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# The Politics of Justice: Legislative Overreach and the Law

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# The Politics of Justice: Legislative Overreach and the Law

BreeAnna K. Conover

## INTRODUCTION

### I. BACKGROUND

#### A. Sentencing Guidelines

1. *The History of Sentencing Guidelines*
2. *Three Strikes Laws*
3. *Do Three Strikes Laws Strike Out Crime?*
4. *Michigan Gets Into the Act: The 650 Lifer Law*
5. *Is the Tide Turning?*

#### B. Sex Offender Registration Laws

1. *The Spread of Megan's Law and the Tangle of the Legislation*
2. *The Plethora of Legal Challenges*
3. *The Place of the Sex Offender in the Culture of Fear*

#### C. JUVENILES AS TARGETS OF THE CULTURE OF FEAR

1. *Juvenile Sex Offender Registrants*
2. *Turning Our Backs on Parens Patriae*
3. *Juvenile Death Penalty*

### II. ANALYSIS

#### A. THE CREATION OF THE PROBLEM: CONGRESS'S RESPONSIVE LAWMAKING

#### B. THE ROOT OF THE PROBLEM: THE CULTURE OF FEAR

#### C. PERPETUATING THE PROBLEM: THE MEDIA

#### D. CAN THE CYCLE BE STOPPED?

### CONCLUSION

## INTRODUCTION

Can you imagine an individual being sentenced to life in prison for an unarmed robbery of a pizza (his only other two legal convictions being similar offenses)?<sup>1</sup> The average American could only imagine this happening in a country like Afghanistan, but this travesty of justice occurred right here in the United States. This happened to a man in Los Angeles under California's "Three-Strike" law.<sup>2</sup>

When the police stop Matt, a 22-year-old Michigan man, for speeding as he is driving home from work, he gets far more than he anticipated. Matt braces himself for a ticket and a lecture but what comes is a much bigger shock. Matt nearly collapses when (following the routine warrant check) the officer sternly tells him, through clenched teeth, that he has failed to register with the local police as a sex offender after moving into the area with his wife for an incident that occurred when he was a minor. Under the Michigan Sex Offender Registration Law<sup>3</sup>, this fictional scenario has played itself out in stark reality for many Michigan citizens.<sup>4</sup>

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<sup>1</sup> Mark Riley, *Tough Approach Strikes Out In US: The only sure result of America's three-strike laws has been a leap in the prison population*, SYDNEY MORNING HERALD, February 18, 2000. Many similar unbelievable results have also occurred from this legislation. One defendant killed his girlfriend and then himself after learning that he would face a life sentence for possession of less than an ounce of marijuana. *See id.* Another man who was also facing a life sentence under this legislation, killed himself by jumping from a sixth-story balcony. *See id.* Another man is serving a life sentence for stealing a video-recorder, his two previous felonies being setting fire to garbage bins. *See id.*

<sup>2</sup> *See* Paul Wright, *Three Strikes Racks 'Em Up*, in THE CELLING OF AMERICA 15, 16 (Daniel Burton-Rose et al. eds., 1998).

<sup>3</sup> *See* MICH. COMP. LAWS ANN. § 28.721-32 (2000).

<sup>4</sup> This scenerio is based upon first hand case experience by the author while workign as an intern in the Genesee County Prosector's office during the summers of 2000-2001. The author handled one case at the pre-trial level that parallels this scenerio. This scenerio refers to the Michigan Sex Offender Registration Act. MICH. COMP. LAWS ANN. § 28.721-32 (2000). This Act was amended on September 31, 1999 to require juveniles who were adjudicated for the offenses of Criminal Sexual Conduct in the First or Second

The American passion for “getting tough on crime” has arisen in recent decades out of what many have come to call “the culture of fear.”<sup>5</sup> This, often unreasoned and unreasonable passion, has resulted in politicians, at every level, rushing to enact quick fix laws and policies. This knee-jerk reaction by the legislature only serves to put into place overly broad laws that fail to fix the problems. It is the intent of this Comment to explore several aspects of laws which are an example of legislative overreaching, which at best are failed social policies and at worse are serious infringements on constitutional rights. Legislative impacts in the areas of mandatory sentencing, sex offender laws, juvenile laws, and the death penalty will be discussed in this Comment.

## I. BACKGROUND

### A. Sentencing Guidelines

By 1997 in America, there were over five million individuals either on probation, in jail, or on parole.<sup>6</sup> In total, about one in forty-seven adults in America is in the corrections system.<sup>7</sup> Only Russia has a higher incarceration rate among industrialized nations.<sup>8</sup> By the year 2000, the United State’s prison population exceeded two million, a

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degree to register on the sex offender Internet registry upon their eighteenth birthday. *See* MICH. COMP. LAWS ANN. § 28.728 (2000).

<sup>5</sup> *See generally*, Lawrence M. Friedman & Issachar Rozen-Zvi, *Illegal Fictions: Mystery Novels and the Popular Image of Crime*, UCLA LAW REV. (2001). The authors explain the genesis of overblown fear of violent crime as entertainment media. They explain that while crime rates are rising and in some ways certain crimes are more mindless, this type of crime makes up a very small percentage of the crime committed in the United States every year. The authors go on to say that despite the rare occurrence of this type of crime, a culture of fear has been created because of our culture’s focus on this type of violent crime as entertainment. *See id.*

<sup>6</sup> *See* United States Department of Justice, *The Nation’s Correctional Population Tops 5 Million*, BUREAU OF JUSTICE STATISTICS, 7 (August 1998).

<sup>7</sup> *See* TODD R. CLEAR & HARRY R. DAMMER, *THE OFFENDER IN THE COMMUNITY* 3 (Wadsworth/ Thomson Learning 2000).

<sup>8</sup> *See* Salon Mothers Who Think, *Locked Up in America*, at [http://www.salon.com/mwt/feature/1998/09/cov\\_01feature.html](http://www.salon.com/mwt/feature/1998/09/cov_01feature.html) (visited Dec. 1, 2001).

number which is equivalent to being the 32<sup>nd</sup> most populated state.<sup>9</sup> A high percentage of this prison population comes from the media/politico- inspired “War on Drugs” and the resulting mandatory sentencing for drug offenses: a direct response to the emerging “culture of fear” of the 1960’s and 1970’s and 1980’s. Following the enactment of mandatory sentencing laws, federal prisoners incarcerated for drug offenses “increased nearly tenfold from 1980-1983, and that increase accounted for nearly three-quarters of the total increase in federal prisoners.”<sup>10</sup>

### 1. *The History of Sentencing Guidelines*

The “War on Drugs,” really began with the passage of the Harrison Narcotics Act in 1914.<sup>11</sup> Politicians, through the Harrison Narcotics Act, were capitalizing on the endemic fear by white Americans at that time of their women being sexually exploited by drugged-up black men. Testimony in Congress prior to the Act’s passage, declared that “cocaine use increased Negroes’ penchant for violent crime, particularly the commission of rape upon white women.”<sup>12</sup> Since that time, the “War on Drugs” and the generalized fear of violent crime has continued to escalate, as has the political enthusiasm for quick fix, usually consequentially poorly aimed and or overreaching legislation. After the “War on Drugs” slowed primarily during the 1970’s, it once again came into focus during the Reagan administration.<sup>13</sup> Some have noted that the “War on Drugs” was rekindled

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<sup>9</sup> See Riley, *supra* note 1, at 1.

<sup>10</sup> DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM, 145 (The New Press 1999).

<sup>11</sup> See Harrison Narcotics Act of 1914, ch. I, 38 Stat. 785 (1914) (current version at 21 U.S.C. 2symbol 810-969 (1982)); RANDALL KENNEDY, RACE, CRIME, AND THE LAW, 57 (Vintage Books 1997).

<sup>12</sup> KENNEDY, *supra* note 7, at 58; see Jefferson M. Fish, Conference: *Is Our Drug Policy Effective? Are There Alternatives?*, 28 FORDHAM URB. L.J. 3, 180 (2000)(stating that the passage of the Harrison Narcotics Act was aimed at the suppression of minorities, because it was minorities who were primarily using drugs at that time).

<sup>13</sup> Marsha Ferziger explains that “[w]ith the passage of the Harrison Narcotics Act in 1914, America began the ‘War on Drugs.’” The author goes on to explain that the “War on Drugs” faltered under Ford and

partially in response to the increased use of crack cocaine in some of the United State's large cities, and "media accounts of open drug trafficking, gang violence, and rampant property crime...."<sup>14</sup> These quick fix laws have not managed to significantly impact the amount of drug use in the country, but they have managed to overcrowd our prisons<sup>15</sup> and diverted billions of American dollars from much needed social programs into prison building.<sup>16</sup> The United States Department of Justice Bureau of Justice Statistics reports a steady rise in arrests for drug abuse violations.<sup>17</sup> Notice how the number of arrests sharply peak during the 1980's when the Reagan administration renewed focus on the "War on Drugs."

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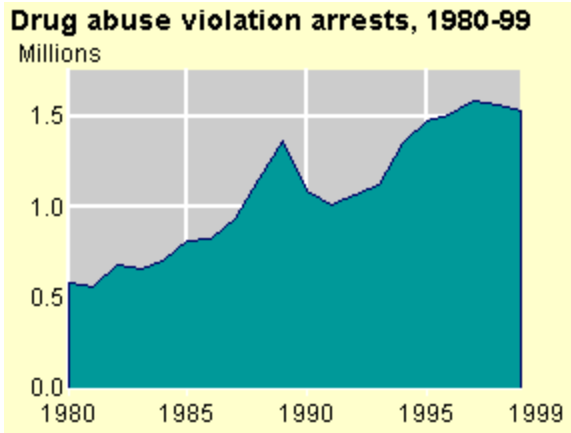
Carter, but that Reagan renewed the war with a vengeance. See Marsha J. Ferziger, *Comment, Monopolies on Addiction: Should Drugs Be Patentable?*, 1994 U. CHI. LEGAL F. 471 (1994).

<sup>14</sup> Richard C. Boldt, Article, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L. Q. 1206 (1998).

<sup>15</sup> According to the United States Department of Justice, Bureau of Justice Statistics, the number of individuals in jail because of drug related convictions have in general risen. Jails: In 1996, 109,200 jail inmates (22%) were being held for drug offenses. The percentage of jail inmates who were being held for drug offenses rose rapidly in the 1980's, and rose at a slower rate during the 1990's. State prisons: From 1990 to 1999 the number of drug offenders in State prison increased by 69% from 148,600 to 251,200. Federal prisons: the largest group of federal inmates were those sentenced for violating drug offenses (61% or 68,360 prisoners) in 1999, this group only comprised 53% (30,470 prisoners) of the inmates in 1990. See Statistic from the United States Department of Justice, Bureau of Justice Statistics, available at <http://www.ojp.usdoj.gov> (visited March 6, 2002).

<sup>16</sup> As of March 5, 2002, the national deficit was \$5,987,408,856,719.35. Department of Treasury Statistics (citing the Bureau of the Public Debt) available at <http://www.publicdebt.trea.gov/opd/opdpenny.htm>. (visited March 6, 2002). See generally, Human Rights Watch: Prison Conditions in the United States, *Prisons in the United States of America*, at <http://www.hrw.org/advocacy/prisons/u-s.htm> (visited Nov. 29, 2001). As a result of prison and jail overcrowding prisons have become more violent with less opportunity for "work, training, education, treatment or counseling" and many jails are "dirty, unsafe, vermin-infested, and lacked areas in which inmates could exercise or get fresh air." *Id.*

<sup>17</sup> Statistic from the United States Department of Justice, Bureau of Justice Statistics, available at <http://www.ojp.usdoj.gov> (visited March 6, 2002).

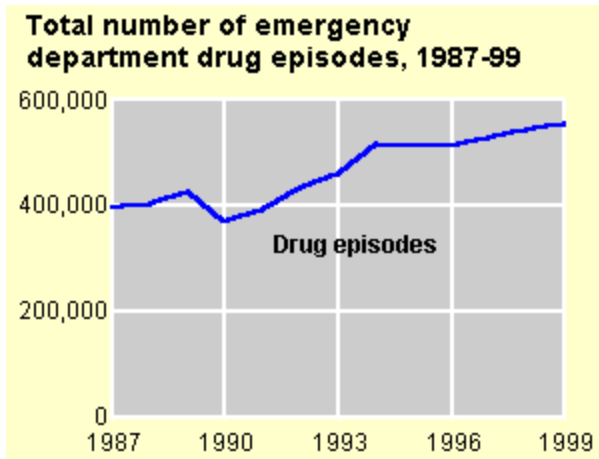


Correlating to the sharp peak of drug relating arrests, Bureau of Justice Statistics reported that public concern about drug use peaked in November of 1989 when a Gallup Poll reported that 38% of those surveyed stated that drug abuse was the most serious problem facing the country.<sup>18</sup> Along with the number of arrests, the amount of money spent on cracking down on drugs dramatically increased. The Bureau of Justice Statistics reports that Federal spending on drug control programs has increased from \$1.5 billion in fiscal year 1981 to \$18.1 billion (enacted) in fiscal year 2001. In total, funding recommended for FY 2002 is an estimated \$19.2 billion.”<sup>19</sup> Despite the increased number of arrests, and the increased spending by the federal government, drug use continues to rise according to the United States Department of Justice, Bureau of Justice Statistics.<sup>20</sup>

<sup>18</sup> 1999 BJS Source of Criminal Justice Statistics (citing the Gallup Poll), *available at* <http://www.ojp.usdoj.gov> (visited March 6, 2002).

<sup>19</sup> Statistic from the United States Department of Justice, Bureau of Justice Statistics (citing the Office of National Drug Control Policy), *available at* <http://www.ojp.usdoj.gov> (visited March 6, 2002).

<sup>20</sup> Statistic from the United States Department of Justice, Bureau of Justice Statistics, *available at* <http://www.ojp.usdoj.gov> (visited March 6, 2002).



## 2. *Three Strikes Laws*

The “War on Drugs,” and other social/legal movements, which evolved out of overblown cultural fears, have fostered a flurry of various mandatory minimum sentencing laws.<sup>21</sup> The “Three-Strikes” law is probably the most notorious of these mandatory sentencing laws (being among the first) and its passage in California resulted in the abuse of justice that happened in Los Angeles to Larry Fisher (featured in the Introduction) who received a mandatory life sentence for three relatively petty thefts.<sup>22</sup> California enacted the toughest “Three Strikes” legislation in the nation.<sup>23</sup> “Three

<sup>21</sup> See generally Symposium, Debate: Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?, 36 A. CRIM. L. REV. 1275, 1280 (1999) (Cokie Roberts describing how the “war on drugs” began in the 1980’s in response to the public’s fear that there was a problem after the overdoses of two prominent individuals: Len Bias and Don Rogers. Roberts states that in enacting the Crime Bill: “[Congress] was obviously responding to what was seen by voters, i.e., parents, as a very genuine concern and a real need to do something about what a lot of people feared was a spreading drug epidemic and one that was harming their children. So, starting in 1984, and as I say, every Congress thereafter, these mandatory minimum penalty provisions were passed by Congress.”; Lisa O. Monaco, *Give the People What They Want: The Failure of “Responsive” Lawmaking*, 3 U. CHI. L. SCH. ROUNDTABLE 735 (1996) (The author argues that congressional representatives do not legitimize themselves by responding to public outcries despite the fact that this is a common misrepresentation. She states that “[t]his belief is so sweeping that representatives of both political stripes are quick to proclaim their loyalty to whichever side has received the most, and often the loudest, support.” The author recognizes that the debate for the Crime Bill “was replete with references to phone calls and individual contacts.” The author states that this leads to “ill-conceived solutions.”)

<sup>22</sup> See Wright, supra note 2, at 16.

<sup>23</sup> See Cal Pen Code § 667 subds. (b)-(i), added by Stats. 1994, ch. 12, § 1, eff. Mar. 7, 1994; see also § 1170.12, added by initiative, Gen. Elec. (Nov. 8, 1994) [Proposition 184] (2002) (note that the difference



Strikes” legislation is the centerpiece of the 1994 federal “Crime Bill.”<sup>24</sup> One commentator called this legislation “hyper-responsiveness to public clamor.”<sup>25</sup>

The thrust of the “Three Strikes” law is that all third-offense felons, regardless of the severity or violence of the felonies, should receive a mandatory sentence of twenty-five years to life in prison. For an individual’s second felony, his sentence is doubled. This bill was immensely popular with the voters. The law was affirmed by three-fourths of the California voters in the statewide initiative of the legislation.<sup>26</sup> After those in the state began to question its effectiveness, the California legislature passed a bill that called for a complete review of the legislation. Then Governor Gray Davis “immediately vetoed the bill, fearing a voter backlash if he supported a move that could eventually lead to watered down criminal laws.”<sup>27</sup>

If what the public wanted was a heavy-handed statute, that is what it was given by the legislature. A by-product of this type of law is a tremendous shortening of plea bargaining and charging since it does not matter if the third offense is a murder or an unarmed robbery of a pizza deliverer. It also gives tremendous bargaining leverage to the prosecutor and police to get information from the defendant in lieu of a felony charge. Not coincidentally, the vast majority of people caught by “Three-Strikes” laws are petty criminals who “tend to be poor people with emotional, drug, or alcohol problems.”<sup>28</sup>

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between the original legislation and the initiative is that the initiative added that any felony will count towards the three strikes, not just specifically enumerated felonies, in addition, the initiative allows the prosecutor to strike prior felonies for any reason, not just because of insufficient evidence. The bill was modified so as to reflect the suggestions in the initiative except for very few minor differences); Margot Hornblower, Three Strikes Are Out: A California Court Cries Foul on the Get-Tough Sentencing Law, TIME, July 1, 1996.

<sup>24</sup> See Wright, *supra* note 2, at 16.

<sup>25</sup> Monaco, *supra* note 18, at 735.

<sup>26</sup> Mike Males and Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, JUSTICE POLICY INSTITUTE, at 1.

<sup>27</sup> See Riley, *supra* note 1, at 1.

<sup>28</sup> Monaco, *supra* note 18, at 735.

According to a study done at the request of former Attorney General Janet Reno, more than thirty-six percent of all prisoners sentenced for drug offenses are “low level drug offenders with no current or prior violent offenses on their records, no involvement in sophisticated criminal activity and no previous prison time.”<sup>29</sup>

Mandatory sentencing laws, as passed by zealous legislators, remove all discretionary sentencing decisions from the judiciary and place them squarely in the hands of the politicians who are vying for “Toughest on Crime” poster child.<sup>30</sup> The discretion of judges has been vilified in the “culture of fear” and such laws satisfy an unquenchable thirst on the part of the public for “real justice.”<sup>31</sup> Judge Stanley Sporkin of the United States District Court for the District of Columbia states that the problem with “three strikes” laws is that “one size doesn't fit all.”<sup>32</sup> He goes on to say that “you've got to give some discretion to the person who looks that defendant in the eye, and sees . . . this person . . . are we going to be able to rehabilitate that person, or do we have to send that person away for ten years? Give some discretion, show some mercy, show some compassion.”<sup>33</sup>

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<sup>29</sup> WILLIAM J. CHAMBLISS, *POWER, POLITICS, AND CRIME* 81 (Westview Press 1999).

<sup>30</sup> See generally *Symposium, supra* note 11, at 1280 (Cokie Roberts remarks that “[t]he basic premise in the crime bill was each party trying to prove that it was tougher than the other party. . . .”)

<sup>31</sup> See generally Thomas R. Goots, *COMMENT: "A Thug in Prison Cannot Shoot Your Sister": Ohio Appears Ready to Resurrect The Habitual Criminal Statute – Will it Withstand an Eight Amendment Challenge?*, 28 AKRON L. REV. 253, 262 (1995) (“It seems as if the general populace and their elected officials support habitual criminal statutes, while those associated with the courts and the judiciary do not. The citizenry approves of the habitual criminal statutes because there is a public perception that judges are too lenient on criminals, and mandatory life terms are needed to get career criminals off the street.”); *Symposium, supra* note 11, at 1282 (Congressman Asa Hutchinson represents the legislative branch in the symposium and explains the justification for the “three strikes” legislation: “What's the strongest justification for mandatory minimums? And I believe the case has been made already, and that is, the public has to have a means of expressing its outrage toward certain offenses that are so harmful to the public.”)

<sup>32</sup> See *Symposium, supra* note 11, at 1285.

<sup>33</sup> *Id.* at 1284-85. Notice that it was eventually the judiciary that gave at least some discretion back to judges. See *People v. Superior Court (Romero)*, 917 P.2d 628 (Cal. 1996). The California Supreme Court held that a trial court, on its own motion, may strike the defendant's prior felonies. See *Romero*, 917 P.2d at 628.

### 3. *Do Three Strikes Law Strike Out Crime?*

Such laws may be what the public demands in order to medicate its fear, and they allow politicians to show that they are meeting the public's desires by being "tough on crime," but do the laws work?

In a recent *Time* magazine article, author John Cloud calls mandatory minimum sentencing "A Get-Tough Policy That Failed."<sup>34</sup> Cloud states flatly that the "Three-Strikes" law, once thought to be a panacea for crime, is not working.<sup>35</sup> It is such a disaster that prominent people who once publicly supported the passage of this law now speak out against it. Examples of this are Mark Klaas who became a recognizable criminal issue advocate after his twelve-year-old daughter, Polly, was tragically kidnapped from her slumber party by a neighbor, raped and murdered.<sup>36</sup> It has dawned on Klaas that unarmed defendants who steals the pizza get the same punishment under the "Three-Strikes" law as a rapist-murderer. In speaking out against these laws, Klass says: "I've had my stereo stolen, and I've had my daughter stolen. I believe that I know the difference."<sup>37</sup> Most mandatory sentencing laws were designed as weapons in the drug war and now, where these laws exist, "it is common to get a longer sentence for selling a neighbor a joint than for sexually abusing her."<sup>38</sup>

Former California Governor Pete Wilson, who conducted a study of the "Three-Strikes" law, concluded that while they sound great to the public, that they are not

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<sup>34</sup> See John Cloud, *A Get-Tough Policy That Failed*, TIME, Feb. 1, 1999, at 48-51.

<sup>35</sup> See *id.* at 48.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* at 49.

working.<sup>39</sup> After the enactment of this legislation, Los Angeles County Public Defender Mike Judge, responded by stating:

This legislation, in my view, is the latest product of the political environment in which politicians get elected by saying they'll be tough on crime and also claiming they will not raise taxes. Well, in my view, this legislation is very much stupid on crime and it's certainly very costly.<sup>40</sup>

The proof that it is not working is that the United States' inmate population has more than doubled since mandatory sentencing became the "hot new intoxicant for politicians."<sup>41</sup> In addition, a 1997 Justice Policy Institute study found that California's declining crime rates were no different than states without a three-strikes law and that those California counties that used implemented the "Three Strikes" legislation the most, did not experience the largest decrease in crime rates (Santa Clara, actually experienced a rise in crime rates after using this legislation more than any county but five others).<sup>42</sup> Cloud reports that these mandatory-minimum sentences, which were supposed to cut down on felony crimes and to slow down drug use, have not worked because they have primarily netted non-violent teenagers, relatively harmless drug addicts, and dumb kids who make bad mistakes but who are not violent criminals.<sup>43</sup> Finally, others charge that African-Americans account for half of those sentenced under the "Three Strikes" legislation, even though African-Americans only make up about 12% of the population.<sup>44</sup>

Despite growing evidence that mandatory sentencing laws fill over-crowded jails, over-punish offenders, add nothing to offender rehabilitation, and are ineffective in reducing crime rates, "Three-Strikes," "Two-Strikes" and even "One-Strike" proposals

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<sup>39</sup> See *id.* at 48.

<sup>40</sup> Males, *supra* note 22 at 1 (quoting Los Angeles County Public Defender Mike Judge).

<sup>41</sup> See Cloud, *supra* note 14, at 49.

<sup>42</sup> See Males, *supra* note 22 at 1.

<sup>43</sup> See Cloud, *supra* note 14, at 50.

<sup>44</sup> See Riley, *supra* note 1, at 1.

have been passed into law.<sup>45</sup> An example of this is Georgia's Democrat Governor Zell Miller, when he came up for re-election, signing the state's "Two-Strikes" law into effect, which the voters had earlier approved by a ballot vote.<sup>46</sup> Regardless of his personal estimation of the "Two Strikes" law, to not sign the bill would surely have cost Miller the election when his opponent would have beat him over the head with it. Not to be outdone, California passed a "One-Strike Rape Bill" which calls for a penalty of twenty-five years to life for sexual assaults, and even for kidnapping or burglary with the *intent* to commit rape.<sup>47</sup> Obviously, the taste for over-kill criminal sentencing legislation still exists in the public psyche and politicians are willing to serve up those dishes. A fascinating (and costly to the public) side effect of this legislation continues to be the boundless growth of the prison industry. New York, for instance, has put \$600 million into prison construction (while cutting \$700 million dollars from higher education).<sup>48</sup> It should be no surprise, therefore, that the fattest PAC fund contributor to the passage of the "Three-Strikes" law campaign in California came from the California Correctional Peace Officers' Association (to which all prison guards belong).<sup>49</sup> As long as the public still wants tough, indiscriminate treatment of offenders, "states will have to deal with the implications of those sentiments by putting up more buildings with bars and concertina wire" and organizations like the CCPOA will continue to press for the draconian laws which ensure their job security.<sup>50</sup>

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<sup>45</sup> See Wright, *supra* note 2, at 18.

<sup>46</sup> See *id.* at 19. The statute states that anyone convicted twice for murder, armed robbery, kidnapping, aggravated child molestation, rape, aggravated sodomy or aggravated sexual battery must be sentenced to life without parole. See Issues 2001, at [http://www.issues2000.org/Domestic/Zell\\_Miller\\_Crime.htm](http://www.issues2000.org/Domestic/Zell_Miller_Crime.htm).

<sup>47</sup> See Wright, *supra* note 2, at 18

<sup>48</sup> See *id.*

<sup>49</sup> See Dan Pens, *The California Prison Guards' Union: A Potent Political Interest Group*, in *THE CELLING OF AMERICA* 134, 134 (Daniel Burton-Rose et al. eds., 1998).

<sup>50</sup> See Marks, *supra* note 28, at 1.

#### 4. *Michigan Gets Into the Act: The 650 Lifer Law*

Michigan has had its own notorious part in the “get tough” sentencing laws with its infamous 1973 “650 Lifer Law.”<sup>51</sup> This mandatory sentencing law demands life-without-parole for possession with intent to deliver at least 650 grams of heroine or cocaine.<sup>52</sup> This inflexible, and over-reaching law was enacted by then Governor William Milliken with the tag line that it would not only put away the bad guys, it would deter future crime by catching major drug dealers.<sup>53</sup> What the law has caught is poor, young, stupid people, not drug dealers, who were confronted with paying for their stupidity with the rest of their lives.<sup>54</sup> Milliken has since called this law his “biggest mistake” as a politician and in the summer of 1998, Governor John Engler set up new guidelines and rolled-back the “650 Lifer Law” and paroled all “650 Lifers” who had served fifteen years.<sup>55</sup>

#### 5. *Is the Tide Turning?*

After twenty-five years of mandatory sentencing laws in America, there is finally a sporadic sentiment for reforming the laws. John Dunne, a former Republican legislator from New York, is lobbying his state legislature to look at treatment-based alternatives and judicial discretion in sentencing: “This [mandatory sentencing] was a good idea 25 years ago, but the sad experience is that it has not had an effect. Behind closed doors, virtually everyone [including state legislators] says these drug laws are not working, but

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<sup>51</sup> MICH. COMP. LAWS ANN SECTION 333.7401(2)(a)(i) (1973) (current version at MCL 333.7401(2)(a)(i) (2002)).

<sup>52</sup> See Marks, *supra* note 28, at 1.

<sup>53</sup> See Cloud, *supra* note 14, at 50.

<sup>54</sup> See *id.*

<sup>55</sup> See Marks, *supra* note 28, at 2. In 1998, Governor John Engler changed the law from a mandatory life sentence to “life or any term of years, not less than 20” and also made this effective for those already sentenced under the statute, making them eligible for parole. Public Act 314 (1998).

they cannot say it publicly.’<sup>56</sup> Dunne *can* say it publicly only because he is no longer seeking election or re-election votes from a populace laced with pop culture fear. A judge who has stepped down from the bench and no longer needs to pander to public phobias, U.S. District Judge J. Lawrence Irving, is highly critical of mandatory sentencing and now says he left the bench because he could not “continue to give out sentences [he] feels in some instances are unconscionable.”<sup>57</sup> A retired police chief detective, now out of the target zone for political correctness, says “police officers and all other Americans...are being lied to by ‘political leaders.’ As someone who has been on the front lines of the war on drugs, I know [mandatory sentencing laws] will never work.”<sup>58</sup>

It is no accident that those who come forward to denounce the usefulness and ultimate justice of legislated mandatory sentencing, are those who no longer have a stake in the game of acquiring political power.

## B. Sex Offender Laws

Other laws which have mandated non-discretionary punishment for certain criminal behavior are the sex offender registration laws. These laws are not yet old enough to evaluate with the same perspective of time as the “Three Strikes” laws, nor is there yet any group, aside from the offenders themselves, willing to criticize the ramifications that these laws have rendered.

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<sup>56</sup> See Cloud, *supra* note 14, at 51.

<sup>57</sup> Eva Bertram and Kenneth Sharpe, *War Ends, Drugs Win*, THE NATION, Jan. 6, 1997, at 11.

<sup>58</sup> See *id.*

Like the more generic mandatory sentencing laws, sex offender registration laws have grown out of a culture of fear.<sup>59</sup> Unlike the cultural perception of crime in most of the earlier part of the twentieth century, crime today is perceived by the culture as being, not only more pervasive, but far more sinister because it is no longer rational.<sup>60</sup> All cultures, including our own, have always heard of rape, theft, and murder, but in today's culture the news media and entertainment fiction are full of stories of children being abducted out of their own homes, serial killers lurking in the darkness to murder innocent people in cold blood and “[m]urders...perpetrated with no reason or motive except for the blood lust of psychotics—monsters who take the form of ordinary people.”<sup>61</sup> The reassurance of “normal” human motives in criminal behavior (as we might have witnessed in the crime novels of such writers as Agatha Christie) is shattered by terrorists who would fly planes into crowded buildings and kill thousands of people, including themselves, and by serial killers who eat their victims-- apparently for fun.

The culture of fear has had a real impact on legal order. It has certainly played a role in producing the wave of toughness on crime that has swept over the country, leading to an explosion of incarceration, draconian drug policies, the three strikes law in California, and statutes such as Megan's law: “The public expresses outrage over brutal crimes sensationalized in the media. Then, legislators and interested groups respond with tailored legislation addressing the cycle of fear sex offenders cause.”

### 1. *The Spread of Megan's Law and the Tangle of the Legislation*

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<sup>59</sup>Raquel Blacher, *Comment: Historical Perspective of the “Sex Psychopath” Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889 (1995)

<sup>60</sup> See Friedman, *supra* note 5, at 8-9.

<sup>61</sup> See *id.* at 9.



Every state has some sort of registration law today, some variant of Megan’s law which hangs a kind of leper’s bell around the neck of sex offenders. The movement spread across the country like a prairie fire. The crime that inspired the original statute tapped into citizens’ worst nightmares.<sup>62</sup>

In 1994, the Michigan Legislature got an early start in the sex offender registration prairie fire by passing the Michigan Sex Offender Registration Act.<sup>63</sup> This Act requires convicted sex offenders to register with their local police agency. Basically, the 1994 Act initially forced convicted sex offenders to register on a “police view only” list and the list was not made public.<sup>64</sup>

Later in 1994, the Jacob Wetterling Act<sup>65</sup> was passed in federal legislation which requires that a state must release confidential registration information to the public. Furthermore, under the Jacob Wetterling Act, registration on a sex offender list is required for a minimum of ten years, and an individual must register for life if he or she is a repeat offender or has been convicted of an aggravated offense.<sup>66</sup> If a state chooses not to follow the guidelines set forth by the Jacob Wetterling Act, the state gives up ten percent of its federal funds.<sup>67</sup> Fifty states, including Michigan fell quickly into line with Wetterling and now require sex offenders to register and to comply with the federal guidelines of disclosure.<sup>68</sup> The public view list in Michigan’s Act was amended to be put

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<sup>62</sup> See *id.* Megan Kanka, a little girl, was sexually assaulted and killed by a convicted and released sex offender who was one of Megan’s neighbors. See Karen L. Folster, *High Court Studies: The New Jersey Supreme Court in the 1990’s: Independence is only Skin Deep*, 62 ALB. L. REV. 1501, 1518 (1999).

<sup>63</sup> See MICH. COMP. LAWS ANN. § 28.721-32 (2000). In 1994, Congress enacted legislation to encourage the states to develop convicted sex offenders registration legislation, including systems to disseminate registration information to the public. See 42 U.S.C. § 14071 (1994); 42 U.S.C. § 14072 (1994).

<sup>64</sup> See MICH. COMP. LAWS ANN. § 28.722(a)(ii) (1994).

<sup>65</sup> 42 U.S.C. § 14071 (1994).

<sup>66</sup> § 14071.

<sup>67</sup> § 14071.

<sup>68</sup> SCOTT MATSON & ROXANNE LIEB, *SEX OFFENDER REGISTRATION: A REVIEW OF STATE LAWS 1* (Washington State Institute for Public Policy, rev. 1996).

on the Internet to accommodate public viewing, in addition to being available at state and local law enforcement agencies.<sup>69</sup> The public view list contains the name of the convicted sex offender, any aliases that he or she might have, social security number, physical description, date of birth, address, and if available: photograph, fingerprints, blood type, DNA and convictions.<sup>70</sup> Internet information is simply accessed through an Internet search or an exact name search.<sup>71</sup> Pointedly, the public registration list does not differentiate the seriousness of the offenses for which the sex offender was convicted, so the indiscriminate list contains former juveniles who had consensual sex with their under-age girlfriends alongside serial rapists.<sup>72</sup>

In 1996, the federal Pam Lyncher Act, or Megan's Law, added the requirement that registrants have to report any new address to the FBI and to the local authorities in the area where they are moving (even across state lines), no later than ten days after the registrant moves there.<sup>73</sup> Through this Act, a registrant cannot move anywhere in the United States and outrun big brother and the stigmatization of a public labeling. The enforcement of the sex offender laws has created a hodge-podge of local legislation and policies in all fifty states.

The author of this Comment can attest to the hodge-podge nature of these legislations as witnessed while the author was serving in the prosecutor's office and researching whether to issue arrest warrants for individuals who allegedly failed to update their registration information on the sex offender registry. Not only are the records

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<sup>69</sup> See MICH. COMP. LAWS ANN. § 28.728 (1996). The current address for the public registry is located at the Michigan State Police Department's homepage, at <http://www.mipsor.state.mi.us/> (visited Jan. 27, 2001).

<sup>70</sup> See MICH. COMP. LAWS ANN. § 28.727(1)(a)-(e), (2) (2000).

<sup>71</sup> See MICH. COMP. LAWS ANN. § 28.728

<sup>72</sup> See *generally*, MICH. COMP. LAWS ANN. § 28.721-32 (2000).

<sup>73</sup> See 42 U.S.C. § 14072.

difficult to find, but they are scattered amongst the Michigan State Police offices in Lansing and in the individual probation departments across the state. It became readily apparent that the right hand of law enforcement did not know what the left hand of the local probationary agencies was doing. In more than one instance, especially in cases closer to the enactment of the law and its many revisions, the local probation officers, who understandably did not fully grasp the Act's many tentacles, wrongfully advised offenders regarding their registration. Also, in other instances, especially when the Act was amended to apply to individuals who previously were not required to register, the offender was never even given the information that he or she had to comply with the Sex Offender Registration Act.

## 2. *The Plethora of Legal Challenges*

Understandably, legal challenges to sex offender registration laws have come from several fronts. Constitutionally, strong arguments can be made that these laws bend several amendments.<sup>74</sup> It has been argued, for instance, that registration infringes upon a liberty interest, which thus triggers the protections of due process. In Michigan, thus far, none of the courts have found that a convicted sex offender who is required to register on the public list has a constitutionally protected liberty interest. Even when the Michigan courts recognize any type of negative effect that has stemmed from being a publicly identified sex offender, they see these consequences as being the fault of the registrant or of society's reaction to the list, not the fault of the law.<sup>75</sup> The offender plaintiffs in *Akella*

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<sup>74</sup> See, e.g., BreeAnna K. Conover, *Due Process: The Pearl of our Scarlet Letter Law* (2001) (unpublished law review paper, Michigan State University-Detroit College of Law) (on file with author) (arguing that the application of the Michigan Sex Offender Registration to juvenile offenders violates Due Process).

<sup>75</sup> See *Akella v. Mich. Dep. of State Police*, 67 F. Supp. 3d 716, 727-28 (E.D. Mich. 1999) (finding that the registrants did not have a protected liberty interest).

*v. Michigan Department of State Police*<sup>76</sup> argued that they *did* have a constitutionally protected liberty interest because releasing their registration information to the public subjects them to ostracism, harassment and humiliation.<sup>77</sup> The plaintiffs also argued that the release of the registration information restricts their ability to be employed, to find housing, and to be “free from threat of physical harm.”<sup>78</sup> The United States District Court for the Eastern District of Michigan, Southern Division, found that the plaintiffs *did not* have a protected liberty interest because “such information is already a matter of public record.”<sup>79</sup> Obviously the court fails to discern the difference between the public dissemination of the sex offender registration list on the Internet from information that exists on some public record buried in some dusty office drawer. As of January 27, 2001, there have been almost four million “hits” on Michigan’s sex offender registration page.<sup>80</sup> The court said as much.<sup>81</sup> This same court, a year earlier noted that any negative consequences that the offender suffered as a result of being on the sex offender list were basically his or her own fault.<sup>82</sup> The courts have been equally unsympathetic to the myriad of other types of challenges to the Constitutionality of sex offender registration laws. The crux of the Michigan courts’ position (and almost every other court in the nation) on this issue has been that they vehemently deny that registration is a form of punishment (of a crime which has yet to be committed), but it is rather the simple dissemination of already public information.<sup>83</sup> Too bad if it results in sometimes

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<sup>76</sup> 67 F. Supp. 3d 716 (E.D. Mich. 1999)

<sup>77</sup> *See Akella*, 67 F. Supp. 3d at 728.

<sup>78</sup> *See id.*

<sup>79</sup> *See id.* at 729.

<sup>80</sup> There were 3,941,918 hits as of January 27, 2001 at [www.mipsor.state.mi.us/](http://www.mipsor.state.mi.us/).

<sup>81</sup> *See id.*

<sup>82</sup> *See Lanni v. Engler*, 994 F. Supp. 849, 857 (E.D. Mich. 1998) (also finding that registrants did not have a liberty interest protected by due process).

<sup>83</sup> *See Doe v. Kelley*, 961 F. Supp. 1105, 1112 (W.D. Mich. 1997); *Lanni*, 994 F. Supp. At 855.

devastating and often unending hardship for the former offender. Michigan courts stand firm that any public stigmatization, ostracism or vigilantism are the results of the independent actions of society in which the government has little or no responsibility.<sup>84</sup> Politically, these laws have found great public support. Not surprisingly, but not understandably, the courts nationwide have almost universally rebuffed every argument and upheld nearly every nuance of sex offender legislation.<sup>85</sup>

### 3. *The Place of the Sex Offender in the Culture of Fear*

Arguments which support this version of pre-commitment punishment of sex offenders who have already “paid” for their crimes, include the theory that “sex offenders pose a high risk of reoffending”<sup>86</sup> and that the public has a right to know who is likely to commit a sex crime in their community. That convicted sex offenders pose a higher risk of committing sex crimes is no doubt true, but it is probably also true that larcenists, shoplifters, weapons offenders and even murderers, are more likely to commit another similar crime and no such public registration list is demanded for each of these offenses. This illustrates the emotional nature of the support for sex offender registration lists, and the cowardly reluctance of the legislative and judicial communities to fairly evaluate the consequences and stigmatization of registration laws. “Registration of sex offenders implies that these offenders are the most dangerous, while other types of offenders present similar or greater risks.”<sup>87</sup> The horrendous social consequences, some lifelong, to the offender and to his or her family are nearly incalculable.

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<sup>84</sup> See *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189 (1989) (making clear that due process does not protect an individual from private actors).

<sup>85</sup> See *MATSON*, *supra* note 45, at 1.

<sup>86</sup> See *id.* at 3.

<sup>87</sup> *Id.* at 4.

Rightly or wrongly, it is difficult to find a group of individuals which more closely fits the focus of the culture of fear than do sex offenders. The culture of fear, particularly prior to September 11, 2001, centered most especially on this group of potential reoffenders. However, this community of fear, together with “the knowledge of an offender’s name, address, and physical appearance, may incite ‘vigilantes’ to seek their own justice against convicted sex offenders.”<sup>88</sup> Two sex offender registrants in New Jersey, for instance, describe being physically assaulted after appearing on the public sex offender registration list.<sup>89</sup> In another instance, a father and son broke into the house of an individual who was registered as a sex offender and ended up assaulting a house guest whom they mistook for the offender.<sup>90</sup> Registrants have been physically threatened, lost their jobs, had their families harassed, been assaulted, and had their houses burned down.<sup>91</sup> In a study done by the Oregon Department of Corrections, they also found that a number of offenders experience harassment, including assault on themselves and their property.<sup>92</sup> Parole and probation officers in the same study report that offenders have great difficulty in finding a place to live and a job to support themselves and their families.<sup>93</sup> Employers who are willing to hire *former* sex offenders are not willing to do so when the offender’s name is put on a public list.<sup>94</sup> Legislators, when weighing the perhaps over-punitive nature of mandatory sex offender lists against the public glory of being viewed as “tough on crime” shed no repentive tears for the registrants.

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<sup>88</sup> Chriandrea L. Turner, *NOTE: Convicted Sex Offenders v. Our Children; Whose Interest Deserve the Greater Protection?* 86 KY. L.J. 477, 497 (1997).

<sup>89</sup> *See E.B. v. Verniero*, 119 F.3d 1077, 1089 (3<sup>rd</sup> Cir. 1997) (holding that sex offender registrants have a protected liberty interest under New Jersey’s state constitution).

<sup>90</sup> *See Verniero*, 119 F.3d at 1089.

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

## C. JUVENILES AS TARGETS OF THE CULTURE OF FEAR

### 1. *Juvenile Registrants*

Legislators also shed no tears for another group which has been targeted for punitive legislation: juveniles. Under the topic of sex registration lists, juveniles suffer special punishment. The Michigan's Sex Offender Registration Act is particularly harsh on juveniles. In 1999, Michigan Senate Bill number 566<sup>95</sup> made one of the most important and punitive amendments to the Michigan's Sex Offender Registration Act. The amendment requires juvenile sex offenders, upon reaching the age of eighteen, to register on the public sex offender list.<sup>96</sup> In fact, only four other states also ignore the mandate of sealing juvenile records at the age of twenty-one and require juveniles to be added to the adult sex offender lists.<sup>97</sup> This amendment forces the registration of eighteen-year-olds on the public list who were convicted of Criminal Sexual Conduct in the first or second degree, when they were juveniles, *which could include consensual sex between minors*.<sup>98</sup> It could also include juveniles who "pled" because they were assured of minimal punishment and the later sealing of their juvenile record.<sup>99</sup> The legal challenges regarding juveniles and the sex registration lists have included the charge of cruel and unusual punishment (a violation of the 8<sup>th</sup> Amendment), and the charge that registrants are not given a case-by-case hearing when they reach eighteen: a violation of

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<sup>95</sup> S. Res. 566, ... (Mich. 1999).

<sup>96</sup> See MICH. COMP. LAWS ANN. § 28.728 (2000).

<sup>97</sup> See MATSON, *supra* note 45, at 8 (those states are California, New Jersey, South Carolina and Washington).

<sup>98</sup> See MICH. COMP. LAWS ANN. § 28.728 (2000). It should be noted at this point that when speaking of juveniles, this Comment is not referring to those juveniles who have been waived to adult court. In Michigan, juveniles between the ages of fourteen to seventeen years of age who are charged with Criminal Sexual Conduct in the first degree may be automatically waived to adult court. See MICH. COMP. LAWS ANN. § 600.060(1), (2)(a) (1994). A juvenile between the ages of fourteen and seventeen years of age who is charged with Criminal Sexual Conduct in the second degree *may* be waived to adult court. See MICH. COMP. LAWS ANN. § 712A.4(1) (1993 & Supp. 2000).

<sup>99</sup> See *The Injustice Line*, at <http://www.injusticeline.com/registra.html>.

procedural due process.<sup>100</sup> The very real consequence of juvenile registration is that the juveniles become “pariahs of our society.”<sup>101</sup> This aspect of the Sex Offender Registration Act is shocking to many adults who were adjudicated for sex crimes in juvenile court since there has traditionally been a presumption that juvenile records are confidential and therefore are not already public information (as the court uses against adults who argue for liberty interest). Historically the juvenile court was created in order to emphasize rehabilitation for juveniles.<sup>102</sup> Many studies find that recidivism among juvenile sex offenders is no higher than among other types of offenders, and some “report a low rate of recidivism among juvenile sex offenders.”<sup>103</sup> The low recidivism rate, according to a Macomb County Assistant Prosecutor Steve Kaplan, may result from the fact that the registry “doesn’t distinguish between dangerous predators and people convicted of consensual statutory rape.”<sup>104</sup> Kaplan also argues that there should be hearings, particularly for juveniles, before “just cluttering the books with thousands of people [many of whom] pose no danger.”<sup>105</sup> Unfortunately, these bloated lists not only don’t serve the public, but they have a very real impact on many former juvenile offenders, arguably with a lifetime of punishment, isolation, and incapacitation.

## 2. *Turning Our Backs on Parens Patriae*

Observers of the juvenile court system will not be surprised at the punitive nature of the amendments to the Sex Offender Registration Act as regards minors. The trend in

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<sup>100</sup> See MATSON, *supra* note 45, at 5.

<sup>101</sup> Bruce J. Winick, *Special Theme: Sex Offenders: Scientific, Legal, and Policy Perspective: Sexually Violent Predator Laws and Registration and Community Notification Laws: Policy Analysis: Sex Offender Law in the 1990’s: A Therapeutic Jurisprudence Analysis*, 4 PSYCH. PUB. POL. AND LAW 505, 505 (1998).

<sup>102</sup> LARRY SIEGEL & JOSEPH SENNA, JUVENILE DELINQUENCY 428-38 (West Publishing, 6<sup>th</sup> ed., 1997).

<sup>103</sup> Daniel L. Feldman, *The “Scarlet Letter Laws” of the 1990’s: A Response to Critics*, ALB. L. REV., 1081, PP 1081, PP (1997).

<sup>104</sup> Dee-Ann Durbin, *Sex Offenders May not Register Address Changes, But Who’s Checking?*, THE DETROIT FREE PRESS, July 5, 1999, at A3.



cultural and legal attitude toward juvenile crime reflects a hardening and punitiveness foreign to the court's once reputed role of *parens patriae*.<sup>106</sup>

This trend emanates from shocking cases such as the one on February 29, 2000 when a six-year-old girl named Kayla Roland was shot by another six-year-old child.<sup>107</sup> The bullet went through Kayla's arm, through her heart, and ricocheted off her sternum, traveling down her leg.<sup>108</sup> When her stunned teacher heard the shot and ran into the room, incredibly, Kayla still stood in shock, looking at herself in a mirror.<sup>109</sup> "I'm dying" Kayla said, and fell to the floor.<sup>110</sup>

Isolated instances of violence by very young children fuels support for tougher, punitive legislation for juvenile offenders. Adult prosecution of younger and younger children is becoming more common. The "get tough" policies that American society is seeing in dealing with adult crime, is also influencing prosecutorial enthusiasm in dealing with children. As a result of these prosecutions, in 1995, there were 107,637 juveniles in the custody of the United States, a forty-five percent increase from 1975.<sup>111</sup> This number does not include children who are presently going through the system or who are on probation.<sup>112</sup> This number also doesn't include children who are being prosecuted as adults and who are being housed in adult facilities.<sup>113</sup> The proportion of youth being held

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<sup>105</sup> *See id.*

<sup>106</sup> *See* SIEGEL, *supra* note 79, at 19 (stating that "although the *parens patriae* concept is still applied to children whose law violations are not considered to be serious, the more serious juvenile offenders are being declared 'legal adults' and placed outside the jurisdiction of the juvenile court").

<sup>107</sup> Interview by Julie Brandon, State of Michigan Forensics Expert, with eyewitnesses to the shooting, including the teacher in whose classroom the incident occurred, and the child shooter, Mt. Morris, Mich. (Feb. 29, 2000).

<sup>108</sup> *See id.*

<sup>109</sup> *See id.*

<sup>110</sup> *See id.*

<sup>111</sup> *See* Bradford Smith, *Children in Custody*, in CRIME AND DELINQUENCY, date, available at [http://web6.infortrac.galegroup.com...n=45!ar\\_fmt?sw\\_aep=lom\\_falconbaker](http://web6.infortrac.galegroup.com...n=45!ar_fmt?sw_aep=lom_falconbaker).

<sup>112</sup> *See id.*

<sup>113</sup> *See id.*

in juvenile facilities has also increased by about twenty percent in the same time period.<sup>114</sup> Amazingly, however, the number of public juvenile facilities (whose funding must be approved by elected political leaders) has actually decreased in the same time period.<sup>115</sup> Michael Farenza, president and chief executive of the National Mental Health Association, says that “[m]ost Americans would be appalled if they knew the conditions that our children are subjected to in juvenile justice facilities.”<sup>116</sup> Violent and non-violent juvenile offenders are thrown together in outdated facilities and the institutions do not meet basic health care criteria or take active steps to prevent suicide: “Children held in juvenile facilities have been subjected to punitive solitary confinement and cruel use of force and restraints and many of those with mental health problems have been denied adequate service.”<sup>117</sup> These detention centers seem to have lost all sense of the spirit of *parens patriae*. Some of the newer legislation, such as California’s Proposition 21, which passed in March of 2000, is clearly geared to stuffing the juvenile detention centers and adult courts with even more children.<sup>118</sup> Polls show that a majority of California voters see young people as part of the “superpredator” generation and do not care about unreasonable infringement of their civil liberties.<sup>119</sup> Proposition 21, billed as an “anti-gang” strategy, is adding more than 8,000 additional California children to the adult criminal court each year.<sup>120</sup> Under Proposition 21, justice has become year-long prison sentences for fourteen-year-old graffiti writers and felony charges for minors

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<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> *NMHA has evaluation List for Juvenile Facilities*, MENTAL HEALTH WEEKLY, date, available at [http://web6infotrac.galegroup.com...0\\_A57822567sw\\_aep=lom\\_falconbaker](http://web6infotrac.galegroup.com...0_A57822567sw_aep=lom_falconbaker).

<sup>117</sup> Rob Freer, *Human Rights in the USA: Land of the Free?*, LANCET, date, available at [http://web6infotrac.galegroup.com...n=39!fmt?sw\\_aep+falconbaker](http://web6infotrac.galegroup.com...n=39!fmt?sw_aep+falconbaker).

<sup>118</sup> See ACT; see generally, Robin Templeton, *California Youth Take Initiative – Prop 21 Prescribes More Prison Time for Juveniles, Who are Rising Up Against It*, THE NATION, March 13, 2000, at 19.

<sup>119</sup> See Templeton, *supra* note 95, at 20.

found guilty of any activity loosely defined as “gang recruitment.”<sup>121</sup> Add the “Three Strikes” law to Prop 21 and the result could be a kid doing a life sentence for three stupid juvenile acts.

“Get tough” policies with juveniles not only have grown out of the culture of fear, but they reflect a growing frustration on the part of politicians to find effective solutions for deviant juveniles. When the public yells, the legislators begin rolling out ill-thought-out bills, which give the whole bottle of Castor Oil when only a teaspoon would probably do the job. A very recent case in point is the penchant last school year for several public school students to “call in” fake bomb threats to their schools. A public uproar has resulted in the passage in Michigan of a senate bill, which is convoluted, hasty, and punishes the apprehended pranksters in excess of drunk drivers. Under Senate Bill 645, juveniles under fourteen who are found responsible for making a bomb threat would not be eligible for obtaining a driver’s license until age seventeen.<sup>122</sup> Individuals from fourteen to twenty-one would be prohibited from receiving driver’s training for three years and if they already have a license, it is suspended for three years with one year of a restricted license tacked on.<sup>123</sup> At least one senator, Burton Leland, a democrat from Detroit has said that the punishment in this bill does not fit the crime.<sup>124</sup> (He must be a long ways from reelection). The public will see a headline in the paper regarding a bill being passed to stop school bomb threats and will be satisfied that the legislature is doing its duty.

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<sup>120</sup> *See id.*

<sup>121</sup> *See* ACT; Templeton, *supra* note 95, at 19.

<sup>122</sup> S. Res. 566 (Mich. ).

<sup>123</sup> *See id.*; MICH. COMP. LAWS ANN. Section 257.625. Compare these punishments to that for a drunk driver, which are....

<sup>124</sup> *Bill Targeting School Bomb Threats Clears Senate*, LEGISLATIVE/ EDUCATION NEWS, Dec. 5, 2001, at <http://web.gisd.k12.mi.us/gisd/stfederal/legnews/BillTargeting.htm>.

### 3. *The Death Penalty for Juveniles*

Given the harsher attitude of American culture toward juvenile offenders, it should be no surprise at the number of juveniles who are tried and sentenced as adults and given the extreme sentences of life in prison and even capital punishment. As of March 2002, there were eighty-one death row inmates (all male) sentenced as juveniles and eighteen men who have been executed for crimes committed as juveniles since 1976.<sup>125</sup> All five juvenile offenders put to death in the world since October 1997, were killed in the United States.<sup>126</sup>

In 1988 and 1989, The United States Supreme Court determined at what age a juvenile could commit a capital crime and still be eligible for the death penalty without violating the evolving standards of decency<sup>127</sup> under the 8<sup>th</sup> Amendment Cruel and Unusual punishment clause. In *Thompson v. Oklahoma*,<sup>128</sup> the Court determined that it violated the 8<sup>th</sup> Amendment to execute an individual who was fifteen-year-old at the time of the crime. But, in *Stanford v. Kentucky*,<sup>129</sup> a case heard a year later, the Court decided that it does not violate the 8<sup>th</sup> amendment to execute someone who was just sixteen-years-old at the time of the crime. Despite the Supreme Court's finding that the death penalty for those sixteen-years-old and older does not violate the standards of decency of our society, both the American Law Institute and the American Law Association oppose

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<sup>125</sup> Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – December 31, 2001*, available at <http://www.law.onu.edu/faculty/streib/juvdeath.pdf> (latest updated n March 8, 2002).

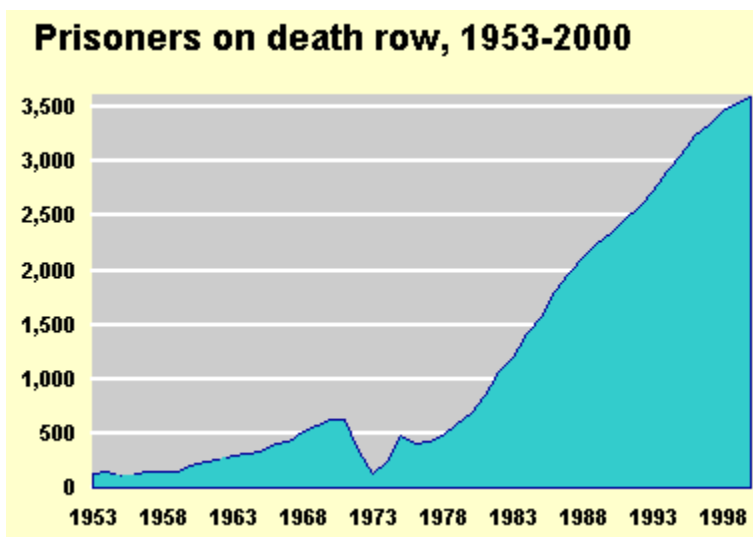
<sup>126</sup> *USA: Three Child Offenders Scheduled for Execution in January*, AMNESTY INTERNATIONAL WEBPAGE, at <http://www.amnesty.org.uk/cgi-bin/amnesty/storage.cgi?id=1565> (2000).

<sup>127</sup> See generally *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion) (determining that the focus should be on the evolving standards of decency in society in order to determine whether the sentence is proportional under the 8<sup>th</sup> Amendment).

<sup>128</sup> 487 U.S. 815 (1988).

the death penalty for individuals who were under the age of eighteen at the time of the crime, not to mention that Pope John Paul II condemned the death penalty completely.<sup>130</sup> As of 2001, every other death penalty nation has prohibited the execution of juvenile offenders.<sup>131</sup> The United Nations Convention on the Rights of the Child prohibits imposing the death penalty on individuals for crimes that they committed while under the age of eighteen.<sup>132</sup>

Capital punishment is perceived as the ultimate method to extinguish those demons in our society (and in our nightmares). The number of inmates on death row has dramatically escalated over the years.<sup>133</sup>



Politicians use capital punishment, just as they have used all mandatory sentencing laws, as a simplistic solution to “rampant” crime. Professor Victor Streib concludes that the juvenile death penalty is of little value to society. He states that it is

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<sup>129</sup> 492 U.S. 361 (1989).

<sup>130</sup> See Victor L. Streib, *Excluding Juveniles from New York's Independent Death Penalty*, 54 ALB. L. REV. 625, 653-677 (1990).

<sup>131</sup> See Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Execution for Juvenile Crimes, January 1, 1973 to December 31, 2000*, at [www.law.onu.edu/faculty/streib/juvdeath.html](http://www.law.onu.edu/faculty/streib/juvdeath.html).

<sup>132</sup> See *id.*; United Nations Convention Article 37(a).

not a deterrent, especially considering that the alternative is life in prison. He cites the case of Heath Wilkins who volunteered for the death penalty, who was sixteen-years-old at the time of his crime.<sup>134</sup> Streib further states that a death penalty for juveniles ignores the “universally accepted truisms about maturation beyond adolescence,” and is an “excessive and overly emotional deference” to the need for retribution, and imposes great costs upon criminal justice systems.<sup>135</sup>

Executions themselves are sanitized and privatized so as not to dirty the American conscience.<sup>136</sup> Citizens are basically shielded from the reality of government sanctioned murder. The condemned, including those condemned for crimes as minors, are locked away on death row (incommunicado from the media and the public), forgotten in a living hell before they are clinically (and as “cleanly” as possible) executed in the middle of the night, deep in the bowels of a prison. Interviews and media coverage are generally so limited that society is not exposed to much of anything which might humanize the condemned.<sup>137</sup> It is simple “justice” at its finest. It is a simple answer to a complicated question: how do we find a way to feel safe from the predators? Pull the right lever, punch the right chad out and “voila!” that tough politician who supports the death penalty

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<sup>133</sup> See The United States Department of Justice Bureau of Justice Statistics, at [www.ojp.usdoj.gov](http://www.ojp.usdoj.gov) (visited March 6, 2002).

<sup>134</sup> See *id.*; Wilins v. Bowersox, 933 F. Supp. 1496 (1996).

<sup>135</sup> See Streib, *supra* note 129, at 653-677.

<sup>136</sup> Thirty-six states plus the United States Military and the Federal Government, use the method of lethal injection, with 597 executions having used lethal injection. Only ten states still use electrocution, with all but two of these states offering lethal injection as an alternative. See *Methods of Execution*, at <http://www.deathpenaltyinfo.org/methods.html> (visited March 4, 2002). John D. Bessler argues that laws which require late-night executions “allow states to evade the television’s probing eye and thus to escape its power to influence public opinion.” See Jonathan S. Abernethy, *The Methodology of Death: Reexaminign the Deterrence Rationale*, 27 COLUM. HUMAN RIGHTS L. REV. 379, 395 (1996).

<sup>137</sup> The United States Supreme Court upheld prison regulation that prevent the media from conducting interviews with death row inmates. See *Houchins v. KQED*, 438 U.S. 1 (1978); *Saxbe v. Washington Post*, 417 U.S. 843 (1974). See generally 28 CFR section 26.4(f): prohibits photographic, audio and visual recording devices at federal executions. The Attorney General has the power to control federal prisons. He

will make everything better. John D. Bessler calls for televised executions to restore accountability to capital punishment and to elected officials for whom the death penalty has become an expedient vehicle for gaining political popularity.<sup>138</sup> Bessler argues that opinion polls that show that the public favors execution are not accurate because the polls do not reflect the true feelings of the public because the public is ill informed about the social, political and economic issues that surround capital punishment.<sup>139</sup>

## II. ANALYSIS

### A. THE CREATION OF THE PROBLEM: CONGRESS' RESPONSIVE LAWMAKING

In determining that Congress cannot legitimize itself by focusing on “phone call democracy,” or the influence of individuals, Lisa O. Monaco states that Congress is drawn to responsive law making because that is what the public demands:

[w]e are continually talking about crime and the fear that permeates our society and the phone calls that come and the letters that come and the pleas that we have from people who feel helpless out there because they are afraid. But we respond in here because we are afraid if we do not pay attention to those voters there is going to be something to pay out there.<sup>140</sup>

Monaco states that legislation, such as the Contract with America, was created for just this reason: Congress was trying to legitimize itself by responding directly to public sentiment.<sup>141</sup> After an examination of the Congressional Record, Monaco discovered that there were 250 mentions of phone call tallies to Congressmen's offices during the session

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is given the authority to promulgate rules under 18 U.S.C. section 4001(b)(1). This power was delegated to the Bureau of Prisons by the Attorney General. 28 C.F.R. section 0.96 (1997).

<sup>138</sup> See generally John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L.J. 355 (1993).

<sup>139</sup> See John D. Bessler, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 153-162 (Northern University Press, 1997).

<sup>140</sup> Monaco, *supra* note 18 at 735.

<sup>141</sup> See *id.* at 735.

that passed the crime bill (that is the 103d Congress), when there were only 100 references to phone tallies in the 101<sup>st</sup> Congress.<sup>142</sup>

Monaco claims that this tendency for Congress to legislate as a knee-jerk reaction to public sentiment creates representatives who respond to those individuals who complain the loudest (often prompted by a media request), and that Congress is often pressured into responding too hastily or too broadly.<sup>143</sup> When appeasing the public is the goal, heavy-handed, hastily enacted legislation may paper over the issue, but it does not fix the underlying problem. Monaco finally reminds us that we do not have a pure democracy, but a representative democracy.<sup>144</sup> Rule by a vocal minority is neither.

#### B. THE ROOT OF THE PROBLEM: THE CULTURE OF FEAR

The “culture of fear” phenomenon has created a phobic society in America. Phobias must take a focus in order for the psyche to “handle” the fear. The prominent American phobia has focused on violent crime in the last half century, with increasing fervency (and more frenetically). The seeds of this phobia have been real crimes which have indeed been chilling by any standard, and the crime rates have certainly risen dramatically in the last half century, although they have steadily declined in the last decade (a fact generally ignored by the public or attributed to draconian laws).<sup>145</sup> However, one need only read history books to find out that violent and chilling crimes were not invented in 1950 in America. What did begin to take over American culture in the 1950’s was television.

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<sup>142</sup> *See id.*

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> 1999 BJS Source of Criminal Justice Statistics, available at <http://www.ojp.usdoj.gov> (visited March 25, 2002). The rate of violent crime has decreased since 1993 (violent crimes included in the study: rape, robbery, aggravated assault and homicide). *See id.*



### C. PERPETUATING THE PROBLEM: THE MEDIA

Since the day televisions sprouted like chiapedes in American living rooms, the literature of horrifying and dramatic crime has turned into visual tabloid which has “educated” the public through entertainment. TV and its partner, cinema, have brought blood and terror up close and personal to the masses and they have reacted with shock. What they have “learned” is that the intelligent, good looking, and charming next-door neighbor may be a cunning serial killer. Terrorists and fanatics are lurking down the block to blow up buildings and plant bombs in crowded places. There are unstable people who will “snap” at work and spray everybody at the office with bullets. Children who are teased will come to your child’s school one day and strife the playground with deadly fire. Even our mail is dangerous and deadly! And flying? Forget it.

### D. CAN THE CYCLE BE STOPPED?

The reversal of any of these elements is a daunting task: responsive lawmaking, the culture of fear, and the perpetuation of the problem by the media.

It has been argued here that legislators generally benefit from supporting ineffective laws. Legislators can gain political power by catering to what the public (or those few in the public who howl the loudest) think that they want. On a less pessimistic note, some legislators no doubt believe that the bills they pass are targeting crime and benefiting society. Certainly some legislators truly are not aware that the law will be ineffective. Both of these reasons make it difficult for anyone to convince legislators not to support ill-conceived laws. Monaco notes in her article that the problem has become exacerbated by Congress trying to combat its poor public image by acting more and more

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like a pure democracy, responding to the culture of fear and mass media pressure.<sup>146</sup> This is a glitch that is inherent in the nature of a democracy since the very basis of a democracy is to represent the people. One possible solution to curb the problem may be greater support for term limits, yet term limits bring with them a myriad of other problems of the opposite kind: that representatives in their last terms will not be accountable to those whom they represent. However, it might be argued that lame duck legislators have little incentive to pass knee-jerk legislation: which may be enough to recommend term limits.

The culture of fear is a societal phenomenon that has gained so much momentum that it would be almost impossible to stop. Especially after the events of September 11, the culture of fear has become more entrenched our society. In a cause and effect scenario, the culture of fear is the effect and the media message is the cause. It is illogical to think that this is the place to stop the cycle of heavy-handed, ineffective law making.

The catalyst behind this cycle is really the media, especially sensationalized mass media, because this problem is really fed by an abundance of distorted information. It is ironic that an over-abundance of media perpetuates a deception of the public. There are several reasons as to why the media continues to fuel these reactionary laws and fails to fairly report on their ineffectiveness. First, it is normally the politicians who have the money to launch media campaigns and to buy commercial time. It behooves the media to support winners. Secondly, media's power to twist tails is pretty heady stuff. This has led some to call the media the fourth (and most powerful) branch of government. Politicians know how the game is played: they need the support of a friendly media to be

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<sup>146</sup> See Monaco, supra note 18 at 735.

reelected and they vote for the bills which have the most media appeal. Likewise, a legislator will think twice about voting against a bill like the Sex Offender Registration Act knowing that major media will dissect him for it.

The American culture isn't a totally innocent victim in this charade. It enables its victimization through its current short, adrenaline-driven attention span. The "MTV culture" is accustomed to quick, non-thought-demanding thrills flashed on a screen every few seconds: a banquet of fast food media. This hinders any thoughtful analysis of these laws by the viewing audience. The media caters to this taste. Also, especially after September 11, it is also doubtful that Americans want to hear about the rights of individual law breakers. Even more likely, "getting the bad guys" is a more titillating story than statistics on how these laws are not working.

The issues here rest on the problems of misuse of power and misuse of information, and when the powerhouse of information dissemination (and, increasingly, of political clout) in our society, the media, abuses its power, it makes solutions nearly inaccessible. The voices which might speak against media abuse don't buy their ink by the barrel.

The best hope for sane legislation continues to come from the legal community and its relentless court challenges against ineffective, unjust, and unconstitutional laws. This comment has cited many examples of failed court cases, but the cases have continued to challenge and two current cases are about to be heard by the Supreme Court.<sup>147</sup> The Supreme Court said on April 1, 2002 that it will use the cases of two petty

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<sup>147</sup> See *Lockyer v. Andrade*, 270 F.3d 743(2002)*cert. granted*, 2002 WL 480176 (2002)(where the defendant was convicted of stuffing videotapes down his pants from a Kmart and was sentenced to fifty years in prison). The second case is an unpublished opinion. In the second case, Gary Ewing was sentenced to twenty-fives yers to life in prison for putting three golf clubs down his pant legs and trying to

thieves sentenced to at least 25 years in prison for shoplifting videotapes and stealing golf clubs to decide how far states can go in applying tough three-strike laws. This will address whether states violate the Constitution's ban on cruel and unusual punishment when they use the three-strike laws to win long sentences for minor offenses.

#### CONCLUSION

According to the twenty-four hour cable news shows, we cannot count on the police to stop rampant crime: the police were pilloried for their reputed bungling of the Jon Benet Ramsey's murder. We cannot count on judges to mete out justice in the face of obvious guilt: Judge Ito's sitcom is supposed to have proven that lesson to the public. We cannot count on lawyers to defend us from the night sweats: they are too busy getting multi-million dollar verdicts for clients who pour hot coffee over their genitals. Our only hope lies in the promises of politicians (who have also discovered the power of the pop culture's news media). We elect the ones who promise us the "toughest" crime bills, send them to Washington or our state bodies, hope they keep their hands out of our billfolds and off their interns, and applaud the outrageous and ineffective laws they pump out as they flex their political muscles.

Sadly, every outrageous, overreaching law is not only ineffective on crime, and violates the civil rights of defendants or convicted offenders, it diminishes us as a society and robs everyone. Bad laws rob us financially and psychologically by failing to rehabilitate offenders: they continue to prey on us and continue to suck away funds to keep them incarcerated. Non-rehabilitated offenders rob us of thousands of contributing citizens. Prisons and the prison system cost us billions of dollars to maintain: money

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walk out of a golf pro shop. See The Associated Press, *Supreme Court to Review 3-Strikes Laws*, available

which could be used for education or scientific research. Bad laws rob us of constitutional rights: rights which we deny to one class of citizens are in great danger of being denied to everyone. Bad laws rob us of our moral base: we can no longer claim the higher ground as a civilization when we deny true justice to any group of citizens. Bad laws rob us of the focus we should have on the real roots of crime and rehabilitation. Bad laws have become the chips in the game of political power. The only winners, however, are the politicians. The best hope we have is a vigilant legal community which doesn't rest in its challenges to bad law.

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at <http://www.cnn.com/2002/LAW/04/01/scotus.threestrikes.ap/index.html>.