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“THREE-STRIKES-AND-YOU’RE-OUT”— MANDATORY LIFE IMPRISONMENT FOR THIRD TIME FELONS

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I. INTRODUCTION

In 1994, politicians swept the nation with election-driven proposals that sounded snazzy but failed to have any real impact on crime. The catchy baseball metaphor “three strikes and you’re out” is the latest expression of such non-reasoned, knee-jerk approaches to fighting crime.

Generally speaking, “three-strikes” provisions impose a mandatory life sentence without parole on offenders convicted of a third violent offense. In many instances such measures are constitutionally suspect, impose automatic life imprisonment for relatively minor crimes that may not warrant so harsh a penalty, and have the potential to disproportionately impact African Americans and other people of color. These proposals constitute bad public policy. They are unnecessary due to existing state habitual offender laws and federal sentencing guidelines for repeat or “career” criminals. They expensively retain low-risk geriatric prisoners without a corresponding benefit to society. They fail to effectively curb the crime rate, and, in some instances, may actually increase violent crime in America.

II. EARLY CONGRESSIONAL PROPOSALS

Prior to final passage of “The Violent Crime Control and Law Enforcement Act of 1994” various “three-strikes” proposals were considered by the 103d Congress. Senator Trent Lott (R-Miss.) and Senator Phil Gramm (R-Tex.) introduced proposals which were adopted on November 19, 1993 as part of omnibus crime legislation passed by the Senate (H.R. 3355). On November 3, 1993 Representative Steny Hoyer (D-Md.) introduced the “Three-Time Loser Act of 1993” (H.R. 3424) in the House of Representatives.

These early proposals mandated the automatic life imprisonment of every defendant convicted of a third separate violent felony after two prior state or federal violent felony convictions. The definition of “violent felony” included offenses against property and crimes not actually involving violence. In describing the term “violent felony,” these proposals referred to 18 U.S.C. § 16, which defines a violent felony as a crime involving the threatened or actual use

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of physical force against the person or the property of another; the term also includes any other offense that is both felonious and by its nature involves a substantial risk that force may be used against the person or property of another.

Thus, pursuant to this definition, malicious mischief to government property or contracts over \$40,000 could be included as a "strike";¹ another "strike" could include impeding or intimidating an employee of the Federal Deposit Insurance Corporation, the National Credit Union Administration, or an FBI agent;² another could be sending a threatening letter to the President.³ Any of these offenses, as well as other federal crimes such as stealing a radio from a federally-owned car, could be a strike that triggers automatic lifetime imprisonment for the third conviction.⁴

Senator Gramm's "three-strikes" proposal also counted felony drug offenses as a strike towards automatic life imprisonment. Thus, pursuant to this proposal, a person convicted of two separate offenses involving simple possession of 5.1 grams of crack cocaine⁵ (the weight of two pennies), with an approximate value of \$125, who thereafter takes a bicycle from someone in a national park, would spend the rest of his life in prison without parole.

Although "three-strikes" sponsors claim that their purpose is to protect society from only the most dangerous felons, these early congressional proposals were overly broad, encompassing a broad range of criminal conduct from murder to minor assaults and offenses against property.

State proposals were no better. In an open letter to the Washington state voters prior to passage of this country's first "three-strikes" law, more than twenty current and former prosecutors urged the public to vote against that state's "three-strikes" proposal. To illustrate why they opposed the law's passage, the following scenario was described:

An 18-year-old high school senior pushes a classmate down to steal his Michael Jordan \$150 sneakers—Strike One; he gets out of jail and shoplifts a jacket from the Bon Marche, pushing aside a clerk as he runs out of the store—Strike Two; he gets out of jail, straightens out, and nine years later gets in a fight in a bar and intentionally hits someone, breaking his nose—criminal behavior, to be sure, but hardly the crime of the century, yet it is Strike Three. He is sent to prison for the rest of his life.⁶

1. 18 U.S.C. § 1361 (1988); U.S. Sentencing Guidelines § 2B1.3.

2. 18 U.S.C. § 111 (1988) (referencing a list of protected federal employees in 18 U.S.C. § 1114); U.S.S.G. §§ 2A2.2, 2A2.4.

3. 18 U.S.C. § 871 (1988); U.S.S.G. § 2A6.1.

4. Thus, pursuant to these proposals, a defendant convicted of sending a threatening letter to the President, where she already has previous separate convictions for damaging a nuclear weapon during a protest and resisting the arrest of an FBI agent during a demonstration, would automatically be sent to prison for the rest of her life.

5. Simple possession of crack cocaine is a felony, requiring a mandatory minimum sentence of five years and a maximum of twenty years for possession of: five grams for a first conviction, three grams for a second conviction, and one gram for a third conviction. See 21 U.S.C. § 844(a) (1988).

6. ACLU DEPARTMENT OF PUBLIC EDUCATION, 10 REASONS TO OPPOSE '3 STRIKES, YOU'RE OUT,' ACLU Brief, produced by the ACLU Department of Public Education (on file with the *University of Dayton Law Review*).

III. CURRENT FEDERAL LAW

The “three-strikes” provision that prevailed in “The Violent Crime Control and Law Enforcement Act of 1994” was narrowed from the provision originally adopted by the Senate. It amends 18 U.S.C. § 3559 to require life imprisonment for a person convicted of a serious violent felony if that person has two or more final convictions for a serious violent felony or one prior conviction for a serious drug offense and one or more convictions for a serious violent felony. Each offense, including the offense subject to the enhancement, must have occurred on separate occasions and be separated by a conviction.

The definition of “serious violent felony” includes a federal or state offense

punishable by a maximum term of imprisonment of ten years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.⁷

In addition, the definition enumerates certain offenses as “serious violent felonies,” such as murder, manslaughter other than involuntary manslaughter, aggravated sexual abuse and sexual abuse, and arson.⁸

Although non-violent drug offenses remain as one of the “strikes” that can result in a mandatory life sentence, the legislation restricts its application to “serious drug offenses.”⁹ Although more limited than the extremely broad proposal encompassing any felony drug offense passed earlier by the Senate, the provision remains troubling. It categorizes “strikes” based upon the amount of drugs involved as opposed to culpability. As a result, a low level courier in a drug operation who is transporting a large amount of drugs faces the same threat of life imprisonment as the high level manager. Also, although automatic life imprisonment for simple possession of cocaine base (crack) will be excluded as a “strike,” the law nevertheless maintains the hundred-to-one sentencing ratio between “crack” and powder cocaine distribution, which has an overwhelming disparate impact on African Americans.

Arson and robbery are exempted from consideration as “serious violent felonies” under certain circumstances. A robbery does not qualify as a serious violent felony if the defendant establishes by clear and convincing evidence that a firearm or other dangerous weapon was not used or threatened and no death or serious bodily injury occurred.¹⁰ Arson is likewise exempted from consideration as a serious violent felony if the defendant establishes by clear and convincing evidence that there was not a threat to human life and the defendant reasonably

7. 18 U.S.C.A. § 3559(c)(2)(F)(ii) (West 1994).

8. *Id.* § 3559(c)(2)(F)(i).

9. A “serious drug offense” is defined as a state or federal drug trafficking offense punishable by at least ten years as described in 21 U.S.C. §§ 841(b)(A), 848, or 960(b)(1)(A) (1988).

10. 18 U.S.C.A. § 3559(c)(3)(A) (West 1994).

believed the offense posed no threat to human life.¹¹ The robbery and arson exemptions are referred to as “non-qualifying felonies.”

The government must comply with the procedures in 21 U.S.C. § 851 to provide notice of the predicate convictions and an opportunity for the defendant to challenge the validity of such convictions. In addition, the law allows for resentencing if a prior conviction upon which the life sentence was based is overturned.

In response to outcries that mandatory life imprisonment would keep people in prison well beyond the age of criminal activity and result in increased costs for care of elderly prisoners, the federal law includes a “geriatric exception” which allows for a seventy-year-old prisoner who has served at least thirty years under such a sentence to be released if the Bureau of Prisons determines that the prisoner is not a danger to the safety of any other person or the community.¹²

The law also includes a provision allowing the governing body of Indian tribes to elect whether this measure would apply to its members.¹³

Although narrowed from the original Congressional proposals, the “three-strikes” provision signed into law by President Clinton remains problematic. Not only is that law and state laws which have been enacted constitutionally dubious, they represent bad public policy as well. They fail to reduce crime, are costly with no corresponding return in public safety, and are unnecessary because of existing tough federal sentencing guidelines and mandatory minimum sentencing laws in most states.

IV. “THREE STRIKES” VIOLATES THE EIGHTH AMENDMENT PROPORTIONALITY REQUIREMENT

Under our system of criminal justice, the punishment must fit the crime. The requirement of mandatory life imprisonment thus raises serious constitutional problems of proportionality where neither the final crime nor the preceding two crimes would otherwise be serious enough to justify a life sentence. Individuals should not be executed for burglarizing a house nor incarcerated for life for committing relatively minor offenses, even when they commit several of them. This principle of proportionality, embodied in the Eighth Amendment, admonishes that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” Punishment may be cruel and unusual if it is out of all proportion to the offense.¹⁴ Many “three-strikes” proposals depart sharply from this rule of proportionality by failing to take into consideration the gravity of the offense.

Indeed, a California judge decided not to sentence a thirty-two-year old prisoner apprehended with two marijuana cigarettes under that state’s new

11. *Id.* § 3559(c)(3)(B).

12. *Id.* § 3582(c)(1)(A).

13. *Id.* § 3598.

14. *See Solem v. Helm*, 463 U.S. 277 (1983).

"three-strikes" sentencing guidelines.¹⁵ Sonoma County Superior Court Judge Lawrence Antolini said that to sentence Jeffrey Dean Missamore to up to eight years in state prison would have been cruel and unusual punishment. Judge Antolini argued: "To send this man to a state prison . . . and take up space for a more violent felon is out of proportion for this crime."

Missamore was convicted in 1986 of burglary and auto theft charges. He was arrested in April 1994 on the marijuana possession charge when in county jail for petty theft. Although the law states that judges must double the sentence for two-time offenders, Antolini sentenced Missamore to a year in county jail and three years probation. The judge said that a loophole in the state Penal Code allows him to alter sentences "in the interest of justice."¹⁶

V. THE FEDERAL SENTENCING GUIDELINES AND STATE RECIDIVIST STATUTES MAKE "THREE STRIKES" UNNECESSARY

Although the life without parole aspect of "three strikes" is new, states have had habitual offender laws and recidivist statutes for years. These laws impose stiff penalties, up to and including life sentences, on repeat offenders. The 1987 Federal Sentencing Guidelines are also very tough on repeat offenders, providing enhanced penalties for repeat or "career" offenders¹⁷ that are substantially similar to "three-strikes" proposals. The United States Sentencing Commission has characterized the sentences under the existing federal career offender guideline as "substantial," and has expressed that it is "not aware of any significant view, even among prosecutors, that [the career offender statute] is too lenient."¹⁸

The Sentencing Commission's analysis of the impact of "three-strikes" proposals is that such provisions would be "significant and disruptive" to the operation of the guidelines and to the Sentencing Reform Act's goals of uniformity and proportionality.¹⁹ Under the Guidelines, for example, a defendant convicted of kidnapping who has two prior violent felonies or serious drug offenses, would receive, on the average, 364 months (over thirty years) of imprisonment. A defendant convicted of assault with the requisite two prior convictions, receives, on the average, sixty-eight months (more than six years) of imprisonment. Both the kidnapping and assault defendant receive substantial

15. See Ron Sonenshine, *Judge Defies '3 Strikes' Mandate*, S.F. CHRON., Aug. 12, 1994, at A17; Tony Slaudes, *County Judge Calls '3 Strikes' Law Insane*, PRESS DEMOCRAT, July 20, 1994, at 1.

16. See discussion of this case in Halles, 5 NATIONAL DRUG STRATEGY NETWORK NEWSBRIEFS (Sept.-Oct. 1994).

17. U.S.S.G. § 4B1.1.

18. See U.S. Sentencing Commission Staff Analysis of Section 1008 of S. 1356 (on file with the *University of Dayton Law Review*). As of the writing of the analysis, the Sentencing Commission consisted of five active and two ex-officio members. Serving on the Commission were a U.S. Circuit Court Judge; U.S. District Court Judge; U.S. District Court Judge and former assistant district attorney; former chief counsel for U.S. Senate's Subcommittee on Penitentiaries; Deputy U.S. Attorney General; Chairman of the U.S. Parole Commission; and law professor.

19. See United States Sentencing Commission Staff Analysis of Section 1008 of S. 1356 and Issues of Concern Regarding H.R. 3424 (on file with the *University of Dayton Law Review*).

sentences, but the sentences are proportional to the seriousness of the offenses. Three-strikes proposals, on the other hand, impose life imprisonment for each defendant without regard to the relative seriousness of the instant offense.²⁰

VI. "THREE STRIKES" IS EXPENSIVE WITHOUT ANY CORRESPONDING BENEFIT TO PUBLIC SAFETY

"Three-strikes" laws will keep people in prison well beyond the age of criminal activity at great fiscal expense to taxpayers, both for increased trial expenses as well as geriatric care in prison. Persons over the age of sixty, however, commit only one percent of all serious crimes.²¹ Young defendants convicted of a third "truly violent" felony²² are already required to serve lengthy sentences and emerge from prison well into their late middle age—a time when they pose little criminal risk to society. Although a "geriatric exception" has been adopted in the federal "three-strikes" law, its application is extremely limited, and will needlessly detain relatively harmless geriatric prisoners, at public expense, without substantially reducing crime.

The average cost of incarcerating a federal prisoner is \$20,072 per year, or approximately \$55 per day.²³ Incarcerating an aging prisoner is estimated to cost three times that amount—over \$60,000 a year.²⁴ Three younger, more violent-prone offenders could be held in the place of one geriatric prisoner.²⁵

Of course, more prisons could be built, at \$100,000 per bed, or special geriatric prisons could be developed to house aging prisoners. There is no doubt, however, that the resources spent to keep elderly men and women incarcerated through their seventies, eighties, and nineties could be more effectively used to address the root causes of crime.

Finally, under a "three-strikes" law, trials will be more frequent and longer. Faced with a mandatory life sentence, repeat offenders will most likely go to trial, which is costly and time-consuming, rather than agree to plea bargaining. In the state of Washington, normal felonies resolved by a plea bargain cost about \$600 to defend.²⁶ In contrast, defense in a full-blown criminal trial could cost as much as \$50,000 per case.²⁷

20. *Id.*

21. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS (1988).

22. Truly violent felonies do not include property offenses. Indeed, even the U.S. Sentencing Commission does not include property offenses as violent crimes in its guidelines.

23. See BUREAU OF PRISONS, STATE OF THE BUREAU 1991, Summer 1992 (quoting FAMM Facts, Families Against Mandatory Minimums Foundation).

24. See WASHINGTON ASSOCIATION OF CHURCHES, WASHINGTON STATE CATHOLIC CONFERENCE, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, AND WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WHY WE OPPOSE INITIATIVE 593 (Oct. 1993) (quoting WALL ST. J., Aug. 18, 1993). This figure does not include operations such as liver transplants or hip replacements which are not uncommon for elderly people to undergo. *Id.*

25. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, FELONY SENTENCES IN STATE COURTS 1988.

26. *Initiative 593 Might Bust Budgets*, SEATTLE TIMES, Sept. 16, 1993, at B1.

27. *Id.*

VII. "THREE STRIKES" IS INEFFECTIVE

Laws similar to "three-strikes" proposals have not been shown to lower the crime rate. Habitual offender laws have been found ineffective in those states that have them.²⁸ Independent studies of selected states which have habitual offender laws, such as Florida, Illinois, and Maryland, found no reduction in the crime rate.²⁹ Florida, for example, experimented with a similar law in 1987. As its prisons became overcrowded, Florida found it necessary to release first-time offenders—younger and more criminally-prone, in order to make room for recidivist offenders. A recently released report from the Rand Corporation predicts that California may have to release younger prisoners early to make room for permanent third-time offenders.

If prison space is insufficient, courts may order the early release of prisoners. They may release those with a brief record in favor of retaining older criminals behind bars. This may not be the right choice from the point of view of crime reduction, as younger criminals have more of a criminal career ahead of them than older ones.³⁰

Even prosecutors have admitted that there is no reliable way to identify violent criminal predators from their official records,³¹ which is what "three-strikes" proposals would automatically do. Indeed, under the discretionary state repeat offender laws, only a small handful of people were actually charged. In Illinois, eighty-eight people in fifteen years were charged, while in Washington state, only sixty-three out of 16,000 felonies are expected to be affected.³² Should discretion be completely eliminated, we could be incarcerating a lot of people who could benefit from rehabilitation programs and thereafter contribute to society.³³

VIII. "THREE STRIKES" COULD DISPROPORTIONATELY STRIKE BLACK DEFENDANTS

A federal "three-strikes" law will most likely have a disproportionate impact based on race. Dr. Lee P. Brown, director of the Office of Drug Control Policy, acknowledged in testimony before Congress that grim statistics reveal

28. See "Three Strike" Laws Strike Out Elsewhere, SEATTLE TIMES, Sept. 30, 1993, at 1 (describing Illinois and Florida laws) [hereinafter THREE STRIKES OUT].

29. See H. SCOTT WALLACE, THE TRUTH ABOUT "THREE STRIKES, YOU'RE OUT," NATIONAL LEGAL AID AND DEFENDER ASSOCIATION (Jan. 25, 1994).

30. See THE RAND CORPORATION, "THREE STRIKES AND YOU'RE OUT": ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY SENTENCING LAW 35 (Sept. 1994).

31. Prosecutors Say "No" to Three Strikes Initiative, Letter from 26 Washington State Prosecutors, Oct. 18, 1993.

32. THREE STRIKES OUT, *supra* note 28.

33. See A "3 Strikes" Law Would Have Cost Him a 2nd Chance, SEATTLE TIMES, Oct. 6, 1993, at 1; Norman Edland, Trivial Inclusions in 593 Could Ruin Countless Lives, SEATTLE POST-INTELLIGENCER, Oct. 21, 1993 (Letter to the Editor).

that "African-American males are disproportionately represented in all criminal justice statistics: arrests, victimization, incarceration, and executions."³⁴ Racial bias in the criminal justice system will thus have dramatic repercussions for a defendant facing a third, "violent" felony.

Studies have revealed that arrest and prosecution rates of Blacks are vastly disproportionate to their percentage in the population as a whole, raising the concern that race could be used as a significant factor in deciding whom to follow, detain, search, arrest or charge, as well as the length and type of sentence imposed.³⁵ Moreover, as a result of the "war on drugs," law enforcement resources are often concentrated in inner-city communities which have large numbers of people of color populations. Often, these factors combine to raise the likelihood that people of color will be arrested and prosecuted more often than their counterparts who reside in suburban areas, which, in turn, raises the potential for them to be subject to criminal convictions more often.

"Three-strikes" laws are also susceptible to prosecutorial manipulation. A Florida study which examined the backgrounds of 47,000 prisoners prosecuted under that state's habitual criminal law found that the decision to prosecute was "based on race and nothing but race . . . [B]lacks had a rate of it being applied twice that of whites."³⁶ Similarly, the recently enacted Washington state "three-strikes" law is expected to be used against African American defendants twice as much as against Caucasians, although Blacks constitute only three percent of the population.³⁷

IX. "THREE STRIKES" MAY ACTUALLY LEAD TO AN INCREASE IN CRIME

Many law enforcement professionals oppose "three-strikes" proposals out of fear such laws would spur a dramatic increase in violence against police, corrections officers and the public. A person facing the prospect of a mandatory life sentence will be far more likely to resist arrest, to kill witnesses or to attempt a prison escape. Dave Paul, a corrections officer from Milwaukee, Oregon, wrote: "Imagine a law enforcement officer trying to arrest a twice-convicted felon who has nothing to lose by using any means necessary to escape. Expect assaults on police and correctional officers to rise precipitously."³⁸ Police in Seattle are already reporting armed confrontations directly attributable to their

34. See STATEMENT OF THE HONORABLE DR. LEE P. BROWN TO THE CONGRESSIONAL BLACK CAUCUS, CONGRESSIONAL BLACK CAUCUS BRAINTRUST ON CRIME, Jan. 13, 1994, at 2.

35. See Gerald W. Heaney, *The Reality of Guideline Sentencing: No End to Disparity*, 8 AMERICAN CRIMINAL LAW REVIEW 203 (1991).

36. THREE STRIKES OUT, *supra* note 28 (quoting Statement of James Austin of the National Council on Crime and Delinquency).

37. "Three Strikes" Would Impact Blacks Most, Records Show, MORNING NEWS TRIBUNE, Oct. 16, 1993.

38. See PORTLAND OREGONIAN, Mar. 1994.

new "three-strikes" law.³⁹ Ironically, these laws may cause more, not less, loss of life.

X. CONCLUSION

The federal "three-strikes" law incorporated in "The Violent Crime Control and Law Enforcement Act of 1994" as well as the various state laws and proposals are examples of ineffective, expensive bad law with constitutionally questionable sentencing consequences. Such legislation does nothing more than invite tougher-sounding proposals from politicians in their attempt to demonstrate to the public that they are "tougher than thou" on crime.

For more than twenty years, state and federal crime control policies have been based on the belief that harsh sentencing laws will deter people from committing crimes. But today, with the federal prison population having surpassed the one million mark and state budgets depleted by the huge costs of prison construction, we are no safer than before. It is clear, however, from already existing repeat offender laws and mandatory minimum sentences, that more stringent measures will not be instrumental in reducing crime. Legislation that could reduce crime must embody a more balanced approach which seriously addresses the need for prevention and imposes realistic sanctions as punishment.

39. See Testimony of the American Civil Liberties Union of Southern California before a Joint Hearing of the Assembly Committee on Public Safety and the Senate Committee on Criminal Procedure Regarding "Proposition 184: The Three Strikes Initiative," submitted by Samuel Mistrano, Legislative Director, Oct. 3, 1994, at 6.