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\* Pre-Law Student Association Subcommittee Chairs, 2009 – 2010

## INTRODUCTION

# GWU Pre-Law Student Association: Mission

*Yalda Nazarian and Nidhi Srivastava*

With the help of the prestigious *Undergraduate Law Review* as well as events held at The George Washington University, the Pre-Law Student Association aims to provide an opportunity to undergraduate students to network; inspire professional ethics; promote scholastic excellence; enhance legal writing; advocate different aspects of the legal profession; publish in a *Law Review* as an undergraduate; as well as provide tools and knowledge through the use of law and undergraduate professors to prepare each member for a future in law school. By providing legal writing workshops, editors, and a Board of Advisors, consisting of undergraduate professors of The George Washington University, the Pre-Law Student Association's primary goal is to equip members with the appropriate tools to strive beyond the academic norms requested of them.

The George Washington University *Undergraduate Law Review* is a student-run and published legal journal that examines internationally significant issues concerning law, policy, philosophy, ethics, and politics. The purpose the George Washington University *Undergraduate Law Review* is to provide students of the George Washington University, as well as other national and international universities and colleges, with an opportunity to explore legal research, enrich the academic community through legal writing and analytical thinking, and spark intellectual discussions and debates on issues related to law.

All articles published in the *Undergraduate Law Review* are original works of the authors, uphold the academic integrity of the *George Washington University*, and abide by The Bluebook legal citation format.



# Beyond Proportionality: The Challenges of Three Strikes Law

Katherine Meier-Davis\*

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## *I. Introduction*

*The passage of Three Strikes Laws in California and many other states over the past 15 years has spurred a great deal of controversy and debate. These laws, which increase prison sentences for recidivists, have prompted fierce support from both sides of the debate: those who believe the laws help to protect the public from dangerous repeat offenders and opponents who believe the laws unfairly deprive offenders of their rights.<sup>1</sup> The majority of recent criticism of Three Strikes Laws (TSLs) surrounds the concept of proportionality. Critics of TSLs argue that the laws frequently impose sentences that are grossly disproportionate to the crimes committed.<sup>2</sup> Due to the vast amount of confusion that surrounds Eighth Amendment jurisprudence, however, this argument is*

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\* Political Science, The George Washington University (December 2010). Katherine Meier-Davis hopes to attend law school following undergraduate studies, and would be most interested in a position that has relevance to constitutional law.

<sup>1</sup> Joshua R. Pater, *Struck Out Looking: Continued Confusion in Eighth Amendment Proportionality Review After Ewing v. California*, 27 Harv. J.L. & P.P. 402-403 (2003).

<sup>2</sup> Michael Vitiello, *Three Strikes Laws: Can We Return to Rationality?*, 87 J. Crim. L. & Criminology 396 (1997).

*difficult to concretely establish. Three Strikes Laws do, in fact, have relevance in terms of other areas of American constitutional law, such as the Double Jeopardy Clause of the Fifth Amendment, the prohibition against ex post facto laws, and the presumption of innocence. Provisions of the California Three Strikes Law seem to conflict with these principles with serious ramifications for the American legal system.*

*This article will focus primarily on the California TSL. It will begin by discussing the circumstances surrounding the passage of the California TSL, the facets of the law, and the Supreme Court case challenging the law (Ewing v. California). Next, the article will explore how the California TSL is relevant to the Double Jeopardy Clause of the Fifth Amendment as well as the ban on laws that are ex post facto. Finally, this article will consider the presumption of innocence in relation to the California TSL and how this concept affects the use of incapacitation as the primary American penological theory.*

## II. The California Three Strikes Law

In 1994, California became the second state after Washington to pass a three strikes law, largely in reaction to the kidnapping and murder of a 12 year-old girl named Polly Klaas by a repeat offender.<sup>3</sup> Following California, 23 other states passed similar legislation.<sup>4</sup> For the most part, the California TSL operates in a similar manner to other TSLs. The law targets repeat offenders and imposes increased punishments after an individual has committed three or more crimes. Such punishments are more

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<sup>3</sup> Reynolds Holding, *Behind the Nationwide Move to Keep Repeaters in Prison*, S.F. Chron., Dec. 8, 1993 at A1., as cited in Pater *supra* note 1 at 400.

<sup>4</sup> John Clarke et al., U.S. Dep't. of Justice, *Three Strikes and You're Out: A Review of State Legislation 1* (1997), available at <http://www.ncjrs.gov/pdffiles/165369.pdf>.

severe than would normally be imposed, which has prompted much of the criticism regarding TSLs.<sup>5</sup>

California's TSL contains certain provisions that have been thoroughly debated. In California, a defendant is subject to increased punishment under the TSL after committing three or more felonies so long as the individual's previous felonies are included in the state's list of "strikeable" offenses. In many other states, the third or greater strike must also be a strikeable offense.<sup>6</sup> The California law not only affects offenders who have been convicted of two or more previous "serious" or "violent" felonies,<sup>7</sup> but also applies to those who have been convicted of only one prior felony with no requirement that it be "violent" or "serious."<sup>8</sup> A two-time convict is therefore subject to "twice the term otherwise provided as punishment for the current felony conviction,"<sup>9</sup> and an offender who has been convicted three or more times faces an indeterminate sentence of life imprisonment with a minimum term either three times the sentence normally imposed for the offense or 25 years, depending on which is greater.<sup>10</sup> Such provisions are considered controversial by some because they impose lengthy sentences on offenders who have committed relatively minor crimes, such as petty theft.<sup>11</sup>

Another much discussed provision of the California TSL is the inclusion of wobblers as possible second- or third-strike felonies. Wobblers are crimes which can be charged as either misdemeanors or felonies at the discretion of the prosecutor and

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<sup>5</sup> Vitiello *supra* note 2 at 396.

<sup>6</sup> *Id.*

<sup>7</sup> Autumn D. McCulloch, *Three Strikes and You're In (for Life): An Analysis of the Three Strikes Law As Applied to Convictions for Misdemeanor Conduct* 24 T., Jefferson L. Rev. 277, 281 (2002) as cited in Pater *supra* note 1 at 399.

<sup>8</sup> Cal. Penal Code § 667(e)(2)(I) (West 1999), as cited in *Constitutional Law: Criminal Law and Procedure*, 117 Harv. L. Rev. 256 (2003).

<sup>9</sup> *Id.* § 667.5(c) (West Supp. 2003) (defining "violent" felonies); *id.* § 1192.7(c) (defining "serious" felonies).

<sup>10</sup> *Constitutional Law: Criminal Law and Procedure*, *supra* note 8 at 256.

<sup>11</sup> Vitiello *supra* note 2 at 396.

incur punishments under the TSL if charged as a felony.<sup>12</sup> Determining whether a wobbler will be charged as a misdemeanor or a felony depends in some cases on the defendant's criminal record. For example, if the defendant had previously been convicted of theft-related crimes and the wobbler in question is petty theft, then the defendant can be charged with a felony.<sup>13</sup> In some cases, the decision to treat a wobbler as a misdemeanor or felony is at the prosecutor's discretion. Although a prosecutor must allege all prior felonies,<sup>14</sup> he can move to treat the wobbler as a misdemeanor<sup>15</sup> or to vacate a prior strike.<sup>16</sup> The courts may do the same.<sup>17</sup> Examples of wobblers include participation in a street gang,<sup>18</sup> receiving stolen property,<sup>19</sup> and the possession of methamphetamine.<sup>20</sup> Treating certain crimes as wobblers can create several issues, for it places a good amount of discretion in a prosecutor's hands.<sup>21</sup> Depending on a prosecutor's personality and view of the law, he or she could decide to charge a wobbler as a felony when the crime would normally be treated as a misdemeanor or choose to treat a certain wobbler as a misdemeanor when it might otherwise be charged as a felony. In either case, the potential for an arbitrary and unjust sentence exists.

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<sup>12</sup> See *Ewing v. California*, 123 S. Ct. 1179, 1183 (2003) (explaining "wobblers") as cited in *Pater supra* note 1 at 399.

<sup>13</sup> Cal. Penal Code § 490 (West 1999) *id.* § 666 (West Supp. 2003).

<sup>14</sup> *Id.* § 667(f)(1), (g).

<sup>15</sup> *Id.* § 17(b)(4).

<sup>16</sup> *Id.* § 667(f)(2) (permitting a motion to strike "in the furtherance of justice" or upon insufficient evidence).

<sup>17</sup> *Id.* § 17(b)(5) (permitting magistrates to treat wobblers as misdemeanors); *People v. Super. Ct. of San Diego Cty. ex. rel. Romero*, 917 P.2d 628, 648 n.13 (Cal. 1996) (granting trial courts "discretion to strike prior felony conviction allegations in furtherance of justice").

<sup>18</sup> *Id.* § 186.22(a)(West Supp. 2003).

<sup>19</sup> *Id.* § 496.

<sup>20</sup> Cal. Health and Safety Code § 11377(a) (West Supp. 2003).

<sup>21</sup> Richard H. Andrus, *Which Crime Is It? The Role of Proportionality Review in Recidivist Sentencing After Ewing v. California*, 19 *BYU J. P.L.* 285 (2004).

### III. The Issue of Proportionality: *Ewing v. California*

On March 12, 2000, Gary Ewing stole three golf clubs, worth \$399 each, from the pro shop of El Segundo Golf Course in Los Angeles County.<sup>22</sup> Ewing was arrested in the parking lot while attempting to leave with the clubs.<sup>23</sup> Ewing, who had 14 previous convictions, was found guilty of grand theft of personal property in excess of \$400 by a California court and therefore subject to punishment under the TSL.<sup>24</sup> Ewing's crime was considered a wobbler and the court decided to treat Ewing's crime as a felony, due largely to Ewing's recidivist past.<sup>25</sup> Ewing was sentenced to 25-years-to-life with no possibility of parole.<sup>26</sup>

*Ewing v. California* reached the Supreme Court in 2003. In *Ewing*, the Court considered the legitimacy of California's TSL on Eighth Amendment grounds. The focus of the Eighth Amendment challenge rested on the concept of proportionality which had never been clearly addressed by the Supreme Court. The Court ruled against Ewing on the basis that his sentence was proportional under California's Three Strikes scheme. Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, wrote in a plurality opinion for the Court that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."<sup>27</sup> O'Connor outlined several principles, which had been established by Justice Kennedy in his concurring opinion in *Harmelin v. Michigan* (1991),

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<sup>22</sup> Ewing, 2001 WL 1840666, at \*1; *Ewing v. California*, 123 S. Ct. 1179, 1183 (2003) as cited in Pater *supra* note 1 at 399.

<sup>23</sup> *Id.*

<sup>24</sup> *Ewing v. California*, 123 S.Ct. 1179 (2003).

<sup>25</sup> Petitioner's Brief, *Ewing* (No. 01-6978), available at 2002 WL 1769930 at \*6.

<sup>26</sup> *Id.*

<sup>27</sup> *Ewing*, 538 U.S. at 23 (quoting 501 U.S. 960, 1001 (1991) (Kennedy, J., concurring in part, concurring in the judgment) (citing *Solem v. Helm*, 463 U.S. 277, 288 (1981))) as cited in *Andrus supra* note 21 at 286.

concerning proportionality review: “the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors,” which ultimately led Justice O’Connor to the principle of forbidding gross disproportionality.<sup>28</sup>

One issue that arose during *Ewing v. California* and that continues to be relevant to both the Eighth and Fifth Amendment challenges is the debate over what exactly triggers the state’s lengthened punishment. In *Ewing*, Justice O’Connor wrote:

In imposing a three strikes sentence, the State’s interest is not merely punishing the offense of conviction, or the ‘triggering’ offense: “it is in addition the interest...in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.”<sup>29</sup>

Here, O’Connor acknowledges that significantly longer sentences that can arise under TSLs are not meant to simply punish the triggering offense but also to punish the offender’s prior criminal history.<sup>30</sup> This is a logical conclusion, for as Justice Scalia notes, the plurality’s opinion “in all fairness[] does not convincingly establish that 25-years-to-life is a ‘proportionate’ punishment for stealing three golf clubs.”<sup>31</sup>

In a dissenting opinion, Justice Breyer advocated a different approach in regard to determining the constitutionality of a sentence given under a TSL. According to Breyer, “[I]n cases involving recidivist offenders, we must focus upon ‘the [offense] that triggers the life sentence,’ with recidivism playing a ‘relevant,’

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<sup>28</sup> *Id.*

<sup>29</sup> *Ewing v. California*, 538 U.S. 11 at 28-32 (citing *Rummel v. Estelle*, 445 U.S. 263, 276 (1980); *Solem v. Helm*, 463 U.S. 277, 276 (1983)) as cited in *Andrus supra* note 21 at 293.

<sup>30</sup> *Id.* 293-294

<sup>31</sup> *Ewing*, 123 S. Ct. at 1189 as cited in *Constitutional Law: Criminal Law and Procedure supra* note 8 at 265.

but not necessarily determinative, role.”<sup>32</sup> As O’Connor does, Breyer acknowledges that a convict’s sentence under a TSL is based on both the triggering offense and the offender’s criminal history, but argues that the criminal history should not play as large a role as the triggering offense. The debate over the focus of punishment is clearly relevant to a proportionality challenge, as allowing a convict’s criminal history to factor into sentencing guidelines reduces the appearance that a 25-years-to-life sentence given for a crime such as grand theft is unjustly disproportionate.

#### IV. The Fifth Amendment and Retrospective Sentencing

As can be seen from Justice O’Connor’s opinion and Justice Breyer’s dissent, determining the exact offense or combination of offenses that the state wishes to punish can be extremely difficult. There are three possible causes for punishment with respect to Three Strikes Laws: the triggering crime alone, the triggering crime and the criminal history, or the offender’s habit of recidivism (with the triggering crime included but not the focus of the punishment). The idea that a TSL sentence is based on the triggering crime alone has already been dismissed by Justices O’Connor, Scalia, and Breyer in *Ewing* as previously discussed, for a 25-year-to-life sentence imposed for the commission of many wobblers alone would violate Justice O’Connor assertion that the Eighth Amendment forbids grossly disproportionate sentences.

Three Strikes Laws therefore must base punishment on either the second or third cause. However, determining which of the two is the actual basis for increased sentencing can be difficult, as certain factors such as motives of legislatures, support both possibilities. Punishment given based on the second cause would support the notion that TSLs are backward-looking: they increase the length of a sentence based not just on the offense at hand but

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<sup>32</sup> *Ewing*, 538 U.S. 11 at 41 (Breyer, J., dissenting) (citing *Solem*, 463 U.S. at 290; *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)) as cited in Andrus *supra* note 21 at 294.

also on the offender's past acts. The purpose of the law as described by California also demonstrates its retrospective focus, since the law was enacted "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."<sup>33</sup> In the same vein, one district attorney commented that "The current offense may not be serious, but they have a criminal history that really spells danger. We're saving a lot of risk for the future, and we're making them pay for their past."<sup>34</sup> As previously noted, the Supreme Court also demonstrated the retrospective nature of TSLs by including criminal history in its threshold analysis of *Ewing*. Based on such comments, one would logically assume that California's TSL is retrospective.

If this is indeed the case, then the law's retrospective nature must be considered in terms of the Double Jeopardy Clause of the Fifth Amendment. The Fifth Amendment of the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."<sup>35</sup> This clause prohibits several forms of multiple punishments, including protection against prosecution for the same offense after acquittal, protection against prosecution for the same offense after conviction, and protection against multiple punishments for the same offense.<sup>36</sup>

The question of a Double Jeopardy Clause violation arose in cases such as *Rummel v. Estelle* (1980) and *Solem v. Helm* (1983), but has never truly been addressed by the Court.<sup>37</sup> In *Ewing*, the

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<sup>33</sup> Cal. Penal Code § 667(b) (West 1999).

<sup>34</sup> *Id.*

<sup>35</sup> U.S. Const. amend. V

<sup>36</sup> U.S. Const. amend. V. *as cited in* Cinotti et. Al., *Double Jeopardy* 90 Georgetown L.J. 1528 (2002).

<sup>37</sup> *Rummel*, 445 U.S. at 284 ("This segregation [under a recidivism statute] and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time...."); *Solem*, 463 U.S. at 296 n.21 ("We must focus on the principal felony--the felony that triggers the life

Court attempted to avoid the issue of double jeopardy by incorporating recidivism into the definition of Ewing's crime.<sup>38</sup> Despite Ewing's assertion that his crime consisted of "shoplifting three golf clubs," the Court framed the crime as "felony grand theft for stealing nearly \$1,200 worth of merchandise after previously having been convicted of at least two 'violent' or 'serious' felonies."<sup>39</sup> However, according to Joshua Pater,

[T]o incorporate Ewing's criminal record into the threshold analysis so completely is to treat his sentence more as an additional penalty for his earlier convictions than a stiffened penalty for the triggering crime. This undermines the constitutional legitimacy of recidivism statutes by skirting the protection of the Double Jeopardy Clause of the Fifth Amendment.<sup>40</sup>

In Pater's view, the Court does not avoid double jeopardy by incorporating Ewing's criminal history and triggering crime; it simply skirts around the issue in a vague yet ultimately detectable manner. California's TSL does appear to conflict with several provisions of the Double Jeopardy Clause including protection against further prosecution for the same offense after conviction and protection against multiple punishments for the same offense. When viewed in a retrospective fashion, a TSL imposes punishment in both of these cases: the offender's increased sentence is assigned based on crimes he or she committed, was convicted for, and served time for in the past, and the offender is given an additional punishment for a crime or crimes for which he or she has already been convicted and punished.

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sentence--since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.") as cited in Pater *supra* note 1 at 416.

<sup>38</sup> *Ewing*, 123 S. Ct. at 1189-90 as cited in Pater *supra* note 1 at 416.

<sup>39</sup> *Id.*

<sup>40</sup> Pater *supra* note 1 at 415-416.

The California Supreme Court attempted to avoid the issue of double jeopardy in *People v. Jackson* (1993) by stating that “increased penalties for subsequent offenses are attributable to the defendant’s status as a repeat offender and arise as an incident of the subsequent offense rather than constituting a penalty for the prior offense.”<sup>41</sup> Such logic, however, fails on multiple levels. Firstly, double jeopardy protection depends on whether a single act can be considered more than one punishable offense. *Blockburger v. United States* (1932) states that, “double jeopardy bars subsequent prosecutions for a single act unless the act can be prosecuted and punished under different statutory provisions that require proof of different elements.”<sup>42</sup> Since it is impossible that the elements of an offender’s past crime have changed, such an exception does not apply.

Secondly, according to Joshua Pater, incorporating recidivism into the definition of the triggering crime fails in terms of proportionality review.<sup>43</sup> While a sentence of 25-years-to-life may not seem disproportionate for a conviction of grand theft with multiple previous convictions for similar offenses, there are other triggering crimes that would clearly violate the Court’s established prohibition against punishments that are “grossly disproportionate.” For instance, if California were to make overtime parking a felony punishable by life imprisonment, it would violate the proportionality principle even if the offender had a significant number of prior convictions.<sup>44</sup> The Court cannot therefore simply sweep an offender’s recidivism into the definition of the crime in order to justify increased punishment, for as the example demonstrates, the triggering crime logically must be considered in determining appropriate punishment. Using this logic, the fact that an offender has committed crimes in the past

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<sup>41</sup> *People v. Jackson*, 694 P.2d 736, 739 (Cal. 1985) as cited in *Vitiello supra* note 2 at 426 n. 185.

<sup>42</sup> *Blockburger v. United States*, 284 U.S. 299, 304 (1932) as cited in *Cinotti et. Al., supra* note 36 at 1528.

<sup>43</sup> *Rummel*, 445 US. at 274 n.11 as cited in *Pater supra* note 1 at 416.

<sup>44</sup> *Id.*

does not justify a steepened penalty in terms of proportionality if the triggering crime is relatively minor.

Some proponents of TSLs may argue that the penalties awarded under such laws are not particularly different from the practice of using past criminal history as an aggravating factor during the sentencing phase of a trial. Justice O'Connor acknowledged this argument in the plurality opinion of *Ewing* by asserting that past criminal history may be considered an aggravating factor, though she did not address how proportionality would be affected.<sup>45</sup> Although the idea that using criminal history as an aggravating factor violates double jeopardy is certainly not without merit, any debate on this concept would be a topic for a separate discourse. Further, such a debate is only marginally relevant to a discussion of TSLs due to their unique nature.

### V. *Ex Post Facto*

Another important note on the constitutionality of TSLs is the inclusion of *ex post facto* punishment. In *Calder v. Bull*,<sup>46</sup> Justice Chase defined *ex post facto* as:

1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2. Every law that aggravates a crime, or makes greater than it was, when committed. 3. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.* 4. Every law that alters the legal rules of evidence, and receives less, or different,

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<sup>45</sup> *Ewing v. California*, 538 U.S. 11 (citing *Rummel v. Estelle*, 445 U.S. 263, 276 (1980); *Solem v. Helm*, 463 US. 277, 276 (1983)) as cited in Andrus *supra* note 21 at 293-294.

<sup>46</sup> 3 US 386 (1978).

testimony, than the law required at the time of the commission of the offense, in order to convict the offender.<sup>47</sup> (Emphasis added)

Michael Vitiello argues that “[i]nsofar as Three Strikes considers felonies committed before its effective date, punishing for that past conduct would...violate the prohibition against *ex post facto* laws,”<sup>48</sup> since TSLs do increase the penalties for strikeable offenses that an offender committed before the passage of the law. The California law does not contain any prohibition to ensure that crimes committed before its passage are excluded from the Three Strikes scheme. The inclusion of such crimes therefore violates the prohibition against *ex post facto* laws. Many individuals convicted under TSLs have, in fact, received increased sentences based on crimes committed before the passage of the laws.

#### VI. “Innocent Until Proven Guilty”

If a state’s TSL targets the offender’s pattern of criminal activity, or recidivism (the third possible cause for punishment) rather than the actual criminal history of the offender, then this law would not appear to conflict with the Double Jeopardy Clause. With this justification, a state imposes additional punishments on the offender in order to keep the offender from committing future crimes. Any argument that TSLs are constitutional due to the fact that they are based on an offender’s tendency towards recidivism rather than his criminal history is undeniably forward-looking. When viewed through a prospective rather than retrospective focus, TSLs are meant to prevent future crimes rather than impose stiffened penalties on past bad acts and therefore do not violate the spirit of double jeopardy.

According to Michael Vitiello, “the rhetoric [surrounding TSLs] is almost always forward-looking; the statutes are justified

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<sup>47</sup> *The Constitutional Dictionary*, <http://www.usconstitution.net/glossary.html>.

<sup>48</sup> See U.S. CONST. art. I, [section][section] 9, cl. 2 and 10, cl. 1 *as cited in* Vitiello *supra* note 2 426 n. 185.

by a need to protect society from future criminality and deterrence.”<sup>49</sup> For example, the president of the California Police Chief’s Association wrote, “By depriving these recent offenders of a future life of crime, we have helped create a brighter future for law-abiding residents.”<sup>50</sup> In an unpublished opinion, the Court of Appeals for the Second District of California acknowledged the TSL’s forward-looking focus by claiming that Ewing’s sentence was appropriate due to his recidivist past and “dim prospects for the future.”<sup>51</sup> Although TSL offenders are incarcerated because of their past criminal history, the emphasis of such laws seems to be on the offender’s potential to commit future crimes rather than a punishment for their past crimes.

When considering potential future bad acts, however, we must also consider the notion of presumption of innocence. This concept may not be explicitly guaranteed in the Constitution, but it has long been a basic tenet of American law. In *Coffin v. United States* (1895), the Supreme Court asserted that “[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”<sup>52</sup> The concept is well-established in many statutes and judicial opinions, and can be seen in the standard of proving a defendant’s guilt “beyond a reasonable doubt.”<sup>53</sup>

Three Strikes Laws conflict with this basic concept, for locking away all offenders with a criminal history in order to prevent them from committing future crimes assumes that the individual will indeed commit such crimes without requiring any proof of such potential criminal activity. Furthermore, it is

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<sup>49</sup> Vitiello *supra* note 2 at 428.

<sup>50</sup> Ronald E. Lowenberg, Orange County Voices, “3 Strikes” Costs Money but Pays Off, L.A. TIMES, Apr. 28, 1996, at B9 *as cited in* Vitiello *supra* note 2 at 428 n.195.

<sup>51</sup> Ewing, 2001 WL 1840666, at \*4 *as cited in* Pater *supra* note 1 at 406.

<sup>52</sup> 156 U. S. 432, 156 U. S. 453 (1895).

<sup>53</sup> Presumption of Innocence, <http://legal-dictionary.thefreedictionary.com/Innocent+until+proven+guilty>.

impossible for such individuals to prove their innocence, since the crimes for which they are imprisoned are have never occurred and will never occur, at least for the duration of their imprisonment. This is in fact a major justification for TSLs, for by incarcerating individuals who have committed crimes in the past, they will be unable to commit crimes in the future. This will certainly prevent some future crime, but it also denies other offenders their freedom based on a presumption that such individuals will engage in future bad acts which, in reality, they will not necessarily commit. In short, TSLs that are justified on a prospective basis result in the incarceration of individuals for potential, hypothetical crimes that may or may not occur sometime in the future. It is also debatable whether the use of only two strikes under the California law actually demonstrates a pattern of lawless behavior that indicates a high likelihood of recitivism, particularly when the second strike is a wobbler.

It is important to distinguish between “criminal history” and “recidivism,” for the two are not interchangeable when it comes to TSLs. Criminal history is solely retrospective; it focuses on past bad acts that the offender has committed. Recidivism is an offender’s tendency to commit bad acts; it is based on the offender’s criminal history but is actually forward-looking with the presumption that the offender will commit future crimes due to his habit of criminal activity. If a state bases its TSL on offenders’ tendency towards recidivism rather than their past bad acts, the comparison of a TSL to using criminal history as an aggravating factor is no longer relevant. The TSL no longer violates the Double Jeopardy Clause of the Fifth Amendment since incarceration is based on potential future action rather than acting as an additional punishment for past acts.

In the forward-looking justifications of TSLs, an individual is incarcerated on the basis of preventing her from committing future crimes. This entails the consideration of two hypothetical possibilities: either the offender would have committed a future crime, but because she is locked up she is unable to do so, or the

offender would not have committed a future crime. If the latter were to be the case, then the state has imprisoned an individual who is innocent of the future crimes that the state claims the individual would commit. This, however, is a separate matter than presumption of innocence.

On the other hand, the first scenario comes into conflict with the presumption of innocence idea. Barton L. Ingraham has defined one of the central components of presumption of innocence as such:

The prosecution (the state) has the burden of proving all the essential elements, or ultimate facts, of the crime charged. These include proof of the criminal act, the defendant's mens rea, that the harm, if any, mentioned in the definition of the crime, was proximately caused by the defendant's criminal act, and the harm itself, by the standard proof "beyond a reasonable doubt."<sup>54</sup>

With respect to TSLs, the state can in fact prove *none* of the above elements, since no trial has taken place for the hypothetical future crime(s). The individual is being incarcerated for a (future, hypothetical) crime, yet the prosecution has no requirement to present any evidence to prove the essential elements of that crime. If TSLs are indeed forward-looking in their intent, then individuals incarcerated under such statutes seem to lack the basic protection of a presumption of their innocence.

We must therefore consider the root of why the state is unable to prove any of these elements, which is the fact that the incarcerated individual has not actually been charged with any crime. This raises a litany of other Constitutional issues, such as the Fifth Amendment's Grand Jury requirement, the Sixth Amendment's right to a speedy and public trial for all criminal

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<sup>54</sup> Barton L. Ingraham, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. Crim. L. & Criminology (1996).

prosecutions, and possibly even habeas corpus. These issues certainly deserve extensive future study.

## VII. Conclusion

Three Strikes Laws walk a precarious tightrope between the Fifth Amendment and the presumption of innocence, among other concepts that are fundamental to the American legal system. Some attempt to justify the laws in a retrospective manner, while others claim their intent is forward-looking. Either way, TSLs appear to run afoul of various constitutional and legal principles. The courts have for a long while avoided the issues of Fifth Amendment, *ex post facto*, and presumption of innocence violations, focusing instead on proportionality challenges. With the widespread enactment of TSLs throughout many states, however, such issues will likely need to be confronted to some degree by the legal system.

If TSLs are indeed forward-looking, then they also prompt questions concerning the offender's right to hear the charges against her and to have a fair trial on these charges. This would obviously raise a number of issues for the state, as the individual has not actually committed any crime for which she is receiving the lengthened sentence and therefore the state would be unable to bring any charges against the individual. The fact that statutes exist that provide for the imprisonment of American citizens without formal charges or a trial undoubtedly raises questions as to the constitutionality of TSLs in a variety of other areas that deserve further examination.

# Cutting the Baby in Half: A Compromise on Torture

*Bryan Bentley\**

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## *I. Introduction*

*Global stability and economic stability are currently more interdependent than at any other point in history. As a result, a*

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*single rogue terrorist could potentially end the current structure of civilization as we conceive of it—a way of life made possible by a stable global economy. In an effort to avert such a catastrophe, on August 1, 2002, the previous administration made it policy for the United States to engage in torture. Many say torture is never justified and must always be illegal, while others contend there are circumstances in which the rules of war must be “bent” for the sake of survival. Moreover, the Obama administration, through policymakers and front-line law enforcement officers alike, has made a compelling case that traditional, legal forms of intelligence gathering are more effective than torture, which also can lead to wasted time on misinformation spewed out by torture victims who will say whatever they think the torturer wants to hear. Contrary to popular belief, these seemingly disparate positions can be reconciled through two simple but controversial changes: make torture illegal regardless of the situation, yet tell military juries they have the right to acquit in spite of the law. Oliver Wendell Holmes once famously said, “The life of the law has not been logic: it has been experience.”<sup>1</sup> In other words, legal systems are the byproduct of both tradition and “[t]he felt necessities of the time.”<sup>2</sup> Laws against torture are not incidental but are the utilization of the wisdom codified into law passed down to us by previous generations. Thus, when thinking about the criminalization/prosecution of torture in the context of the U.S. War on Terror, one should not look to abstract reasoning concerning right and wrong. Instead, pragmatism and common sense should be the compass in determining the best course of action as a means of resolving this simultaneously moral and national security dilemma.*

## II. The Proposal

When defending torture, many cite the elusive but nevertheless realistic possibility of the ticking-time bomb scenario. In this hypothetical occurrence, a bomb is going to explode in a few minutes, and the suspect, who is the only lead in custody, is refusing to say anything. The interrogator is then

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<sup>1</sup> Oliver Wendell Holmes, Barnes Noble Inc. (2004 Ed.) *The Common Law* 6. 1881.

<sup>2</sup> *Id.*

confronted with the problem of whether or not he should torture the suspect. Even in an instance such as this, many would argue torture cannot be condoned. Its immorality, they would claim, is corrosive to both the ethos of our nation and the dignity of our soldiers; in addition, the bad press that the United States receives from torture inspires more terrorism than it offsets.<sup>3</sup> On the other hand, those in favor of the right to use torture claim that it has been very effective in obtaining viable information from suspects.<sup>4</sup> In the case *Leon v. Wainwright*, after a police interrogator ruffed up a suspect and threatened to expose him to severe torture, the suspect gave valuable information as to where he was holding a hostage he had kidnapped. When used effectively, torture has successfully preserved life by garnering information otherwise unobtainable. In the War on Terrorism, to forestall chaos, the military, vanguard of our freedom, may be forced to deprive others of their basic liberty. My proposal will not in, the short term, make this country a freer one, but it will make us a safer one. We would not be a better people to become dumb and deaf to the nature of reality; instead, realism must prevail, and the law must be modified to ensure that certain liberties, when necessary, be curtailed. As Judge Richard Posner aptly summed up, “a Constitution that does not bend, will break.”<sup>5</sup> Thus it is necessary to find a middle ground between safety and security by adopting the model I am proposing. The model suggested is rooted in the common-law ideal of jury nullification.

### III. The Compromise

The compromise proposed in this paper is twofold. First and foremost, torture must be properly defined and never legalized regardless of the circumstances. Secondly, Congress must pass a statute instructing judges, to fully inform jurors of their right to nullify the law. The idea of Jury Nullification is that it

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<sup>3</sup> Thomas Hegghamer, *Irreparable Damage*, Foreign Policy, May 2009, <http://experts.foreignpolicy.com/blog/6793>.

<sup>4</sup> *Leon v. Wainwright* 734 F.2d 770 (1984).

<sup>5</sup> Posner Richard, *Not A Suicide Pact: The Constitution in a Time of National Emergency* pg. 13 (2006).

is simply a mechanism by which a jury “refuse[s] to apply a law...in situations when the strict application of the law would lead to an unjust or inequitable result.”<sup>6</sup> Jurors must be fully informed of their right to judge, and if need be, “decide all elements of the law.”<sup>7</sup> It is important to keep in mind that the principle of jury nullification asks juries to not only judge whether a law is just, but also whether it is being misused. These two seemingly contradictory notions can be synthesized into an effective counter-terrorism strategy, which, significantly, still pays deference to a basic measure of human rights. By criminalizing torture, it will have the effect of enforcing some level of deterrence against soldiers, and other law enforcement agents who might too quickly and needlessly torture said combatant. At the same time, allowing for jury nullification will offer the defendant who has engaged in torture potential legal cover, provided his motives were valid and justifiable. However, before jury nullification can be argued in the context of torture, it is important to first look at what torture is and how it should be understood.

#### IV. The Necessity of Criminalization

##### A. What is Torture?

Torture as defined by the United Nations is an

*act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*<sup>8</sup>

This definition has been interpreted broadly as a method of banning most forms of harsh interrogation, some of which—including cultural and religious attacks such as sexual

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<sup>6</sup> Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 *LAW & CONTEMP. PROBS.* 51, 54 (1980).

<sup>7</sup> *Id.*

<sup>8</sup> United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

humiliation—are not typically regarded by the American public as “torture.” Media personality Rush Limbaugh, in response to the photos leaked from Guantanamo Bay, began referring to facility as “Club Gitmo”.<sup>9</sup> The cost-benefit analysis of employing such methods must take into consideration the social sensitivities of those who are at war with America. While some practices may not immediately be recognized as torture, if publicized they are useful recruitment tools for terrorist groups such as Al Qaeda.

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## B. What is Torture to America?

Torture, until recently, was defined by American law as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”<sup>10</sup> However, the Bush Administration, through the Bybee Memo, (released August 1 2002), perverted the definition in several ways. (During his tenure in the Office of Legal Council, Jay Bybee, on request from the CIA, signed a memorandum stating what interrogation methods could be used on Al Qaeda suspects.) For something to be characterized as “physical pain,” it must “[accompany serious] physical injury, such as organ failure, impairment of bodily function, or even death.”<sup>11</sup> Also, “mental pain” must result in “significant psychological harm of significant duration, *e.g.*, lasting for months or even years.”<sup>12</sup> The memo also notes that many acts considered horrific or degrading are not inherently torture. This was done in an attempt to create an intentional ambiguity, so that practices conventionally regarded as torture would not be considered as such under the circumstances.

## C. The Continuation of Torture During the Obama Administration

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<sup>9</sup> “Club G’itmo”

[http://www.rushlimbaugh.com/home/eibessential/illustrating\\_absurdity/clubgitmo.guest.html](http://www.rushlimbaugh.com/home/eibessential/illustrating_absurdity/clubgitmo.guest.html).

<sup>10</sup> . § 113 (C).

<sup>11</sup> Memorandum from Jay Bybee regarding standards of conduct for interrogation under 18 U.S.C. §§ 2340-2340 (A) for Alberto R. Gonzales, Counsel to the President, (Aug. 1, 2002).

<sup>12</sup> *Id.*

Recently President Obama signed several executive orders aimed at officially ending torture against people captured in “armed conflict.” However, the order goes on to differentiate between armed conflict and counter-terror operations.<sup>13</sup> This is a key distinction, since “armed conflict” applies to soldiers of traditional Clausewitzian (state vs. state) warfare, while counter-terrorism operations target non-state actors, such as Al Qaeda and the Taliban. Obama’s executive order on torture does not label any particular practice “torture,” but instead requires that future interrogation practices conform to those outlined in the Army Field Manual. But like other parts of Obama’s order, this prohibition apparently applies only to persons detained in an armed conflict.<sup>14</sup> Effectively this does little to close the torture loopholes created in the Bush Administration.

#### D. The Politically Pragmatic Argument For Banning Torture

There are multiple issues and complications surrounding the legalization (*de jure* or *de facto*) of terrorism. To begin with, the United States is acutely aware of its position in the international community as a traditional defender of individual rights. By making torture illegal, the United States would no longer be subject to rampant criticism from organizations like the United Nations and Amnesty International for violating the “human rights” of purported enemy combatants. (Note that I am not suggesting we should give detainees all Constitutional rights provided to U.S. citizens but that we should treat detainees with basic dignity, erring on the side of caution in how we choose to conduct ourselves to the extent possible.) While these organizations may have little direct power, the words of an NGO or international tribunal investigating violations of the Geneva Convention carry enough moral legitimacy to be taken seriously by all individuals or governments concerned with human rights. Were the United States to conform to international standards it could theoretically be upfront and transparent about the manner in which it treats its detainees. On the more purely domestic front, unifying potential dissenters with mainstream opinion by making

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<sup>13</sup> Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

<sup>14</sup> *Id.*

torture illegal would help engender the domestic unity needed for waging a successful military campaign

#### E. The Scientific Reasons for Banning Torture (as it is currently instituted)

There are additional humanitarian and practical issues to consider as well before putting a proposal such as mine into practice. According to Jeanne Bell, as a rule torture is not nearly as effective as conventional methods of interrogation.<sup>15</sup> Better and reliable information is often attained by the interrogator forging a relationship with the prisoner and treating him with both dignity and respect. When a suspect is tortured, there is a good chance he will lie and say whatever needs to be said to end the pain. Also, neuroscientists like Shana O'Mara have found methods such as water-boarding have been known to produce false memories, so a suspect could try to tell the truth, but inadvertently lie.<sup>16</sup> That said, there are some instances where, as stated above, torture simply works. However, because torture can coerce truth, break a human being's dignity, and treat him as an expendable means, it has a terrible power to corrupt. Historically, such as the case of French Algeria, when armies outlaw torture but allow it under the context of certain exceptions, the exception tends to have an endemic affect over time.<sup>17</sup> One of the reasons torture has an endemic effect is that the character it takes to torture an individual can potentially change a "normal" person (soldier) into a sadist prone to using brutality whenever possible.<sup>18</sup> Essentially, when condoned and informally instituted, the exception becomes the rule. Therefore, the army must construct clear guidelines as to what constitutes torture, and must prosecute all soldiers who engage in it. By criminalizing torture yet allowing for the defense to openly argue Jury Nullification, however, the United States will

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<sup>15</sup> Jeanne Bell, *Behind this Moral Bone: The Effectiveness of Torture*, 83 IND. L.J. 340 (2008).

<sup>16</sup> Shana O'Mara, *Torturing the Brain: On the Folk Psychology and Folk Neurobiology Motivating 'Enhanced and Coercive Interrogation Techniques'*, 13 TRENDS IN COGNITIVE SCI. 497-500 (2009).

<sup>17</sup> Lazreg Marie *Torture and the Twilight of Empire: From Algiers to Baghdad* (Human Rights and Crimes against Humanity) Princeton University Press (December 3, 2007) 1<sup>st</sup> Edition pg.215.

<sup>18</sup> Herbert C. Kelman, *The Policy Context of Torture: A Social-Psychological Analysis*, 87 INT'L REV. OF THE RED CROSS 123 (2005).

conform to international standards, without compromising national sovereignty and an American brand of justice.

## V. The Argument For Nullification

### A. The History of Nullification in the Anglo-American Tradition

While the history of jury nullification in English common law dates back to 1544, the first instance of jury nullification in the history of the thirteen colonies was the case of John Peter Zenger in 1736.<sup>19</sup> Zenger printed a series of articles critical of the royal governor. Zenger was then prosecuted by the governor for seditious libel. According to the letter of the law, using truth was not a plausible defense; therefore, Zenger's attorney, Alexander Hamilton, had no choice but to argue that the jury nullify the law. The jury eventually acquitted Zenger on all charges. The case established for the first time that American juries had the right to decide the law. Consequently, the *Zenger* case helped lay a legal foundation that the founders remembered when they wrote freedom of the press into the Bill of Rights.<sup>20</sup> Subsequently, U.S. Supreme Court Chief Justice John Jay wrote in 1794, in the case of *Georgia v. Brailsford*,

[O]n questions of fact, it is the province of the jury; on questions of law, it is the province of the court to decide. But it must be observed that by the same law which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."<sup>21</sup>

Therefore, the notion of using jury nullification is neither unprecedented nor incongruent with the original intent of one the Constitution's chief founders.

### B. Current Examples of Nullification

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<sup>19</sup> M. Kristine Creagan, *Jury Nullification: Assessing Recent Legislative Developments*, 43 Case W. Res. L. Rev. 1101, 1109 (1993).

<sup>20</sup> M. Kristine Creagan, *Jury Nullification: Assessing Recent Legislative Developments*, 43 Case W. Res. L. Rev. 1101, 1109 (1993).

<sup>21</sup> *Gail v. Brailsford*, 3 U.S. 1 (1794).

The problem, as of now, is that while jury nullification can be used at trials, it cannot be done so openly since it is illegal in most states. The defense can make allusions and references so that their argument can essentially be understood, but the jury still faces a dichotomy as to whether it wants to follow the law or do what it feels is right. If Congress passes a statute allowing jurors to be informed of their right to exercise Nullification in instances relating to torture, jurors would no longer forced to face this dilemma. The legal model for such judicial change already exists in Indiana's state constitution, which stipulates that, "the jury shall have the right to determine the law and the facts."<sup>22</sup> A federal statute such as this one would allow the defense in torture cases to tailor their argument more towards the jury's sensibilities rather than putting on the façade that they are actually arguing for their client's innocence in relation to facts of said case.

## VI. The Five Criticisms of Nullification

### A. The Negation of Law Criticism

Most prosecutors and defense attorney this author interviewed before writing this people all agree that allowing jury nullification is tantamount to jury lawlessness.<sup>23</sup> Within the legal community, many contend the jury should impartially find the facts and apply the legislature's law to those facts or risk having juries who will acquit the defendant for no other reason than they themselves dislike the victim. The principle example against Jury Nullification is that it was exercised as a defense by attorneys for white defendants in the American South as a means of justifying murder solely on the basis of racial prejudice. Jurors who would acquit a man of savagely brutalizing his fellow countryman for no other reason than a difference in skin pigmentation are clearly not tethered to legitimacy of the law. Essentially, one does not need to argue jury nullification openly if a bigoted juror wants to acquit the defendant. It is a horrid disgusting fact, but unfortunately jurors who have it in their hearts to acquit bigots of murder, shall

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<sup>22</sup> INDIANA CONST. ARTICLE 1 SECTION 19.

<sup>23</sup> Interview with Bradley Bridge, Public Defender, Defender Association of Philadelphia, in Philadelphia, Pennsylvania, January 2 2010.

do regardless of whatever facts or circumstances present themselves.<sup>24</sup>

### B. The Slippery Slope Argument

Others argue (particularly those of a libertarian persuasion), that allowing for a viable defense on behalf of those who perpetrate torture will provide a slippery slope, leading inevitably to allowing jury nullification within a civilian setting.<sup>25</sup> This logic ignores the difference between criminal action and national security. Torture in a civilian situation is a completely different category of necessity than torture within a military situation. Torture is not to be celebrated within either context, yet it must be understood that, within a military atmosphere, torture, when used effectively, can hypothetically preserve the collective security of every American. On 9/11, it took only nineteen men and \$500,000 to do more damage to the United States than the entire empire of Japan could in World War II. If torture were to be used in a civilian context, it would likely be employed by authorities to stop or prevent crime, but hypothetically even if inappropriate torture were to occur, it would not endanger the viability of the American way of life. The current status quo of the judge giving the jury the law and allowing the jury to apply said law to the facts of the case as the jury finds the facts to be is a good system that has served this country well for centuries. However, if a nuclear bomb were to explode in an American city, the nation may very well collapse. Necessity must spur the creation of different categories in regards to how the law shall apply. Law is a living thing that needs to grow with the time to which it lives. Thus, civilian authority figures like police officers should not be extended the opportunity to use jury nullification as a defense for their actions; instead, only the military should be afforded that option.

### C. The Natural Law Argument

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<sup>24</sup> Marvin Free, *Racial Issues in Criminal Justice: The Case of African Americans* 224 (2004).

<sup>25</sup> Samaha Joel *Criminal Law* Wadsworth Publishing; 7<sup>th</sup> edition pg. 330 2005.

Some argue that there is a natural law against torture and creating a loophole undermines the inviolability of human rights. The only natural laws in this world are in relation to science. I would suggest that natural law is a sophist's notion that those who do not want to face the relativist nature of law use as a means of exercising moral supremacy over the opposition. There is no similar concept of "natural law" in places like China or Saudi Arabia that give every individual freedom of speech and protections from cruel and unusual punishment. A feature of law is enforcement (or at least a good faith attempt at enforcement). When a tangible law is broken the crime is investigated and the offender is brought to justice. The reason why laws of science exist is because they enforce themselves. Natural law does not enforce itself, nor does it have any "natural enforcers." When rights are violated in a place of tyranny, no law is broken, because no human being has any rights. Quite literally, in places of oppression, there is no natural law, because no rights are enforced. While something may be codified in statute, without any enforcement there is no law, there is only goodwill. Law is a social construct, which varies from society to society.<sup>26</sup> It is necessary to adapt to changing circumstances and allow the U.S. military to be as humane as present conditions permit it to be. Today these artificial constructs codified as "laws" are pronounced not in terms of necessity; rather they are spoken of in the language of moral absolutism. Today this absolutism threatens national security by hindering potential usefulness of certain "inhumane" interrogation methods. Law that is blind to national security in nuclear age is little more than a glorified suicide pact.

#### D. The Argument Against Applying Law in a Context of War

On the other extreme of potential critics are the cynics of wartime law, such as Political Science Professor Dr. Stephen Gale. Dr. Gale, and others like him believe only law of war is to win.<sup>27</sup> The problem with this notion is that, for the reasons stated above, when torture goes unchecked, it is counter-productive to the

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<sup>26</sup> Peter Berger and Thomas Luckmann, *The Social Construction of Reality, in CONTEMPORARY SOCIOLOGICAL THEORY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE*. GARDEN CITY, NY: ANCHOR, 1967 42.

<sup>27</sup> Interview with Dr. Stephen Gale, Political Science Professor, University of Pennsylvania, in Philadelphia, Pennsylvania December 30 2009.

overall strategy of victory. While it is undoubtedly hypocritical to cast moral aspersions during war, it is nonetheless effective in raining in chaotic forces whose savagery does nothing but feed the enemy's will and produce faulty intelligence. Consequently, criminalizing torture in pursuit of victory is not contradictory to those who believe it is both pointless and immoral in trying to civilize war.

#### E. The Free Society Criticism

Political theorists, like Andrew Sullivan, have written that torture in and of itself is a litmus test as to whether or not a free society has become a tyranny.<sup>28</sup> It is undisputed that every tyranny in history has engaged in torture against those it claimed were threats to the state, and creating a means in which people who admittedly engaged in torture could potentially walk free may be taking our nation down a path further towards tyranny. This is a fair and poignant criticism that must be taken seriously. While I am not proposing martial law by acknowledging separate categories of necessity and stressing circumstances under which certain actions become acceptable, on some level I am encouraging citizens to break the law. However, I contend that the most important element of law, is not law itself, but the respect engendered from the mirage that humanity exist in a society, where when individuality is violated, action is merited with consequences. So long as one maintains the appearance and base service to the idea of law, in an effort that appears to most, (not all), but most observers, as a good faith attempt, in enforcing some obscure measure of liability on behalf of the victim, the idea of law is preserved, and along with it the order. In war, a nation has one responsibility: to preserve the collective security and safety of its citizens from enemies both foreign and domestic. Terrorism will not kill every American, but due to the interdependence of the global economy, mass destabilization can potentially cause another Great Depression. While "economic loss" may sound mundane and uninteresting, it is in every sense a human tragedy. Poverty is an assault on one's self-worth and has the capacity to destroy an individual's sense of being. Freedom can never be fully

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<sup>28</sup>Sullivan Andrew, *The Atlantic*, October 2009 pg. 81  
<http://www.theatlantic.com/magazine/archive/2009/10/dear-president-bush/7663/>.

appreciated nor understood when one is hungry. Choosing between freedom and well-being is not a false choice, but a hard choice. Between those two evils, a semi-authoritarian state, which defends its citizens' welfare at any cost, is far more humane than a democratic government so spellbound by principle that it is blind to the plight of those it should be protecting.

## VII. Conclusion

Ideally, no good person should go to jail, nor should an innocent be subject to the torture. But, as reality dictates, both the latter and former can and do occur. I contend the purpose of law is not to engineer justice, but to prevent injustice. If Congress passes a clear statute banning torture, based on recognized international principles, some innocent men, but not all, may be spared. But this step alone is naïve at best, and murderous at worst. Occasionally torture is necessary for a greater end, and no otherwise loyal, patriotic, humane soldier should suffer the indignity of prison for doing what is necessary to spare the nation from a terrorist attack. Thus jury nullification becomes the second but equally necessary step for preventing a grave injustice from occurring. Many argue that jury nullification is wrong since “[t]he key to any ordered society, such as ours, is being able to rely on the predictability of laws.”<sup>29</sup> But in this instance, that is exactly why nullification is necessary, since history has indisputably shown war is anything and everything but predictable. War does not adapt to the needs of law; law must adapt to the needs of war. Finally, there are those who fear putting faith in the “common sense” of any institution that could acquit O.J. Simpson. As a response, U.S. Court of Appeals for the District of Columbia Senior Judge David Bazelon said it best when he argued that he “[does] not see any reason to assume that jurors will make rampantly abusive use of their power. Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine.”<sup>30</sup> As a question of both ensuring self-preservation and thwarting injustice, criminalizing torturing while legalizing jury nullification is the best way of securing the

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<sup>29</sup> Aaron Oliver, *Jury Nullification: Should the Type of Case Matter?* 6 KAN. J.L. & PUB. POL'Y 49,68 (2007).

<sup>30</sup> *United States v. Dougherty*, 473 F.2d 1113, 1142 (1972).

national interest without compromising our identity as a liberal democracy.

# Free Will

*James Bridges\**

## *Extract*

*Do we have free will, and what are the implications of this? People do make choices freely, but people have no control over their initial conditions, and the properties that make them 'them', along with external factors. Therefore although one could label people with moral labels, or say that what they do indicates something moral or immoral about them, they cannot be held accountable for being moral/immoral. The implications of this on how society should operate are very significant.*

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Free will is the power of an individual to make free choices. Thus the first issue is over the meaning of the word 'free' in this context. Many would argue that for a choice to be 'free' means that the outcome must not be determined before the choice is made. However, I do not agree and will move on to argue this point in my essay.

A choice may be determined and not free, if, for example, we are referring to the choice to get wet or stay dry when caught outside in the rain without shelter. However, a choice may also be determined and free if the only reason it is determined is because, given every piece of information about ourselves (aspects of our personality, or equivalent information from a neuroscientific perspective, for example), it is clear what choice we will make, left to our own devices to make it. In my eyes, determined as this may be, this still constitutes some form of free will that we do in fact have. I will now expand on this point in more detail, explaining precisely how I arrived at this conclusion, the limitations of the

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'free' will that we can be said to have, and the implications of this on society.

When we observe the world around us, we see that everything appears to be a part of a chain of linked events, each one causing the next. Thus the state of the universe at a given time is fixed in all of its details by prior states and the laws of nature, and all future states are results of the current state and the laws of nature. Therefore, if there was an entity that knew everything about the previous and current states of the universe, as well as all the laws of nature, and had the capacity to fully analyse this, then that entity would be able to predict the state of the universe at any point in the future. This will henceforth be referred to as the deterministic viewpoint. Although I use this as the basis for many of my explanations, evidence from quantum mechanics that contradict the cause and effect nature of determinism and point towards many occurrences being down to chance does not weaken my later arguments, as we have no more influence over a series of random events before our existence than we do a set of causally linked events.

We can deduce from the deterministic viewpoint that people are just a confluence of causal processes initiated long before their existence. Therefore, the actions carried out by people are also simply a confluence of the causal processes that lead to the existence of those people, with the properties they have. However, if it is antecedent conditions that therefore determine my behaviour, then surely I can conclude that my autonomy is an illusion and that I do not have control over my actions. If I am not in control of my own actions then surely I can conclude that I do not have free will. Even if there is an aspect of us that is not causally determined, consciousness perhaps, and lets say that this does effect our actions, in what way can we say we have any more control over the initial conditions of this aspect of ourselves

simply because it is not causally determined by something physical? Either something must have caused it or its existence and characteristics must be random, but in either instance it was not down to us, by choice, and thus the possibility of it effecting our actions is not an argument for free will.

I would oppose the above argument that states that we therefore do not have free will by further analysing what 'I' refers to. A causal chain has determined properties about me, and has determined that there is an entity, 'me', to which these properties apply. These properties then determine my actions. However, these properties are what I am (and thus what 'I' refers to). Therefore, I determine my actions.

It is true that the aforementioned causal chain has, indirectly, through causing me to have certain properties, caused all of my actions. Therefore, this causal chain does determine what I will do, but only because properties I have, which is what makes me 'me', determine what I will do. In other words, things I cannot control, many of which occurred before my existence, have caused me to be 'me', with the properties I have. However, it is this 'me' that then makes free choices, even if they are determined by what this 'me' is like. Therefore, the notions of determinism and free will are not incompatible. The only thing related to myself that I have no effect over is the properties I have (i.e. what 'me' refers to).

Many would say, as a counter argument, that surely if you have no effect over who or what you are and the properties you therefore have, and it is these that determine your actions, then you have no effect over your actions and therefore do not have free will. However, a premise to this argument would undoubtedly have to be that the properties you have (as a result of a causal chain) determine your actions. In my argument, I define myself as the properties I have, and so this premise would imply that 'you (as a result of a causal chain) determine your actions'. My point

therefore lies in the notion that I am the result of a causal chain and this causal chain must therefore determine any action I carry out as the chain results in what I am. This is the same as saying that I determine any action I carry out: 'I' and 'the result of this causal chain' are the same thing.

To clarify the point further, let us look at an example. Let us say that yesterday I went to my lecture. Yes, my going would have been determined, but only because the nature of myself, as well as the nature of everything around me (my environment) that may effect my decision, is determined. I had the choice between going and not going, which I made freely. The only way that which choice I made was already determined was because, given what I am like (due to some chain of events prior to my existence, and various environmental factors during my existence), I would make that choice. Just because it was already determined that I would make that choice doesn't mean that it wasn't my choice to make, as it could only have been predicted if one were to analyse either what properties I have (i.e. that which makes me 'me') or if one were to analyse factors before my existence which then lead to me being created with the properties I have (again, that which makes me 'me'), along with environmental factors that had an effect in either case.

Therefore I can conclude at this stage that, although we do not have an effect over what properties each of us has, i.e. what 'we' are, once we exist this 'we' does have control over our actions. Thus the debate comes down to whether this constitutes free will. We have free will in the sense that the entities that are 'us' are free to choose and act as they wish, but not free in another sense as we cannot choose what 'we' are, i.e. what properties we initially have, and therefore which way we will naturally be inclined to choose.

In terms of the implications of this conclusion on accountability, they can be shown with one example: imagine (in a very simplified world with no moral ambiguity) that every moral choice that a particular person made is argued to be 'bad'. Due to the fact that he was free to make these choices he can be said to be

a 'bad person'. However, a 'bad person' is someone with character traits that will cause the person to make morally 'bad' decisions. These properties are part of what makes that person who they are, and over which he has no effect (refer to my earlier argument of a causal chain leading to the creation of an entity with certain properties and that entity being the person). Thus, although the person freely (in the sense of freedom of will laid out in my argument) chose to make morally 'bad' decisions, the person is not accountable for being a 'bad person'.

Therefore, people do make choices freely, but people have no control over their initial conditions, the properties that make them 'them', along with external (environmental) factors (nurture, for example, as opposed to nature) that affect them, and therefore although one could give people moral labels, or say that what they do indicates something moral or immoral about them, they cannot be held accountable for being moral or immoral. The implications of this on how society should operate are very significant.

The first implication concerns justice and punishment. Clearly, as people are not accountable for their actions, nobody should be punished purely based on the argument that he 'deserves' to be punished. Yes, if someone is a danger to society and there is no practical solution then the only response may be to imprison them for the safety of others. In addition, to the extent that sentences such as imprisonment, etc, can be justified as a deterrent, i.e. the benefit from punishing to prevent reoffending and other members of society offending outweighs the cost of the punishment, including upon the individual to be punished, they are valid. However, once we start using words such as 'deserved' to justify punishment, or criminals are punished for purely vindictive reasons, then their arguments are invalidated by the conclusion from this essay.

Just because concepts of deserved punishment have aided human survival over time, and therefore the instinct that such concepts are valid have evolved to be a part of human psychology (or passed down the race through nurture, rather than nature),

does not make the concept of deservedness a valid one – simply one that has aided survival. Therefore, the existence of systems of legality and punishment which rely partly on a notion of deservedness does not weaken my argument, though my argument does imply that such systems should be changed to focus purely on utilitarianism – instances where, through deterrence or aiding society by imprisoning dangerous citizens, punishment leads to a gain for society and thus do not rely on notions of deservedness to be justified.

There are further political/economic implications. People are not accountable for being hard working or idle, or intelligent or unintelligent. Yes, hard work should be rewarded if it benefits society, not because the reward is ‘deserved’ but to encourage others to work hard to benefit society (in other words, because rewarding hard work can lead to a gain in utility). However, ignoring the effects of incentives, the complete equalization of everyone’s wealth would be the most justifiable policy – no one ‘deserves’ better or worse. However, this is not viable as it would remove the incentive to work, thus the total wealth would be equally split but this total wealth would be far lower, harming everyone. Instead, I am arguing for a balance: the government should try to equalize wealth to the greatest extent that they can up to the point where the results become negative, even for low income earners, as the removal of incentives to work actual damages society more than the redistribution of wealth aids it.

To conclude, although it can be argued, defining people in the way I have, that people do have control over their actions and do make choices, people are not accountable for what they are like, and therefore are not accountable for these actions and choices. Whether this constitutes free will or not I will leave to the reader to decide, as it is more of an arbitrary point referring to the definition of free will than one that will have any effect on the conclusions drawn from this essay. The implications of people not being accountable are far greater than I have gone into in this essay; I hope that in merely scraping the surface of what the

invalidation of the concept of deservedness implies, I have given sufficient examples to encourage further thought and hopefully action in this vein. For while we can justify hardship, suffering and the inequalities across society as being 'deserved', nothing substantial will be done to rectify these problems.

