



NACDL Testimony

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"Three Strikes" Sentencing

**Testimony by NACDL member, Bill Moffitt, before the United States
Commission on Civil Rights**

Thank you for providing me this opportunity to join your panel on mandatory life imprisonment after "three strikes" on behalf of the members of the National Association of Criminal Defense Lawyers (NACDL).

NACDL opposes the so-called "three strikes (or less) and you're out" laws, be they wreaked through the state or the federal systems.

"Three strikes and you're out" means automatic life imprisonment upon a third conviction. Recent surveys show that a grossly disproportionate number of non-whites are presently incarcerated, and there is every reason to believe that three-strikes sentences will incarcerate a grossly disproportionate number of young black persons, at great expense, until they become feeble old men and women who look forward only to leaving prison in a box.

A rational society would promulgate a rational policy designed to incarcerate the *least* number of citizens rather than the maximum number possible, because every time we incarcerate an individual, we create a person who will forever have little stake in this society.

A just and rational sentencing policy is one that looks at both the offender and the offense. A three strikes regime only addresses revenge, often after a petty, non-violent, non-predatory third offense. This is not a rational criminal justice "policy"; it is a short-sighted political goal, in which vengeance is secondary to justice, and cost is no object.

It is a fact that it is cheaper to prevent crime than punish it, as studies have shown. In the three strikes debate, politicians, because they have made the crime problem so political, have ceased to

consider the expense of their "solutions." It costs a great deal of money to incarcerate an individual for a single year. A life sentence for a single young offender sentenced today will cost society upwards of \$1 million over the next 40 years or so, while it would cost less than \$100,000 to feed, clothe, house and send that same person to Harvard for four years. Harvard and prison cost about the same per year. But which alternative does our society consider worth the investment?

Until we change our criminal justice policy from one of revenge to one of prevention, we are going to be spending dollars warehousing human beings which would be better spent preventing crime in the first place. How many Picassos, Ralph Bunches, John Glenns, and Wynton Marsalises are we throwing away forever with our mindless criminal justice policies? Until we begin addressing the front end of the crime problem rather than the back end, we are fooling ourselves into thinking we are really doing something about crime.

Disproportionate number of prisoners are non-white

A report released last October by The Sentencing Project, a Washington, D.C. organization which studies criminal justice policies and sentencing reform, shows that on any given day about 827,440 black men between the ages of 20-29 are imprisoned, on probation, or parole--almost one in four young African American males is under some form of criminal justice supervision. That figure represents a 31 percent increase over a similar study by The Sentencing Project in 1990.

An earlier study, noted in *The Economist* last month, divided America's blacks between "underclass" and "non-underclass," and concluded that the biggest increase in prison population was among "non-underclass" blacks convicted for drug offenses. Our society is not just throwing away the hopeless. We are throwing away ourselves.

Does it make for a sane, rational criminal justice policy to insist on incarcerating these individuals for life, with no chance at probation and no hope for parole, until they come out of prison feet first? The insanity of that kind of thinking is particularly evident when it is noted that many "third strike" convictions are for non-violent, non-"predatory" offenses. In the article mentioned above, entitled "Crime in America," *The Economist* took a cynical look at preoccupation with incarceration as a solution to crime, particularly California's three strikes law. The magazine noted that the most celebrated case was the man whose third strike was for stealing a piece of pizza, and then observed that his case was not unique: another man got life after stealing three steaks. The real irony of these stories is that we can go to the theater to see *Les Miserables* and feel the injustice of Jean Valjean's being cast into the Bastille for stealing bread. Are we sure we are completely rational here?

The growth in the criminal justice system in the past 20 years has coincided with economic and social problems that have had profound effects on income distribution, employment and family structure. While politicians rail about the demise of the family, the decline of the manufacturing base and middle class tax base in urban areas have left African Americans disproportionately

represented in low-income urban communities where the effects of social problems are more concentrated.

Our "war on drugs" virtually guarantees that three strikes sentencing will fall primarily on African Americans, because drug sales count as prior felonies. There is increasing evidence that the set of policies and practices contained in the "war on drugs" has been an unmitigated disaster for young blacks and other minorities. The risk of incarceration per drug arrest has risen more than 400 percent since 1980, from 19 prison or jail terms per 100,000 arrests to 104 per 100,000 arrests in 1992. According to The Sentencing Project, one in four inmates were locked up for a drug offense. The full impact of mandatory minimum and mandatory life sentences for these usually non-violent crimes is yet to be seen, since many of these penalties only began to be applied in large numbers in the late 1980s.

Only one out of 10 inmates serving a term for drug possession is a non-Hispanic white. African Americans are serving 73.7 percent of all state prison sentences for simple drug possession.

How can people of conscience draft and enforce a law that would force a judge, even against his experienced judgment, to incarcerate a 20-year-old man or woman for life, without hope of parole, the third time they wrote a bad check or sold \$10 worth of crack? What kind of system do we have that permits us to elect or appoint judges and then not trust them to do justice?

If fairness and justice for all are not sufficient reasons to reject three strikes sentences of life imprisonment, then let us turn to the darling of argument in this day and age: incarceration is very expensive. Incarceration for life is incredibly expensive. The general aging of our prison populations and attendant costs will be staggering in the next 40-50 years--which is what we are talking about when we talk about locking up young three-time losers until they are geriatric patients. That is not a rational punishment. That is not deterrence. That is not retribution. That is, when all is said and done, the most expensive and most cruel kind of revenge.

A 1994 Carnegie Corporation report found that about one in ten children in the United States are seriously abused or neglected by their parents or guardians. The rate is considerably higher among lower socio-economic groups. Is it any wonder we have a crime problem in America?

We must learn to consider all of our children a cherished national resource, and we must protect them and cherish them as any other national resource. We cannot build enough jails to house young offenders their entire lives in a country where one out of ten children grows up in an abusive environment.

A report released just last month by the Rand Corporation, entitled "Diverting Children from a Life of Crime: What Are the Costs and Benefits?" discusses the cost-effectiveness of early intervention strategies in comparison with long mandatory sentences and California's three-strikes regime. Intensive intervention, such as home visit and day care, parent training, incentives for graduation from high school and delinquent supervision are not cheap, Rand found, but they *are cost-effective*: the cost per serious felony prevented would be around \$12,000-\$16,000. Yet instead of spending an average of \$12,000 to prevent a serious crime, and possibly spare someone from being a victim of that crime, we prefer to spend \$22,000 per year to incarcerate

that individual in a medium-to-maximum security facility. Multiply that figure by the 40 to 50 years a three-time loser will spend in prison before he dies of old age, and add in the costs of caring for him when he's elderly, and you can see that our "war" on crime is not only cruel, it's fiscally insane: the Rand Corporation found, for example, that within the three-strikes regime, a long term graduation incentives program alone would probably save enough money to pay for its costs. A rational society would invest in the future with crime prevention as an added bonus; a rational criminal justice policy would promote that kind of thinking.

To turn our backs on education and decide that revenge is the best policy indicates a preference for the mob mentality. Mobs do not plan for the future. Mobs do not plan past midnight, or past the next election at most. The Rand study found that graduation incentives and parent-training interventions could together reduce serious crime by 22 percent at a combined annual cost of less than \$1 billion. That is a lot of money, but it is less than the eventual annual cost of locking up every young third offender and throwing away the key.

Other observations of the Rand report make a strong *economic* case for prevention over incarceration:

- Graduation incentives for high-risk youths would be expected to cost around \$4,000 per serious crime. Moreover, in contrast to parent-training, the positive effects of graduation incentives would begin to be felt in just a few years after the programs is implemented, because the targeted youth are very close to their most crime-prone years.
- Parent-training intervention could prevent 160 serious crimes per \$1 million spent.
- The cost per serious crime prevented for both of these two interventions is much lower than that for the three-strikes law. In fact, even if the crime-prevention rates of these programs are only a third of what the Rand researchers assume, they would still be much more effective than three strikes in reducing crime than the reduction in crime predicted to occur as a result of the three-strikes law.

Three strikes weakens the power of the court to do justice

When the legislature determines the punishment in all cases, regardless of the seriousness of the offense or the relative culpability of the offender, the justice system itself also suffers. As stated by then-NACDL President Gerald H. Goldstein in testimony before the House Judiciary Subcommittee on Crime in late 1994:

"three strikes" laws, like all mandatory sentencing schemes, deprive judges of the discretion necessary to fashion sentences in individual cases appropriate to the defendants standing before them. Over-broad "three strikes" laws can send people to prison for life merely for committing non-violent crimes. They force taxpayers to support geriatric offenders who must be kept in

prison long after their propensity to commit additional crimes has dissipated.

States such as California that rushed to enact broad "three strikes" laws, are now finding that their judicial and prison systems--to say nothing of their state and local budgets--are being strained past the breaking point by the huge volume of cases resulting from these laws. Defendants, knowing that an initial or second criminal conviction could later subject them to a life sentence, are insisting on trials rather than accepting plea agreements. Conscientious prosecutors are refusing to wreak havoc with these laws. For instance, David T. Bristow, a deputy district attorney for San Bernardino County, California, refused, in his prosecutorial discretion, to apply the California "three-strikes" law to defendants charged with nonviolent crimes. He told his superiors that on philosophical and moral grounds, he could not prosecute any cases in which the "third strike" is simple possession of narcotics or petty theft with a prior. Convictions in these cases, believe it or not, mean a mandatory state prison term of 25 years to life! Politics weighed in on Mr. Bristow; San Bernardino District Attorney Dennis Stout, not to be labeled "soft on crime," quickly asked for, and he received, Bristow's resignation.

The federal, and most state criminal justice systems already have laws under which repeat or habitual offenders receive significantly enhanced sentences. "There are no early releases of violent federal offenders," as Goldstein informed the congressional panel. The federal "three strikes" law enacted in the 1994 Crime Act seeks to politically "fix" a system that is not broken.

Fortunately, the Justice Department has so far applied the federal law in a relatively judicious manner. But we caution state legislators and voters against hastily adopting broad "three-strikes" laws without carefully examining their inherently debilitating impact on courts, prisons, budgets, law enforcement and prison officials, and particularly on nonviolent offenders for whom life in prison would be a profoundly unfair punishment.

We must stop looking only at the back end of the crime problem and finally start addressing the front end, by creating an environment which reduces crime itself. The purely punitive three-strikes-means-less-crime paradigm is as expensive as it is false, and we are sacrificing our children, and the very future of this country, on an altar of law and order. The "war on crime--war on drugs" rhetoric must stop. In war, you kill "somebody else." In this "war," we're killing our own. We are killing our future. Soundbite solutions to crime problems make for unsound criminal justice policy.

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