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A Need For Proportionality "Three Strikes and You're Out"

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In 1993 the public perceived that violent crime was on the rise in Washington State. This perception, based largely on anecdotal accounts, was not supported by empirical evidence. Note, *Washington's Voters Go Down Swinging*, 30 Gonz. L. Rev. 433, 437-441 and notes 23-49 (1995). Nevertheless, "Three Strikes and You're Out" was enacted with the strong support of the NRA, whose lobby mailed over half a million letters and petitions urging passage of I-593. The NRA also obtained about 50% of the signatures and contributed over one-half of all money spent on the signature drive.¹ Initiative Measure No. 593, now codified as RCW 9.94A.555, RCW 9.94A.570.

Under this "Persistent Offender Accountability Act," those found to be three-time "most serious offenders" must be sentenced to life in prison without the possibility of parole. Fifty-one separate offenses are "strikes," including second degree assault, second degree robbery, vehicular assault, and all class B felony offenses with a finding of sexual motivation.² RCW 9.94A.030(28). This constitutes the longest list of eligible felonies for any similar legislation in any state. Michael G. Turner et al., *"Three Strikes and You're Out" Legislation: A National Assessment*, 59 Fed. Probation 16, 25 (Sept. 1995). Washington is also one of the few "three strikes" states to impose a mandatory life sentence without possibility of parole.

One of the stated purposes of Initiative 593 is that "Punishments for criminal offenses should be proportionate to both the seriousness of the crime and the prior criminal history." RCW 9.94A.555. Initiative 593 was intended to "[r]estore public trust in our criminal justice system." *Id.* On the contrary, Initiative 593 requires uniform treatment of complex cases and individuals, eliminating sentencing hearings³ for three-strike cases wherein judges would otherwise consider the unique circumstances of each case, listen to victims, and try to impose a punishment to fit the crime and the offender.⁴ By eliminating judicial discretion, Initiative 593 does great harm to the principle of proportionality in sentencing, undermining public trust in our criminal justice system.

The Principle of Proportionality

Proportionality, a central principle of criminal justice systems since before Biblical times ("an eye for an eye")⁵, was succinctly described by H. L. A. Hart:

The guiding principle is that of a proportion within a system of penalties between those imposed for different offenses where these have a distinct place in a commonsense scale of gravity. This scale itself no doubt consists of very broad judgments both of relative moral iniquity and harmfulness of different types of offence: it draws rough distinctions like that between parking offenses and homicide, or between 'mercy killing' and murder for gain, but cannot cope with any precise assessment of an individual's wickedness in committing a crime.

Yet . . . where the legal gradation of crimes expressed in the relative severity of penalties diverges sharply from this rough scale, there is a risk of either confusing common morality or flouting it and bringing the law into contempt.

H. L. A. Hart, *Punishment and Responsibility* 25 (1968).

The states of Illinois, Indiana, Maine, Nebraska, New Hampshire, Oregon, Rhode Island, Vermont, and West Virginia have Constitutional provisions expressly directing that every penalty be proportional to the offense. In the case of *In re Lynch*, 503 P.2d 921 (1972) the Supreme Court of California found that a punishment was invalid under the cruel or unusual punishment prohibition of the California Constitution, Cal. Const., art. I, § 6 if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. 503 P.2d at 930.6

Before the Sentencing Reform Act of 1981 ("SRA") the wide disparity among sentences under the indeterminate sentencing laws of Washington and other states was generally regarded as a significant defect. According to the *President's Commission on Law Enforcement and the Administration of Justice Task Force Report: The Courts* 23-24 (1967):

The problem of disparity arises from the imposition of unequal sentences for the same offense, or offenses of comparable seriousness, without any reasonable basis. The existence of unjustified disparity has been amply demonstrated by many studies.

The SRA Wasn't Broke.

The Sentencing Reform Act of 1981 ("SRA"), spearheaded by King County

Prosecutor Norm Maleng, addressed in large part the public's concern that, depending on the judge, one sentence could be radically different from another. The SRA was a departure from traditional sentencing law because it limited judicial discretion in all but exceptional cases. In order to depart from a standard sentencing range, a judge must set forth in writing substantial and compelling reasons. RCW 9.94A.535. Although a sentence within the standard range cannot be appealed, an exceptional sentence is subject to appellate review. RCW 9.94A.585.

The SRA's stated purpose is "to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences," and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve him or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

The SRA's Sentencing grid, which has been amended numerous times since the law was enacted, has fifteen different Seriousness Levels for crimes (horizontal rows). The standard sentence for a crime is calculated on the Sentencing grid by taking into account the criminal history of the offender (ten vertical rows). RCW 9.94A.525. Criminal histories range in increments from 0 to 9+, and are based on prior convictions, except when several convictions involving one incident are merged as the "same criminal conduct." In general, "serious violent offenses"⁷ count as three points, violent offenses count as two points, other adult offenses and juvenile violent offenses count as one point, and juvenile nonviolent felonies count as one-half of a point. RCW 9.94A.525.

Use of a firearm in the commission of a crime can add up to five years to the sentence. RCW 9.94A.510(3). Sentences are reduced by up to one-third for "good-time" earned during incarceration, except sentences for serious violent offences, which may be reduced up to 15%, and deadly weapon enhancements, which are not reduced.

Under the SRA, the standard ranges for the least serious Level I felonies such as second degree theft (\$250.00 to \$1500.00) and forgery are 0-60 days incarceration for first offenders, and 22-29 months for an offender with a criminal history score of 9+. The standard ranges for more serious Level IV felonies such as second degree assault (i.e. reckless infliction of substantial bodily harm) and second degree robbery (i.e. taking property from another's person by the use or threatened use of force) are 3-9 months incarceration for first offenders, and 63-84 months for an offender with a criminal history score of 9+. Murder by abuse and first degree murder, Level XV offenses, are punishable by 240-320 months for first offenders, and 411-548 months for an offender with a criminal history score of 9+. Only first degree aggravated murder is punishable by life without the possibility of parole. Under "Three Strikes," any third-strike offender must be sentenced to life without parole. Neither a judge nor the victim has the ability to shorten the sentence.

The SRA has been amended numerous times in order to satisfy various legislative concerns. It has the approval of law enforcement, judges, prosecutors and even the defense bar. It has proven easy to administer for the courts, and has brought considerable certainty to criminal sentencing. Moreover, the use of earned good time, instead of parole, has proven very useful to the Department of Corrections in modifying inmate behavior through the use of rewards and punishments. The SRA has done very well in satisfying its enumerated goals.

"Three Strikes" Needs Fixing

Initiative 593 was intended to incarcerate the "most serious offenders" in the State, but its sweep is too broad, so it applies just as often to less dangerous criminals. In *State v. Rivers*, 129 Wn.2d 697 (1996) the 30-year-old defendant was sent to prison for life when he was convicted of taking \$340 from an espresso stand by threatening to use a weapon (second degree robbery). His two predicate offenses were for strong arm second degree robbery, and for second degree assault. The maximum sentence for each of his strike offenses was ten years. The defendant's standard range was five to seven years.⁸ The *Rivers* case is not unique.

Offenders sentenced to life in prison without parole are unlikely to commit more crimes outside the prison walls, but by taking away the possibility of parole and good time, I-593 has created dangerous situations for law enforcement and corrections officers. When facing life in prison without parole, three-strike offenders have less to lose in resisting capture. Three-strike prisoners cannot be motivated with good time, have little reason for rehabilitation and suffer fewer consequences for bad behavior. Moreover, the State will bear a heavy price to house these inmates until they die.⁹

"Three Strikes and You're Out" does not address the goals of sentencing as well as the SRA, and does not even satisfy its own stated purposes. I therefore propose two ways that I-593 should be improved through legislation.

1) The list of "most serious crimes" should be limited to Class A felonies--crimes punishable by up to life imprisonment.

2) The SRA should be amended so that a person convicted of a third strike must be given an exceptional determinate sentence above the standard range.

By limiting the list of strike offenses to Class A felonies, the State will limit this punishment to truly dangerous offenders, who present a clear threat to society.

If judges are required to give an exceptional determinate sentence for a third strike, they can take into account the circumstances of the case and the offender as well as the victims' desires. This will help to ensure that sentences will be proportional. By issuing determinate sentences, rather than life sentences with parole available, we can avoid expanding the parole board (Indeterminate Sentencing Review Board), whose discretionary decisions were long a cause for concern.¹⁰ The Department of Corrections could also use earned good time as an incentive for good behavior. These changes would help restore public trust in the criminal system, and address the purposes of the SRA.

Endnotes:

1. 1. National Public Radio, "All Things Considered" October 14, 1993 broadcast.
2. 2. These enumerated offenses would otherwise be punishable by a maximum of 10 years.
3. 3. Sentencing decisions are otherwise governed by the Sentencing Reform Act of 1981 ("SRA"), RCW 9.94A.010 *et seq.*
4. 4. Discretion regarding these decisions is now entirely vested in the prosecuting attorney's charging and plea-bargaining decisions.
5. 5. *See Solem v. Helm*, 463 U.S. 277, 284-85 (1983).
6. 6. Initiative 593 survived review under Washington's constitutional prohibition against "cruel punishment," Const. Art. I § 14, despite Justice Sander's strong criticism of the law's disproportionate and unjustified consequences. *State v. Rivers*, 129 Wn.2d 697, 716-735 (1996) (Sander, J., dissenting).
7. 7. 9.94A.030(37) defines "Serious violent offense" as a subcategory of violent offense and includes the following:

�. (a) (i) Murder in the first degree;

�. (ii) Homicide by abuse;

(iii) Murder in the second degree;

�. (iv) Manslaughter in the first degree;

�. (v) Assault in the first degree;

�. (vi) Kidnapping in the first degree;

(vii) Rape in the first degree;

(viii) Assault of a child in the first degree; or

�. (ix) An attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or

�. (b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious violent offense under (a) of this

subsection.

1. 8. The standard range for second degree assault and second degree robbery could be amended if the legislature believes that it is insufficient to punish these crimes.
2. 9. The cost of housing an inmate for life is estimated at \$800,000.
3. 10. Eliminating the parole board's largely unfettered discretion was a primary reason for the SRA. Under indeterminate sentencing, judges would recommend a minimum term, but the parole board would determine the date of release. Determinate sentences and earned good time are easier to administer and bring far more certainty to the process for inmates, victims and corrections officers.

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