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“Three Strikes” Legislation: Utilitarian Deterrence

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The notion of “payback” or “vengeance” runs deep in the human psyche. No matter how noble or above the fray people consider themselves, it is difficult, if not impossible on occasion, to control vengeful thoughts. In fact, most major religions have as their essence, a focus on not giving in to these base-level human feelings; whether in Judaism and Christianity (Lev. 19:18; Rom. 12:19) or the Eastern notion of karma found in Buddhism, Sikhism, and Hinduism, to name a few. Exacting personal vengeance may be similar to appetite, based biologically on a sense of justice. It has been both beneficial and detrimental within society (Carey, 2004).

The social process whereby control is exerted to prevent personal acts of retaliating against the most serious acts is the process of criminalization. Initially, Common Law dealt with social problems that are historically destructive; murder, rape, robbery, theft, etc. More recently, as customary law (social self-ordering) decreased in ability to deal with modern society (for a variety of reasons), a large body of formal law (centralized state ordering) has emerged dealing with more specific issues (Hafen, 1989). In the early 1990s, the concept of “Three Strikes” legislation emerged in California as an attempt to raise the level of criminal sanction to keep criminals off the streets longer and deter would-be criminals from committing more serious crimes. In the end, the hope is that these increased sanctions would lower the rate of serious and violent crime (Stolzenburg & D’Alessio, 2002).

The current research into “three strikes” type legislation does not seem to support the goals of decreasing overall crime rates, but there are proponents on each side. Shepard (2002) touts the California law as very successful and lists the decreases in criminal acts. But the Stolzenburg and D’Alessio study shows that crime was already going down and the decrease was due to prior trends, rather than enactment of the legislation (1997). There is also the possibility of ideological fears that virtually force conservatives to demand that this legislation works

regardless of data. It does tend to be the conservatives and neo-conservatives that strongly support the return to “crime-control” policy making. “Conservative approaches emphasize deterrence through arrests, *incapacitation through imprisonment*, and just desserts through *harsh sentencing*, and rely on the criminal justice system to mete out certain, severe, prompt, and just penalties” (Conklin, 1992)(emphasis added).

Three strikes legislation is indeed a policy outgrowth of “crime control” theory. It seeks to incapacitate through long sentences and takes a progressively harsher stance after each offense, culminating in a 25-to-life sentence upon a third conviction (Stolzenburg & D’Alessio, p. 432) but this varies by state. A major problem with this sort of sentencing is that the focus of punishment is on the offender, rather than the offense. This is apparent in the graduated structure culminating in very harsh punishment. It is only human to use past action as an indicator or future performance; therefore one who commits a crime, is more likely to do it a second time, and a third time. This cannot be a legitimate basis for determining punishment. An offender’s criminal history understandably *does* play into sentencing, but it ought not.

Reasons for not taking into account past criminal acts are two-fold, drawing from two separate paradigms of justice. First, the assumption should be that an offender, after punishment, is restored to society. Failure to bring a person back “into the fold” of society causes ostracization after punishment and leaves few options for a normal productive life. If that assumption is not possible, then the form of punishment is ineffective (and hence utility theory would also reject this). Assuming the opposite, that an offender cannot be restored to society leaves only paranoia, fear, and ultimately the death penalty as the only solution for any crime.

Secondly, retribution theory demands specific punishment for offenses (as opposed to punishing for being an offender). People bestow governments with the responsibility of

punishing criminals for their offenses. According to Constitutional scholar and Notre Dame Professor of Law Gerard Bradley,

“The central wrong in crime is this: the criminal unfairly usurps liberty to pursue his own interests and plans, contrary to the common boundaries for doing so marked out by the law. Viewed, in this way, we can see how the whole community – save the criminal – is victimized by crime. The criminal’s act of usurpation is unfair to everyone else.” (2005).

When a criminal is punished, it is to right the wrong of that incident and has nothing to do with individual or community vengeance. To punish more harshly because an offender was previously convicted of an offense is unjust according to retribution and restoration theories, and can only be found emanating from the liberal notion of rehabilitation theory (assuming harsh punishment rehabilitates) or the a-moral utilitarian theory. Thus, deterrence is the only theoretical purpose of the three strikes legislation, regardless of intent at its inception.

Back to the notion of vengeance; it would seem that a more likely scenario is that the harshness of three strikes laws, although initially based in crime control theory, is actually an example of community vengeance. Crime has collectively made communities so angry, that when police arrest a second time offender these laws allow community payback for the hassle, economic costs, fear, frustration, and uncertainty that criminals have brought into their lives. Political scientist James L. Payne, in his book *A History of Force*, notes that sadism, or taking pleasure in the pain of others, has been declining historically (2004, pp.125-126). On the contrary, it seems to have merely taken other forms, more entertaining and more palatable; in the form of movies and modern criminal and penal law.

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