvenile adjudication satisfies the requirements under Three Strikes, the court must count the adjudication as a prior strike. Both Three Strikes provisions require the sentence for the current felony conviction to be doubled when a defendant has one prior juvenile

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117. *See, e.g.*, People v. Fenton, 20 Cal. App. 4th 965, 968, 25 Cal. Rptr. 2d 52, 54 (1993) ("Ordinarily penal statutes are construed most favorably to the defendant."); People v. Jones, 155 Cal. App. 3d 153, 202 Cal. Rptr. 162 (1984) (holding defendant shall receive benefit of the doubt in interpreting and constructing statutory language).

118. Penal Code § 667(d)(3)(B) provides:

> A prior juvenile adjudication shall constitute a prior felony conviction for sentence enhancement if . . . [t]he prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) [which references violent felonies in section 667.5 and serious felonies in section 1192.7] . . . as a felony.

CAL. PENAL CODE § 667(d)(3)(B) (West Supp. 1995). Section 1170.12(b)(3)(B) of the Penal Code is essentially identical.

119. *In re* Philpott, 163 Cal. App. 3d 1152, 1156, 210 Cal. Rptr. 95, 97 (1985). The court observed "the well-established rule of statutory construction that significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. A construction making some words surplusage should be avoided." *Id.*

adjudication (a strike two situation).[120] However, the provisions differ significantly in a strike three situation. Section 667 of the Penal Code counts prior juvenile adjudications as strikes to enhance a sentence to twenty-five years to life.[121] Conversely, the language of section 1170.12 of the Penal Code appears to exclude juvenile adjudications in a strike three situation.[122] Whether juvenile adjudications count in the strike three situation depends in part on whether the courts interpret the statutes as coexisting.[123]

If the statutes are interpreted as coexisting, then arguably a prosecutor could charge a defendant under either Three Strikes provision. However, the rules of statutory construction provide that when parts of the code conflict, the latest enacted section governs.[124] If a court interprets the statutes literally, the strike three provision of section 1170.12 would be deemed "the law" on this point because it conflicts with section 667 and was enacted after section 667. In addition, the courts have also held that when ambiguity exists, statutes must be construed most favorably to the accused.[125] Not counting a juvenile adjudication in a strike three situation, as section 1170.12 provides, obviously favors the accused.

The courts may reject the notion that the two statutes are coexisting because section 1170.12 of the Penal Code,[126] which was passed after section 667,[127] includes the statement, "[n]otwithstanding any other

120. See *supra* note 99 for the text of the Three Strikes provisions regarding juvenile adjudications.

121. CAL. PENAL CODE § 667(e)(2) (West Supp. 1995). See *supra* note 12 for text.

122. CAL. PENAL CODE § 1170.12(c)(2) (West Supp. 1995). Note that this section, unlike § 667, also excludes convictions in another jurisdiction in the two strike situation. See *supra* note 12 for text.

123. Beth F. Holzman, *Proposition 184: Will It Restrict 'Three Strikes' Sentencing to Defendants With Two Prior Serious/Violent Felonies Committed by Adults (or Persons Tried as Adults) in California?*, CAL. CRIM. DEF. PRAC. REP., Nov. 1994, at 416-17.

124. People v. Oppenheimer, 42 Cal. App. 3d Supp. 4, 7 n.2, 116 Cal. Rptr. 795, 797 n.2 (1974) ("In accordance with ordinary principles of statutory construction we must read all of the sections of the Penal Code together, give effect in case of conflict to the latest enacted sections . . . .").

125. *See supra* note 117.

126. Approved by voters on Nov. 8, 1994. CAL. PENAL CODE § 1170.12 (West Supp. 1995).

127. Approved by the Governor on Mar. 7, 1994. CAL. PENAL CODE § 667 (West Supp. 1995).

provisions of law."[128] This language suggests that section 1170.12 supersedes section 667. Under this interpretation, juvenile adjudications would not count as strikes in the strike three situation per the plain language of subdivision (c)(2)(A) of section 1170.12. Moreover, because the language of this portion of section 1170.12 is clear and unambiguous, analysis of the ballot pamphlet to discern the voters' intent is arguably unnecessary.[129]

Les Kleinberg, the counsel to the Senate Criminal Procedure Committee, observed that "[s]ince the initiative is clearly different from the bill, the people's intent was for the changes to be there."[130]

Despite these two arguments in favor of juvenile adjudications not counting in the strike three situation under section 1170.12, the courts have not yet addressed this issue. However, a California court of appeal held that an out-of-state conviction, which like a juvenile adjudication appears to be excluded from strike three situations under section 1170.12, could be used in a strike three situation.[131] In *People v.*

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128. CAL. PENAL CODE § 1170.12(a) (West Supp. 1995). Assembly Bill 971, which amended § 667, was written after Proposition 184, which added § 1170.12. These two laws were supposedly identical and Proposition 184 was to be passed first. Drafters of Assembly Bill 971 apparently deleted the limiting language regarding juvenile adjudications to presumably expand the reach of the law. Holzman, *supra* note 123, at 416.

129. Legislature v. Eu, 54 Cal. 3d 492, 504, 816 P.2d 1309, 1315, 286 Cal. Rptr. 283, 289 (1991) (discussion on statutory analysis). See *supra* note 12 for the text of the statutes; *see also* People v. Jones, 5 Cal. 4th 1142, 1146, 857 P.2d 1163, 1164, 22 Cal. Rptr. 2d 753, 754 (1993). In construing Proposition 8, the California Supreme Court observed:

> We begin with the fundamental rule that our primary task is to determine the lawmakers' intent. In the case of a constitutional provision adopted by the voters, their intent governs. To determine intent, "The court turns first to the words themselves for the answer . . . . If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)."

Id. (quoting Delaney v. Superior Court, 50 Cal. 3d 785, 798, 789 P.2d 934, 940, 268 Cal. Rptr. 753, 759) (1990)) (citations omitted).

130. Hallye Jordan, *Prop. 184 May Water Down 'Three Strikes,'* L.A. DAILY J., Oct. 21, 1994, at 1, 8.

131. *See* People v. Jones, 40 Cal. App. 4th 630, 632, 47 Cal. Rptr. 2d 308, 309 (1995). Jones's current convictions were for six counts of rape, three counts of assault with force likely to produce great bodily injury, one count of first degree burglary, one count of false imprisonment, and one count of sodomy by force. *Id.* at 632 n.1, 47 Cal. Rptr. 2d at 309 n.1. Additionally, Jones admitted to five prior felony convictions, which included an Arizona robbery conviction. *Id.* at 631, 47 Cal. Rptr. 2d at 309.

Out-of-state prior convictions are described in paragraph (2) of subdivision (b) in § 1170.12 of the Penal Code. Subdivision (c)(2)(A) of Penal Code § 1170.12 requires imposition of a 25-year-to-life sentence if the person has two or more prior felony convictions as defined by paragraph (1). CAL. PENAL CODE § 1170.12 (West Supp. 1995). See *supra* note 12 for the text of this provision.

Jones, the defendant argued that the language of section 1170.12 required exclusion of his Arizona conviction.[132] In rejecting Jones's contention, the court stated that "the difference in the wording of the initiative version is the result of a drafting error and does not indicate an intent to produce sentences that are any less severe than under the earlier legislative version."[133] The court observed that the ballot pamphlet conclusively showed that the voters did not intend the initiative to weaken the legislative version of Three Strikes.[134] Additionally, Jones's version, the court opined, would lead to absurd results because it would undermine the initiative's stated purpose of keeping habitual criminals behind bars and directly contradict the ballot pamphlet's statement that the initiative does not alter the law.[135]

The *Jones* court's interpretation of which prior convictions count as strikes in a strike three situation is more persuasive. The voters' clearly stated intent in Proposition 184 was to increase the sentences of recidivists. This stated purpose would be frustrated if out-of-state and juvenile adjudications were not counted as strikes in a strike three situation. While the language on this issue is different from the legislative version of Three Strikes, in view of the stated purpose of

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132. Although Jones was convicted under the legislative version of Three Strikes, § 667 of the Penal Code, he argued that the initiative version was more lenient and, therefore, should be applied retroactively, citing *In re* Estrada, 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965), as authority. *Jones*, 40 Cal. App. 4th at 633, 47 Cal. Rptr. 2d at 310.

133. *Id.* at 632, 47 Cal. Rptr. 2d at 309. The court later stated that "[t]he underlying intent is so clear that it will prevail over an inexplicable drafting error." *Id.* at 635, 47 Cal. Rptr. 2d at 311.

134. *Id.* at 634, 47 Cal. Rptr. 2d at 310. The ballot pamphlet stated that the initiative was identical to the legislative version of the law and merely reaffirmed the already existing law. Additionally, the pamphlet stated that out-of-state felonies were counted as strikes. *Id.*

135. *Id.* at 635, 47 Cal. Rptr. 2d at 310-11. Because the court found the initiative was not more lenient than the legislative version, the court held it was not retrospective. *Id.*

In addition to the absurd results that the court observed Jones's version of § 1170.12 would yield, this interpretation also sets up a potential Equal Protection Clause challenge. A person with two prior California convictions for armed robbery would be sentenced to 25 years to life for the current armed robbery conviction. However, a person with two prior Arizona convictions for armed robbery or two prior juvenile adjudications for this crime would not be subject to a 25-year-to-life sentence if convicted of the current armed robbery charge. Accordingly, similarly situated people would be treated differently under this interpretation of § 1170.12.

Proposition 184, this difference was more likely the result of a drafting error than an intentional change by the voters.

Regardless of whether a juvenile adjudication counts as a strike in the strike three situation, the use of juvenile adjudications in sentencing by the Three Strikes laws marks a significant change in California law. Three Strikes has been deemed "a parallel sentencing scheme for specifically described recidivists."[136] The courts have rejected the argument that doubling or tripling a sentence under Three Strikes constitutes an enhancement.[137] An enhancement is an addition to the base term. Three Strikes changes the base term for recidivists. Hence, the pre-Three Strikes prohibition on the use of juvenile adjudications to enhance sentences is presumably still in place.

However, the pre-Three Strikes use of juvenile adjudications as an aggravating factor in sentencing is significantly different from the use of juvenile adjudications under Three Strikes. In the first situation, the existence of a prior juvenile adjudications is a factor that is weighed with other aggravating and mitigating factors. Thus, the mere existence of a prior juvenile adjudication does not necessarily result in the imposition of an upper term.[138] Additionally, under the California Rules of Court, a single juvenile adjudication alone does not justify the imposition of the upper term.[139] In contrast, under Three Strikes, the existence of one qualifying prior juvenile adjudication requires the court to double the sentence for the current offense, regardless of the existence of mitigating factors.

The use of a juvenile adjudication under Three Strikes also differs significantly from the pre-Three Strikes use of juvenile adjudications in death penalty sentencing. Before Three Strikes, the jury could consider the behavior underlying a juvenile adjudication when determining whether to impose the death penalty. The mere existence of a juvenile adjudication did not, however, mandate imposition of the death penalty. In contrast, under Three Strikes, the existence of a qualifying juvenile adjudication results in an automatic sentence increase. Accordingly, Three Strikes' non-discretionary, automatic use of juvenile adjudications to enlarge sentences constitutes a significant change in California law.

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136. People v. Anderson, 35 Cal. App. 4th 587, 595, 41 Cal. Rptr. 2d 474, 478 (1995).

137. *Id.* The interpretation of Three Strikes as "a parallel sentencing scheme" for recidivists enables the court to double (or triple) a life sentence based on one prior conviction and impose an enhancement based on the same prior conviction. *Id.*

138. See *supra* notes 68-96 and accompanying text for a discussion of the pre-Three Strikes use of juvenile adjudications in sentencing.

139. CAL. R. CT. 421(b)(2). See *supra* note 90 for statement of this rule.

IV. CONSTITUTIONAL CHALLENGES TO THE USE OF JUVENILE ADJUDICATIONS UNDER THREE STRIKES

While the rules of statutory construction suggest that prior juvenile adjudications must be used to increase sentences under Three Strikes,[140] these provisions obviously cannot be enforced if they are unconstitutional. The primary constitutional challenges to the use of juvenile adjudications under Three Strikes involve the violation of due process and equal protection rights.

A. Due Process Challenges to the Use of Juvenile Adjudications Under Three Strikes

Denying a juvenile the right to a jury trial in the juvenile court has been deemed constitutional by the United States Supreme Court because of the fundamental differences between the purposes of the juvenile and criminal justice systems.[141] However, it is unclear whether the subsequent use of a juvenile adjudication to increase the punishment for a current felony conviction under Three Strikes violates the Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 15 of the California Constitution.[142]

In *People v. Peterson*,[143] the Court of Appeal for the Second District

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140. Unlike the ambiguous use of the term "juvenile conviction" in the Victims' Bill of Rights, Three Strikes clearly articulates when juvenile adjudications count as felony convictions. Penal Code statutes must "be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." CAL. PENAL CODE § 4 (West 1988 & Supp. 1995). Therefore, juvenile adjudications must be counted for sentence enhancement purposes as a matter of statutory construction.

141. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971). See *supra* notes 35-47 and accompanying text for a discussion of the *McKeiver* decision.

142. U.S. CONST. amend. XIV, § 1 (no state shall "deprive any person of life, liberty, or property, without due process of law"); CAL. CONST. art. I, § 15 ("Persons may not . . . be deprived of life, liberty, or property without due process of law.").

143. 40 Cal. App. 4th 1479, 1483, 48 Cal. Rptr. 2d 318, 319 (1995). Peterson's current conviction was for kidnapping during the commission of a carjacking. *Id.* at 1483, 48 Cal. Rptr. 2d at 318. Additionally, the jury found Peterson had used a firearm during the commission of this offense. *Id.* Peterson had a prior juvenile adjudication for robbery and was found to have used a dangerous weapon during the robbery. *Id.* at 1482 n.1, 48 Cal. Rptr. 2d at 318 n.1. Three Strikes required Peterson's sentence to be doubled based on the prior juvenile adjudication, making him eligible for parole in 14 years instead of seven. *Id.* at 1483, 48 Cal. Rptr. 2d at 318.

considered whether the use of juvenile adjudications to enlarge adult sentences under Three Strikes violated due process. In concluding that it did not, the court observed that the use of juvenile adjudications to increase adult sentences had been upheld against due process challenges under pre-Three Strikes California case law, as well as in the case law of other state and the federal courts.[144] The *Peterson* court opined that the rationale that led these courts to approve of the use of juvenile adjudications in sentencing also applied to Three Strikes.[145] The court then noted that it is constitutionally permissible to deny juveniles certain rights that adults possess, such as a right to a jury trial, because of the fundamentally different purposes of the juvenile and criminal justice systems.[146] "'If it does not violate due process for a juvenile to be deprived of his or her liberty without a jury trial, we fail to find a violation of due process when a later deprivation of liberty is enhanced

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Peterson challenged the constitutionality of the juvenile adjudication provisions of Three Strikes. *Id.* at 1482, 48 Cal. Rptr. 2d at 318. The trial court denied Peterson's motion, but still struck the prior juvenile adjudication in the interest of justice or alternatively because the use of the juvenile adjudication to double Peterson's sentence ran afoul of the federal and state constitutional prohibitions on cruel and unusual punishment. *Id.* at 1482-83, 48 Cal. Rptr. 2d at 318.

The People appealed the ruling, asserting the trial court ignored the clear intent of the law and, therefore, imposed an unlawful sentence. *Id.* at 1483, 48 Cal. Rptr. 2d at 318. In addition to ruling on the due process and equal protection challenges to the use of juvenile adjudications, the court of appeal held that Proposition 184, which enacted § 1170.12, did not grant the trial court power to strike an alleged prior conviction in the interests of justice. *Id.* at 1489, 48 Cal. Rptr. 2d at 323. The court further held that the use of a juvenile adjudication to double Peterson's sentence did not constitute cruel and unusual punishment because the penalty was not grossly disproportionate to the offense. *Id.* at 1490-91, 48 Cal. Rptr. 2d at 324.

144. *Id.* at 1483, 1485-86, 48 Cal. Rptr. 2d at 319, 320-21. Although juvenile adjudications have been considered as sentencing factors in California, the use of juvenile adjudications under Three Strikes marks a significant change in the law. See *supra* notes 136-37 and accompanying text for a discussion of this change.

145. *Peterson*, 40 Cal. App. 4th at 1486, 48 Cal. Rptr. 2d at 321.

146. *Id.* Although the *Peterson* court noted that the differences in the two systems justify a lower due process standard in juvenile court, it is unclear whether these distinctions still exist in California. *See* Breed v. Jones, 421 U.S. 519, 530 (1975) (noting the similar potential consequences of adjudicatory and criminal hearings in California); *In re* Javier A., 159 Cal. App. 3d 919, 967, 206 Cal. Rptr. 386, 424 (1984). See *supra* note 62 for a discussion of this section of the *Javier A.* opinion. With Three Strikes, the consequences of criminal convictions and juvenile adjudications are even more similar as both may be used to double a life sentence. See also Martha Elin-Blomquist & Martin L. Forst, *Moral and Practical Problems with Redefining the Goal of the Juvenile Justice System as Accountability*, 14 J. JUV. L. 26, 28-46 (1993), for a summary of the history of California's juvenile justice system and current trends. The authors conclude the injection of the concept of accountability into the system jeopardizes the concept of a separate juvenile system. *Id.* at 46.

due to this juvenile adjudication.'"[147] The court also stated that the punishment under a recidivist statute is for the current offense.[148] Moreover, findings of delinquency are made only after a judge is convinced beyond a reasonable doubt that allegations of the petition are true.[149] Therefore, the court concluded that a juvenile adjudication "represents a fair means of establishing a defendant's criminal propensity."[150]

As noted by the *Peterson* court, the federal courts have approved of the use of prior juvenile adjudications to increase adult sentences under the Federal Sentencing Guidelines. Under the federal guidelines, a sentencing judge calculates the defendant's criminal history score based on past convictions and adjudications. The judge uses this score to sentence the person for the current offense. These guidelines require courts to add points to a defendant's score when a prior juvenile adjudication exists.[151]

The District of Columbia Circuit recently upheld the use of juvenile adjudications in calculating sentences under the sentencing guidelines in *United States v. Johnson*.[152] In *Johnson*, the defendant argued that a juvenile adjudication was not a criminal conviction and, therefore, should not be used to increase his sentence.[153] The court recognized

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147. *Peterson*, 40 Cal. App. 4th at 1486-87, 48 Cal. Rptr. 2d at 322 (quoting United States v. Williams, 891 F.2d 212, 215 (9th Cir. 1989)).
148. *Id.* at 1487, 48 Cal. Rptr. 2d at 322.
149. *Id.*
150. *Id.*
151. FEDERAL SENTENCING GUIDELINES § 4A1.2(d) (West 1994). This section provides:

> (d) Offenses Committed Prior to Age Eighteen
> (1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1(a) for each such sentence.
> (2) In any other case,
> (A) add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;
> (B) add 1 point under § 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).

Id.
152. 28 F.3d 151 (D.C. Cir. 1994). Johnson was convicted of possession of cocaine with intent to distribute. Under the federal sentencing guidelines, Johnson was awarded 10 points, nine of which were based on his juvenile record. *Id.* at 153.
153. *Id.* at 154.

that juvenile justice systems emphasize rehabilitation and treatment. However, the court stated that a juvenile offender turned recidivist loses the benefits of the juvenile system because of society's stronger interest in punishing habitual criminals.[154] The court also noted that there is a long-standing tradition of using juvenile adjudications in calculating sentences.[155] Other courts have similarly upheld the use of juvenile adjudications under the Federal Sentencing Guidelines.[156]

While *Peterson* and the federal courts have upheld the use of juvenile adjudications to increase adult sentences, one could argue that these holdings were based on a misunderstanding of the premises underlying *McKeiver*.[157] The Supreme Court allowed differential treatment of juveniles in *McKeiver* because the Court assumed that the juvenile adjudication would be used for a treatment purpose.[158] When a juvenile adjudication is used to increase an adult sentence under the Federal Sentencing Guidelines or Three Strikes, the adjudication is used for a punishment purpose. Thus, the treatment-only justification that

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154. *Id.* (citing United States v. McDonald, 991 F.2d 866, 872 (D.C. Cir. 1993)). The court noted that while a juvenile may not have received a "conviction," the juvenile did in fact violate a criminal statute. *Id.*

155. *Id.* The court observed, "The practice of considering prior juvenile adjudications at sentencing, a practice authorized in the Federal Youth Corrections Act, 18 U.S.C. § 5038(a)(2), has long been accepted." *Id.* (citations omitted).

156. *See* United States v. Holland, 26 F.3d 26 (5th Cir. 1994) (holding it proper to consider juvenile adjudications in sentencing, even though Texas law does not equate juvenile adjudications and criminal convictions); United States v. Kirby, 893 F.2d 867 (6th Cir. 1990) (permitting consideration of a juvenile record in sentencing); United States v. Booten, 914 F.2d 1352 (9th Cir. 1990) (ruling it does not violate due process to consider juvenile adjudications as criminal convictions for sentence enhancement purposes); United States v. Mackbee, 894 F.2d 1057 (9th Cir. 1990) (holding due process rights were not violated when a sentence for possession of a controlled substance was enhanced based on prior juvenile adjudications).

157. *See* David Dormont, Note, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1791 (1991) (discussing the use of juvenile adjudications under the Federal Sentencing Guidelines). See also Circuit Judge Wald's dissenting opinion in *Johnson*, 28 F.3d at 159, which cites Dormont's note.

Another commentator observed: "Many courts have rejected this argument [the absence of a jury trial should limit the use of juvenile adjudications to increase adult sentences] with a conclusory reference to *McKeiver*. *See, e.g.*, State v. Little, 423 N.W.2d 722, 724-25 (Minn. Ct. App. 1988) . . . United States v. Williams, 891 F.2d 212, 215 (9th Cir. 1989) . . . ." Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1063 n.434 (1995).

158. Dormont, *supra* note 157, at 1790. *See also* McKeiver v. Pennsylvania, 403 U.S. 528, 552 (1971) (White, J., concurring) ("Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties."); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN L. REV. 691, 696 (1991). Feld asserts that "[t]he *McKeiver* Court justified the procedural differences between juvenile and criminal courts on the basis of the former's *treatment* rationale and the latter's *punitive* purposes." *Id.*

permits the lower due process standard in the juvenile system is not served by this subsequent punitive use of the juvenile adjudication.[159]

In denying a juvenile a right to a jury trial, the *McKeiver* Court also assumed that a juvenile adjudication would not adversely affect a person when he or she became an adult.[160] When a juvenile adjudication is used to enhance an adult sentence, the juvenile adjudication obviously adversely affects the person in adulthood. In *McKeiver*, Justice White observed that "the consequences of adjudication are less severe than those flowing from verdicts of criminal guilt."[161] Under Three Strikes, the initial consequences of juvenile adjudications and criminal convictions may still differ. However, if a person is subsequently convicted of a felony as an adult, the consequences of qualifying juvenile adjudications and criminal convictions are identical—each count as one strike.

In short, one could argue that the Three Strikes juvenile adjudication provisions violate due process because the use of juvenile adjudications to enlarge sentences permits an adjudication to be used for a non-treatment purpose and allows the adjudication to have a significant and onerous impact on an adult. Although this argument has some merit, it will likely fail. The United States Supreme Court has not yet considered whether it is constitutionally permissible to use juvenile adjudications to enhance adult sentences. However, the Court's decision in *Nichols v. United States*[162] suggests that the juvenile adjudication provisions of Three Strikes will pass constitutional muster.

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159. Dormont, *supra* note 157, at 1793-94.

160. *Id.* at 1790. Dormont suggests this assumption is inherent in the *McKeiver* Court's decision. *Id.* at 1790 n.105. As support for this proposition, Dormont noted the *McKeiver* Court stated a delinquency finding was "significantly different from and less onerous than a finding of criminal guilt." *Id.* (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 540 (1971)). Dormont also cites Justice White's concurring opinion in *McKeiver* to illustrate Justice White's assumption that the child would not be stigmatized by a finding of delinquency. *Id.* Justice White stated:

> Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that a punishment is required to deter him or others.

McKeiver v. Pennsylvania, 403 U.S. 528, 551-52 (1971) (White, J., concurring).

161. 403 U.S. at 553 (White, J., concurring).

162. 114 S. Ct. 1921 (1994) (6-3 decision).

The issue in *Nichols* was whether a prior uncounseled misdemeanor conviction of the defendant, which was valid under *Scott v. Illinois*[163] because no term of imprisonment was imposed, could be considered in sentencing the defendant for his current conviction.[164] The *Nichols* Court observed that the *Scott* Court held that the Sixth Amendment right to counsel cases had expanded the language of this right well "beyond its obvious meaning" and, therefore, the *Scott* Court drew a line between cases that did and did not result in actual imprisonment; the right to counsel attaches only when imprisonment is imposed.[165] The *Nichols* Court then stated that a "logical consequence of the holding is that an uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment."[166] The Court explained that the sentencing statute did not change the penalty for the prior conviction.[167] Moreover, the Court noted that the consideration of prior uncounseled misdemeanor convictions in sentencing was consistent with traditional sentencing procedures, and that judges considered many factors in sentencing that may constitutionally include criminal behavior not resulting in a conviction.[168] The Court observed:

> [C]onsistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct which gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence. Surely, then, it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proven beyond a reasonable doubt.[169]

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163. 440 U.S. 367 (1979). In *Scott*, an indigent convicted of shoplifting was fined $50 in a bench trial. The maximum penalty for the crime was $500 and one year in jail. Scott appealed the conviction because the state did not provide him counsel. The Supreme Court held, "The Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.* at 373-74.

164. *Nichols*, 114 S. Ct. at 1924.

165. *Id.* at 1927 (citing Scott v. Illinois, 440 U.S. 367, 372-74 (1979)).

166. *Id.*

167. *Id.*

168. *Id.* at 1927-28.

169. *Id.* at 1928 (citation omitted).

Accordingly, in *Nichols*, the Supreme Court overruled its earlier decision in *Baldasar v. Illinois*[170] and held that the uncounseled misdemeanor conviction could be used to impose an increased sentence.[171]

Like the prior conviction at issue in *Nichols*, a juvenile adjudication without a jury trial does not violate a juvenile's due process rights. Also, the Three Strikes use of a juvenile adjudication in sentencing does not alter the treatment purpose of the earlier juvenile adjudication. If it is constitutionally permissible to increase a sentence based upon conduct underlying an offense that did not result in a conviction and that was proved by a preponderance of evidence, then certainly it is permissible to use a finding of delinquency that was obtained in a procedure that provided a right to notice, counsel, confrontation, and cross-examination, in addition to requiring proof beyond a reasonable doubt.[172] Moreover, unlike an uncounseled misdemeanor conviction, a juvenile adjudication may be used to deprive someone of his or her liberty.[173] Because it is constitutional to enhance a sentence based on an uncounseled misdemeanor conviction, even though no deprivation of liberty could be imposed as a direct result of the offense, then surely it is permissible to use a juvenile adjudication, which could have been used to deprive someone of liberty in the first instance, to increase an adult

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170. 446 U.S. 222 (1980) (per curiam), *overruled by* Nichols v. United States, 114 S. Ct. 1921 (1994). In *Baldasar*, the Court held that a prior uncounseled conviction that was valid under *Scott* could not be considered under Illinois's enhancement statute. Justice Marshall stated, "A rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from our previous cases." *Id.* at 228-29 (Marshall, J., concurring).

171. *Nichols*, 114 S. Ct. at 1927-28. The Court held that "we adhere to *Scott v. Illinois* . . . and overrule *Baldasar*." *Id.* at 1928.

172. *See* United States v. Williams, 891 F.2d 212, 215 (9th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990). Williams claimed that consideration of his juvenile adjudications in calculating his sentence under the Federal Sentencing Guidelines violated his due process rights. *Id.* at 214. After approving the use of juvenile adjudications to enhance convictions, the court observed that prior to the sentencing guidelines, courts had upheld sentencing enhancements based on a prior offense that resulted in an acquittal and based on an arrest underlying a void conviction. The court opined:

> If a judge could have enhanced a sentence because of factors which have not been fully adjudicated with due process guarantees, a judge can enhance a sentence due to a prior adjudication when . . . the defendant has had such due process safeguards as the right to counsel and the right to cross-examine adverse witnesses.

Id. at 215.

173. *Id.* at 215.

sentence.[174] Accordingly, in view of *Nichols*, Three Strikes' use of juvenile adjudications will likely withstand a due process challenge.[175]

One distinction between Three Strikes and the sentencing guidelines considered in *Nichols* is that the sentencing guidelines at issue in *Nichols* allowed judges to increase or decrease punishment within a specified *range*. Thus, the guidelines at issue in *Nichols* allowed for judicial discretion to depart downwards based on the circumstances of the prior conviction.[176] In contrast, Three Strikes provides automatic sentence increases whenever a defendant has a prior felony conviction as defined by the statute.[177] Under Three Strikes, the prosecutor must prove the prior convictions. The prosecution can move to dismiss a prior strike when insufficient evidence exists to prove the prior conviction or when the dismissal would be in the furtherance of justice.[178] The court can dismiss or strike the alleged prior felony upon a finding that insufficient evidence exists to prove the past felony.[179] However, the Three Strikes provisions do not appear to allow a court discretion to strike a

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174. *See id.* The *Williams* court also noted that the right to counsel had been deemed more fundamental than a jury trial right. *Id.* (citing Argersinger v. Hamlin, 407 U.S. 25, 46 (1972) (Powell, J., concurring)). Thus, if it is permissible to enhance a sentence based upon a disposition in which the defendant was not afforded the more fundamental right of counsel, then it should be permissible to increase a sentence based upon a proceeding where the person was afforded the right to counsel but not the less fundamental right to a jury trial.

175. *See* United States v. Johnson, 28 F.3d 151, 153 n.3 (D.C. Cir. 1994). In upholding the use of juvenile adjudications to increase sentences under the federal sentencing guidelines, the *Johnson* court stated "[i]n light of *Nichols*, there is no reason why a constitutional non-jury juvenile adjudication may not be used in the same way." *Id.*

176. Nichols v. United States, 114 S. Ct. 1921, 1930 (1994) (Souter, J., concurring). The guidelines specifically authorize downward departures when a defendant's criminal category over-represents the seriousness of the criminal history. *Id.*

177. CAL. PENAL CODE §§ 667(f)(1), 1170.12 (d)(1) (West Supp. 1995). Section 667(f)(1) states: "Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2)." CAL. PENAL CODE § 667(f)(1) (West Supp. 1995). Section 1170.12(d)(1) is essentially the same.

178. CAL. PENAL CODE §§ 667(f)(2), 1170.12(d)(2) (West Supp. 1995). These identical provisions state: "The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction." *Id.*

179. CAL. PENAL CODE §§ 667(f)(2), 1170.12(d)(2) (West Supp. 1995). These identical provisions state: "If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation." *Id.*

prior conviction in the interests of justice[180] or give less weight to a juvenile adjudication the prosecution has proved.

Justice Souter noted, in his concurring opinion in *Nichols*, that the *Baldasar* Court considered a sentencing framework that provided automatic increased sentencing.[181] In contrast, the sentencing guidelines at issue in *Nichols* reasonably accommodated Sixth Amendment reliability concerns because of the allowance for downward departures in cases involving less reliable convictions.[182] Accordingly, Justice Souter viewed the use of an uncounseled conviction for increasing a sentence as constitutional under the non-automatic sentencing provisions. Justice Souter cautioned, "I am shy, however, of endorsing language in the Court's opinion that may be taken as addressing the constitutional validity of a sentencing scheme that *automatically* requires enhancement for prior uncounseled convictions . . . ."[183]

One could argue that the use of juvenile adjudications to enhance a sentence under Three Strikes is unconstitutional because the court has no discretion to strike a questionable juvenile adjudication.[184] A study on

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180. The Fourth District Court of Appeal addressed this issue in People v. Superior Court (Romero), 31 Cal. App. 4th 653, 37 Cal. Rptr. 2d 364 (1995), *review granted and opinion superseded by* People v. Superior Court (Romero), 892 P.2d 804, 40 Cal. Rptr. 2d 308 (Apr. 13, 1995). In *Romero*, the court of appeal held that the trial court could not strike a prior felony conviction on its own motion under both versions of Three Strikes and that this limitation on the court's power did not constitute a violation of the separation of powers doctrine.

In contrast, the First District Court of Appeal approved a judge's refusal to follow Three Strikes and double a sentence. Philip Carrizosa, *Court Won't Overturn 3 Strike Refusal*, L.A. DAILY J., Dec. 19, 1994, at 1. The defendant had a 10-year-old residential burglary conviction when he was caught with eight grams of marijuana outside a county honor farm where he was serving a 120-day shoplifting sentence. The sentence should have been four, six, or eight years under Three Strikes. The judge ordered the accused to a drug treatment program instead. In an unpublished order, the court of appeal affirmed the order. *Id.* at 1, 12.

181. Nichols v. United States, 114 S. Ct. 1921, 1930 (1994) (Souter, J., concurring).

182. *Id.*

183. *Id.* at 1931 (emphasis added).

184. In United States v. Davis, 48 F.3d 277, 280 (7th Cir. 1995), a case involving a due process challenge to the use of juvenile adjudications in sentencing under the Federal Sentencing Guidelines, the court stated:

> Lest one believe that this system punishes a defendant too harshly for offenses committed while he was young and foolish, the Guidelines authorize the sentencing judge to adjust a defendant's criminal history if the judge believes the criminal history does not adequately reflect the defendant's past conduct or his tendency to recidivism. . . . The scheme, then, is designed to meet the sentencing objectives while maintaining a sense of fairness by

the conviction[185] rates of juvenile and criminal courts in California found that juveniles were convicted for a higher percentage of comparably charged crimes than were adults.[186] This difference might be attributable to the evils from which the jury trial protects the accused—"corrupt or overzealous prosecutor[s] and . . . compliant, biased or eccentric judge[s]."[187] The distinction may also be attributable to other factors including the heavy juvenile court caseloads that may result in the court becoming "less meticulous in considering the evidence" or the court applying "less stringent concepts of reasonable doubt and presumption of innocence."[188] In view of the difference in the conviction rates between juveniles and adults and possible explanations for this disparity, judicial discretion is arguably necessary to ensure that a juvenile adjudication is sufficiently reliable.

An argument challenging the use of juvenile adjudications in sentencing, based on the lack of judicial discretion in Three Strikes, would, however, likely fail. While Justice Souter viewed the lack of discretion as a distinguishing feature between the sentencing frameworks at issue in *Baldasar* and *Nichols*,[189] the majority did not, as evidenced by its decision to expressly overrule *Baldasar* in *Nichols*.[190] Also, the reliability of an uncounseled conviction is arguably more questionable than a juvenile adjudication. The Court gave retrospective effect to its decision recognizing a right to counsel in state criminal trials but not to

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> offering the sentencing judge some discretion. Accordingly, the consideration of a defendant's juvenile record is important to achieving the congressional goals of federal sentencing, is not "unfair," and does not remotely infringe on the defendant's Fifth Amendment rights.

Id.

185. Technically, juveniles are not convicted. Instead, they are adjudged a ward of the court. *See supra* note 68.

186. Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing The Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1124 n.272 (1991).

187. Duncan v. Louisiana, 391 U.S. 145, 156 (1967). *See also* Feld, *supra* note 158, at 719. After noting the *McKeiver* Court equated the factual accuracy of juvenile and adult adjudications, Feld states:

> *McKeiver* simply ignored that constitutional procedures also prevent governmental oppression. In *Duncan v. Louisiana*, the Court held that adult criminal proceedings required a jury to assure both factual accuracy *and* protection against governmental oppression. *Duncan* emphasized that juries protect against a weak or biased judge, inject the community's values into law, and increase the visibility and accountability of justice administration. These protective functions are even more crucial in juvenile courts that labor behind closed doors, immune from public scrutiny.

Id. (footnotes omitted).

188. Ainsworth, *supra* note 186, at 1124.

189. Nichols v. United States, 114 S. Ct. 1921, 1930 (1994) (Souter, J., concurring).

190. *Id.* at 1928.

the jury trial right recognized in *Duncan*.[191] The *McKeiver* Court noted that *Duncan* would have been applied retrospectively if "the integrity of the result was seriously at issue."[192] The fact that the right to counsel was given retrospective application, while the right to a jury trial was not, suggests the Court was more concerned about the integrity of an uncounseled conviction than the results of bench trials. Accordingly, even though Three Strikes does not appear to permit judges to review the reliability of a prior juvenile adjudication that the prosecution has pled and proved, the juvenile adjudication portions of Three Strikes will still likely be deemed constitutional.

In short, although the juvenile justice system does not afford juveniles the same procedural rights that adults have in the criminal courts, and Three Strikes does not appear to give judges discretion to review the reliability of prior juvenile adjudications, this portion of Three Strikes will likely withstand a due process challenge in light of the existing case law, in particular the *Nichols* decision.

B. Challenges to the Use of Juvenile Adjudications for Sentence Enhancements Under the California Constitution

If the Three Strikes provisions regarding juvenile adjudications survive a due process challenge under the United States Constitution, a second

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191. *See* Pickelsimer v. Wainwright, 375 U.S. 2 (1963) (granting the petitions for writs of certiorari, vacating the judgments, and remanding the cases for further consideration in view of Gideon v. Wainwright, 372 U.S. 335 (1963), which recognized a right to counsel in state criminal trials, giving it retrospective effect); DeStefano v. Woods, 392 U.S. 631, 635 (1968) (refusing to give *Duncan* retroactive effect).

Justice Powell noted that the Court gave retroactive effect to the *Gideon* ruling in *Pickelsimer*. Argersinger v. Hamlin, 407 U.S. 25, 46 n.6 (1972). However, one commentator suggests that in *Pickelsimer*, "[t]he justices had not themselves made the decision to apply the new rule retrospectively, but they seemed to be inviting the Florida court to do so." ANTHONY LEWIS, GIDEON'S TRUMPET 205 (1964).

192. McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971). *Compare Gideon*, 372 U.S. at 344 ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.") *with Duncan*, 391 U.S. at 158 ("We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury."). *See also Argersinger*, 407 U.S. at 46 (Powell, J., concurring) ("[T]he interest protected by the right to have guilt or innocence determined by a jury—tempering the possibly arbitrary and harsh exercise of prosecutorial and judicial power—while important, is not as fundamental to the guarantee of a fair trial as is the right to counsel.").

basis for challenging their use may exist under the California Constitution. The *Javier A.* court provided a compelling explanation of why juveniles should be afforded the right to trial by jury under California law, based on an historical analysis of the English common law in 1850.[193] Per *Javier A.*, juvenile adjudications are unconstitutional because of the lack of a right to trial by jury.

Under California law, an individual may challenge the constitutional validity of a prior conviction that is used to increase a subsequent sentence.[194] If the California Supreme Court adopts *Javier A.*'s reasoning and holds that juveniles have a constitutional right to trial by jury, then the use of prior juvenile adjudications to increase sentences under Three Strikes would be subject to a collateral attack. However, these attacks would likely fail if based solely on the lack of a jury trial. As the *McKeiver* Court noted, when *Duncan* established the right to trial by jury in state criminal proceedings, the right was not applied retrospectively, which indicates that the integrity of a bench trial result was not at issue.[195] Moreover, because it has been more than ten years since the *Javier A.* court urged the California Supreme Court to reconsider a juvenile's right to a jury trial, it is doubtful that the California Supreme Court will reconsider the *In re Daedler* decision in the near future.

C. *Equal Protection Challenges to the Use of Juvenile Adjudications Under Three Strikes*

A second class of constitutional challenges to the use of juvenile adjudications under Three Strikes involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[196] and Article I, Section Seven of the California Constitution.[197] The California Court of Appeal for the Second District addressed one of the

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193. *In re* Javier A., 159 Cal. App. 3d 913, 929-50, 206 Cal. Rptr. 386, 396-411 (1984); *see supra* notes 54-64 and accompanying text.

194. *In re* Woods, 64 Cal. 2d 3, 409 P.2d 913, 48 Cal. Rptr. 689 (1966) (holding that a prior conviction without counsel or waiver was subject to collateral attack if the prosecution attempted to use the prior conviction in subsequent proceedings). In addition, the California Supreme Court has also held that the determination that a prior conviction was invalid was res judicata as to any related proceeding that attempts to increase a sentence based on the invalid prior. Thomas v. Department of Motor Vehicles, 3 Cal. 3d 335, 475 P.2d 858, 90 Cal. Rptr. 586 (1970).

195. McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971). See *supra* note 40 for the exact text of the *McKeiver* Court's reasoning on this issue.

196. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

197. CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws. . . .").

potential equal protection challenges to the use of juvenile adjudications under Three Strikes in *People v. Peterson*.[198]

Peterson argued that the use of a juvenile adjudication to double his current sentence under Three Strikes violated his equal protection rights because defendants with prior criminal convictions were afforded rights that those with prior juvenile adjudications did not receive.[199] Peterson stated that because of this treatment, juvenile offenders, as a class, are treated differently to their disadvantage because of their youth.[200] Under Three Strikes, juvenile offenders who did not have a right to a trial by jury are being punished in the same manner as adult offenders who were afforded this right.[201] The *Peterson* court rejected this argument, stating that "we [are not] persuaded that a constitutional problem arises under California's three strikes law because someone with adjudications of juvenile delinquency is subject to the same sentence as a person with prior adult criminal convictions."[202]

Although the *Peterson* court denied the equal protection claim, defendants with prior juvenile adjudications and those with prior criminal convictions are arguably not similarly situated because of the fundamental differences between the two systems;[203] most significantly criminal defendants have a right to a jury trial but juveniles do not. The *Peterson* court dismissed the defendant's challenge without reference to what standard of review applied.[204] Other Three Strikes cases have not

198. 40 Cal. App. 4th 1479, 48 Cal. Rptr. 2d 318 (1995).
199. *Id.* at 1485, 48 Cal. Rptr. 2d at 320.
200. *Id.*
201. *Id.*
202. *Id.* at 1487, 48 Cal. Rptr. 2d at 322. The federal courts have reached the same conclusion. *See, e.g.*, United States v. Johnson, 28 F.3d 151, 155 (D.C. Cir. 1994) (holding that although differences in the juvenile and criminal systems exist, in view of the purposes of the sentencing guidelines, which include deterrence, protection of the public, and promotion of respect for the law, the sentencing commission did not act unreasonably in equating juvenile adjudications and criminal convictions).
203. In *In re* Eric J., 25 Cal. 3d 522, 530, 601 P.2d 549, 557, 159 Cal. Rptr. 317, 320-21 (1979), the California Supreme Court stated: "Adults convicted in the criminal courts and sentenced to prison and youths adjudged wards of the juvenile courts and committed to the Youth Authority are not 'similarly situated.'" *Id.* Presumably, adults with prior juvenile adjudications and those with criminal convictions are also not similarly situated because the state did "not have the same purpose in sentencing adults to prison that it has in committing minors to the Youth Authority." *Id.* at 531, 601 P.2d at 558, 159 Cal. Rptr. at 321.
204. People v. Peterson, 40 Cal. App. 4th 1479, 1486-88, 48 Cal. Rptr. 2d 318, 322 (1995).

clearly resolved this issue. In one case, the court appeared to apply the rational basis standard of review.[205] Under the rational basis standard, a statute will be upheld if the state shows that a rational relationship exists between the classification and a legitimate state purpose.[206] However, in another Three Strikes case, the court acknowledged that the strict scrutiny standard of review might apply because a fundamental interest that is recognized by the California Supreme Court, personal liberty, was at stake.[207] Under the strict scrutiny standard, Three Strikes would only be upheld if its classifications are necessary to achieve a compelling government interest.[208]

In addressing the issue of government interest, the Court of Appeal for the Second District held that "[t]he state has a compelling interest in the protection of public safety and in preventing and punishing recidivism."[209] As one commentator observed, "A record of persistent offending, whether as a juvenile or as an adult, is the 'best evidence' of career criminality."[210] In California, the estimated recidivism rate for the county juvenile probation camps is 63.5% and the adult recidivist rate is 69.7%.[211] Therefore, treating juvenile adjudications like

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205. People v. McCain, 36 Cal. App. 4th 817, 820, 42 Cal. Rptr. 2d 779, 780-81 (1995) (holding that the fact that a person who committed a serious felony, but had no priors, could earn more credits than a recidivist who committed a non-violent felony did not constitute an equal protection violation because "we cannot say harsher treatment for such recidivists is irrational or arbitrary such that it denies them equal protection under the law").

206. People v. Applin, 40 Cal. App. 4th 404, 408, 46 Cal. Rptr. 2d 862, 864 (1995).

207. *Id.* at 409, 46 Cal. Rptr. 2d at 864-65. The court noted that the California Supreme Court had recognized personal liberty as a fundamental interest in People v. Olivas, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976), which would seem to indicate that strict scrutiny is required. *Applin*, 40 Cal. App. 4th at 408-09, 46 Cal. Rptr. 2d at 864. See *infra* notes 214-16 and accompanying text for a discussion of the *Olivas* decision. However, the *Applin* court also recognized that a split of authority existed on what standard applies in challenges to statutes involving aspects of criminal sentences. *Applin*, 40 Cal. App. 4th at 409, 46 Cal. Rptr. 2d at 864-65. However, the court did not reach the issue of which standard should apply because the defendant, a recidivist, was not similarly situated to murderers and pre-conviction detainees. *Id.* at 409, 46 Cal. Rptr. 2d at 865.

208. *Applin*, 40 Cal. App. 4th at 408, 46 Cal. Rptr. 2d at 864.

209. People v. Jerez, 208 Cal. App. 3d 132, 140, 256 Cal. Rptr. 31, 36 (1989) (holding that a statute that increased punishment for prior serious felony convictions differently depending upon whether prior offenses were consolidated into one proceeding or brought and tried separately did not violate the Equal Protection Clause).

210. Feld, *supra* note 157, at 1058.

211. CHILDREN'S ADVOCACY INSTITUTE, CALIFORNIA CHILDREN'S BUDGET, 1995-96, 8-5 (1995) (citing LITTLE HOOVER COMMISSION, PUTTING VIOLENCE BEHIND BARS: REDEFINING THE ROLES OF CALIFORNIA'S PRISONS 68 (1994)). Additionally, the juvenile violent crime rate in 1992 was 650.1 per 100,000 population. *Id.* at 8-28 (citing LITTLE HOOVER COMMISSION, THE JUVENILE CRIME CHALLENGE: MAKING PREVENTION A PRIORITY 7, 9 (1994)).

criminal convictions is arguably necessary to achieve the compelling state interests of protecting public safety and preventing and punishing recidivism.[212] Because the use of juvenile adjudications to enhance adult sentences will likely survive strict scrutiny, the provisions should also be upheld under the less rigorous rational basis review.

However, Three Strikes' treatment of certain offenses as strikes only when committed by juveniles likely violates the Equal Protection Clauses of the United States and California Constitutions. A successful equal protection claim requires a threshold showing that the statute affects two similarly situated groups unequally.[213] In *People v. Olivas*,[214] the California Supreme Court considered an equal protection challenge to a statute that authorized juveniles convicted of an offense in an adult court to be committed to the California Youth Authority for a longer term than the maximum jail sentence. The court stated that although Olivas was not a member of a suspect class, a fundamental interest was at stake, namely Olivas's personal liberty, and, therefore, the strict scrutiny standard of review applied.[215] The *Olivas* court invalidated the statute because it did not serve a compelling government interest.[216]

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212. *But see* Feld, *supra* note 157, at 1011 n.197. Feld cites Three Strikes as an example of a misguided sentencing policy. Feld notes that by the time a person usually has acquired a criminal record that would trigger Three Strikes, the person is on the down slope of criminal activity. Because Three Strikes does not account for this factor, the result will likely be "geriatric prisons housing older offenders with low probabilities of recidivism." *Id.*

213. *In re* Eric J., 25 Cal. 3d 522, 601 P.2d 549, 159 Cal. Rptr. 317 (1979). The California Supreme Court stated: "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." *Id.* at 530, 601 P.2d at 553, 159 Cal. Rptr. at 320.

214. 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976). Under the law challenged in *Olivas*, the defendant would have served in excess of three years in the California Youth Authority for conviction of a misdemeanor that carried a maximum jail term of six months. *Id.* at 241-42, 551 P.2d at 378, 131 Cal. Rptr. at 58.

215. *Id.* at 244, 551 P.2d at 380, 131 Cal. Rptr. at 60. The court defined personal liberty as including freedom from incarceration, restraints associated with parole, and other controls by authority. The court noted that while it may seem obvious that personal liberty is a fundamental interest, a split of authority exists on the issue among the state and federal courts. *Id.* at 246-47, 551 P.2d at 381-82, 131 Cal. Rptr. at 61-62.

216. *Id.* at 255, 551 P.2d at 387, 131 Cal. Rptr. at 67. The court stated:

> Even though we agree that the state has an interest in the rehabilitation of youthful offenders we have not been shown how this sentencing scheme is necessary to further that interest. Assuming arguendo that rehabilitation is a compelling state interest, we cannot determine what minimum period of

Unequal confinement periods for the commission of the same past crime may also arise under Three Strikes. Consider the following hypothetical. Two adults are each convicted of murder. Both have previously been convicted of selling one ounce of PCP to an adult. In their previous drug cases, one was adjudged a ward of the juvenile court, but the other was convicted in a criminal proceeding. The two adults are similarly situated. However, under Three Strikes, a prior conviction for selling PCP to an adult only counts as a strike if the crime was committed by a juvenile.[217] Thus, under Three Strikes, only the adult with the juvenile adjudication will get a double sentence based on his or her prior felony conviction.

In this hypothetical Three Strikes case, as in *Olivas*, an individual's liberty is at stake. Therefore, a court would likely follow *Olivas* and require the existence of a compelling government interest that justifies the discriminatory categories in the Three Strikes laws. No stated government interest justifies confining an adult who committed a prior offense when he or she was a juvenile longer than an adult who committed the same prior offense when he or she was an adult. Moreover, it is difficult to imagine any possible justification that the legislature or voters could have intended. Accordingly, the provisions that define some offenses as strikes only if they are committed by juveniles likely violate the Equal Protection Clauses.

Another potential equal protection claim exists when a prior juvenile adjudication was based exclusively on the uncorroborated testimony of an accomplice. Section 1111 of the Penal Code provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated. . . ."[218] While Section 701 of the Welfare and Institutions Code provides that the California Rules of Evidence apply in juvenile proceedings,[219] the courts have refused to apply the Penal Code's uncorroborated accomplice testimony rule in juvenile court.

The California Supreme Court considered whether a finding of delinquency based solely on uncorroborated accomplice testimony violated the juvenile's equal protection rights.[220] The court applied the

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confinement is sufficient to achieve the state's goal of meaningful rehabilitation.

Id.

217. See *supra* note 105 for statutory references.

218. CAL. PENAL CODE § 1111 (West 1985 & Supp. 1994).

219. CAL. WELF. & INST. CODE § 701 (West 1984 & Supp. 1995). The text provides "admission and exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code and by judicial decision." *Id.*

220. *In re* Mitchell P., 22 Cal. 3d 946, 587 P.2d 1144, 151 Cal. Rptr. 330 (1978), *cert. denied*, 444 U.S. 845 (1979). Mitchell was found to have committed the offenses

rational basis standard of review to determine whether a legitimate government interest was served by allowing uncorroborated accomplice testimony to be used as the sole basis for confinement in juvenile but not criminal court.[221]

In *Mitchell P.*, the court noted that accomplice testimony was "generally suspect because it may have been proffered in the hope of leniency or immunity, and thus greater weight may be accorded such testimony than is warranted."[222] However, as the court observed, juveniles are only entitled to bench trials, and a judge, unlike a jury, would be more critical of this testimony. The court also pointed out that due process did not require the accomplice corroboration rule.[223] Moreover, the court asserted that because a criminal defendant faces a more onerous term of confinement than a juvenile, it was reasonable to place more severe limitations on admissible evidence in a criminal proceeding. Accordingly, the court rejected the equal protection challenge and concluded that the different standards of evidentiary procedures were permissible because California's juvenile justice system met other constitutional demands.[224]

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of burglary, grand theft, and receiving stolen property. The accomplice who testified against Mitchell had been granted immunity. *Id.* at 948, 587 P.2d at 1146, 151 Cal. Rptr. at 333.

221. *Id.* The court stated:

> There is no basis herein for application of the 'strict scrutiny' as opposed to the 'rationality' test in measuring permissible classifications. We do not here make a classification directly affecting a fundamental interest as in *Olivas*. . . . Here, there is no classification based on a deprivation of liberty or any other fundamental right. The classification affects only the kind—but not the degree—of otherwise proper evidence which may support a finding of misconduct.

Id. at 950-51 n.3, 587 P.2d at 1147 n.3, 151 Cal. Rptr. at 334 n.3.

222. *Id.* at 951, 587 P.2d at 1148-49, 151 Cal. Rptr. at 334-35. The court noted:

> Although the rehabilitative purpose of the juvenile court may not warrant a lesser degree of proof of the charged misconduct, the Legislature may well consider that judicial intervention in the interest of rehabilitating an impressionable minor outweighs policies against the use of particular kinds of testimony not otherwise constitutionally proscribed.

Id. at 952, 587 P.2d at 1148, 151 Cal. Rptr. at 335.

223. *Id.* at 949, 587 P.2d at 1147, 151 Cal. Rptr at 333. The court stated that the accomplice corroboration rule was not required by the U.S. Constitution. The court observed that many states did not apply the rule and the federal courts had rejected the rule. *Id.*

224. *Id.* at 953, 587 P.2d at 1149, 151 Cal. Rptr. at 336. The court suggested that "if there are sufficient distinctions between criminal and juvenile proceedings to justify

The dissent made several valid points in *Mitchell P.* First, in 1975, the United States Supreme Court found few distinctions between the consequences of a juvenile adjudication and a criminal conviction in California.[225] The California juvenile justice system had not significantly changed since that date. Second, the case was not merely about the quality of evidence. Under the holding of the majority in *Mitchell P.*, in two identical cases where the only evidence was an uncorroborated accomplice's testimony, a juvenile could be confined, but an adult could not be confined as a matter of law.[226] Under Three Strikes, a prior juvenile adjudication based solely on uncorroborated accomplice testimony should not count as a prior felony conviction. The initial confinement likely violated the juvenile's equal protection rights. The subsequent use of the same juvenile adjudication compounds the problem because the person with the juvenile prior would receive double the sentence for the current offense, but another adult with an identical past case would not have suffered a conviction and, therefore, would not be subject to Three Strikes sentencing.

In sum, the Three Strikes laws will likely withstand a facial equal protection challenge. However, the provision that designates some offenses as a strike only if committed by a juvenile will likely be deemed unconstitutional as a violation of the Equal Protection Clause. If the prior juvenile adjudication was based solely upon uncorroborated accomplice testimony, it should arguably not count as a strike because an adult would not have suffered a felony conviction in the identical circumstances as a matter of law. However, in light of the California Supreme Court's rejection of the equal protection argument in *In re*

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granting the constitutional right to a jury to the former and denying it to the latter, those same distinctions must also apply to the quality of evidence." *Id.*

225. *Id.* at 961, 587 P.2d at 1154, 151 Cal. Rptr. at 341 (Bird, C.J., dissenting) (citing Breed v. Jones, 421 U.S. 519 (1975)). *Breed* involved a double jeopardy challenge. The defendant, a juvenile, was first adjudicated in the juvenile court. After two prosecution witnesses testified, the juvenile court judge held the defendant was not a "fit and proper" subject for juvenile court. Thereafter, the juvenile was certified to and convicted in a criminal court. The *Breed* Court observed that "in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution." Breed v. Jones, 421 U.S. 519, 530 (1975). The Court also found few distinctions between a juvenile adjudication proceeding under the Welfare and Institutions Code and a criminal trial. Accordingly, the Court held that the ban on double jeopardy applied in juvenile proceedings. *Id.* at 541.

226. *Mitchell P.*, 22 Cal. 3d at 963, 587 P.2d at 1156, 151 Cal. Rptr. at 342. The dissent's analysis of the accomplice corroboration rule in criminal and juvenile courts focused on a fundamental interest—personal liberty. Accordingly, the dissent viewed the majority's application of "the rational basis test, rather than a strict scrutiny analysis, to the minor's equal protection claim" as "dubious at best." *Id.* at 960 n.13, 587 P.2d at 1154 n.13, 151 Cal. Rptr. at 341 n.13.

Mitchell, it is not certain that the courts would reach the same conclusion.

V. CONCLUSION

Because the courts will likely uphold the use of juvenile adjudications under Three Strikes, the legislature should amend[227] the provisions as follows. First, the portions of the Three Strikes provisions that reference offenses listed in Section 707(b) of the Welfare and Institutions Code should be eliminated, as well as the requirement that the juvenile be adjudged a ward of the court for committing an offense listed in section 707(b) of the Welfare and Institutions Code.[228] Deleting these portions of the statutes will eliminate the problem of some prior convictions counting as strikes only when committed by a juvenile. Second, the legislature should consolidate sections 667 and 1170.12 of the Penal Code. The Three Strikes statutes are similar in most respects, but they contain discrepancies in some key areas. Consolidation of the two statutes would eliminate differences and confusion. If these changes are made to the Three Strikes laws, many of the inconsistencies and problems that have been pointed out in this Comment will be eliminated.

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227. Both statutes provide for amendment with two-thirds approval of both houses of the legislature or by a voter-approved statute. CAL. PENAL CODE §§ 667(I), 1170.12 (West Supp. 1995).

228. CAL. PENAL CODE §§ 667(d)(3)(D), 1170.12(b)(3)(D) (West Supp. 1995); *see supra* note 99.