

The Pendulum of Change and California's Three Strikes Law

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As a drug war correspondent buried alive for a nonviolent drug offense, I make my reports from deep within the bowels of the California prison system — one of the last true bastions of absolute prison industrialism remaining from the tough-on-crime era.

“I have been locked up longer on this drug case than all my strike cases put together,” said 54-year-old Manuel Madrid from San Fernando Valley, incarcerated since 1997 and serving a life sentence. “I’m an old man. I’m going to die in here”.¹

THE HEAVY-HAND OF JUSTICE

The “three strikes and you’re out” sentencing law came into being at the apex of the lock ‘em up movement in the early to mid 1990s. The state of Washington first established a three strikes sentencing scheme in 1993, but only included violent crimes in the recidivist statute.² California lawmakers, on the other hand, used the 1993 kidnapping and murder of twelve year old Polly Klaas by sexual predator Richard Allen Davis to write the most extreme version of three strikes imaginable.³ Ten years later, this statute has proven to be infallible, surviving a gauntlet of state and federal judicial challenges. Entering its second decade of existence, the regulation is being challenged once more, this time in the court of public opinion.

Through an enormous effort by concerned citizens to gather the required signatures, *The Three Strikes and Child Protection Act of 2004* (Proposition 66) easily qualified for November’s ballot.⁴ If the proposition passed, penalties for child molesters would dramatically increase, while the experiment of sending nonviolent offenders to prison for life would come to an end.⁵

Associated with three strikes, and California corrections in general, are numbers that suggest justice gone astray. Over 7,400 have been given life sentences under this controversial sentencing methodology, 57 percent of which are nonviolent third strikers.⁶ Additionally, 35,000 second strikers have been sentenced under this law, the vast majority of whom are nonviolent offenders.⁷ Further, second strikers must serve 80 to 85 percent of their doubled-up sentences,⁸ while third strikers have to serve at least 25 years before they are eligible for parole.⁹ This steady-stream of “strikers”

has brought the state prison population to an all-time high of 164,000 prisoners.¹⁰

MAINTAINING THE CRIMINAL JUSTICE STATUS QUO

While the pendulum of change is beginning to swing, and most of the country is moving away from incarceration as the primary approach to deviance, California's criminal justice hierarchy refuses to acquiesce. "Crime is down, which proves to us the law is doing what it was supposed to do. We don't want to reverse that progress," said Carol Norris, president of the California Probation, Parole and Corrections Association.¹¹

The progress about which Mrs. Norris speaks is a state that spends approximately \$30,000 a year to incarcerate a prisoner¹² and roughly \$5,000 a year per pupil on education.¹³ By investing so generously at the wrong end of the problem, the children from under funded education are systematically absorbed into the California Department of Corrections (CDC) by \$100,000 a year prison guards: more money than tenured professors.¹⁴

California spends nearly \$6 billion a year on corrections,¹⁵ and the CDC alone employs over 50,000 workers.¹⁶ The influence the 31,000 unionized prison guards exert on state government renders their power unmatched and the success of their bottom-feeder industry assured for generations.¹⁷ Crime is not down in California. CDC's rates of recidivism lead the nation at near 70 percent,¹⁸ while violent crime has dropped at a greater rate in non-three strikes states than in California.¹⁹ Contrary to the conclusions drawn by the proponents of the heavy-hand of justice, crime in California is a chronic social problem and displays no signs of going away.

THE MYTH OF DISCRETION

As with most issues, few understand the nuances of how this law actually works in the courtroom. Unknown to most is that power has been transferred from judges to the prosecutors. There is a tremendous amount of rhetoric surrounding how discretion works in a three strikes case. "[J]udges and prosecutors already have substantial discretion to avert application of 'three strikes' in the furtherance of justice," wrote state Senator Chuck Poochigian (R-Fresno) against Proposition 66.²⁰ Poochigian refers to the California Supreme Court's decision in *People v. Superior Court (Romero)* (1996), which held that a sentencing judge has discretion to avoid excessive

punishments in the interest of justice.²¹ “My sentencing judge spent five minutes considering *Romero* and denied it,” said Tommy Wallen, a 34 year old from Kern County who was struck out for receiving stolen property in 1996. “It makes me very angry because it is so misleading to the public. Very rarely is it exercised because most judges are afraid to use it”.²²

Wallen is right and Poochigian completely mis-states the truth. Since post-*Romero* case law favors the prosecution, few judges are willing to exercise their limited authority under *Romero* over the objections of the prosecutor.²³ This is especially so in counties like Kern where three strikes is vigorously pursued by the District Attorney.²⁴

Further, in *People v. Carmony* (2004), the state Supreme Court upheld a three strikes life sentence when a sex offender failed to register by a mere five days, a technical violation.²⁵ This case was watched closely to see if even the smallest hole would be poked in the three strikes bubble which always appears ready to burst. “The court did leave open the possibility that it still could happen,” said Deputy Attorney General David Andrew Eldridge, the prevailing attorney in *Carmony*, when asked under what circumstances a judge would risk exercising discretion. “But it would have to be extremely rare”.²⁶

Poochigian, like so many who vigorously support harsh punishments (including California’s Attorney General, Bill Lockyer),²⁷ cites discretion as a substantial safeguard when it is, in fact, a non-factor except when politicians are spinning the facts to influence society.

THE DRUG WAR JUDICIARY

On March 5, 2003, the Supreme Court of the United States ruled in *Lockyer v. Andrade*²⁸ and *Ewing v. California*²⁹ that giving life sentences to California shoplifters did not violate the ban against cruel and unusual punishment as guaranteed by the Eighth Amendment of the United States Constitution.³⁰ Leandro Andrade received 50 years to life for two counts of shoplifting videotapes,³¹ while Gary Ewing received 25 years to life for stealing golf clubs.³² Both had serious and violent felony strike priors committed years ago, which qualified them for a third strike life sentence.³³

Of the 26 states that have a form of three strikes on their books, California is the only one to include the “any” felony provision within the language of the statute.³⁴ This is why it is the toughest sentencing law in the country.³⁵ Had the Court declared these sentences violated the Eighth Amendment

and were disproportionate under the three-pronged proportionality test articulated in *Solem v. Helm* (1983),³⁶ thousands of us similarly situated (e.g., petty theft, grand theft, drug offenses, and other relatively minor, victimless transgressions) would have attempted to expand the scope of the Court's ruling.³⁷

While the decision was a devastating blow to California's community of nonviolent lifers, the high court refused to accept responsibility. "This criticism is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme. We do not sit as a 'superlegislature' to second-guess these policy changes," wrote Justice Sandra Day O'Connor in *Ewing*.³⁸

Generally, the Supreme Court gives wide deference for States to create their own needs-specific laws, no matter how harsh. This is best illustrated in their watershed Eighth Amendment ruling in *Harmelin v. Michigan*.³⁹ In 1991 the Court held it was not cruel and unusual punishment for the State of Michigan to impose a sentence of life without the possibility of parole for those who possess over a kilo of narcotics for the purpose of distribution.⁴⁰ *Harmelin* is the oft-cited linchpin in the Court's drug war era role to allow states and the federal government to do their worst.⁴¹ The case signaled America's absolute willingness to do what no other industrialized nation would attempt: to eradicate drugs through incarceration no matter what the cost. Moreover, *Harmelin*⁴² directly led to the even harsher *Andrade*⁴³ and *Ewing*⁴⁴ 12 years later.

Yet, despite *Harmelin*⁴⁵ and its progeny, Michigan's lawmakers have recently amended their ultra-tough mandatory minimum drug laws.⁴⁶ Even New York, with the Rockefeller drug laws from the early 1970s, and the federal government have altered their ultra-harsh sentencing mandates.⁴⁷ These changes came about due to years of pressure on state and federal lawmakers to at least address the extremes these laws create. Amazingly, the Supreme Court recently ruled in *Blakely v. Washington* (2004) that a judge could not increase a penalty based on a judicial determination of fact without allowing a jury, not just a judge, to consider the evidence.⁴⁸

Blakely has brought into doubt the constitutionality of the entire federal sentencing guidelines, which likely would include about ten state systems with similar sentencing schemes, and has resulted in the drastic reduction in sentences all over the country.⁴⁹ Change is spreading like wildfire all over the criminal justice landscape, and the Supreme Court has decided to address two post-*Blakely* cases to clarify their position.⁵⁰ With the high

court largely seen as a hard core drug war judiciary by strengthening, not weakening, *Blakely*, they may signal a shift to the left after twenty years of drug warmongering.⁵¹ It is not likely, but possible.

THE DRUG WAR AND THE VOTER INITIATIVE

The tough-on-crime movement has been buttressed by heavy-handed prosecutors, judges and politicians. Yet it was the voter initiative that actually started the pendulum moving ever so slowly away from prison as the primary solution to crime. Paul Soros, international financier, John Sperling, founder of the University of Phoenix — both billionaires — have teamed up with Peter Lewis, multimillionaire retired CEO of Progressive Insurance, and formed the Drug Policy Alliance Network.⁵² They work through grassroots efforts and intense, well-organized media campaigns to attack the drug war on as many fronts as possible.⁵³ In 1996, the Drug Policy Alliance backed two key voter initiatives in Arizona and California. Voters in Arizona approved mandatory treatment over jail for those who have committed drug offenses,⁵⁴ while California voters approved the legalization of marijuana for medicinal purposes.⁵⁵ This was no small feat because of the heavy-handed criminal justice atmosphere of the mid 1990s. Yet the commonsense message of approaching addiction and medicinal marijuana in its proper context, instead of mindless incarceration and ignoring the benefits of allowing certain illnesses to be treated with marijuana (a natural remedy) made more sense when packaged correctly.

With their 1996 successes giving them the momentum they needed, the Drug Policy Alliance again targeted California, with the largest prison system in the country and the harshest laws.⁵⁶ In 2000, Proposition 36, a mirror of Arizona's treatment over jail rehabilitative methodology, passed by a margin of nearly two to one.⁵⁷ This successful initiative was yet another serious blow against those who advocate punishment over rehabilitation. "The war on drugs had failed.... We pay \$25,000 annually for prisoners when treatment costs only \$4,000," wrote the authors of the initiative in the summary argument of the voter pamphlet.⁵⁸ For the first time since the drug war had been launched, the people were beginning to understand — first in Arizona, then in California — that indefinitely consuming unfathomable amounts of resources to incarcerate an unending number of nonviolent drug offenders simply made little sense. The prison-building boom suddenly looked like a big mistake. Yet, for the drug war hawks, they would continue

to claim treatment comes at a very reasonable price: at approximately \$30,000 a year per inmate multiplied by however many addicts cannot cure themselves on their own.⁵⁹

This is not America's first war against its own people. The Prohibition against alcohol in the early 20th Century is the drug war's predecessor.⁶⁰ With addiction to alcohol ravaging the American family, the root cause was ignored and the government decided to attack both supply and demand.⁶¹ This became a real American war. The potential for profit by supplying the nation's desire to drink outweighed the risk. Throughout the Prohibition era, for nearly fifteen years, cheap and powerful contraband was readily available.⁶² The government created a persevering market force because violating the nation's liquor laws was a victimless crime — just like in the drug war. Addiction, the variable that fueled the illegal industry, could not be brutalized into submission. Alcoholism was eventually accepted to be what it is — a disease and not a crime.⁶³ The "Nobel experiment" came to an end.⁶⁴ Now, contemporary America lawmakers have invested over 30 years into yet another failed ideology, despite the lessons history has to offer. The American drug war, just like Prohibition, proves criminalizing addictions does not work.

In the here and now, the people, through the voter initiative, because of the Drug Policy Alliance and their growing movement, are in the process of making some serious changes in how America deals with drugs, crime and addiction. A criminal justice Renaissance appears to be under way. Many are watching to see what happens with the latest attack on a controversial sentencing mandate that derived from the heavy-handed drug war mentality which has failed so miserably on so many levels — California's three strikes.

TO FIGHT THE GOOD FIGHT

Being a jailhouse lawyer, writer and activist, I am fighting my conviction, sentence and circumstances on as many fronts as possible. To me, it is not just about Supreme Court precedents, constitutional analysis or public opinion, it is about justice. I am a 38-year-old three striker. Due to a robbery and two burglary convictions committed in my late teens and early 20s, my current nonviolent drug offense resulted in a 26 year to life sentence.⁶⁵ Everyday I am reminded about the injustice of this law. The recipients of nonviolent

life imprisonment are my friends, neighbors and enemies — such being the nature of prisonhood. We are an amalgam of unfortunates.

Moreover, my injection into the three strikes debate touched a nerve in my hometown of Sacramento, the state capital. I argued in favor of Proposition 66 against state Senator Poochigian in the “Forum” section of *The Sacramento Bee* on July 25, 2004.⁶⁶ I claimed the law is too harsh, includes too many, and I called for justice.⁶⁷ The Senator contended crime was down because three strikes is a big deterrent to recidivist behavior.⁶⁸

Afterwards, *The Bee* published a couple of rebuttals which are prime examples of how the drug war mentality has convinced so many that 30 years of prison industrialism is sound public policy. “He minimizes a crime spree from 1984 to 1988...slashing a juvenile across the chest with a knife, requiring 200 stitches,” wrote Jan Scully in a letter to the editor. Scully is the District Attorney for the County of Sacramento and responsible for striking me out six years ago. “Most recently, a buck knife was found in his car along with 200 baggies of marijuana”.⁶⁹

A columnist from the same paper, Marjie Lundstrom, took a similar path and claimed, in addition to slashing a juvenile in 1986, I committed yet another assault in 1988. Making me look even worse, she said I possessed not one, but two knives in the commission of the current drug crime — while accusing me of downplaying my past.⁷⁰

While a rap sheet is never a pretty picture, neither are prosecutorial journalists who spin the facts in an election year and take the debate to the lowest common denominator. I never had 200 bags of marijuana, just one bag weighing five grams.⁷¹ The 1986 slashing, while tragic and regrettable, was reduced to a misdemeanor because the prosecutor discovered the juvenile lied about his culpability.⁷² It was a case of self-defense. Moreover, a misdemeanor is not a strike and there was not a second assault from 1988.

Sadly, the 200 bags of marijuana that do not exist, the misdemeanor assault that is not a strike, and the second assault that never happened have no logical correlation to the buck knife in the glove box, the multi-wrench with a 2-inch blade on the seat of the car-nor do I have any connections to bin Laden, Al Qaeda or ever possessed any WMDs. I am just a man with a past who possessed some drugs in the present.

The fact is I entered prison a 22-year-old high school dropout in 1988, and left a college-educated, published writer in 1994. I paid my debt to society in full.⁷³ “When I entered prison I had no post-secondary education

and little understanding of the world from which I was separated,” I wrote in the *San Francisco Chronicle* on May 23, 1994. Then I enrolled in Soledad State Prison’s college program and graduated *summa cum laude* from Hartnell Junior College. I presently maintain a 3.75 GPA in a Bachelor of Arts in Social Science.⁷⁴ Upon release from prison I pursued a number of goals, taking a full-load at my hometown university, starting a construction company from scratch, and volunteered for the *Prisoner’s Rights Union* for two years. That is the short list. I became a consummate taskmaster and never looked back. The troubled youth from my past no longer existed. I buried him through work and study.⁷⁵

However, just like a rap sheet, a relapse is not a pretty picture. I started using again. Eventually, after serving two drug-related parole violations in 1996 and 1997, I was caught with approximately 20 grams of methamphetamine in 1998, a felony, and have been buried alive ever since.⁷⁶ With six years in, I have an unimaginable 20 to go for a victimless crime that only carries a year or two in every other jurisdiction in the nation.⁷⁷

Still, regardless of our individual stories, fear mongers like Poochigian, Scully and Lundstrom work very hard to portray three strikers like myself as an amalgam of murderous pedophiles about to be unleashed on society if voters approve Proposition 66. Too often, as I experienced first-hand — and the main thesis I advance as a *pro se* litigant and activist-writer — their arguments are based on flawed analysis, evidence that does not exist, and illogical correlations that are contrary to the truth.

“I hope and pray the public will see the injustice of the current law and vote to make the changes,” states Wallen. “It is a huge misconception that the District Attorneys Association is trying to say that murderers, rapists and child molesters will be freed. This change only affects nonviolent convictions”.⁷⁸ Like Wallen, Madrid, thousands of us, our friends, families and supporters, we hope the pendulum of change will finally begin to swing away from the drug war mindset that has resulted in an exhaustive list of injustices.

California’s three strikes law and the American drug war are failed American experiments, just like the Prohibition against alcohol, and both need to be repealed. Whether Proposition 66 passes or not really is not the point. A correctional Renaissance needs to take place in order to truly bring the nation out of the criminal justice Dark Ages. This is a generation distinguished by the domestic POW, collateral damage in the war on drugs. MIAs (Missing in Action) we are — and it’s time to bring us home.

AFTERWARDS

We lost the election for Proposition 66 by a few percentage points, but that does not mean we lost the war. The pendulum is swinging, and the prison industrialists are fighting viciously. So it did not surprise me when the prisoncrats used my photo in an anti-Prop. 66 television campaign of fear: it worked well. The people bought into the propaganda, and they believed the fallacy that Prop. 66 would release “126,000 murderers, rapists, and child molesters”. I do not take such matters personally: politics is a dirty business. With the three strikes again going up on the ballot in November [2006], I am prepared to do battle. With fear on the side of the zealots, and right on the side of the permanently incapacitated, we push with all our might to ensure the pendulum swings all the way to California — the prison industrial wasteland.

ENDNOTES

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- ²⁶ Dolan, M. (2004). "Three Strikes Sentence Upheld In Sex Case," *Los Angeles Times* (July 9).
- ²⁷ California Ballot Pamphlet (2004). "Proposition 66: Arguments."
- ²⁸ *Lockyer v. Andrade* (2003). 123 S.Ct. 1166.
- ²⁹ Supra note 3.
- ³⁰ United States Constitution, The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
- ³¹ Supra note 3.
- ³² Supra note 28.
- ³³ Supra note 28 and 3.
- ³⁴ Supra note 5.
- ³⁵ *Ibid.*
- ³⁶ *Solem v. Helm* (1983). 463 U.S. 277.
- ³⁷ Supra note 5.
- ³⁸ Supra note 3.
- ³⁹ *Harmelin v. Michigan* (1991). 11 S. Ct. 2680.
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- ⁵⁷ *In re Varnel* (2002). 115 Cal. Rptr. 2d 464. Proposition 36 refers to legislation that allows non-violent drug offenders (possession) to receive treatment instead of incarceration.
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- ⁶⁰ United States Constitution, The Eighteenth Amendment: Prohibition. States Given Concurrent Power To Enforce. In 1919, The Volstead Act was established and the Prohibition began. By doing so it became very profitable to make and sell alcohol.
- ⁶¹ *Ibid.*
- ⁶² *Ibid.*
- ⁶³ United States Constitution, Amendment 21, Repeal of Prohibition. Ratified 1933. After 15 years of Prohibition, the "Nobel Experiment" was abandoned in favor of regulation and treatment.
- ⁶⁴ *Ibid.*
- ⁶⁵ *People v. Dey* (2000). 101 Cal. Rptr. 2d 581.
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