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# Comment: The Politicalization of Crime

by  
HONORABLE J. ANTHONY KLINE\*

I believe the focus of this Symposium obscures the real problem, which is not the federalization, but the politicalization of crime. Congressional expansion of federal criminal jurisdiction is simply a manifestation, and a relatively minor one at that, of a much more profound movement in this nation. It is at the state not the federal level that this movement is most evident.

While there is some doubt whether heightened political attention to the criminal justice system has had much impact on violent crime,<sup>1</sup> there is no doubt that it is having an extraordinary, some might say even transforming, effect on state justice systems. The massive increase in criminal caseloads is not only diminishing the ability of state courts to efficiently administer their civil calendars, but is also diminishing the willingness of state judges to continue to even entertain some civil disputes. One of the purposes of efforts to politicize state justice systems is the constriction of judicial discretion, which is claimed to have been misused by judges excessively indulgent of criminal defendants. The massive increase in state judicial responsibilities and diminution of judicial authority concomitantly taking place at the state level is affecting fundamental aspects of the judicial role. This development is not receiving the attention it deserves.

The politicalization of crime has had a much greater impact on state than federal courts for two reasons. The first, of course, is that criminal cases constitute a far greater portion of the work of state courts. State judges handle six times as many criminal (and two times

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1. The chief purpose of this political effort has been the increased and broader application of criminal penalties. This goal has largely been achieved. For example, from 1971 to 1992 California's incarceration rate increased almost 300%. However, the crime rate remained relatively flat during that period, increasing by only about 11%. "Some researchers argue that this situation should be expected because they believe that incarcerating more people for a longer period of time has no impact on the crime rate. Others disagree and argue that the crime rate would have increased significantly if the rate of imprisonment had not increased so significantly." ELIZABETH G. HILL, CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, CRIME IN CALIFORNIA 40 (1994).

as many civil) cases as their federal counterparts.<sup>2</sup> In 1993 there were 72 criminal filings per federal judge, but 450 such filings for each state judge on a court of general jurisdiction.<sup>3</sup> This disparity is widening. Between 1984 and 1993, the filing of felony cases in the federal district courts increased forty-five percent, while state courts reported an increase of seventy percent in the filing of such cases during that period.<sup>4</sup> The adverse impact of the extraordinary growth in the criminal caseloads of state trial judges is that such judges lack the resources available to federal trial judges. The federal judicial budget for the present year is about \$2.9 billion,<sup>5</sup> or roughly \$4 million per federal judge.<sup>6</sup> The California judiciary is about twice as large as the federal judiciary, but its present annual budget, approximately \$774 million,<sup>7</sup> is less than one-fourth the federal budget and amounts to less than \$1 million per superior court judge.<sup>8</sup>

The adverse effect on California courts from the politicalization of crime that has occurred during the past decade has not been caused by the creation of new crimes, which is the concern at the federal level, but by procedural and sentencing "reforms," which affect vast numbers of felony cases. These changes have imposed far greater judicial burdens than would result from the mere creation of new criminal offenses.

The most recent, but by no means the only, example is the so-called "Three Strikes" measure enacted by the California Legislature<sup>9</sup> last year and then subsequently adopted by vote of the people through the initiative process.<sup>10</sup> This new law, which is similar to laws recently adopted in more than a dozen other states, materially increases the

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2. BRIAN J. OSTROM & NEAL B. KAUDER, NATIONAL CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1993: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 69 (1995).

3. *Id.*

4. *Id.* at 70.

5. JUDICIAL CONFERENCE OF THE U.S., THE JUDICIARY: BUDGET ESTIMATES FOR FISCAL YEAR 1996 (1995). See also ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT OF THE DIRECTOR (1993).

6. As of January 1, 1994, Congress authorized 645 federal district court judgeships. See JUDICIAL OFFICERS BRANCH, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, LIVING JUSTICES AND JUDGES AS OF JANUARY 1, 1994.

7. ANALYSIS OF THE 1995-96 BUDGET BILL: REPORT FROM THE LEGISLATIVE ANALYST'S OFFICE TO THE JOINT LEGISLATIVE BUDGET COMMITTEE D-7, FIG. 2 (1995).

8. In 1994 there were 789 superior court judges in California. JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL DATA REFERENCE: 1993-94 CASELOAD DATA BY INDIVIDUAL COURTS 10, tbl. 1 (1994).

9. CAL. PENAL CODE § 667 (West Supp. 1995).

10. Proposition 184, which became effective November 9, 1994, added § 1170.12 to the Penal Code. The provisions of § 1170.12 are almost identical to those previously added by the legislature in enacting Penal Code § 667(b)-(i). CAL. PENAL CODE § 1170.12 (West Supp. 1995).

prison sentences of persons convicted of felonies who have been previously convicted of a "violent" or "serious" felony and mandates a long prison sentence. "Violent" offenses include murder, robbery of a residence in which a weapon is used, rape, and other sex offenses.<sup>11</sup> "Serious" offenses include lesser offenses, such as burglary of a residence.<sup>12</sup> If an offender has one previous serious or violent felony (a first strike), the mandatory sentence for any new felony conviction (the second strike) is twice the term otherwise required for the new conviction.<sup>13</sup> If an offender has two or more serious or violent felony convictions, the mandatory sentence for any new felony (the third strike), *even if it is neither violent nor serious*, is life imprisonment with the minimum term being the greater of (1) three times the term otherwise required for the new felony, (2) twenty-five years, or (3) the term determined by the court for the new conviction.<sup>14</sup> Crimes committed by a minor who is at least sixteen years of age count as strikes.<sup>15</sup> Probation or other alternative punishment or treatment programs are specifically prohibited for persons previously convicted of even one prior serious felony.<sup>16</sup> Not surprisingly, this new law, which has been in effect for barely one year, has already had a dramatic effect on California courts.

A recent study<sup>17</sup> reveals that more than 5,000 second- and third-strike cases had been initiated in Los Angeles County alone by the end of November 1994.<sup>18</sup> Only about fourteen percent of all second-strike cases are being disposed of through negotiated pleas, and only about six percent of all third-strike cases have been resolved in this manner.<sup>19</sup> As a consequence, there has been an enormous increase in the number of criminal cases going to jury trial.<sup>20</sup> In Los Angeles, for example, it has been estimated that the number of criminal trials will increase from about 2,410 in 1994—roughly the amount handled annually since 1992—to 5,875 in 1995, an increase of 144 percent.<sup>21</sup> Similarly, San Diego authorities expect the number of jury trials in that county to increase threefold—from about 500 in 1993 to 1,500 in 1994.<sup>22</sup> After reviewing its cases from 1992, Santa Clara County esti-

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11. CAL. PENAL CODE § 667.5 (West Supp. 1995).

12. *Id.* § 1192.7(c).

13. *Id.* § 667(e)(1).

14. *Id.* § 667(e)(2)(A).

15. *Id.* § 667(d)(3)(A).

16. *Id.* § 667(c).

17. CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, "THREE STRIKES AND YOU'RE OUT" LAW: A PRELIMINARY ASSESSMENT (1995) [hereinafter THREE STRIKES].

18. *Id.* at 3.

19. *Id.* at 4.

20. *Id.* at 5.

21. *Id.*

22. *Id.*

mated that the number of jury trials would have increased from 200 to 585 had the Three Strikes law been in effect that year—an almost 200 percent increase.<sup>23</sup> Furthermore, because of the greater consequences, these cases are being more aggressively defended. The supervising judge of the criminal courts in Los Angeles has commented that trials for two- and three-strike cases are taking longer—up to six days from an average of two or three days—because defense lawyers are calling more witnesses and taking more time to select juries.<sup>24</sup>

This logjam of criminal cases has begun to seriously obstruct the trial of civil cases. As of October 1994, no civil cases are being tried in three of Los Angeles County's ten superior court districts.<sup>25</sup> In addition, more than half of the fifty courtrooms in the downtown district normally used for civil cases have been diverted to criminal trials.<sup>26</sup> The Los Angeles Superior Court estimates that in the current calendar year two-thirds to three-fourths of all courtrooms that hear civil cases will be devoted to criminal trials.<sup>27</sup>

One of the consequences of the inability of California courts to expeditiously hear civil cases is renewed interest in alternative dispute resolution, which is ordinarily available only to wealthy litigants. Alternative dispute resolution is increasingly seen by some judges as an attractive means of reducing caseloads.<sup>28</sup> This judicial interest in promoting nonjudicial alternatives appears to have influenced recent appellate decisions compelling trial judges to confirm arbitrator's awards that exceed the relief a court could legally award under the arbitration agreement<sup>29</sup> and insulating an arbitrator's error in deciding the merits of a claim from judicial review or correction, even when the error is manifest on the face of the arbitrator's decision and causes substantial

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23. *Id.*

24. Fox Butterfield, *California's Courts Clogging Under Its "Three Strikes" Law*, N.Y. TIMES, Mar. 23, 1995, at A1, A9.

25. THREE STRIKES, *supra* note 17, at 7.

26. *Id.*

27. *Id.* Although it is not directly a judicial problem, it is worth noting that this increase in criminal trials has also increased jail populations far beyond capacity, requiring many counties to release nonviolent offenders far earlier than was contemplated. The San Bernardino County jail is no longer accepting offenders who are being booked for misdemeanors because of the growth of its Three Strikes presentenced population awaiting trial. *Id.*

28. A study by the California Legislative Analyst's Office indicates that by obstructing civil calendars, the Three Strikes law "may lead to more cases being decided in alternative judicial forums, such as arbitration or so-called 'private judging.'" *Id.*

29. In *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1005-06 (Cal. 1994), the California Supreme Court held that an arbitrator in a commercial contract dispute may award an essentially unlimited range of remedies, beyond those a court could award under the contract, so long as the relief derives its "essence" from the contract rather than from some other source.

injustice.<sup>30</sup> Perhaps the most arresting indication of judicial desire to discourage the use of the courts is a decision permitting a losing party to obtain the "stipulated reversal" of an adverse trial court judgment as a condition of postjudgment settlement, without having to demonstrate that the judgment is in any way erroneous,<sup>31</sup> an opportunity which as a practical matter is also available only to litigants with deep pockets. Such relief—which is allowed in no other jurisdiction and was recently repudiated by a unanimous United States Supreme Court<sup>32</sup>—was justified on the ground it would conserve scarce judicial resources. Appellate courts already "have enough to do," the court noted,<sup>33</sup> predicting that if a losing party is not allowed to compel "reversal" on its terms as a condition of settlement, the judgment may be reversed and retrial allowed, in which case "considerable future expense and trial court resources will be consumed."<sup>34</sup> One cannot help but wonder whether California's indulgence of arbitration—which is in stark contrast to the position of federal courts, particularly the Ninth Circuit<sup>35</sup>—and the allowance of stipulated reversal responds to the increasing number of criminal cases the courts of this state are now required to hear. It is pertinent to note in this regard that during the last seven years more than a quarter of the published opinions of the California Supreme Court have been death penalty cases, which the court is statutorily obliged to accept.

Judicial concern with caseload also appears to be influencing what courts consider to be error in criminal cases. In the well-publicized "Trailside Murder" case in Marin County,<sup>36</sup> the defendant had

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30. *Moncharsh v. Heily & Blase*, 832 P.2d 899, 919 (Cal. 1992).

31. *Neary v. Regents of Univ. of Cal.*, 834 P.2d 119, 125 (Cal. 1992). I have criticized *Neary* in *People v. Barraza*, 35 Cal. Rptr. 2d 377, 379 (Ct. App. 1994), and *Norman I. Krug Real Estate Invs., Inc. v. Praszker*, 28 Cal. Rptr. 2d 498, 504 (Ct. App. 1994) (Kline, P.J., concurring).

32. *Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 393 (1994). Stipulated reversal and vacatur, the federal analogue, are also criticized in Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1057-84 (1993). See also Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991) (concluding that postsettlement vacatur of judgments distorts the settlement process).

33. *Neary*, 834 P.2d at 122.

34. *Id.* at 121.

35. See, e.g., *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244 (9th Cir. 1994) (severing arbitration clause employed by franchisor in distribution agreement because it violated federal law); *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994) (holding that Title VII plaintiff may be forced to forgo statutory remedies and arbitrate claims only if she knowingly agreed to submit to arbitration); *Tracer Research Corp. v. National Envtl. Servs. Co.*, 42 F.3d 1292 (9th Cir. 1994) (dissolving preliminary injunction based upon arbitration decision).

36. *In re Carpenter*, 889 P.2d 985 (Cal. 1995).

previously been convicted of "trailside murders" in another county and had received a death sentence for those crimes.<sup>37</sup> Despite the efforts by the trial court to keep knowledge of the previous convictions and sentence from the jury, one juror obtained the forbidden information and also discussed it with nonjurors prior to the return of a verdict.<sup>38</sup> The trial court found these actions to constitute prejudicial juror misconduct and declared a mistrial,<sup>39</sup> but the California Supreme Court reversed the decision, citing as valid reasoning a United States Supreme Court opinion that stated, "It seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing caseload."<sup>40</sup>

Civil backlogs are not the only problem created by the politicalization of crime at the state level and may not be the most pernicious. Those promoting greater political interest in the criminal justice system invariably believe—to quote the words used by supporters of the Three Strikes initiative—that violent crime is the result of the "judicial system's revolving door," which is controlled by "soft-on-crime judges."<sup>41</sup> This revolving door can be barred, it is argued, only by reducing judicial discretion. Proponents of the Three Strikes law have achieved that result. Previously, a California judge could, on his or her own motion, dismiss or strike a sentence enhancement in "furtherance of justice."<sup>42</sup> The Three Strikes measure eliminates that power; a judge can now dismiss or strike a prior offense (*i.e.*, a first- or second-strike) in furtherance of justice only upon motion of the prosecutor.<sup>43</sup> California trial judges therefore appear to have been deprived of the authority to prevent the imposition of a life term on a defendant who, say, steals a slice of pizza from a convenience store after leading a

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37. *Id.* at 988-89.

38. *Id.* at 989-90.

39. *Id.* at 990-92.

40. *Id.* at 994 (quoting *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 584, 553 (1984)).

41. CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 36-37 (1994) (argument in favor of Proposition 184).

42. *People v. Thomas*, 841 P.2d 159, 162 (Cal. 1992).

43. See CAL. PENAL CODE § 667(f)(2) (West Supp. 1995). Criminal defendants are contending, among other things, that this subordination of judicial discretion to prosecutorial authority is unconstitutional as violative of the separation of powers. See *People v. Tenorio*, 473 P.2d 993 (Cal. 1970) (holding that branches of government are coequal and prosecutor does not have vested power to foreclose the exercise of judicial power); see also *Esteybar v. Municipal Court*, 485 P.2d 1140 (Cal. 1971) (holding unconstitutional a law requiring consent of prosecutor before magistrate may exercise power to determine that charged offense is to be tried as a misdemeanor). This argument has been rejected by an intermediate appellate court; the California Supreme Court will soon address it. *People v. Superior Court (Romero)*, 37 Cal. Rptr. 2d 364 (Ct. App. 1995), *review granted*, (Apr. 13, 1995).

blameless life for twenty years after committing two nonviolent felonies as a teenager.<sup>44</sup> Elimination of any meaningful judicial discretion in sentencing creates the possibility of grossly unfair sentences, which will undoubtedly subject the courts to a different form of criticism than they are now receiving. As indicated, the Three Strikes initiative is merely the latest attack on judicial discretion. A 1990 initiative barred trial judges from striking or dismissing any "special circumstance" asserted by a prosecutor as grounds for imposition of the death penalty.<sup>45</sup> A 1982 initiative created a constitutional "right to truth-in-evidence" designed to limit judicial discretion to exclude relevant evidence.<sup>46</sup> Mandatory sentences and mandatory minimums are now a favored "reform" in California, as in many other states.

The attack on judicial discretion underway in California is not only unwarranted—because such discretion has not been used to favor criminal defendants<sup>47</sup> nor misused under any rational standard—but threatens the quality of American justice. To be sure, the prevailing theory that a sentence is punishment, the degree of which need only comport with the seriousness of the crime, requires more uniform application of consistent standards than was appropriate under the rehabilitative penal model previously in fashion.<sup>48</sup> Absolute uniformity will result in injustice, however, if trial judges are deprived of any ability to adjust sentences in atypical cases, in which the harmfulness of a particular offender's conduct or the extent of his culpability differs substantially from the norm. Handcuffing the judiciary will not even create genuine conformity because disparities will in-

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44. See Butterfield, *supra* note 24, at A1. Numerous cases applying the Three Strikes law to relatively petty offenses are collected and described in a recent report issued by the Center on Juvenile and Criminal Justice. VINCENT SHIRALDI ET AL., CENTER ON JUVENILE AND CRIMINAL JUSTICE, THREE STRIKES: THE UNINTENDED VICTIMS (1994). The California Legislative Analyst's Office notes that 70% of all second and third strikes relate to nonviolent and nonserious offenses. The largest category of those charged with a serious strike are charged with burglary. Very few second and third strikes allege violent offenses. THREE STRIKES, *supra* note 17, at 8.

45. CAL. PENAL CODE § 1385.1 (West Supp. 1995).

46. CAL. CONST. art. I, § 28(d).

47. California judges obtained the power to influence the length of most state prison sentences in 1978, when the legislature enacted California's Determinate Sentencing Law. CAL. PENAL CODE § 1170 (West Supp. 1995). The rate of incarceration has increased by about 300 percent since then and the percentage of juvenile offenders and adult felons receiving heavier sentences to state correctional facilities, as opposed to local facilities, more than doubled during that period. HILL, *supra* note 1, at 34; see also CALIFORNIA DEP'T OF JUSTICE, CRIME AND DELINQUENCY IN CALIFORNIA 70-83 (1993).

48. The California Legislature declared in 1978 "that the purpose of imprisonment for crime is punishment. The purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." CAL. PENAL CODE § 1170(a)(1) (West Supp. 1995). However, even the determinate sentence law permitted judicial aggravation and mitigation of a sentence in appropriate circumstances. *Id.* § 1170(b)-(c).

stead be created by different prosecutorial charging policies. In effect, discretion has not been eliminated; it has simply been shifted from impartial judges to partial prosecutors who are more vulnerable to political pressure.

Unfettered and unreviewable judicial discretion in sentencing is admittedly evil, as Judge Frankel has explained.<sup>49</sup> But the extirpation of discretion can be equally iniquitous. Mandatory imprisonment for a quarter century for the commission of a nonserious offense by a nonviolent offender may be as morally unjustifiable as the failure to adequately penalize serious and violent offenders and will subject the judiciary to no less obloquy. Judges are bound to be demoralized if, in the name of justice, they are compelled to impose a sentence they know to be unjust. Unwarranted accusations of coddling criminals may be replaced by the more justifiable claim that judges, or at least the system they administer, are cruel and inhumane.<sup>50</sup>

Those whose interest lies chiefly in the preservation of the traditional role of federal courts cannot remain indifferent to the unhappy predicament of many of their colleagues at the state level. The real danger confronting the federal judiciary is that it will be subjected to the burdens and restrictions already imposed on state courts, which, as indicated, are far more profound than anything Congress has yet seriously contemplated. It is, in short, in the interest of the federal judiciary that the much more pressing problems of state courts begin to receive the attention of national policy makers they deserve. This redirection will not occur without the leadership of influential elements in the legal community, especially the law schools, whose preoccupation with federal jurisdiction distracts them from the real crisis.

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49. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 69 (1920).

50. Apparently for this reason, "some juries have refused to convict persons for relatively minor felony offenses which would have resulted in longer prison sentences under the 'Three Strikes' law, and some victims of crime have refused to cooperate and testify in such cases." *THREE STRIKES*, *supra* note 17, at 8.