

A Problem in Emotive Due Process: California's Three Strikes Law

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The minimum of punishment is more clearly marked than its maximum. What is *too little* is more clearly observed than what is *too much*. . . . An error on the maximum side . . . is that to which legislators and men in general are naturally inclined: antipathy, or a want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity. It is on this side, therefore, that we should take the most precautions, as on this side there has been shown the greatest disposition to err.¹

It often happens that a legislator, desirous of remedying an abuse, thinks of nothing else; his eyes are open only to this object, and shut to its inconveniences. When the abuse is redressed, you see only the severity of the legislator; yet there remains an evil in the state that has sprung from this very severity; the minds of the people are corrupted, and become habituated to despotism.²

[O]n no subject has government in different parts of the world discovered more indolence and inattention than in the construction or reform of the penal code. Legislators find themselves elevated above the commission of crimes which the laws prescribed, and they have too little personal interest in a system of punishments to be critically exact in restraining its severity. The degraded class of men, who are the victims of the laws, are thrown at a distance that

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1. Jeremy Bentham, Principles of Penal Law, in 1 The Works of Jeremy Bentham 401 (J. Bowring ed. 1843).

2. Baron de Montesquieu, 1 The Spirit of Laws 84 (Thomas Nugent trans., Colonial Press, rev. ed. 1899) (1748).

obscures their sufferings, and blunts the sensibilities of the legislator.³

No one likes to be told what to feel or what not to feel. Nor does anyone like to hear that one's judgment about a matter of great importance is morally or legally suspect. Little wonder then, that courts hesitate to critique modern sentencing laws on these grounds. Similarly, in a nation founded on the authority of the people, no public official wants to tell the voting public that it, or its representatives, are wrong on an issue of major importance, especially one that arouses great passion. Again the reluctance of courts to curb the penal appetites of legislatures and the public is understandable. But it will be the burden of this paper to argue that courts should seriously consider this thankless task as to California's Three Strikes sentencing law, and perhaps as to other recently enacted mandatory penalty laws.

Appellate courts generally presume that legislatures have broad authority to set the punishments for crimes. Courts presume not only as a matter of law, but as a matter of democratic policy that legislatures are better suited to setting penal policy and thus shaping penal law, than are judges. I will argue that with respect to penal laws such as Three Strikes, which impose mandatory penalties based primarily on the offender's propensity to commit crimes rather than particular criminal conduct, this institutional presumption is unfounded. This is because in approving California's Three Strikes law, voters and elected officials moved beyond the accepted legislative function of setting the parameters of punishment, to effectively adjudicating sentence in particular cases—and doing so based not on the offense of conviction primarily but on the presumed bad character of the offender. Particularly as to its third strike provision, the law transforms sentencing from a decision to be made by single

3. William Bradford, *An Inquiry On How Far the Punishment of Death Is Necessary in Pennsylvania* 5 (1793) quoted in O.F. Lewis, *The Development of American Prisons and Prison Customs, 1776-1845* 10 (1922).

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responsible individual based on the facts of a particular case, to one determined by a mass of voters or legislators based on presumptions about dangerousness and culpability drawn from abstract offense definitions. As a consequence, the defendant is deprived—designedly—of any realistic opportunity to appeal to sentencer compassion. Sentencing is rendered in such a way that the real decision maker—the legislature or voting public who set the mandatory penalties—lacks full information concerning the offender to be sentenced, his criminal career and his offense of conviction. Most importantly, the sentencer lacks the personal, emotional incentive to fully consider mitigating information that may be available. In this fashion, the law violates what I will call emotive due process.

The same argument may be expressed in terms of legal wisdom. The wise legal decision maker not only understands the shape and function of legal rules, but also the limitations of human judges. In reviewing sentencing laws, especially under the constitutional authority of the Eighth Amendment, U.S. courts have traditionally hewn to a policy of nonintervention, asserting that judicial wisdom mandates deference to the decisions of voters and elected politicians. After all, in a democracy governmental authority comes from the people. I do not, as a general matter, dispute the wisdom of deference to the people on matters of criminal justice policy. But with respect to the kind of sentencing involved in California's Three Strikes we may discern a different rule of wisdom. When voters and elected officials set mandatory penalties for a wide range of offenders based on narrow assumptions about criminal character, in a context where concerns about crime in general will inevitably outweigh concerns for the individual offender and his offense, we have good reason to be skeptical about the justice of the resulting sentences. Judicial wisdom here mandates greater scrutiny of legislative decision-making, for the sentencing procedure of Three Strikes is virtually an invitation to injustice and cruelty in a number of cases.

I do not purport to present here a full legal argument that lawyers or courts might use to overturn California's Three Strikes law or other similar statutes. The essay does not attempt the extended historical and doctrinal analysis necessary for such a legal brief. Instead it presents a part—albeit an important part—of this argument, asserting that Three Strikes represents a radical and unwise departure from traditional sentencing procedures that provide important emotive safeguards against penal excess.

CALIFORNIA'S THREE STRIKES SCHEME

The so-called “Three Strikes and You're Out” law in California is actually comprised of two different enactments. The first is a statute passed by the legislature and signed into law by the governor in early 1994.⁴ The second is an amendment to the state constitution enacted by public referendum in the fall of that year. The wording of the two laws is nearly, but not entirely identical.⁵ By virtue of the constitutional status of the second enactment, the law cannot be changed by the legislature except by a two-thirds majority of that body.⁶ The Three Strikes law also has a dual nature in that it operates to dramatically increase punishment for recidivist felony offenders in two distinct ways, according to whether the so-called second strike or third strike provisions of the law apply.

To fall under the second strike provision of Three Strikes, an offender must have committed at least one prior felony that appears in a list of statutorily designated “serious” or “violent” offenses. These include offenses such as murder, manslaughter, arson, various assault offenses

4. Cal. Penal Code § 667 (h)-(i) (West 2002). For a detailed overview of Three Strikes, see Dwight W. Moore, Felony Sentencing, in *California Continuing Education of the Bar, California Criminal Law: Procedure and Practice* 961, 998-1006 (5th ed. 2000).

5. Cal. Penal Code § 1170.12 (West 2002); *People v. Hazleton*, 926 P.2d 423 (Cal. 1996).

6. Cal. Penal Code § 667(j) (West 2002).

and certain drug sales to minors.⁷ One of the most commonly committed felonies on the list is residential burglary.⁸ Such serious or violent felony convictions may have been obtained in California or any other U. S. jurisdiction; adjudications of equivalent offenses in juvenile proceedings count as strikes as well.⁹ A person who has a first strike on his record will face a doubled penalty for any new felony committed in California. There is no limitation on the kind of felony that accounts for a second strike in a second strike case. (The first strike must be a felony on the serious or violent list, but the second strike need not.) California courts have said that the same criminal transaction may supply both a first strike and the second offense for which the penalty is doubled.¹⁰ The Three Strikes law also imposes a special requirement that the offender serve at least 80 percent of his original sentence, thus limiting standard sentence reductions for good behavior.¹¹

A repeat offender is subject to the third strike provisions of the law if, on being convicted of *any* new felony, he has at least two prior convictions for felonies on the serious or violent list. Just as with second strike cases, there is no limitation on the kind of felony which will

7. Cal. Penal Code §§ 667(a)(4); 1192.7 (West 2002).

8. Cal. Penal Code § 1192.7(c)(18) (West 2002). The residential burglary provision is especially significant because under California law virtually any entry into an inhabited dwelling belonging to another, accompanied by the intent to commit a felony therein, constitutes a burglary. See *People v. Salemme*, 3 Cal. Rptr. 2d 398 (Ct. App. 1992) (burglary committed when defendant enters the home of the victim in order to sell fraudulent securities and victim consented to the entry).

9. Cal. Penal Code §§ 667(d)(3); 1170.12(b)(3) (West 2002); *People v. Fowler*, 84 Cal. Rptr. 2d 874 (Ct. App. 1999); *People v. Davis*, 938 P.2d 938 (Cal. 1997). There are some restrictions, the most important of which is that the juvenile must have been at least 16 years of age at the time of the offense. Cal. Penal Code §§ 667(d)(3)(A); 1170.12(b)(3)(A) (West 2002).

10. *People v. Benson*, 954 P.2d 557, 558 (Cal. 1998) (defendant held to have had two strikes from previous case where he suffered two felony convictions arising out of the same transaction, even though the court in the previous case had stayed the sentence on one conviction).

11. Cal. Penal Code §§ 667(c)(5); 1170.12 (a)(5) (West 2002).

qualify for the so-called third strike.¹² There are even three strike cases where the new offense would be a misdemeanor but for the fact that, by operation of a separate California statute, it is treated as a felony because of prior convictions for similar offenses.¹³ A conviction on a third strike carries a mandatory minimum penalty of 25 years to life in prison.¹⁴

There are other provisions in the Three Strikes law dealing with consecutive sentences and other enhancements which increase punishment beyond even the standard provisions of second and third strike enhancements.¹⁵ As is the case for other prior conviction enhancements under California law, for both second and third strike enhancements the age of the prior convictions is irrelevant to the law's increased penalties.¹⁶

In terms of numbers of people affected and immediate impact on the state prison population, the law's second strike provisions are the most important because they apply to the greatest number of convicts.¹⁷ The third strike

12. The terminology here becomes confusing in that, as with the second "strike" provision, the offender's third "strike" need not be a felony on the serious or violent list. Thus the term "strike" has two quite different meanings under the statute, a very limited one with respect to prior felony convictions (which must be serious or violent) and another meaning with respect to new offenses (which may be felonies of any kind).

13. See *Andrade v. California*, 270 F.3d 743 (9th Cir. 2001), cert. granted, 535 U.S. 969 (2002); Cal. Penal Code § 666 (West 2002) (petty theft with a prior conviction for petty theft may be treated as a felony).

14. Cal. Penal Code § 667(e)(2)(A) (West 2002). Taking into account the maximum good time credits under the statute, the offender must serve a minimum 20 years in prison prior to parole on such a sentence. The offender will receive a longer sentence if the usual penalty for the current offense of conviction, when tripled, produces a longer term than the twenty-five year minimum. In such a case, the tripled offense penalty is the one that applies. Cal. Penal Code § 667(e)(2)(A)(i) (West 2002).

15. Otherwise applicable limits on the imposition of consecutive sentences are eliminated and sentences for current or past felonies must be served consecutively. Cal. Penal Code § 667(c)(1); § 667(c)(6)-(8) (West 2002).

16. See *People v. Smith*, 253 Cal. Rptr. 673 (Ct. App. 1988).

17. Franklin E. Zimring, Gordon Hawkins & Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California*, 199-201 (2001). As of January 31, 2001 there were nearly 50,000 prisoners in California serving sentences that had been doubled under the second strike provisions of the law. See Joshua E. Bowers, "The Integrity of the Game Is Everything": The Problem of

penalties are the most severe, however, and have been the focus of most public attention. They carry the potential for the most dramatic injustices and will in the long run have a very significant effect on the prison population.¹⁸ The third strike provisions will be the exclusive focus of my argument here.

In the first seven years of its life, the impact of Three Strikes has depended in significant measure upon the exercise of prosecutorial discretion.¹⁹ Throughout the state, the possibility of charging second and third strike enhancements has given prosecutors increased plea-bargaining power, with prosecutors frequently agreeing to refrain from seeking punishment enhancements under the scheme in return for a guilty plea to the new offense.²⁰ Even beyond plea-bargaining considerations, variation in the application of Three Strikes penalties has come from the adoption of significantly different charging policies by elected prosecutors.

The most controversial cases under the law tend to fit a common pattern. They usually involve a third strike punishment for a minor, nonviolent property or drug offense by someone with a long and persistent criminal record, usually associated with some form of substance abuse. These are cases in which law enforcement can argue that the offender has repeatedly proven himself incapable of obeying the law in free society, which justifies society in protecting itself from that person via long-term incarceration. These are also cases in which some argue that less expensive and painful methods would provide a

Geographic Disparity in Three Strikes, 76 N.Y.U. L. Rev. 1164, 1165 (2001) (citing unpublished California Department of Corrections statistics).

18. As of January 31, 2001 6,615 people were serving twenty-five year minimum third strike sentences in the state. See Bowers, *supra* note 17, at 1165. For figures demonstrating the dramatic changes resulting from the third strike provision, see Zimring et al., *supra* note 17, at 73.

19. For an analysis of statewide variations, see generally Bowers, *supra* note 17. See also Zimring et al., *supra* note 17, at 80-84.

20. This has led to several cases of miscarriage of justice, in which innocent defendants pled guilty to avoid Three Strikes enhancements. Samuel H. Pillsbury, *Even the Innocent Can Be Coerced into Pleading Guilty*, Los Angeles Times, November 28, 1999, at M5.

high degree of societal protection.²¹ In fact, the majority of third strike prisoners in the state have received life sentences for nonviolent drug and property crimes.²²

THREE STRIKES AND RULE REGULATION: PROPORTIONALITY AND CHARACTER PUNISHMENT

Our strong preference in law is that we should judge the correctness of any decision by objective criteria; decisions should not depend entirely, or even largely, on the purely personal preferences of the decision maker. To put this another way, we aspire to legal decisions based upon widely shared and formally adopted principles, applied in a manner consistent with collective views of justice. We do not want legal decisions to depend primarily upon decision maker emotions. But the truth is, as many in recent years have come to acknowledge, emotional influence cannot be excluded from important human decisions.²³ Therefore the legal question must always be *how* emotional influence is regulated in decision-making.

The law's standard method for emotive regulation is rules. Rules constructed from relatively precise and objective criteria permit us to assess the correctness of a particular application of the rule, thus providing a check on the idiosyncrasies of the decision maker. In seeking a rule to determine whether punishment is excessive, judges and commentators have long turned to the principle of proportionality. Under proportionality, punishment is merited to the extent that it mirrors the seriousness of the crime of conviction. The principle of penal proportionality has received support from a wide variety of figures over the course of several centuries. Cesare Beccaria, perhaps the

21. E.g., *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002); *Andrade v. California*, 270 F.3d 743 (9th Cir. 2001), cert. granted, 535 U.S. 969 (2002); *People v. Romero*, 99 Cal. App. 4th 1418 (2002); *People v. Goodwin*, 69 Cal. Rptr. 2d 576 (Ct. App. 1997).

22. See *Bowers*, supra note 17, at 1170.

23. See generally *The Passions of Law* (Susan Bandes ed. 2000); Ronald De Sousa, *The Rationality of Emotion* (1987); Robert C. Solomon, *The Passions* (1976).

most influential writer on crime in the 18th-century Western world declared in his *On Crimes and Punishment*, that punishment was justified if it was “public, prompt, necessary, the minimum possible under the given circumstances, proportionate to the crimes, and established by law.”²⁴ The idea that punishment for a particular offense be proportionate to the seriousness of the offense was a principle on which both Jeremy Bentham, the leading 18th-century proponent of deterrence in punishment and Immanuel Kant, the leading proponent of retribution in punishment, agreed.²⁵ In the 20th century the principle has received constitutional approval under the Eighth Amendment from the United States Supreme Court, both as to the imposition of death and sentences of incarceration.²⁶

As classically stated, the proportionality principle envisions a sentencing decision based upon particular criminal conduct. But modern sentencing, and especially recidivist schemes such as California's Three Strikes, are not so limited in their scope. Recidivist schemes envision punishment based not primarily upon the particular bad conduct demonstrated by the offense of conviction, but upon the entire criminal history of the offender. The state's penal motivation comes more from the defendant's propensity for criminal wrongdoing than the particular wrong of the new offense. Thus defenders of Three Strikes argue: “These people are being punished for being recidivists, not just the current offense.”²⁷ As the United

24. Cesare Beccaria, *On Crimes and Punishment* 81 (David Young trans., Hackett 1986) (1764).

25. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 178-88 (1948) (1823); Immanuel Kant, *The Metaphysical Elements of Justice* 101-2 (John Ladd trans., 1965).

26. *Coker v. Georgia* 433 U.S. 584 (1977) (death penalty disproportionate for rape); *Solem v. Helm*, 463 U.S. 277 (1983) (life without chance of parole disproportionate to recidivist conviction for nonviolent offender).

27. Kathy Storton, Santa Clara County Deputy District Attorney, quoted in Andy Furillo, *Most Offenders Have Long Criminal Histories*, *Sacramento Bee*, Mar. 31, 1996, at A1.

States Supreme Court has noted, the primary goals of recidivist statutes are

to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of been sentenced for other crimes.²⁸

In this fashion, recidivist statutes like Three Strikes emphasize criminal character in determining punishment levels. The legitimacy of this approach to punishment can certainly be questioned, but that is not our current concern. Assuming, as courts have done, that this approach to punishment is legitimate,²⁹ we must look beyond principles

28. *Rummel v. Estelle*, 445 U.S. 263, 284 (1980).

29. See *Rummel v. Estelle*, 445 U.S. at 283-85. Conceptually, recidivist statutes raise significant problems concerning the relationship between conviction and punishment. For a variety of reasons, not least of which is the prohibition on double jeopardy, punishment can only be legally imposed for the offense of conviction and not for prior offenses for which sentence has already been served. *Witte v. U.S.* 515 U.S. 389, 400 (1995). Most recently the Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) that any fact—except prior conviction—that increases penalty beyond the usual statutory maximum must be determined by a jury beyond a reasonable doubt. For a critique of the prior conviction exception, see Kyron Huigens & Danielle Chinaea, "Three Strikes" Laws and *Apprendi*'s Irrational, Inequitable Exception for Recidivism, 37 *Crim. L. Bull.* 575 (2001). One possibility for rule regulation would be to require the legislature to set a maximum penalty for each offense, regardless of criminal record. The maximum penalty would thus have to reflect both possible aggravating circumstances of the crime and the possibility that the offender had a significant criminal record. This is not the approach favored by legislatures, which have in recent years enacted a wide variety of special statutes which dramatically increase the penalties for a variety of offenses beyond their statutory maximums, based solely on criminal history. In interpreting such recidivist penalties, courts generally hold that added penalties are merited for the new offense, because the new offense is a more aggravated one given the offender's criminal history. The problem is, courts offer no objective criteria for distinguishing between a judgment that the new offense is an aggravated one due to criminal history, and a judgment that the offender merits enhanced punishment based on a cumulation of criminal offenses, new and old. The former is constitutional; the latter is not. But there may be no practical distinction between the two. See generally, Brown

of conduct proportionality to determine if punishment under such statutes is excessive.

We might use the proportionality principle to assess not the severity of a single offense, but the severity of an entire criminal career. Given that courts have often questioned their ability to assess proportionality for a single offense, however, the prospect of coming up with a proportionality rule to judge an entire criminal career is daunting. The new proportionality test would have to include not just a cumulative index of offense severity, but also a calculus incorporating time factors (relative youth of the offender at time of offense and how long ago the offense was committed) and sequence (the extent to which offenses grow or diminish in severity during the course of the criminal career). There is another way forward, however. Instead of trying to regulate excess punishment by means of a rule that sets substantive penal limits, we might consider regulation of the role of sentencer.

Returning for a moment to the problem of emotive regulation, courts and other legal bodies have long recognized the inadequacy of rule regulation to produce just decisions in many contexts. Rule regulation is by nature expensive, requiring some form of formal appellate review for enforcement. Moreover, with respect to decisions that depend upon complex and highly fact specific considerations, no rule drafter will be able to supply complete and reliable criteria for all future decisions. A common move taken by the judiciary and other legal authorities when confronted with such situations is to employ what may be called role regulation. Instead of trying to establish rules which dictate correct decisions, we construct a dispute resolution system that emphasizes the different roles played by different legal actors. The idea is that if we construct the decision dynamic properly, and all legal actors play their roles properly, the chances of a just decision greatly increase.

The great problem we see in Three Strikes is that, because of how the law was enacted and must be implemented, traditional role regulation of sentencing has been deliberately undermined. A decision normally committed to judicial discretion and shaped in significant measure by the emotive norms of the legal process has instead been given to legislative bodies who operate subject to the vastly different emotive norms of the political process. The result is a fundamental violation of emotive due process in sentencing.

ADJUDICATION VS. LEGISLATION: THE PROBLEM OF
LEGISLATIVE SENTENCING FOR BAD CHARACTER

In the United States, the strong presumption of the criminal law is that legislatures set criminal justice policy by enacting criminal legislation which courts must then apply to particular criminal cases. Thus legislatures and elected executives decide what is criminal and the general parameters of how crimes should be punished. Absent a clear violation of a constitutional prohibition, legislative decisions about offense definitions and punishment policy should not be overturned or interfered with by judges.

According to this division of authority, California's Three Strikes law appears largely immune from judicial review. Not only did the legislature and governor approve the original legislation, but the state's voters directly approved it by a wide margin in a referendum. When the people have spoken so clearly on a matter of major criminal justice policy, surely the courts have no justification for second-guessing the decision rendered. But there is a significant flaw in this argument for deference to legislative policy-making. When we consider the substance of Three Strikes, we see a law that may be better characterized as sentencing *adjudication* rather than sentencing *legislation*.

The voters and legislators who approved Three Strikes did not just set the general terms of sentencing, as is normally the case with penal legislation. These decision

makers also effectively took on the role of sentencer in a wide range of cases.³⁰ The Three Strikes law mandates that offenders who meet certain criteria based on their criminal records should receive particular (minimum) punishments. The law was deliberately crafted to operate in mandatory fashion so as to bypass the exercise of sentencing discretion (at least as to lesser penalties) by judges. In combination with previous changes in state penal law, Three Strikes eliminates most flexibility at the back end of the punishment process as well: no parole and extremely limited good time credits for prisoners who do not commit major disciplinary violations while incarcerated. Seen as a whole, the law constitutes a kind of penal bill of attainder; it resolves by legislative fiat the most important contested issue in most criminal cases—sentencing—for a number of unnamed but legally designated offenders.

Ordinarily, criminal legislation sets the terms for the judicial or jury resolution of particular disputes. Statutes are written in sufficiently broad language to accommodate a wide range of case variations. In defining criminal offenses or setting punishment ranges, the legislature does not attempt to determine the outcome of particular trials or sentencing hearings. We expect that legislators will draw on our collective experience of past criminal case adjudications to shape guidelines for future adjudications. We do not expect the legislature to anticipate all of the complexities of future cases by dictating, specifically, how they must be resolved.

30. In important sense, those who approved Three Strikes in 1994 acted as the sentencers of thousands of unnamed offenders. Under the plan of Three Strikes, judges who are officially designated as sentencers act more as bureaucratic implementers of the law rather than as discretionary decision makers. Thus we might speak of the sentencing of three strikes offenders in the past tense, since the “real” sentencing, even for offenders who have not yet committed their third strike offenses, occurred in 1994. Because using the past tense here might cause confusion, and because under subsequent court decisions, there are important matters to be resolved by judges, I will follow standard legal usage and refer to sentencing under the law in the present tense.

Courts by contrast are the presumed masters of adjudication. Their central mission is to oversee the application of criminal statutes to particular sets of facts presented in the courtroom. The legally trained know that courts in fact must consider criminal justice policy in a wide range of decisions, in part because no legislature can foresee the details of any particular criminal case. Still the strength of the courts—in both a political and legal sense—is their focus on the application of general principles to particular facts. Every case to come before the court is considered on its own individual merits.

The distinction between legislation and adjudication is perhaps most respected in the determination of guilt at trial. The terms of criminal adjudication—the rules of judgment applied by juries and sometimes judges in their verdicts—are set by legislative decisions concerning the statutory definitions of applicable offenses and related evidentiary and procedural rules. But most of the criminal trial concerns the application of these general rules to a set of contested facts, and about this the legislature has little to say. Attempts by the legislature to determine the guilt of a defendant by specifying exactly what evidence would support conviction, would be seen as an illegitimate effort to interfere with adjudication.³¹ It would likely constitute a violation of both due process and the right to a jury trial.³² The legislature should not and constitutionally probably cannot function as a trier of fact in the abstract.³³ Justice depends upon evaluating the particular facts of particular

31. United States legislatures do have fairly free rein in the definition of offenses, however, and so may be able to achieve similar ends by the elimination of certain traditional elements of criminal offenses, especially *mens rea*. See, e.g., *Montana v. Egelhoff*, 518 U.S. 37 (1996) (no constitutional violation in state's prohibition on the use of voluntary intoxication to negate guilt). Cf., Reference Re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 (violation of Canadian constitution to deprive liberty for a criminal offense based on strict liability).

32. See *Carella v. California*, 491 U.S. 263 (1989); *Sandstrom v. Montana*, 442 U.S. 510 (1979). See also *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979); *Bell v. Wolfish*, 440 U.S. 520, 535 (1979) (violation of due process to punish without conviction at trial).

33. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

cases, something that only judges and juries evaluating admissible evidence can do.

But do similar considerations apply to sentencing? American criminal law has always applied different rules of evidence and procedure to sentencing than to trials. Traditionally this has meant that the sentencer has fewer restrictions on the kind of information to consider and broader discretion in rendering a sentencing decision.³⁴ Yet none of this suggests that the sentencer can do away with a sentencing hearing or that there is no difference between setting general sentencing policy and ordering a particular sentence for a particular offender.³⁵

Some may object that there is a long history in the Anglo-American criminal law of mandatory sentences for particular offenses, most notably for murder.³⁶ Surely this indicates a tradition of legislators acting as sentencers in some cases, indeed in some of the most important of criminal cases. But again the severity of the Three Strikes regime proves distinguishable from previous legal regimes, even from the harshest penalty provisions of the English common law. Unlike mandatory penalties imposed at common law, Three Strikes does not impose a particular punishment for a particular offense. Its penal rationale depends primarily on a determination of the offender's bad character rather than his new bad conduct.

In the end, the question whether California's Three Strikes law should be labeled as adjudication or legislation is not likely to be determinative of the question of penal excess, for the categories themselves are too broad and subject to manipulation to convince skeptics.³⁷ For the

34. *Williams v. New York*, 337 U.S. 241 (1949).

35. For a similar critique of Congress's efforts to micro-manage sentencing by imposing minimum mandatory penalties, see Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 *Wake Forest L. Rev.* 199, 200 (1993).

36. For a review of this history, see *Woodson v. North Carolina*, 428 U. S. 280, 304 (1976).

37. The Supreme Court has encountered similar problems in attempting to distinguish between those elements of the offense that the prosecution must prove beyond a reasonable doubt and other elements of criminality for which the burden of proof may be shifted onto the defense. Cf., *Mullaney v. Wilbur*, 421 U.S.

legislative/adjudicative distinction to be meaningful, it must track more specific distinctions in the kind of decision rendered and how it is rendered. In the context of Three Strikes, we must move to a more detailed consideration of how sentencing decisions in particular cases should be rendered. In particular, it brings us to problems with emotive regulation of sentencers.

ADJUDICATION, ROLE REGULATION, AND EMOTIVE DUE
PROCESS

Recall the nature of the decision made by voters and legislators in approving California's Three Strikes law. They resolved to impose harsh minimum mandatory penalties on a number of offenders based on their criminal propensities determined primarily by the legal definitions of their previous offenses. Sentencers undertook a character assessment of unseen and unnamed offenders. Assuming, as we have done so far, that rule regulation of this kind of sentencing will be difficult at best, we need to consider how else we might regulate decision maker emotions in a context where decisions are often highly emotional. To understand the regulatory problem we need to consider how emotions affect such decisions.

We experience emotional reactions to other persons depending in significant measure on our personal connection to the individual. Emotions are fundamentally our way of experiencing the world around us, of making its data personally meaningful. Emotions therefore track personal significance. We experience the strongest emotions with respect to persons who mean the most to us: friends, family, lovers, colleagues. As a result, regulating

684 (1975) (in murder prosecution, unconstitutional for burden of proof on common law provocation to be placed on defendant, where provocation negates malice aforethought required for murder) and *Patterson v. New York*, 432 U.S. 197 (1977) (in murder prosecution, constitutional for burden of proof on extreme emotional disturbance, an expansion of common law provocation, to be placed on defendant where murder definition makes no mention of the doctrine). For a discussion, see *Huigens & Chinae*, *supra* note 29.

what we might call the personal distance between defendant and decision maker is a critical feature of criminal justice. Both judges and prospective jurors may be removed from a case because of the existence of personal relationships with parties, witnesses or lawyers involved in the case.³⁸ Our foremost concern is that the decision maker have enough personal distance from those being judged so that the decision maker's strong personal ties—and resulting emotional reactions—do not affect his legal judgment. But we also worry about too much distance between subject and decision maker. Differences in race, sex, age and other factors can mean that the decision maker does not have enough connection to the subject to engage in the empathetic work of imagining another's situation that is required for conscientious judgment.

In criminal justice decision-making, our primary way of bridging the emotional gap between strangers, of making the experiences of strangers important to the adjudicator, is to assign particular legal responsibilities to different participants in the adjudicative process. The assignment of such roles creates a set of new personal commitments which prompt corresponding emotional reactions. The assignment of role responsibilities is a critical component of what we may call emotive due process.

Emotive due process renames a familiar concept in criminal law: that justice depends on the designation and adoption of particular professional roles in the adjudication process. The distinct roles of prosecutor and defense attorney, judge and jury, promote justice by the emotional commitments which each role entails. A large amount of criminal procedure relating to adjudication involves enforcement of these roles. The rules for the selection and disqualification of these actors, their powers, their access to information and the scope of their decision-making all are designed to enforce a particular conception of role.

38. E.g. Cal. Civ. Proc. Code, § 170.1 (a)(1)-(5) (West 2002) (grounds for disqualification of judge); Cal. Civ. Proc. Code § 229 (West 2002) (grounds for challenging prospective juror for cause).

Role regulation works by making individuals responsible for particular roles in the adjudicative process. The assignment of roles gives each individual a stake in the process, an emotional but still professional commitment to particular persons and values critical to adjudication. By assigning persons particular justice roles, we in effect personalize justice values. We encourage the participants to put aside their pre-existing ideas and emotions, at least to the extent that they conflict with their new roles. The professional roles are designed so that actors interact in a way that maximizes the amount of relevant information produced and the seriousness with which that information is evaluated.

Examples of role regulation in criminal adjudication are legion; I will cite just a few involving prosecutors and defense attorneys to illustrate the essential concept. We begin with a critical prosecutorial power that we might expect would be subject to extensive rule regulation. Instead it is subject only to role regulation.

In U.S. law there are no substantive rules concerning one of the most important of all criminal justice decisions: the prosecutor's decision *not* to file criminal charges in a particular case. Even when the police present the prosecutor with evidence that demonstrates overwhelmingly a person's criminal guilt, the prosecutor need not pursue criminal charges and no one—not the victim, not the police, nor any interested citizen—can force the filing of criminal charges.³⁹ The assumption of U.S. law (contrary to that of many other legal systems, especially those built on a more inquisitorial model) is that because the prosecutor is a public servant sworn to enforce the criminal law, and subject to the indirect check of the electoral process, we can trust prosecutors to bring charges where warranted.⁴⁰ We do not need rule regulation, because once a person takes on the role of prosecutor, she

39. See *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970).

40. Obviously there are many other factors which contribute to the lack of rule regulation of executive decisions to decline prosecution, including the doctrine of separation of powers.

adopts a certain law-enforcement zealotry that encourages the filing of charges where a public interest indicates. Indeed, the general experience of the nation has been that prosecutors do not abuse their powers by refusing to file warranted criminal charges; abuses tend to occur in the filing of unwarranted criminal charges.⁴¹

American criminal law relies at least as heavily upon role regulation to ensure the proper defense of the accused. The United States Supreme Court, particularly under the leadership of Chief Justice Earl Warren, has considered the appointment of defense counsel to be the single most important protector of defendant rights.⁴² The notion is that by taking on the defense of a particular case, an attorney will be motivated to investigate and vigorously defend a client against criminal charges. The Court has devised more substantive rules with respect to the conduct of defense attorneys than prosecutors—at least with regard to events outside the courtroom—but the most important regulatory mechanism remains the attorney client relationship. The reality of contemporary criminal justice is that defense attorneys, especially if appointed, have an enormous amount of discretion in how they handle the defense of a matter. What kinds of motions to bring, legal objections to make at hearings and trial, and general strategies to pursue are committed to the discretion of the defense attorney.⁴³ Most cases are resolved by plea bargain and the primary protection of defendant rights in the guilty plea is the efforts of the defense attorney. While there are rules to which an aggrieved defendant may resort in complaining about defense attorney conduct, the reality is

41. Not that charging decisions are subject to much rule regulation either. See *U.S. v. Armstrong*, 517 U.S. 456 (1996).

42. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”); see also *Coleman v. Alabama*, 399 U. S. 1 (1970); *United States v. Wade*, 388 U.S. 218 (1967); *Miranda v. Arizona*, 384 U.S. 436, 471 (1966).

43. See *Faretta v. California*, 422 U.S. 806, 812 n.8 (1975) (reviewing standard rules of criminal procedure with respect to the authority of appointed counsel in the direction of a criminal case.)

that courts are extremely deferential to defense attorney decision-making.⁴⁴ The rationale for this—putting aside cynical explanations—is that we should, and for a variety of reasons must, largely trust to the defense attorney’s personal commitment to his client in order to ensure justice.

This account of role regulation is highly simplistic even for a brief introduction to the subject. Most notably, it suggests that reliance on role regulation is largely an affirmative choice made by courts based on faith in its efficacy, rather than a default position preferred because of the costs in time and money of rule regulation. But the discussion has introduced a critical set of assumptions that shape our criminal justice system and indicate why we must take the distinct roles of all major legal players—prosecutors and defense attorneys, judges and jurors—seriously.

Role regulation can be seen as a form of emotive due process in that it works by establishing and enforcing certain emotional commitments according to professional norms. By virtue of taking on the role of a prosecutor, a lawyer becomes emotionally committed to protection of the public and a particular vision of criminal justice. Similarly, the defense attorney by virtue of case assignment becomes emotionally committed to the cause of his client.⁴⁵ Ideally, each role brings with it a set of professional norms that the role adopter internalizes. In effect, these professional norms substitute for the purely personal reactions that the lawyer would otherwise have to the individuals involved in case.

At sentencing, the prosecutor pays special attention to the concerns of the police and of victims, giving less

44. See *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (constitutional review of defense counsel performance must be highly deferential).

45. “The basic duty to lawyer for the accused owes to the administration of justice is to serve as the accused’s counselor and advocate, with courage, devotion and the utmost of his learning and ability, according to law.” American Bar Association, *Standards Relating to the Administration of Justice*, Standard: The Defense Function, 1.1 (b) (1974) .

attention to the plight of the defendant and defendant's family. This is because according to the professional norms of the job, the prosecutor should focus primarily on (care most about) the harm done by a crime and thus on those persons victimized by it. The defense attorney's priorities at sentencing are opposite; he will focus primarily on (care most about) the situation of the defendant.

While we normally talk about these kinds of professional commitments in terms of professional norms and ethics, they are at base emotional commitments. We want prosecutors to care about victims even if as individuals the victims would not be particularly appealing to the prosecutor. In just the same way we hope that the defense attorney will care about the defense of the defendant even if she lacks personal affection for the client. Role regulation works to the extent that the role adopter takes the appropriate professional norms to heart. Professional norms must shape the emotional reactions of the role player.

Role regulation is sometimes enforced by explicit sanctions for rule violations. For example, a defense attorney may be removed from a case, or a conviction may be overturned if a court determines that the attorney had a conflict of interest in the case.⁴⁶ The concern here is that divided loyalties undercut the attorney's commitment to a particular client. Or to put it another way, we worry that the representation of conflicting interests will undercut the attorney's emotional commitment to a given client. In such cases courts do not review the attorney's actual decisions, but assume that because the attorney client dynamic is so questionable, representation must have been impaired. In this sense, the rules of attorney conflict of interest are a vital aspect of emotive due process in criminal adjudication.

More often, role regulation works by encouraging certain affirmative emotional commitments through the promotion of respect for particular roles. For example, the

46. See *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *Cuyler v. Sullivan*, 466 U.S. 335, 345-50 (1980) (prejudice presumed when defense counsel has an actual conflict of interest).

role of the judge is celebrated by her judicial robe, elevated place in the courtroom, honorific address (your honor), and above all, her responsibility for deciding issues according to the law. The judicial role encourages the person designated as judge to view the case from a particular, judicial, perspective with a particular set of emotional commitments. At first hearing it may sound strange to speak of the judicial role in terms of affirmative emotional commitments, but this is clearly what is meant by judicial temperament. Our ideal judge is someone who is personally committed to the justice process such that she or he eschews the usual emotional reactions. She listens with patience to the tedious, refuses to respond angrily to the provocative, and ponders important decisions with care regardless of the press of other work. In other words, she displays the temperament—the emotional characteristics—of a judge rather than a lawyer or litigating party.⁴⁷

Role regulation has serious limitations. It often does not work. Simply assigning a role to a person does not mean that that person will in fact adopt the role in the proper way. Two of the most common ways in which role regulation fails are when: (1) the legal actor places personal comfort or ambition over professional norms, or (2) the actor interprets the professional role too narrowly.

Legal actors frequently minimize or avoid professional responsibilities when they become personally costly. The appointed defense attorney may be reluctant to risk the wrath of the judge on an especially controversial matter for fear that the resulting dispute will hurt the attorney's chances of gaining future appointments from the court. Likewise, the prosecutor may not wish to risk his professional reputation as a crime fighter or chances for advancement by taking actions critical either of the police or his own colleagues, even if these actions are demanded by his role as a servant of justice and seeker of truth.

47. See generally American Bar Association, Model Code of Judicial Conduct, Canon 3B (1999). For discussion of related issues concerning appellate judges, see Samuel H. Pillsbury, Harlan, Holmes, and the Passions of Justice, in *The Passions of Law*, supra note 23, at 330.

In part to avoid these kinds of conflicts, legal actors sometimes define their roles narrowly. The attorney may reject any responsibility for “justice” resolving that his only obligation is to “do the job” according to the expectations of superiors. Prosecutors, defense attorneys and judges alike may see the orderly disposition of cases as the primary goal of their work and seek to avoid asking hard questions about the justice of those dispositions.

EMOTIVE DUE PROCESS AND THREE STRIKES

Finally we return to Three Strikes to determine how its structure affects emotive due process in sentencing. To what extent does this law change role regulation in the imposition of severe sentences? The simple answer is that California’s Three Strikes law stands traditional role regulation in sentencing on its head.

To understand how radically Three Strikes has changed the usual roles of legal actors at sentencing, and thus subverted traditional role regulation, we need to recall how the traditional sentencing process works. Under the traditional model, a judge passes sentence on an individual defendant based on evaluation of that defendant’s offense and character. Even under most determinate sentencing schemes, the judge retains significant discretion over the sentence in many cases.⁴⁸ The judge’s sentencing decision will depend upon evaluation of the information formally presented by the probation department, the prosecution, and the defense.

In the traditional sentencing proceeding both the prosecution and the defense have significant incentives to present the judge with full information concerning the case. The prosecution will seek to inform the judge about the

48. For an overview of determinate sentencing schemes, see Michael H. Tonry, *Sentencing Reform Impacts* (1987). For an introduction to the controversy concerning federal sentencing guidelines, see Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998); Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 *St. Louis U. L.J.* 299 (2000).

harms to society caused by the particular offense and by other conduct of the defendant. The defense will endeavor to present any mitigating factors in the defendant's commission of the offense, mitigating factors in his background and any positive character attributes. Finally, because the judge knows that she has the fate of another human being in her hands, she has a strong incentive to listen to both sides.

Central to the emotional dynamic of sentencing is compassion.⁴⁹ At sentencing, both prosecutors and defense attorneys make tacit (and sometimes explicit) appeals to the judge's sense of compassion. Prosecutors argue for compassion on behalf of victims; defense attorneys do so on behalf of the defendant. Both sides seek to present facts which will inspire in the decision maker a feeling of emotional identity with and caring for the suffering of the person or persons the attorney represents.⁵⁰ Critical to justice in sentencing therefore is that both sides have a realistic opportunity to appeal to sentencer compassion.

The defendant's right of allocution is in part the right to appeal to judicial compassion.⁵¹ Just the defendant's physical presence in the courtroom represents a kind of emotional appeal. In standing before the court the defendant says to the judge: here I am, the person who will suffer the pains that you inflict. Look me in the eye and tell me what my fate will be and why. The defendant's

49. For an extended look at the emotion of compassion and its importance to moral reasoning, see Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2001). See also Lawrence Blum, *Compassion, in Explaining Emotions* 507 (Amelie Oksenberg Rorty ed., 1980).

50. While formally prosecutors represent the interests of all persons within the jurisdiction, including the defendant, as noted below, prosecutors are primarily concerned with representing the interests of those who have been directly or indirectly hurt by the defendant's criminal activity.

51. See generally *United States v. Barnes*, 948 F.2d 325 (7th Cir. 1991) ("[T]he opportunity to plead for mercy is another provision in a procedural body of law designed to enable our system of justice to mete out punishment in the most equitable fashion possible, to help ensure that sentencing is particularized and reflects individual circumstances." *Id.* at 328. "Because the sentencing decision is a weighty responsibility, the defendant's right to be heard must never be reduced to a formality." *Id.* at 331.). See also *Green v. United States*, 365 U.S. 301 (1961).

presence gives emotional substance to all the evidence and arguments presented on his behalf by counsel.⁵²

Meanwhile prosecution arguments at sentencing appeal to sentencer compassion for those hurt by the defendant's wrongdoing. In a crime of violence the prosecution may generate sympathy for the person hurt or killed. In a property offense, the appeal is on behalf of all of those who directly or indirectly suffered losses (or will suffer losses) because of the defendant's wrongdoing. In a drug offense, the prosecution will speak of the many harms to persons caused by drugs—the lives lost to drug abuse and the secondary harms of the drug trade. One product of the victims' rights movement in recent years has been to afford victims the right to speak for themselves at sentencing, enabling them to make a more personal and thus more emotional and perhaps more powerful appeal for compassion than the prosecutor.⁵³

Central to the effectiveness of these competing compassion appeals is the judge's personal responsibility for the sentencing decision. When the judge has discretion over the length of sentence, she has a professional and personal obligation to listen and consider. Her professional reputation and conscience are engaged by the decision. What happens to the defendant, what happens to past victims and potential future victims all become personal concerns for the court.

52. Claims of ineffective assistance of counsel in sentencing, particularly in the death penalty context, often relate to the zealotry of the attorney in seeking sentencer compassion. See, e.g., *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991) (ineffective assistance found where attorney at penalty phase told jury: "[T]he one you judge is not a very good person . . . I ask you for the life of a worthless man.").

53. The use of so-called victim impact statements in the death penalty context was given constitutional approval in *Paine v. Tennessee*, 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987)). The movement for more victim participation at sentencing has proven politically popular but remains controversial. For an introduction to the debate, see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361 (1996); Paul G. Cassell, *Barbarians at the Gate? A Reply to the Critics of the Victims' Rights Amendment*, 1999 Utah L. Rev. 479.

The benefits of this emotional dynamic can certainly be exaggerated. The crush of cases in modern courtrooms and the tendency of all veteran legal actors to take emotional refuge in narrowly defined role obligations mean that some or all of the legal actors may avoid significant emotional involvement of any kind. Moreover, emotional appeals can distort decision-making by over emphasizing some aspects of the case or the individuals involved.⁵⁴ And we must always distinguish between the opportunity to appeal to compassion and grounds for compassion in the particular case.⁵⁵ My point is simply that the traditional structure of sentencing decision making generally enhances the likelihood of a just decision by giving both parties a realistic opportunity to appeal to judicial compassion. The same cannot be said of California's Three Strikes law.

LEGISLATIVE SENTENCING FOR BAD CHARACTER, REDUX—
AN INVITATION TO CRUELTY

Sentencing involves not just an evaluation of defendant character; it represents a test of sentencer character. The power to take away another's liberty for decades and more, to condemn a person to live the rest of his life in prison is an awesome one, especially if we lack substantive principles to guide the exercise of that power. Here particularly we should demand high standards of emotive due process. But California's Three Strikes law deliberately flouts any such notion of due process.

54. See, e.g., Margaret L. Paris, *Why It Matters*, 45 *St. Louis U. L.J.* 495 (2001); Bandes, *supra* note 53; Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 *Cornell L. Rev.* 655 (1989).

55. Thus the defendant's opportunity to appeal to judicial compassion must be distinguished from any judicial obligation to experience compassion on the defendant's behalf. A judge may, after considering all facets of the case, properly find no grounds for fellow feeling with the defendant concerning the pain he will suffer as punishment. The judge may resolve that the defendant merits such pain because of his criminal activity. This distinction, between realistic opportunity to make an emotive appeal and the success of that appeal, just states in emotive terms the familiar legal distinction between recognizing a party's right to have an argument considered and the party's entitlement to prevail on the merits.

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We have already seen how Three Strikes reassigns sentencing power from judges to lawmakers⁵⁶ and largely eliminates traditional role regulation of the sentencing process. In place of judges assessing criminal conduct and character in the context of a particular case, we have elected officials and voters assessing criminal character based primarily on the legal definitions of prior convictions. This has had a number of deleterious effects upon the sentencing process.

Addressing sentencing via legislation rather than adjudication means that sentencers have less information and less reliable information about offenders and offenses. The legislative approach fundamentally alters the nature of the decision process by altering the identity of and roles played by sentencers. Legislative sentencing places defendants at a great remove from sentencers, greatly weakening any potential appeal to compassion that defendants might make. Legislative sentencing promotes the objectification of defendants by emphasizing concerns with crime generally rather than defendants' specific crimes. In short, legislative sentencing replaces the norms of legal adjudication with those of the partisan political arena. The result is a sentencing process that condones cruelty.

Perhaps the most obvious problem with legislative sentencing for bad character is that sentences are rendered based on very limited information. By making sentences mandatory based primarily upon the legal definitions of prior offenses, Three Strikes excludes from consideration large bodies of information normally evaluated in sentencing. Information about the severity of the particular offense committed by this offender (as opposed to the severity of the offense generally), similar information about the offender's past offenses, and positive qualities in the offender's background (especially important considering that sentencing here emphasizes criminal character) are

56. It also transfers power to prosecutors because of their authority to decide what charges to bring and what charges to dismiss as part of a plea bargain.

among the categories of information excluded by Three Strikes sentencing.

Yet the most serious problem with Three Strikes is not lack of information but the way in which legislative sentencing for bad character distorts evaluation of relevant data. Legislators or voters who determine sentences based primarily on criminal record almost inevitably overemphasize the severity of the defendant's wrongdoing and neglect potential mitigating factors. They do so for two related reasons. First, the objectification of offenders greatly increases the emotional distance between decision maker and subject. In this respect the framers of Three Strikes took careful note of a basic law of human nature: we judge more harshly and hurt more readily those whose full humanity we need not acknowledge. Second, presenting sentencing as a legislative decision means that decision makers adopt the norms of the political rather than the legal process. Ordinary legal checks on self-interested and non-case related emotions are removed while general anxieties about crime are emphasized.

We have already seen the importance of regulating emotional distance in decision-making. We have seen that while the criminal justice process is most concerned with establishing a minimum personal distance between decision maker and subject, too much distance can be a problem as well. Virtually all forms of ill treatment become easier when the sufferer is distant or unseen. This is because the significance of an event to an individual always depends on that person's emotional connections to those involved.⁵⁷ Thus a traffic jam on the way to work may inspire much more passion than a natural disaster that kills hundreds or thousands in a distant country. Sentencing by legislative fiat dramatically increases the distance between decision maker and subject, converting a local decision involving individuals whose fate has some personal meaning to the decision maker, into a kind of

57. This is definitionally true. Because we experience significance in our emotional reactions, the two phenomena are joined.

foreign policy decision, where the harsh consequences of the decision involve distant, faceless people.

The Three Strikes law increases emotional distance in sentencing by the objectification of the offender. Because those in effect sentenced by voters and legislators in 1994 had no names, faces or actual personal histories, they were not fully human to the sentencers. The law's subjects were not respected as unique persons, even as their characters are condemned. The offenders became Other; they were simply and entirely Criminals. This profoundly altered the way in which sentencing decisions were reached.

Simply considering criminality in the abstract—as Three Strikes sentencing does—rather than in the context of a particular case tends to heighten our perception of criminal severity. We can see this in legislative decision-making about both the definitions of crime and their punishments. When we think about a generic type of crime—a murder, a rape, a robbery—we generally assume the worst concerning the criminal conduct involved and the person responsible. Asked to describe a robbery, the average person is likely to tell of an armed robbery, a frightening confrontation between a citizen and a physically imposing adult male who holds a deadly weapon to the head and is prepared to use it if he does not obtain what he seeks. Few will imagine a slightly built adolescent, addicted to drugs, who enters a bank and hands the teller a note that demands all of her large bills. Both offenses are robberies, but present significantly different profiles of culpability and dangerousness. These distinctions will likely be recognized at sentencing if sentencing is based upon the facts of the particular case. But if sentencing depends upon a legislative assessment of the severity of all robberies, then both cases will receive the same sentence, a sentence heavily skewed to the worst instances of the offense.

The emotional dynamic of sentencing changes dramatically with the alteration of sentencer responsibility and role. We have already seen how in traditional sentencing the requirement that the judge take personal

responsibility (within her professional role) for the sentencing decision of a person who stands before her,⁵⁸ maximizes the defendant's opportunity to appeal to judicial compassion. But under Three Strikes, no single person bears primary responsibility for sentencing.

Yet even more troubling than the number of decision makers in legislative sentencing, is the altered role played by a legislative sentencer. In adjudicative sentencing, the sentencer acts within a judicial role that entails a particular intellectual and emotional perspective on the sentencing decision. In accord with the norms of role regulation, we presume that when lawyers take the judicial oath and lay persons are sworn as part of a jury panel, they will adopt a legal perspective on their work. By contrast, when persons make decisions in the political realm, they act according to political norms which impose few restrictions on what may be considered, either intellectually or emotionally.⁵⁹

We can see the importance of the distinction between adjudicative and legislative roles in social science research into public views of certain important criminal justice decisions. These views tend to vary according to whether they are presented to the interviewee as a general policy matter, or as a decision concerning a particular case. Thus researchers have reported for a number of years a divergence between general views about the severity of criminal punishment and views about the proper punishment of particular offenders.⁶⁰ Surveys indicate that

58. Recognizing this dynamic, in the death penalty context, the Supreme Court has required that sentencing jurors understand their primary responsibility for the sentence, and not shift responsibility to other legal actors. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). See generally, Markus Dirk Dubber, *The Pain of Punishment*, 44 *Buff. L. Rev.* 545 (1996).

59. "In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates; every Athenian assembly would still have been a mob." *The Federalist No. 55*, at 374 (James Madison) (Jacob E. Cooke ed., 1961).

60. See Michelle D. St Amand & Edward Zamble, *Impact of Information about Sentencing Decisions on Public Attitudes Toward the Criminal Justice System*, 25 *Law and Human Behavior* 515 (2001); Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice in 16 Crime and Justice: A Review of Research* 99 (Michael

citizens in several industrialized nations believe the state's criminal justice system is too lenient in its handling of those convicted of crimes. Consistent with this view, many support legislative and other measures to increase penal severity for a wide range of offenders. Yet when asked to evaluate particular criminal cases, when given the facts of a particular offense and the background of a particular offender, these critics of the current system tend to recommend punishments similar to those standardly issued by judges working in the current system.

We see the same dichotomy appear in attitudes towards the death penalty, depending upon whether these are considered legislatively or in the role of a juror. Studies of death penalty decision-making indicate that jurors often change their view of the death penalty from the beginning of a case to the time of sentencing. Persons who state confident support for capital punishment at the outset of a trial may change their minds when asked to impose it on a particular individual.⁶¹

In turning sentencing into an essentially legislative decision, the Three Strikes law fundamentally changed the nature and emotive dynamics of sentencing. In accord with legislative norms, decision makers concerned themselves with broader issues than would be considered in traditional sentencing in the courtroom. Similarly, the deliberations were conducted in accord with the emotive norms of the political realm. Neither change bodes well for the justice process for both tend to blur the line between purely personal concerns and those critical to justice.

In traditional sentencing, the judge concerns herself primarily with the proper disposition of particular cases according to existing law and the prevailing sentencing culture of the courthouse and jurisdiction. Legislative sentencing involves the resolution of issues of broad public importance in a partisan, political context. Instead of decisions based on presentence reports and attorney

Tonry ed., 1992).

61. See sources cited at Dubber, *supra* note 58, at 571-77.

arguments, we have decisions influenced by sound bites and attack ads. Instead of appeals made according to the norms of law, where emotions must be restrained and logical connections to the particular case are required, legislative sentencers decide according to the nearly unrestricted emotional norms of politics. In the absence of judicial robes, courtrooms, lawyers and the defendant, and in the presence of other politicians and the press, any emotive appeal that resonates with the listener may be employed.

In legislative sentencing, both the abstract nature of the decision and the legislative role of the decision maker mean that general fears of crime and anger at criminal offenders come to dominate sentencing. Instead of worries about public safety being filtered through the particulars of a criminal case, decision makers in the legislative setting see themselves as dealing directly with Crime. Legislative sentencers focus not on the particular threat posed by a particular offender but with the threats to overall physical and psychological security of citizens posed by a whole class of offenders. This exacerbates the tendency for sentencing decisions to be symbolic, to represent highly personal reactions to perceived threats that the criminal statute may or may not address effectively. Thus general anxieties about economic, cultural and demographic change often find expression in anti-crime crusades, including support for harsh mandatory penalties.⁶²

The foregoing concerns with emotive due process in legislative sentencing—the increase in emotional distance

62. There is a growing literature in both criminology and law seeking to explain and critique the political dynamics of changing criminal policy in the last generation in the United States and England. The premise of most authors is that major increases in the severity of punishment in recent years cannot be explained simply as a reaction to rising crime rates. Many analysts attribute the increases to changes in the public's view of government, of criminal justice experts, and the impact of media reporting on crime. See, e.g., Zimring et al., *supra* note 17; David Garland, *The Culture of High Crime Societies*, 40 *Brit. J. Criminology* 347 (2000); Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 *Brit. J. Criminology* 445 (1996); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity through Modern Punishment*, 51 *Hastings L.J.* 829 (2000).

by objectification of offenders, and the adoption of a political rather than legal role for the sentencer—can be seen in the successful campaign waged on behalf of California's Three Strikes law.⁶³

In the rhetoric of the campaign, the subjects of Three Strikes were always objectified as criminals. At best they were felons, repeat offenders. More often they were predators or "dirtbags."⁶⁴ Never did they have a human identity beyond their criminal record.⁶⁵ Gov. Pete Wilson when he signed the first Three Strikes law, stated: "It sends a clear message to repeat criminals: Find a new line of work because we are going to start turning career criminals into career inmates."⁶⁶

Proponents consistently took advantage of the norms of politics to argue that Three Strikes was needed because of the threats posed by violent offenders.⁶⁷ This emotional oversimplification of the issue drew popular support even though the law's greatest impact would be on offenders who had not committed violent offenses. The law gained

63. For detailed accounts of the political process, see Zimring et al., *supra* note 17; Michael Vitiello, *Three Strikes: Can We Return to Rationality?* 87 *J. Crim. L. & Criminology* 395, 409-22 (1997); see also Victor Sze, *Note & Comment, A Tale of Three Strikes: Slogan Triumphs over Substance As Our Bumper Sticker Mentality Comes Home to Roost*, 28 *Loy. L.A. L. Rev.* 1047 (1995).

64. Jeff Thompson of the California Correctional Peace Officers Association speaking before the legislature: "it is a crime when the system permits these predatory individuals to roam our streets." Mike Reynolds and Bill Jones with Dan Evans, *Three Strikes and Your Out! . . . A Promise to Kimber*; *The Chronicle of America's Toughest Anti-Crime Law* 135 (1996). Mike Reynolds, the prime mover behind Three Strikes, declared: "I say that if a person commits two serious or violent felonies and then commits another felony, we should get that dirtbag off the street!" *Id.* at 175.

65. See Zimring et al., *supra* note 17, at 199. The authors note that when persons consider criminals as a group, they become both symbols of crime and targets of general hostility not connected to their particular criminal offenses. "There is no natural limit to this nonproportional hostility. It is only when specific situations involve an individual with a face and a story that punitive sentiments might encounter an upper limit." *Id.* at 202.

66. *Id.* at 201.

67. For example, the ballot pamphlet in favor of Three Strikes argued that it would protect the public from "career criminals" who "rape women, molest innocent children and commit murder." Bowers, *supra* note 17, at 1171-72 (quoting the Three Strikes ballot pamphlet).

enormous political momentum in the wake of a terrible kidnapping and murder of a young girl by a repeat violent offender who had served less time for his offenses than they appeared to merit.⁶⁸ Typical of proponent rhetoric in this regard was this statement of Mike Reynolds, the principal mover behind Three Strikes to California legislature: “This legislature has a moral responsibility to protect the citizens of this state. Any time a person in this state dies at the hands of a repeat felon, you must share responsibility for enabling that person to leave prison and commit that crime. For enabling a person with a demonstrated history of serious or violent felonies to walk the streets and commit the same crimes over and over again.”⁶⁹

Fear of violent crime and anger at government for failing to curb it was used by proponents to attack judges who were said to be “soft on crime” in sentencing.⁷⁰ This was the factual predicate supporting the law’s removal of most judicial discretion over sentencing of repeat offenders. The emotional dynamic of traditional sentencing was thus the direct target of reformers: judges were to be prohibited from caring about the persons that they sentenced, or at least prohibited from allowing their caring to affect the legal decision.⁷¹

68. Jeffrey Toobin, *The Man Who Kept Going Free*, *The New Yorker*, March 7, 1994, at 38.

69. Reynolds & Jones, *supra* note 64, at 134 (1996). Similarly, a radio host argued in favor of Three Strikes: “Three Strikes is there to cut the blood line. To get to the repeat felons off the street before they do indeed kill! Before they rape! Before they burglarize your home!” *Id.* at 220 (quoting Ray Appleton).

70. To those who had a working knowledge of California criminal justice in 1994 this claim may appear bizarre given that the great majority of state judges at this time had been appointed by governors with a strong interest in harsher punishment and many of these judges had previously been prosecutors, giving them a generally prosecution oriented view of sentencing. Indeed the rate of incarceration in the state had increased significantly in every year from 1980 to 1994, before Three Strikes was passed. See Zimring et al., *supra* note 17, at 156.

71. “The upward bias in bloodless, general rules of punishment is a corollary of whatever pressure toward mercy that results from the presence of a defendant [at sentencing] . . . [T]he obvious cure for this ameliorative pressure is to remove the people that make penalty decisions from contact with the people to be punished.” Zimring et al., *supra* note 17, at 199-201 (2001).

A STEP TOWARD EMOTIVE DUE PROCESS: THE CALIFORNIA
SUPREME COURT'S *ROMERO* DECISION

Legal challenges to the Three Strikes law began immediately upon its enactment. Many challenges have been mounted under the cruel and unusual punishments provision of the Eighth Amendment, with mixed results.⁷² Two such cases are on this term's docket of the United States Supreme Court.⁷³ But our focus here has been on the question of institutional competence and role regulation, rather than on substantive rule regulation of sentencing. In this regard, the most important and most successful challenge to the Three Strikes regime came in a 1996 decision rendered by the California Supreme Court, in which it held that trial courts retained some discretion to vary from the mandatory penalties set out in Three Strikes.

In *Romero*⁷⁴ the court relied upon long-standing statutory authority in California to hold that trial courts, in appropriate cases, could dismiss allegations of prior felony convictions "in furtherance of justice," without the consent of the prosecution. The effect of such a dismissal could be to either remove the case from the strictures of Three Strikes entirely, or reduce a third strike case to a second strike case. The lengthy decision was concerned almost entirely with statutory interpretation in light of state constitutional separation of powers doctrine. The court's primary stated concern was the asymmetry of the powers argued for by the

72. E.g., *Andrade v. California*, 270 F.3d 743 (9th Cir. 2001), cert. granted, 535 U.S. 969 (2002) (sentence of life without chance of parole for 50 years held violation of Eighth Amendment where offenses of conviction were thefts of videotapes which, without an enhancement for prior offenses, would have been treated under state law as misdemeanors); *People v. Martinez*, 84 Cal. Rptr. 2d 638 (Ct. App. 1999) (Three Strikes penalty constitutional for new driving under the influence offenses, drug use and attempting by theft to deter a peace officer from carrying out his duty). See also *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002) (finding third strike sentence to be grossly disproportionate); *People v. Mantanez*, 119 Cal. Rptr. 2d 756 (Ct. App. 2002) (finding third strike sentence constitutional); *People v. Romero*, 99 Cal. App. 4th 1418 (2002) (same).

73. *Lockyer v. Andrade*, 535 U.S. 969 (2002) (granting cert.); *Ewing v. California*, 535 U.S. 969 (2002) (granting cert.).

74. *People v. Superior Court (Romero)*, 917 P.2d 628 (Cal. 1996).

Attorney General, who maintained that prosecutors had discretion to dismiss prior conviction allegations, but not judges. The court resolved that earlier decisions maintaining independent judicial power to dismiss charges strongly suggested that there was no legislative or voter intent in Three Strikes to change this long-standing policy.⁷⁵

The *Romero* decision was important because it returned a measure of sentencing authority to courts and in effect restored a measure of emotive due process, by making the sentencing court at least in some cases the real sentencer as opposed to just the issuer of a predetermined penalty.

The significance of the decision can be exaggerated, however. The California Supreme Court has held that a sentencing court must give a statement of reasons for the dismissal of any prior convictions and that the dismissal must not be “outside the spirit” of the Three Strikes law.⁷⁶ The “outside the spirit” rule is a somewhat mysterious principle by which the court seeks to reconcile judicial sentencing discretion with a law primarily designed to remove such powers from judicial hands. The court seems to envision the gradual development of a line of appellate authority which would guide trial courts in ameliorating the harshness of Three Strikes without fundamentally subverting its aims. Although the court has not explicitly laid out guidelines for striking priors, the analysis it has undertaken to date indicates the need for a review of the defendant’s new offense, his criminal history and his prospects for future criminality, all of which would be compared to the sort of criminal background that the court presumes was envisioned by the supporters of Three Strikes as meriting the severe sentences provided by the law.⁷⁷

75. The court held this despite the strongly expressed sentiments of Three Strikes proponents that the law was needed to curb judicial discretion over sentencing. The opinion quoted from part of the ballot argument in favor of Three Strikes that: “soft-on-crime judges, politicians, defense lawyers and probation officers care more about violent felons than they do victims.” *Id.* at 646 (quoting Ballot Pamphlet, rebuttal to the argument against Prop. 184, as presented to the voters, Gen. Elec. (November 8, 1994), at 37).

76. *People v. Williams*, 948 P.2d 429 (Cal. 1998).

77. *Id.* For a recent application by the Court of Appeals, see *People v. Strong*,

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The same problems found in California's Three Strikes law appear in many determinate sentencing schemes enacted at both the state and federal levels. As an Arizona judge recently wrote concerning sentencing in that state: "The venerable ritual of sentencing has become a puppet show where defendants are not individuals but criminal classes and judges' discretion is hamstrung by generic legislative decrees."⁷⁸ Indeed, Three Strikes may be seen as simply one of the most extreme examples of a trend in many United States jurisdictions in the last 15 to 20 years to transfer sentencing decision-making from judges to legislatures—and prosecutors—through mandatory minimum sentencing laws.⁷⁹

Wherever and however enacted, legislative sentencing for bad character should receive close constitutional scrutiny. Where mandatory penalties are justified not on the severity of the offense of conviction, but based on the offender's propensity for criminality, courts should consider a variety of potential constitutional violations in light of what I have called violations of emotive due process.⁸⁰

100 Cal. Rptr. 2d 490 (Ct. App. 2001). See generally Rebecca Gross, Comment, The "Spirit" Of the Three Strikes Law: From Romero Myth to the Hopeful Implications of Andrade, 32 Golden Gate U. L. Rev. 169 (2002).

78. Judge Rudolph J. Gerber, On Dispensing Injustice, 43 Ariz. L. Rev. 135, 141 (2001).

79. See Christopher Mascharka, Comment, Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences, 28 Fla. St. U. L. Rev. 935, 938-42 (2001); Edward G. Luna, Forward: Three Strikes in a Nutshell, 20 T. Jefferson L. Rev. 1, 2-3 (1998).

80. Not considered in this essay, but important to this point is drawing a substantive distinction between character and conduct punishment. There may well be some instances where penalties that purport to punish conduct, in fact represent a judgment about propensity for criminality. For example, the enormous disparity in federal law between penalties for powder cocaine vs. crack cocaine may be better explained by presumptions about the criminal propensities of persons engaged in these respective drug markets. The disparity has been especially controversial because of its racial implications, implications which may also go to the character assessments that informed legislative decision-making. See David Cole, No Equal Justice: Race in Class in the American Criminal Justice

As noted at the outset, I have not attempted a doctrinal argument here. I have not tried to show that emotive due process is a principle currently recognized in our constitutional law of penal limitation. Nor have I tried to establish the particular shape or limits of legal rules that might be informed by emotive due process. I have not tried to answer the hard, practical questions of what rules we might establish to distinguish between permissible and impermissible mandatory penalty laws. I have concentrated instead on a larger set of concerns raised by current legal structures. I do not mean to imply by any of this that such doctrinal arguments cannot be made, however. In fact, long-standing principles found in a number of constitutional contexts may provide the material needed for constructing a doctrine of penal limitation based on emotive due process.

The Eighth Amendment's prohibition on cruel and unusual punishment provides perhaps the most obvious doctrinal structure to express the concerns raised here. Two different lines of Supreme Court cases interpreting the Eighth Amendment might be employed: those requiring individualized sentencing in capital cases and those mandating that all criminal penalties—capital or otherwise—be proportional to the offense of conviction.

Over the course of many years, the United States Supreme Court has consistently struck down criminal laws requiring the death penalty for particular offenses.⁸¹ Even when the offense is narrowly defined, such as first-degree murder by a prisoner serving a life sentence, the Court has found such penal legislation violative of the Eighth Amendment's ban on cruel and unusual punishment.⁸² The

System (1999); Michael H. Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (1995). Cf. Randall Kennedy, *Race, Crime and the Law* 364-86 (1997). On the disparity generally, see United States Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (1995).

81. See *Sumner v. Shuman*, 483 U.S. 66 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976); see also *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

82. E.g., *Sumner v. Shuman*, 483 U.S. 66 (1987).

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Court's stance in this regard has struck many, including some on the Court, as curious, even inexplicable, because it stands in such tension with the Court's other major concern with death penalty decision-making, that death sentences be made according to predetermined legal criteria and not the subjective preferences of the decision maker.⁸³ Still a majority of the justices believe that there is a moral imperative to individualized sentencing, at least as to death.

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.⁸⁴

The principle of individualized sentencing provides that both the dignity of the offender—his right to be treated as a person and not a legal category—and the emotive dynamics of sentencing, require that no one be put to death unless he or she has had a real chance to appeal to sentencer compassion. As a result, no sentencer may order death without facing the emotional consequences of direct, personal responsibility for the decision.

The Supreme Court has been careful to restrict the individualized sentencing principle to the death penalty. The Court here, more than almost anywhere else, has

83. Justice Scalia has made this point in characteristically pointed fashion. See *Walton v. Arizona*, 497 U.S. 639, 656-74 (1990) (Scalia J. concurring). For a response, see Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 *UCLA L. Rev.* 1147 (1991). For an overall critique of the Supreme Court's death penalty jurisprudence, see Carol S. Steiker and Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 *Harv. L. Rev.* 355 (1995).

84. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

insisted on the differentness of death as a punishment.⁸⁵ But the moral insight that drives the Court to ban mandatory death sentences may apply to other situations. Under California's Three Strikes law, the offender is also treated, not as a unique person but as a thing, a legal category comprised of present and prior offenses. The law mandates that he lose a significant portion of his life, and in many cases should die in prison, without ever having the opportunity to make a realistic appeal to sentencer compassion. In this regard, Three Strikes violates the wisdom of individualized sentencing in at least as serious a fashion as do mandatory death penalties for certain designated offenses.⁸⁶

A court concerned with violations of emotive due process might consider the individualized sentencing precedents in combination with other decisions by the Court regulating the balance of power between judges and juries in criminal cases. The Court has used both the due process clause and the jury trial right to overturn legislative and sometimes judicial decisions concerning what issues in a criminal case must be resolved by a fact finder at trial, and the related question of how the burden of proof on particular issues must be allocated.⁸⁷ While these decisions involve legal questions distinct from mandatory sentencing, they can be seen as part of a larger constitutional structure in which courts play a critical role in regulating the boundaries between legislation and adjudication, trial and sentence. Courts might use this larger body of precedent to mandate that a sentencer have certain minimum responsibilities for decision-making, at least with respect to particularly harsh sentences.

The second line of Eighth Amendment authority, prohibiting criminal penalties grossly disproportionate to the offense of conviction, has dominated the current

85. E.g., *id.* at 305.

86. At least the mandatory death penalty statutes impose punishment primarily based upon the severity of the offense of conviction.

87. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Carella v. California*, 491 U.S. 263 (1989); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

litigation concerning Three Strikes.⁸⁸ Because this essay has concerned role rather than rule regulation, I have not considered this aspect of cruel and unusual punishment in any detail. But proportionality analysis under the Eighth Amendment might well be informed by the concerns of emotive due process. Courts could resolve to scrutinize more carefully the proportionality of any penalty imposed by legislative sentencing (especially that based on character assessment) on the ground that deficiencies in emotional due process make a disproportional penalty far more likely.⁸⁹

In end, the most serious obstacle to constitutional regulation of legislative sentencing for bad character based on problems with emotive due process is not current doctrine, but judicial will. To date, most appellate courts have not demonstrated the interest or will to take the political risks involved in checking the recent shift in institutional power from judges to legislators and prosecutors, a shift inherent in (and, we must concede, a source of the popularity of) legislative sentencing.

CONCLUSION

In this nation committed to democratic principles, we generally believe that the best way to make public policy is for the people to decide policy matters for themselves. Thus we generally believe that legislation enacted by the people's representatives, or better yet approved by the voters themselves, should not be second-guessed by the courts. But as I have argued here, the authority of the people—and their abilities—change when the decision to be rendered is

88. See *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002); *Andrade v. California*, 270 F.3d 743 (9th Cir. 2001), cert. granted, 535 U.S. 969 (2002); *People v. Romero*, 99 Cal. App. 4th 1418 (2002); *People v. Mantanez*, 119 Cal. Rptr. 2d 756 (Ct. App. 2002); *People v. Martinez*, 84 Cal. Rptr. 2d 638 (Ct. App. 1999).

89. This could be analogous to differing levels of scrutiny under the equal protection clause where categorical judgments about the seriousness of the potential injury and likelihood of a violation of constitutional norms determines the level of deference given to state decision makers.

not legislative in nature but represents the adjudication of particular disputes.

The democratic pedigree of California's Three Strikes law does not change or mitigate the moral fact that it is designed to impose harsh sentences by permitting decision makers to avoid the emotional consequences of imposing harsh sentences. It is punishment by proxy, constructed so that no one person need feel responsible for sentences issued far into the future. By making the decision in legislative rather than adjudicative fashion, responsibility for individual sentences is so thinly and widely dispersed that it nearly disappears.

Generally we may separate difficult public policy decisions into two distinct categories: those where the right outcome is genuinely difficult to discern and those where the right outcome is clear, but difficult to accomplish. The problems with California's Three Strikes law fall under the second category. The injustice of mandatory life sentences for nonviolent offenses without any consideration of the individual offender or the particulars of his offenses is as obvious to courts as it is to many others. Certainly no one needed to read this essay to discover the basic problems with California's Three Strikes law. Here I have just sought to rename the obvious and provide a measure of provocation for courts to do what justice requires.