

The Impact of Three-Strikes: A Socio-Legal Perspective

Christi Thompson

California's three-strikes law has had a massive impact on the political, social and economic landscape of the state. Penal Code 1170.12 (Proposition 184), passed by voters in March 1994, requires that defendants who have been convicted of prior violent or serious felonies be subject to the mandatory sentencing standards of twice the normal length for second felonies and twenty-five years to life in third felony convictions. The three-strikes law was passed in an atmosphere of crime hysteria brought about by the media and politicians, thus illustrating the power of public opinion, perception of crime and interest groups as sources for sentencing legislation. The law has successfully traded the indeterminate sentencing standards for mandatory sentencing schemes which reduce a judge's discretionary power. The effect of this law has been most strongly felt by minority groups, who are significantly overrepresented as second and third strike offenders in California's prisons. In addition to displacing many minorities, the three-strikes law has cost taxpayers, not only in increased taxes, but in cuts throughout much of California's public school system. The impact of the three-strike law has had significant political, social and economic effects on California's landscape by decreasing judicial discretion in lieu of strict mandatory sentencing laws, displacing minority communities through mass incarceration and depleting financial resources from other government funded programs.

Playing on Public Fear

The murder of Kimber Reynolds by a career criminal prompted her father, Mike Reynolds, to begin drafting legislation that later became Proposition 184, which the National Rifle Association dubbed the "three-strikes, you're out" law. Unfortunately, as soon as the bill made its way into the Assembly, it was killed in committee (Vitiello 1997:411). Reynolds began gathering signatures in an effort to get his initiative on the ballot. "Despite National Rifle Association and California Corrections and Peace Officers Association support, signature gathering was going slowly and the bill appeared to be doomed were it not for the murder of Polly Klaas in late 1993" (Schultz 2000:569).

The California three-strikes law was passed after, "Polly Klaas,

an innocent 12-year-old girl, was kidnapped during a slumber party ... [and] was subsequently murdered ... [by] a repeat felon with prior convictions for burglary and kidnapping, the case became an icon for what is wrong with the criminal justice system in California and across America” (United States Center on Juvenile and Criminal Justice 1994:1). The media publicized the case incessantly perpetuating a fear of crime among the public, resulting in overwhelming support for Proposition 184. “The campaign literature supporting passage of Proposition 184 declared that the law would put ‘rapists, murderers and child molesters behind bars where they belong’” (Vitiello 2002:264). They further argued that the passage of the bill would reduce crime by 22% to 34% and produce \$23 billion in social savings. The bill passed with more than 70% approval (Schultz 2000:570).

Michel Foucault (1995) argues that those who study the legal system should, “regard punishment as a complex social function ... [and] a political tactic” (23). Foucault would regard the three-strikes law as a necessary reaction to a terrible crime that resulted in public unrest. The law has two critical functions: creating solidarity among the masses and placating society’s need for revenge by establishing draconian laws that will serve as retribution for the society as a whole. Politicians use this law and other “get tough” rhetoric to get elected (Davis 1995:233; Gaubatz 1995:5; United States Center on Juvenile and Criminal Justice 1994:1; Simon 2000:1112). Jonathan Simon (2000), in his essay “Megan’s Law: Crime and Democracy in Late Modern America,” describes this as governing-through-crime. Simon (2000) argues that, “governing through crime ... is attractive to people because it permits popular fears and experiences to be valorized in the strongest and most public terms ... [to create] a sense of renewed solidarity with fellow citizens” (1119-1120). As a result of the solidarity among voters on the issue of crime, politicians find it very easy to jump on the “tough on crime” bandwagon.

After the Polly Klaas murder, “Democrats in the legislature jostled to take for themselves ownership of the crime issue of the election ... [and] the Republican Party and its ‘Contract with America’ made crime a center stage issue” (Vitiello 2002:261). Political leaders debated back and forth on how best to solve the epidemic of crime that was plaguing the state. The crime issue was used to “mobilize crime-fearful voters at the polls” (Schultz 2000:583) as a means to further the goals of politicians. By 1999, many politicians still strongly supported the measure, despite many reports of the inefficiency of the three-strikes law (Vitiello 2002:258).

Does the Three-Strikes Law Reduce Crime?

Michel Foucault (1995) argues in his book *Discipline and Punish: The Birth of the Prison*, that we must, “rid ourselves of the illusion that penalty is above all (if not exclusively) a means of reducing crime” (24). Supporters of the three-strikes law would claim just the opposite; that the law will serve as a deterrent to future criminals and that locking habitual offenders up will work at reducing crime through the theory of incapacitation preventing the offender from committing crimes against the public through incarceration (Gaubatz 1995:25). Although both deterrence and incapacitation are legitimate theories of punishment, the three-strikes law rarely reduces crime based on either one. Overall, the crime rate in California has decreased since the implementation in 1994, but there are a number of reasons to doubt that the new law is the cause.

First, the crime rate began to decline before the implementation of the three-strikes law. Further, the three-strikes law should have a delayed effect, rather than an immediate impact on the rate of crime. “For example, the effects of a Three Strikes sentence for an offender sentenced to twenty-five-years-to-life instead of, say, six years, would not show up until after his sixth year of imprisonment” (Vitiello 2002:268). Second, criminologists suspect the drop is a result of socio-economic factors rather than the new law. During the mid to late 1990s the economy was strong, and society had more opportunities to offer people, reasons typically associated with reduction in the crime rate. However, California’s economy has slipped into a recession as a result of the dotcom bust and other layoffs, and as expected, the crime rate has begun to creep upward again (Vitiello 2002:270). Third, evidence obtained in studies that compare counties within California show that, “crime dropped 21.3% in the six counties that have been the most lenient in enforcing Three Strikes, while the toughest counties experienced only a 12.7% drop in their crime rate” (Vitiello 2002:270). Although the three-strikes law may have had some impact on the crime reduction during the late 1990s, it is unlikely that it is responsible for the majority of the drop.

Proponents of three-strikes argue that the law serves as a deterrent for future criminal activity. Determining the effectiveness of deterrence requires a tool to infer how much criminal behavior would have occurred had it not been for the enactment of the three-strikes law. Unfortunately, it is extremely challenging to precisely measure the deterrent effect of the three-strike law. Despite the difficulties, a study conducted by Franklin Zimring, Gordon Hawkins, and Sam Kamin, reasoned that if the law has a deterrent effect, “the percentage

of crimes committed by one-strike and two-strike offenders would decrease, and the percentage of crime committed by those who are not within the law's provisions would not be affected" (Vitiello 2002:277). Instead, they found that the change in rates of crime was statistically insignificant. Criminologists would argue that the law is unlikely to deter crime because many offenders are unlikely to calculate the crime in a cost-benefit analysis, weighing the length of the sentence against the benefit gained by the offense. After the passage of the three-strikes law, "one study indicated that 83% of the robbers caught and facing sentencing under three strikes did not expect to be caught, . . . and 80% of another sample of felons stated that they had no idea that they were subject to three strikes" (Schultz 2000:574). The deterrent effect that supporters of the legislation had promised, in practice, is negligible.

Although the three-strikes law does not successfully deter crime, it does serve to incapacitate criminals from committing more offenses. Three-strikes advocates posit that the law will work at reducing crime by incapacitating career criminals who, they claim, are responsible for the majority of the crimes committed in society (Beres & Griffith 1998:4). "A typical estimate [is] that doubling the prison population might reduce serious crimes by ten percent—more in the case of burglaries and robberies, less for homicides and rapes" (Currie 1998:29). The three-strikes law has not been successful in preventing crime in society, in part because of the types of crimes most likely to be prosecuted under the law. Drug-related crimes account for the largest group that is prosecuted under the three-strikes law (California Department of Corrections 2002b). These types of crimes are relatively unresponsive to increased incarceration because of the criminological concept known as the "replacement effect—putting a drug dealer or gang leader in prison may simply open up the position for someone else in an ongoing enterprise" (Currie 1998:30). Murder and rape are also unresponsive to increased incarceration because they are usually crimes that an offender commits only once in their lifetime except for serial killers or repeat rapists. This means that putting murderers and rapists behind bars is unlikely to reduce or prevent similar crimes in the future. Beres and Griffith (1998) studied the effect of the three-strikes law on incapacitation and found that, "Incapacitation . . . will display declining marginal efficiency: as the average prison term increases, the amount of crime prevented by each additional inmate will decline" (9). This implies that as the three-strikes law catches more and more offenders in its wide net, it will have less and less impact on the overall crime rate.

The three-strikes law was hailed by its supporters as being the necessary legislation to protect society from violent offenders. In actuality, 80% of people serving sentences under the law were for nonviolent crimes (Coward 1998:625). On the flip side, the law also has the potential to actually release violent criminals onto the streets. The three-strikes law will inevitably increase the number of inmates throughout the entire Corrections system, which can lead to prison overcrowding. Lisa Cowart (1998) states that this can result in, “the early release of criminals, many of whom were incarcerated for serious or violent crimes. ... The three strikes laws were a response to public demand for safety from violent criminals, yet some states, including California, are granting early release to some violent criminals as one method of combating the prison overpopulation problem” (644). The impact of the three-strikes law on reducing crime has been minor, while the implementation has been costly and has the potential for creating numerous problems.

Judicial Discretion

The three-strikes law has stripped the discretionary powers of judges away by requiring mandatory sentencing standards for second and third felony offenders, eliminating sentencing alternatives, and giving the sole discretion of removing “strikes” to the prosecution. The mandatory sentencing standards of the three-strikes law limit the judge from determining the length of the sentence based on the estimated amount of time it would take to rehabilitate the offender, or the level of seriousness of the crime. Mandatory sentences also restrict the judge from considering mitigating circumstances in third strike offenses because, “the third strike, triggering the twenty-five years to life term of imprisonment may be for any felony, not just serious or violent felonies” (Vitiello 2002:264). Instead, the application of the law in third-strike offenses is inversely related to the level of seriousness associated with the crime. For instance, if the crime is murder, the sentence imposed under the law is likely to be similar to the sentences that existed before. Conversely, if the crime is petty theft, the sentencing scheme is dramatically different, where the offender could have received six months in jail, a \$1,000 fine, or both (Olson 2000:558), he is now subject to the same twenty-five years to life as the murderer (Vitiello 2002:264).

The three-strikes law has removed the judge’s power to choose sentencing alternatives such as rehabilitative treatment programs for relatively minor property or drug-related crimes. California Penal Code 1170.12 section 4 states, “there shall not be a commitment to

any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center.” This makes it impossible for the judge to opt for an alternative penal strategy that may be better suited for dealing with the problems that led the defendant to commit the crime in the first place. Tina Olson (2000) argues that, “California’s ‘Three-Strikes’ law results in disparate treatment of criminal defendants because it allows first strike defendants to plea bargain without requiring rehabilitation, but then severely punishes them if they commit a new offense” (547). Larson and Garrett (1996), authors of *Crime, Justice, and Society*, claim that mandatory sentences can also, “compromise justice by encouraging judges who find sentences inappropriate to dismiss cases and acquit offenders” (308). Reducing the amount of judicial discretion can create unexpected and adverse problems throughout the criminal justice system and society as a whole.

Despite the limit on judicial discretion, there has been movement by the courts to shift some of the discretion back to the judges. Originally, the three-strikes law included a provision that allowed the prosecution the sole discretion to remove or “strike” a prior offense in an effort to preserve justice. In *San Diego County v. Romero* (1996), “the California Supreme Court stated that ‘dismissal’ is a judicial rather than an executive function, and that this power cannot be conditioned upon approval of a district attorney” (Schultz 2000:577). In response to this decision, Michael Vitiello (2002) states, “in holding that a trial judge has independent discretion to ‘strike’ a prior felony, the court assured some individualized treatment for criminal offenders” (282). Although this helps increase judicial discretion, judges are still prevented from altering the length or type of sentence for second and third strike convictions.

The Impact of Three Strikes on Minorities

Minority communities have probably been the most affected by the three-strikes law because minorities are more likely to be serving a sentence under the law than the white majority. In California, as of December 31, 2001, the breakdown by race of second and third strike offenders was: 26.2% white; 31.4% Hispanic; 38.2% Black; 4.1% Other (California Department of Corrections 2002b). Given these statistics, 73.6% of inmates serving for second or third strike offenses are from minority groups. Despite the obvious statistical evidence that there is a bias in the way that the law is being applied, it is highly unlikely that the courts will rule that this is a violation of the Equal

Protection clause of the Fourteenth Amendment. In *McCleskey v. Kemp* (1987), the court ruled that statistical evidence showing bias in the system is not enough to prove intentional discrimination and suggested that the, “legislatures are better at assessing statistical studies and assigning moral significance to their findings” (Cole 1999:138). Given that politicians are unlikely to change aspects of the three-strikes law for fear of being viewed as “soft on crime,” the overrepresentation of minority inmates will continue to have huge socio-legal implications.

There are a number of reasons that can account for the large percentage of minorities serving sentences under the three-strikes law. Usually, inner-city neighborhoods, with a large percentage of minorities, suffer from higher crime rates and thus become the focus of “quality of life” policing (Cole 1999:44). “The theory behind quality-of-life policing is that subjecting people to regular frisks and reducing the incidence of quality-of- life crimes will also prevent more serious crime by promoting a sense of law and order, making it more costly to carry weapons in public, and using arrests for minor infractions to detect, detain, and deter more serious criminals” (Cole 1999:44). The more pronounced presence of law enforcement in these areas increases the likelihood of contact between the police and members of the community. David Cole (1999), author of *No Equal Justice*, points out that the courts have upheld that stopping an individual on the basis of “reasonable suspicion” is acceptable, and being in a high-crime area is a factor that police can consider for finding that suspicion (44). Once the police have stopped an individual they can request a consent search, but are not required to inform the detainee that they are legally entitled to decline. Cole (1999) acknowledges that many people do not exercise this right because they “do not know their rights or are afraid to assert them” (31). Either way, since minorities are more likely to be living in crime-ridden areas and come in contact with police more frequently, they are more likely to get caught committing illegal activities.

The overrepresentation of minorities serving time under the three- strikes law can be partially attributed to the structure of drug laws. Specifically, there is a huge disparity in sentencing between the powder and crack forms of cocaine. The law can be described as the following: [The] law equates 5 grams of crack with 500 grams of powder cocaine, a 1-to- 100 ratio that no other country recognizes. Possessing 5 grams of crack is a felony with an automatic five-year prison term, while 5 grams of the same drug in powder form is a misdemeanor likely to carry no jail time (Egan 1999:20). This law has

huge implications for the Black community, who compose 90% of the people prosecuted for crack possession under the law (Cole 1999:142; Egan 1999:20). Due to the fact that possession of 5 grams of crack automatically results in a felony charge, Blacks are more likely to have been charged with previous drug felonies, which could be considered as a strike against them under the three-strikes law. Had the drug been in powder form, the crime would have been a misdemeanor, not a felony, and could not be considered for the purposes of three-strikes.

The impact of the war-on-drugs and other “get-tough measure[s] are felt principally in minority communities” which can have tremendous influence on other social problems (Cole 1999:149). Unfortunately, as more minorities are locked away for non-violent drug offenses, the social costs to the community can be extreme. Incarceration has a profound effect on the inmate’s family. Clearly, when the offense is violent, incarcerating the offender may actually help protect the family, on the other hand, if the offense is drug-related or non-violent, as are 80% (Cowart 1998) of the crimes prosecuted under the three-strikes law, the impact on the family may be too high. If the offender has children, those children will now have to grow up without one of their parents. If the offender had a job, the family now has to try to survive with one less income. These stresses can lead to trouble, both in the family and the community. The child could begin having problems in school, getting into fights, or other delinquent behavior. The loss of income could put a struggling family onto the street, contributing to the social problem of homelessness. Paul Butler (1995) sums up the issue in his article in the *Yale Law Journal*: “Black people have a community that needs building, and children who need rescuing, and as long as person will not hurt anyone, the community needs him there to help” (716). The problems faced in minority communities have been amplified by the war-on-drugs, and the three-strikes law has compounded those issues by further increasing the minority representation in prisons.

The Cost of Three-Strikes

The three-strikes law has not only had a strong impact on criminals, but on law-abiding citizens as well. Not only has the statute not effectively reduced crime, it has cost taxpayers immensely, both fiscally and socially. The mandatory sentences imposed under the three-strikes law has limited the amount of plea-bargaining that can be done between a prosecutor and the defense. Usually, the prosecutor has the ability to offer a lesser sentence in exchange for a guilty plea,

but with mandatory sentences for any third-strike felony, the prosecutor has little to offer. Since the passage of three- strikes, more and more defendants have chosen to exercise their due process rights and go to trial, instead of plea-bargaining. The increased number of cases going to trial has raised trial costs and bogged down the courts (Coward 1998:632; Olson 2000:555). David Schultz (2000) points out that there has also been an, “11% increase in pretrial detention in the local jails as a result of three strikes” (580). Every aspect of the criminal justice system is experiencing an increased financial burden as a result of the three strikes law, and the most profound cost is in the California Department of Corrections.

According to the California Department of Corrections Quarterly Fact Sheet (2002a), the CDC has jurisdiction over 304,749 felons, with an annual budget of \$4.8 billion. Advocates of three-strikes argue that the cost of maintaining high levels of incarceration is necessary to prevent the epidemic of crime that society would face had not so many offenders been locked away. Unfortunately, as it has been shown, mass incarceration has very little effect on the overall crime rate, nor does it address any of the underlying causes of crime. It is clear that the law is based on the assumption that third-strike felons, regardless of how minor the crime, are beyond any hope of rehabilitation and that it is safer for society as a whole to impose lengthy sentences. In some cases, this may be absolutely necessary, in others though, the cost to society may be too high. The cost of imprisoning an offender for a relatively minor non-violent offense is \$26,894 a year, or \$672,350 for twenty- five years (California Department of Corrections 2002a). This value goes up when the expenses associated with the medical needs of older inmates are included. Considering the costs, along with a well-documented criminological phenomenon that as an offender ages, he or she is less likely to commit high- risk or criminal behavior, known as “aging-out” (Currie 1998:75), it is unlikely that the incarceration of this particular offender would be beneficial to society in the long run.

It has been extremely costly to incarcerate so many people, and it has come at the expense of other government funded programs. “The money spent on prisons ... [is] money taken from the public sector that educate, train, socialize, treat, nurture, and house the population—particularly the children of the poor” (Currie 1998:35). Opponents of the three-strikes law argue that increased prison spending will certainly result in a trade-off between prison and education. This is illustrated in the *New York Times*: “As the prison budget swelled, California raised tuition to make up for the university financing gap. Over the last ten years, as the states population grew

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by 5 million people, state university enrollment fell 20,000” (Egan 1999:20). In today’s society, an education is critical for getting ahead in society. Unfortunately, as the funding for public school decreases, the quality of education diminishes and fewer people have the opportunity to go to college. This can cause strain on society which can aggravate the crime problem, based on the idea of Merton’s Strain Theory:

Basically, Merton’s theory is a frustration-aggression theory. All Americans are encouraged to pursue certain general and ideal goals—for example, the attainment of esteemed occupational status; but many, if not most, do not have access to legitimate means such as funding for quality schooling for their realization. Frustrated in this sense, a certain number of people ... can be expected to invent or adopt illegitimate means to accomplish their purposes (Larson and Garrett 1996:203).

Due to the fact that most of the prestigious and desirable occupations require at least a four-year college degree, cutting educational budgets result in fewer scholarships and financial aid for less-fortunate students, thus blocking those people from even being able to compete for those “esteemed occupational” positions. Merton would argue that the strain created by systematically blocking some people from legitimate means of goal achievement will cause some people to come up with innovative means to obtain them, which include crime. In an attempt to gain wealth and power, some people might become gang-leaders or drug lords, or involved in other illegal organizations, thus producing more crime. The cost of mass-incarceration generates an ironic trade-off between funding the criminal justice system and educational programs that could be preventing crime.

Conclusion

The three-strikes law has had a profound effect on the political, social, and economic landscape of California since its implementation in 1994. The law has been used by get-tough politicians to get elected and simultaneously has reduced sentencing discretion among judges. Supporters of the three-strikes law have argued that the law was necessary to protect society from violent career criminals. They have argued that the law would deter future crime and incapacitate known offenders from continuing on their crime spree. As it has been shown, the law has not achieved either of those goals effectively. The law will most certainly lead to an increased prison population, and possibly overcrowding, which has

the dangerous effect of early release programs for inmates without mandatory sentences. The law has been fiscally and socially expensive without producing the benefits its proponents promised it would. Minority communities have been adversely affected by the uneven application of three-strikes as a result of quality-of-life policing in high-crime areas and the powder/crack cocaine disparity. Educational spending has been significantly cut back in attempt to fund the growing prison population. The law was intended for violent habitual offenders, but the large majority of offenders are non-violent, and continuing to allow the law to be applied for non-violent third offenses will aggravate the ever increasing problems associated with the three-strikes law.

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