

IDEAS

FOR AN OPEN SOCIETY



REPEALING THREE STRIKES

Politicians who remain supportive of three strikes are lagging behind the public's desire to have criminal justice policies that make sense.

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Three strikes should be OUT

This past April the U.S. Supreme Court agreed to hear arguments surrounding the constitutionality of the three strikes convictions of two California prison inmates. Landro Andrade was sentenced to 25 years to life in prison following his arrest in 1995 for stealing a handful of videos from a Kmart store. Gary Ewing struck out after being convicted of stealing three golf clubs in 2000.

Andrade and Ewing's lawyers successfully argued before California's Ninth Circuit Court of Appeals that sentences so disproportionate to the severity of the crimes were nothing short of cruel and unusual punishments. But the state of California, leery of the ramifications of accepting the ruling, and wanting to forestall the inevitable avalanche of appeals from three strikers convicted of similar crimes, decided to challenge this verdict. Now, most likely sometime this fall, the nine justices of the nation's highest court will have their chance to weigh in.

If Andrade and Ewing's cases were anomalies, the case would have little broader significance. Tragically, however, these sentences have become almost commonplace. Half a century ago, in 1951, Louisiana Congressman Hale Boggs got Congress to pass a raft of mandatory sentences for drug dealers: two years for first time offenders, five years for second offenses, twenty years and more for those convicted a third time. Over the next two decades, the mandatory sentencing movement waxed and waned. From the mid-1970s on, however, mandatory sentencing has become increasingly popular. At a state level, New York's adoption of the now notorious Rockefeller drug laws in 1973 paved the way for a massive expansion in the use of mandatory sentencing laws for drug crimes. Nationally, with the onset of the

crack epidemic, Congress passed a host of extremely punitive mandatory sentencing laws in 1986. In 1994, then-President Clinton embraced the tough-on-crime movement by pushing a federal crime bill that included a federal version of three strikes. The administration also backed a so-called truth-in-sentencing provision that provided financial incentives to states that made inmates serve at least 85 percent of their prison sentence, thereby eradicating parole board discretion in much the same way as mandatory sentencing laws diminished judges' presentencing discretion.

In some cases ending judicial discretion can serve a progressive function, ironing out sentencing disparities resulting from judges' racial prejudices, sheer capriciousness, or political differences from one judicial district to the next. Frequently,

BY SASHA ABRAMSKY

however, it has resulted in a uniform move upward in sentence lengths, an across the board increase in the severity of punishments, and oftentimes a further skewing of the judicial process against poor people, in particular against poor people of color. Three strikes is merely the most extreme manifestation of this trend.

The end product of these changes isn't exactly a surprise. After 20 years of politicians playing the tough-on-crime card and demanding harsher penalties for criminals, and after a generation of an increasingly futile, expensive, and socially destructive war on drugs backed up by mandatory sentencing laws, today the country's prison system is increasingly warehousing vast numbers of relatively low-level, oftentimes drug addicted, offenders.

Built around the catchy baseball jingle, the three strikes and you're out law grew out of an anti-crime movement in the early 1990s. In 1993, Washington became the first state in the country to embrace this, voting for a law that put people convicted of a third serious felony behind bars for life. Later that year, California followed suit, in the wake of the particularly brutal and massively publicized kidnapping and murder of a young girl, Polly Klaas. But in California, the legislature, under enormous pressure from a citizens' movement backed by then-Governor Pete Wilson, and voters, in a

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statewide ballot initiative, chose to create a far more pervasive version of the law. If someone had two serious felonies in their past — and a serious felony could be something as non-violent as burglary of an unoccupied house — then *any* third felony conviction would automatically qualify someone for a sentence of 25 years to life.

To understand the climate surrounding the passage of three strikes, bear in mind that in addition to campaigning for a no nonsense three strikes bill that year, Governor Wilson, running hard for re-election, had corralled the state legislature into convening a special session devoted entirely to new criminal justice legislation. His public relations team also arranged a Crime Summit in Los

Angeles for early 1994. Though destined to be postponed in the wake of the 1994 Los Angeles earthquake, the event was to include an array of top politicians, law enforcement officers, and victims' rights spokespeople, all of whom were there to back up Governor Wilson's demands for drastic changes in California's sentencing codes.

Not surprisingly, within weeks of three strikes' passing, the first horror stories started hitting the news. A homeless man receiving a life sentence for stealing a slice of pizza. A man sentenced to life in prison for buying a nut-sized chunk of a substance that turned out not to be a real narcotic.



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Today, of the over 7,000 people in California's massive prison system who have struck out, approximately 4,000 were convicted on their third strike of non-violent offenses. More than 300, like Andrade and Ewing, were convicted of petty thefts. Billy Ochoa (who goes by the alias Richard Gutierrez) a middle-aged heroin addict, house burglar, and welfare cheat from Los Angeles, whom I wrote about in *Hard Time Blues: How Politics*

second strike sentences — the overwhelming majority of them for non-violent offenses — costing California taxpayers hundreds of millions of dollars a year in additional incarceration costs.

The United States now accounts for close to one quarter of the world's prison population. In absolute numbers, it surpasses both the Russian and the Chinese gulags. One in four young African American men in many

past — are currently disenfranchised because of their involvement with the criminal justice system.

In my reporting on the criminal justice system over the past several years, I have encountered many cases in which the sentence that resulted from such laws never made sense. Take for instance the case of a homeless man in Florida sentenced to life for stealing several rolls of toilet paper; a middle-aged third striker in California whose last crime, after years of living a crime-free, tax-paying life, consisted of walking out of a store with an unpaid for carton of cigarettes; numerous young men and women slated to live out their youth, and often their middle age, behind bars after being arrested on minor drug charges, and then being sentenced under draconian mandatory minimum drug laws, such as the Rockefeller laws that deny judges any discretion as to what sentence to impose.

These laws did, however, have their temporary, even if not terribly coherent, rationales, rationales supported by mass incarceration theorists such as Bill Bennett and the criminologist James Q. Wilson. Three strikes emerged in response to at least three phenomena: extreme public fears about crime (despite the fact that violent crime rates were already falling by the time three strikes was enacted); public perception that the criminal justice system's response to crime was overly technocratic; and an inchoate, but powerful, feeling that age-old social mores were breaking down. We increased our incarcerated population from one million to two

In addition to those who have struck out, tens of thousands more are serving enhanced second strike sentences — the overwhelming majority of them for non-violent offenses — costing California taxpayers hundreds of millions of dollars a year.

Built A Prison Nation, struck out 13 times and received the ludicrous sentence of 326 years to life for \$2,100 worth of welfare fraud.

The activist organization Families to Amend California Three Strikes (FACTS) estimates that 44 percent of three strikes inmates are African American and 26 percent are Latino.

Beyond these numbers, three strikes in California also contained a little understood second strike clause, one that essentially doubled the sentence for people convicted of a second felony. More than eight years after the law was passed, in addition to those who have struck out, tens of thousands more are serving enhanced

cities are either in prison or jail or on parole or probation, and a Bureau of Justice Statistics report from the late 1990s estimated that 29 percent of black males born in that decade could expect to be incarcerated during their lifetimes. All told, about two million Americans live behind bars; and, as sentences have been ratcheted up for low-end crimes, today over one million prisoners and jail inmates are people convicted of non-violent crimes. Throughout the country, close to five million Americans — those currently behind bars or on parole, and, in about a dozen mainly southern states, those living free but with a felony conviction somewhere in their

million in the 1990s, during years of unprecedented economic growth—years when cities, states, and the federal government itself were all boasting improved finances and eventually budget surpluses.

These days, however, even these flimsy rationales for a ballooning prison population have disintegrated. Most informed citizens are now well aware that crime rates have been falling for the better part of a decade, yet the imprisoned population has plateaued at the astonishingly high level of two million. In fact, a recent survey conducted by Peter Hart Research Associates, Inc. for the Open Society Institute found that public opinion on crime and criminal justice has shifted fundamentally over the past few years, with Americans now supporting an approach that addresses the roots of crime over strict sentencing by a two to one margin. While the initial push for three strikes legislation was fueled by politicians who felt they were representing their constituents' wishes, the significant public opinion shift—as shown in the Hart poll and others—means that most politicians who remain supportive of three strikes are, in fact, lagging behind the public's desire to have criminal justice policies that make sense.

In many states, voters—disillusioned with the war on drugs and the fruitless cycles of addiction, incarceration, release, recidivism, and re-incarceration—have begun passing initiatives to place low-level drug offenders into treatment programs rather than prisons. Perhaps most importantly, with budget deficits forc-



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ing states across the country to re-examine fiscal priorities, state after state has begun looking for ways to trim bloated corrections budgets. As a conservative Republican I recently interviewed in North Carolina told me, when explaining why he no longer supported putting so many low-level offenders into prison, “it’s a guns and butter issue.” The finances of the situation are leading the policy shift.

How does this affect three strikes? The answer isn’t too hard to fathom: it makes little sense from a moral standpoint for men such as Andrade, Ewing, and Ochoa—no matter how sleazy their actions, how crime infested their histories—to spend the rest of their lives in prison

for two-bit crimes that in and of themselves were little more than misdemeanor offenses. And, these days in particular, with California facing an astonishing \$23 billion deficit, it makes even less sense from an economic standpoint. The tens of thousands of dollars per year that it costs to keep each three strikes inmate in a maximum security prison could better be spent shoring up vital investments in education, job training, or, for that matter, domestic security.

Legally, the Supreme Court would be doing a powerful service should it decide that vastly disproportionate sentences, such as the three strikes sentences handed down to shoplifters, were indeed unconstitutional. Regardless of the formal constitutional findings, however, ultimately the policy questions remain. In the long run, both the judicial and the political system must reexamine the concept of rigid mandatory sentencing laws, and ought, at the same time, to reexplore the age old concept of judicial discretion. After years of “reform,” during which time mandatory sentencing codes have reduced judges in many cases to little more than chart readers and number crunchers, the Supreme Court, even in addressing only the narrow issue of cruel and unusual punishments being inflicted on petty criminals, has an opportunity to infuse America’s criminal justice system with a much needed dose of commonsense.

Sasha Abramsky is the author of the recently published book, *Hard Time Blues: How Politics Built a Prison Nation*. He is currently a Soros Justice Media Fellow.

AGING BEHIND BARS

Three strikes seven years later

In August, 2001, The Sentencing Project, a nonprofit research group based in Washington, D.C., released a report entitled, *Aging Behind Bars: “Three Strikes” Seven Years Later*. Co-authored by Ryan S. King and Marc Mauer, the study finds that California’s three strikes legislation is contributing to the rapid aging of the state’s prison population. In addition to examining the burden this change in demographics will place on the California penal system, the report documents the larger impact the legislation has had since it was passed.

In a 1996 *Policy Review* piece, California Attorney General Dan Lungren made claims to bolster opinion concerning the efficacy of three strikes. The following abridged section from *Aging Behind Bars* evaluates how the promises of three strikes compare with the facts.

MYTH #1: **California is setting records for its crime drop.**

Two years after the passage of California’s three strikes legislation, Lungren credited the state’s record decline in several categories of violent and property crime to the law.

FACT #1: Crime has decreased consistently both in California and nationwide since the early 1990s. Leading criminologists consider increased incarceration as one factor among many contributing to the national decline. An analysis by The Sentencing Project demonstrated that substantial increases in incarceration did not necessarily translate into significant crime reduction.

Recent analysis of both California and national data shows that the decline in California crime cannot be attributed significantly to the three

strikes law. Criminologists Lisa Stoltzenberg and Stewart D’Alessio found that the decrease in California crime after 1994 merely continued existing trends unrelated to the law and was not statistically significant. In a state commissioned report, the California Department of Justice’s Criminal Justice Statistics Center could find no “valid evaluations” of “get tough” laws that verified empirically a direct negative effect on crime rates.

A comparison between 1993 and 1999 crime rates shows that New York (-40.9 percent), Massachusetts (-33.3 percent), and Washington, D.C. (-31.4 percent) also experienced significant reductions in crime rates, but, unlike California, did so without the use of three strikes laws. Analysts at RAND found similar results in their comparison of crime rates between three strikes and non-three strikes states.

MYTH #2: **This is what the voters wanted.**

Lungren maintains that three strikes “is doing precisely what the voters demanded when they overwhelmingly passed the initiative by 72 percent to 28.”

FACT #2: Five years after the Lungren article, the reality of the situation does not match his assertion. A law designed ostensibly to target the most serious offenders has performed abysmally.

As of March 31, 2001, 57.9 percent of third strike cases were for non-violent offenses. Although 93 percent of those surveyed in California do support these mandatory sentences for those convicted of three serious, violent crimes, support wanes as the crimes become less serious: 65 percent for three serious drug violations, 47 percent for serious property crimes, and 13 percent for less serious property offenses. Public opinion research in other states has drawn similar conclusions.

MYTH #3: **Three strikes is not disproportionate punishment.**

Lungren asserts that the law’s design does not levy unduly harsh punishment for minor offenses.

FACT #3: Three strikes was purported to target the most violent career criminals. An

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ever increasing number of three strikes prosecutions, however, are for crimes as menial as stealing a can of beer or a few packs of batteries.

The California Department of Corrections reports that under the repeat offender law the majority are sentenced for non-violent crimes, demonstrating that the law fails to address the serious felons as Lungren promised.

MYTH #4: **Three strikes has a deterrent effect.**

Lungren asserts that three strikes does indeed function as a deterrent to future criminal activity.

FACT #4:

On the issue of deterrence, an examination of Los Angeles, San Diego, and San Francisco crime rates for 1993, 1994, and 1995 found that of all committed felonies, only 10.6 percent were perpetrated by two or three strike eligible felons with two-thirds of those done by two strike eligible offenders. Thus, the maximum amount of crime that can be expected to be prevented by this policy is one in ten crimes, far below the figures forecast by Lungren.

Lungren cites the increased number of paroled California felons leaving the state after the passage of three strikes as evidence of the law's deterrent effect. Lungren's conclusions, however, suffer from too narrow a scope. All residents of California, not just parolees, are leaving the state in increased numbers.



Unless three strikes is driving *everyone* out of California, Lungren has credited erroneously a small fraction of a bigger trend to the effect of three strikes.

MYTH #5: **Three strikes is cost effective.**

Lungren asserts that locking up indi-

viduals as a means of preventing future crime, no matter how large the prison population grows, is far more cost effective than a lenient approach in which society pays the cost.

FACT #5:

As of 2001, the cost of incarcerating an offender in California is \$25,607 per year. Current estimates predict that it will cost \$1.5 million to incarcerate an elderly prisoner for the minimum of 25 years, in part because elderly inmates will require greater expenditures for health care. By extrapolating this number to an increased prison population due to three strikes, it becomes apparent that we may be incarcerating ourselves.

By using Lungren's formula to calculate the state's savings due to three strikes the savings would be monumental if all those convicted under the legislation were murderers; but the preponderance sentenced under this legislation are property and drug offenders, rendering the budgetary effect of three strikes far less conclusive.

Excerpts compiled by Andy Miara from *Aging Behind Bars: "Three Strikes" Seven Years Later*. To view the full study, or for more information about The Sentencing Project, please visit : www.sentencingproject.org.

OSI and three strikes

OSI's grantmaking on criminal justice reform issues in the United States is done through the Criminal Justice Initiative (CJI). The goal is to reduce excessive incarceration and its consequences; to promote fair and equal treatment in all areas of the criminal justice system; to re-

direct public focus and resources away from punishment and toward long-term investment in individuals and communities; and to encourage the reintegration of former prisoners through policies that foster public safety, respect human and civil rights, and promote responsible citizen-

ship. CJI encompasses three main programs: the Gideon Project, The After Prison Initiative, and the Community Advocacy Project. Other components of CJI are the Policy and Research Program, the Soros Justice Fellowships, and the Baltimore Criminal Justice Program.

The Open Society Institute is a private operating and grantmaking foundation that promotes the development of open society around the world. OSI's U.S. Programs seek to strengthen democracy in the United States by addressing barriers to opportunity and justice, broadening public discussion about such barriers, and assisting marginalized groups to participate equally in civil society and to make their voices heard. U.S. Programs

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