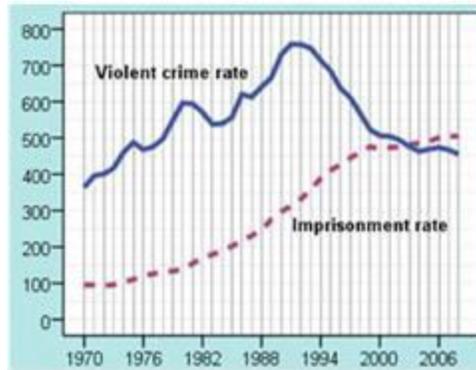


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THE GREAT DEBATE (PART II)

Violence is the problem. Is harsh sentencing the solution?



“The three-strikes law sponsor is the correctional officers’ union and that is sick!”

By Julius (Jay) Wachtel. Who said that? Here are three possibilities: (1) the ACLU president, (2) the ACLU executive director, or (3) [Supreme Court Associate Justice Anthony M. Kennedy](#), addressing a gathering of lawyers on February 3, 2009 at Pepperdine University’s Odell McConnell Law Center, perched high on a spectacular bluff overlooking the shores of the Pacific.

Hmm...let’s see...

For someone who’s supposed to keep an open mind Justice Kennedy’s words may seem intemperate. Yet those familiar with his concerns aren’t a bit surprised. A staunch supporter of the police, the third-most senior member of the Court (he joined in 1988) is also a long-standing prison reformist. Justice Kennedy has frequently spoken out against overcrowding and excessively long sentences, which he likes to point out are on the average eight times longer than the European norm.

Justice Kennedy’s ire last week was directed at California’s three-strikes law, widely considered to be the toughest in the nation. [We’ve already described](#) its two most salient features. First, it’s both a two-strikes *and* three-strikes law. Persons who are convicted of a new felony after being convicted for a violent or serious felony get their terms doubled; two such priors draw a mandatory 25 years to life. Note that the triggering offense – the new charge, or “strike” – can be *any* felony, including drugs and theft.

It's no secret that sentencing has become substantially harsher. According to the [Bureau of Justice Statistics](#), 447 per 100,000 adults (18+) were sentenced for felonies in State court in 1990. In 2006 the rate was 503 per 100,000, an increase of 13 percent. More importantly, [those sentenced to State prison](#) were serving considerably lengthier terms. Between 1993-2005 the average time served in State prison (all offenses) went up from 21 months to 29, an increase of 38 percent. For violent crimes the increase was from 36 months to 50 (39 percent); for property crimes it was from 17 months to 22 (29 percent).

Harsh sentencing goes back several decades. According to the [Statistical Abstract of the U.S.](#) the U.S. imprisonment rate (persons in State or Federal custody and sentenced to one year or more, per 100,000 population) was 96 in 1970. It took off four years later and never looked back. By 1980 it had reached 139; in 1990 it was 296 and still climbing. The historical high, a mind-boggling 756 per 100,000 population came in 2007. In that year 2,298,041 persons – nearly one out of every one-hundred Americans – were locked up doing a year or more. (In 2008 the rate dropped ever so slightly, to 754.)

As the good justice implied, when it comes to imprisoning its citizens the U.S. is on top (or the bottom, depending on one's point of view.) According to the authoritative [World Prison Population List](#), our 2007 incarceration rate of 756 was by far the highest on the planet, five times greater than the world rate of 145 per 100,000 and eight times that of Southern and Western Europe's measly 95. Way behind in second place was Russia, with a barely respectable 629. Other pleasant places like Cuba (531) and Belarus (468) weren't even in contention.

Our chart depicts [historical](#) and contemporary [violent crime](#) and [imprisonment](#) rates per 100,000 population from 1970 to 2008. Comparing the trend lines we see that the well-known surge in violent crime that began in the mid-1970's substantially outpaced the imprisonment rate until the late 1980's. It's generally agreed that by then a punitive mindset had formed, which persisted even as violent crime tumbled. In 1991, as the mayhem reached its zenith, there were 1,911,767 violent crimes, yielding a rate of 758.2 per 100,000. By 2000 the violent crime rate (based on 1,425,486 offenses) was a full one-third lower, at 506.5. A moderate downtrend still persists; 2008's rate, 454.5, amounts to an additional reduction of ten percent.

So here's the million dollar question: was it punishment that turned things around? While it's common sense that incapacitating offenders prevents crime, just how much additional value was produced by imprisoning more persons for longer terms? In his conservatively entitled "[The Limited Importance of Prison Expansion](#)," statistician extraordinaire William Spellman estimates that increased imprisonment cut violence twenty-seven percent, a seemingly modest figure until one remembers that there were

nearly two million violent crimes at the height of the madness. His endorsement of stiffer sanctions, though, seems half-hearted.

One may conclude, with considerable conviction, that the prison buildup was an important contributing factor to the violent-crime drop of the past few years.

America would be a much more violent place had billions of dollars not been invested in prison beds; violent crime would not have dropped as far and as fast as it has. Nevertheless, violent crime would have dropped a lot anyway. Most of the responsibility for the crime drop rests with improvements in the economy, changes in the age structure, or other social factors. Whether the key to further reductions lies in further prison expansions, or (more likely) in further improvements in these other factors remains an open question.

What could *really* harsh stuff like three-strikes accomplish? Methodological issues make it difficult to figure out its unique effects. Three recent studies arrive at varying conclusions. In a survey of U.S. three-strikes laws [Chen](#) reported slight but statistically significant associations between three-strikes and declines in crime. Notably, California's law, the harshest of the lot, didn't fare better than the others. On the other hand, [Kovandzic, Sloan and Vieraities](#) found that three-strikes had no impact. (One possibility they cite is that in cases where three-strikes applies, its added sanctions aren't of sufficient magnitude to stand out.) Finally, [Helland and Tabarrok](#) estimate that California's three-strikes law reduced felony arrests for those with two existing strikes by 17-20 percent. They nonetheless suggested that the money spent on three-strikes is better used elsewhere.

Money *is* a central issue. Thanks to liberalizations brought on by the economic downturn, imprisonment rates in a majority of States stood still or went down [between 2007-2008](#), with reductions of as much as thirty-one prisoners per 100,000 population in Texas and Massachusetts. Still, harsh treatment is unlikely to disappear, and for the most practical of reasons: as [we said](#) last week citizens aren't "averages" – they're victimized one at a time. If, as Dr. Spellman conceded, stiff sentencing cuts violence by one-fourth, hundreds of thousands could be saved from becoming victims each year.

Indeed, a push-back is already underway. [In California](#) a jail inmate let go under a new early-release policy then promptly re-arrested for sexual assault became the new poster-child for victim-right groups, while [in Oregon](#) the release of a violent inmate who went on to reoffend spurred reassessment of a law expanding good-time credits. Speakers at a recent [national conference](#) cautioned against letting financial considerations dictate sentencing. A public-policy expert opposed releasing prisoners just to "return to policies that don't make sense," while a State senator called a recent

triple murder by a parolee a sharp reminder that he and others hadn't been taking the threat of violence "as seriously as we should have been."

There's nothing new about horrible crimes being committed by persons released on bail, or by probationers and parolees. Sure, it's always possible to tune up the release system, but in the end predicting individual dangerousness is well-nigh impossible. So what about changing people? Well, we can't force anyone to age out of crime any faster, and as far as making humans kinder and gentler – forget it!

But we *can* throw away the key.