University of Dayton Law Review

Volume 20 | Number 2 Article 14

1-1-1995

"Three-Strikes-and-You're-Out"—Pragmatic, Political, or Pacification

Morton Feldman

Follow this and additional works at: https://ecommons.udayton.edu/udlr

Part of the Law Commons

Recommended Citation

Feldman, Morton (1995) ""Three-Strikes-and-You're-Out"—Pragmatic, Political, or Pacification," *University of Dayton Law Review*: Vol. 20: No. 2, Article 14.
Available at: https://ecommons.udayton.edu/udlr/vol20/iss2/14

This Symposium is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact mschlangen1@udayton.edu, ecommons@udayton.edu.

"THREE-STRIKES-AND-YOU'RE-OUT"—PRAGMATIC, POLITICAL, OR PACIFICATION

Morton Feldman[*]

I. INTRODUCTION

The "new" sound bite for politicians in 1994 was the "three-strikes-and-you're-out" proposal to reduce crime. Painted in broad, vague, and undefined terms, the plan calls for the incarceration for life of all "violent" three-time offenders. To a society plagued with random, violent crime (even though statistics show a decline in such crime), it is understandable that Americans believe that courts do nothing when criminals are caught and convicted, that there is no truth in sentencing (true), and that no criminal serves enough time in prison. The "three-strikes" proposal is music to the ears. A "cure" has been found, and I'm safe again.

Hold that thought. The United States incarcerates more people than any country in the western world—one of every 250. In 1992, there were 2.7 million adults on probation and 531,000 on parole. Adding those in jail and prison, there were 3.7 million adults under some type of "supervision" in our country. Those numbers should tell us that somebody, somewhere is doing something right. Unfortunately, the system has lost focus. As a result of badly flawed, hastily-crafted laws enacted to pacify the public in an attempt to show that we were waging a "war" on drugs, federal prisons are loaded to the seams with mid- to low-level nonviolent drug offenders. The laws as written took all discretion from judges. Laws that remove judges' discretion, such as the Federal Sentencing Guidelines, are under constant attack.

II. WE MUST LEARN FROM THE PAST

The cost of incarceration (also known as the cost of protecting society from the criminal predator) is around $20,000 per inmate per year. When we expend this much money on the violent offender, the money is well spent—there is no dollar value to be placed on the lives of the victims of violent crime. The problem is that we have not learned from the past. Starting in the early 1920s and lasting until the early 1950s, we had a three-time loser act. That act failed as a result of indiscriminate targeting, and it was abandoned. The Department of Justice tells us that from 1979 to 1993, the rate of incarceration (per hundred thousand residents) rose from just under 150 to 350. These were the targets:

---

* Executive Vice-President, National Association of Chiefs of Police.

Published by eCommons, 1994

- Drug Offenders: from 25% to 65%
- Violent Offenders: from 15% to 35%
- Property Offenders: from 10% to 20%
- Weapons Offenders: from 5% to 10%
- Other Offenders: from 10% to 20%

These figures should tell us two specific facts. First, we are not locking up the predators. Second, the "surgical strike," not the shotgun approach, is what we need.

III. AIM AT THE RIGHT TARGET

It is axiomatic in the law enforcement community that between twelve and fifteen percent of the criminals commit between eighty and eighty-five percent of the crimes. Many public prosecutors' offices have created "career criminal units" that target habitual offenders. This is an excellent place to start. The next move is to identify, with total clarity and specificity, the nature of offenses that will be cited when invoking the new law. For example, when we cite the offense of rape, we must be careful to state forcible rape as opposed to statutory rape. We do not want to incarcerate for life an eighteen-year-old boy for having consensual relations with his sixteen-year-old partner simply because the law says that she cannot give consent until she is seventeen. Forcible rape is a matter of a sub-human entity using brute force or the threat of fear to victimize someone. It is not comparable to statutory rape, and the two should be distinguished. There is an absolute need for the ingredient of specificity. We do not want to expend the huge dollars, or even use the bed space, to incarcerate the nonviolent for life. The nonviolent can and must be dealt with at intermediate stages.

If our laws were properly aimed at the right targets, those immediately eligible for execution or life without parole would include those convicted of: (1) Murder; (2) Homicide of any law enforcement officer killed in the line of duty; (3) Homicide in any school, house of worship, airport, jail, prison, courtroom, or hospital; (4) Homicide during a forcible rape, armed robbery, armed burglary of an occupied dwelling, or home invasion kidnapping for ransom or with bodily harm; and (5) Homicide by any violent criminal competently diagnosed as sociopathic. We should not wait until the third such violent crime in most cases, as allowing the number of victims to multiply is not acceptable.

IV. TO SERVE WHAT PURPOSE?

Incarceration serves a number of purposes. It incapacitates the offender, it protects society, it is acceptable retribution for the victim, and it punishes. Punishment, unlike brutality, is not a dirty word—it is the consequence of the criminals' choice of action; it is earned. Absent major mental disorder, there is no acceptable excuse for the actions of these predators. They have made a choice

https://ecommons.udayton.edu/udlr/vol20/iss2/14

and now must pay the price. There are those that, by the repetition of their behavior, have demonstrated that they are not fit to live in a free society. This is an unfortunate but true fact.

V. THE DEVIL IS IN THE DETAILS

In the crafting of the "three-strikes" provision of the 1994 Crime Bill lies its potential success or failure. The cost of incarceration should not deter the plan's implementation. It should, however, create pause and thought that we must not repeat the failure of the past. The "shotgun" approach of the abandoned three-time loser law must be avoided, and the hastily-crafted mandatory drug sentences must not apply. With proper crafting, we have the intelligence and technology to strike the proper target.

For example, like all people, prisoners are subject to serious illness or injury, and medical costs are a serious burden added to the cost of incarceration. In the event an inmate suffers a medically confirmed incident that renders him incapable of inflicting additional harm, the court should commute his sentence to time served, release him, and let him take his place in line with the citizens who face this medical dilemma on a daily basis. To those who would say that this is a cold and unfeeling action, I would observe two things. First, Supreme Court Justice Louis Brandeis once said, "If we would guide by the light of reason, we must let our minds be bold."[1] In this case, the reasoned, bold approach is to release the inmate. Second, it is the criminals that have demonstrated by their violent acts that they are unworthy of compassion—the victims deserve our sympathy. Under current law, there is a gross obscenity in what we do for criminals in need as compared to how we help their innocent victims. This must change.

VI. AN IDEA WHOSE TIME HAS BEEN LONG OVERDUE

"Three-strikes-and-you're-out" has the potential for being the first major positive step in criminal justice. Crafted properly, imposed effectively, and not diluted politically, the warning sign may soon be lighted: PREDATOR BEWARE.

1. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Published by eCommons, 1994