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Somewhat Frantic: A Brief Response to *Crime, Punishment, and Romero*

Michael Vitiello

I. INTRODUCTION

I first encountered an article appearing in the *Duquesne Law Review*, entitled *Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law*,¹ when researching for a book review of a new book regarding the California Three Strikes Law.² In the article, authors Janiskee and Erler make a number of remarks about my work that call for a response.³

In this response, I would like to reply to claims that Janiskee and Erler made about my position on Three Strikes. The co-authors' criticism of my position is twofold. First, although my position is quoted accurately, i.e., that Three Strikes "passed as a result of public panic, flamed by politicians who spurned rational debate,"⁴ they offer my position as an example of opposition to Three Strikes that they characterize as "somewhat frantic."⁵ Second, the authors fault both Zimring and myself for suggesting that "[s]uch fundamental issues as crime and punishment should be left to experts."⁶ Apparently, this position makes us "radical reformers"⁷ and anti-democratic in our views. Specifically, they contend that "[u]ntil the rule of experts replaces democracy, however, radical

1. Brian P. Janiskee and Edward J. Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law*, 39 DUQ. L. REV. 43 (2000).

2. FRANKLIN E. ZIMRING, GORDON HAWKINS, AND SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* (2001); my review of that book is entitled *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises, Punishment and Democracy: Three Strikes and You're Out in California*, Franklin E. Zimring, Gordon Hawkins and Sam Kamin, reviewed by Michael Vitiello (to appear in CAL. L. REV. January 2002).

3. I was pleased to learn that Professor Zimring was also responding to remarks about his work.

4. Janiskee and Erler, *supra* note 1, at 54 (quoting Michael Vitiello, "Three Strikes" and the Romero Case: *The Supreme Court Restores Democracy*, 30 LOY. L.A. L. REV. 1643, 1652 (1997)).

5. *Id.*

6. *Id.* at 55.

7. *Id.* at 56.

reformers are confined by the forms of democracy."⁸

While I disagree with a number of positions that the co-authors take in their article, I confine my remarks to their attacks on my position.⁹ My first point is that, despite their willingness to make an ad hominem attack, they do not engage in any effort to address the content of my article, that Three Strikes was the result of public panic and the failure of politicians to engage in rational debate. My second point overlaps somewhat with my first point, but goes well beyond a discussion of passage of Three Strikes. The co-authors' suggestions that a rule of experts is "radical" and that our system is a popular democracy are simply wrong. Their mistake is fundamental; ours is a *republican* form of government precisely because the framers of the Constitution feared mob rule. As a result, our system frequently insulates important policy decisions from popular passions.

II. MEETING THE ARGUMENT

In *Crime, Punishment and Romero*, the co-authors not only failed to meet my argument fairly, they made no effort to address the argument at all. Instead, they dismissed the point with an ad hominem attack.

Two separate articles of mine on the Three Strikes legislation have addressed the circumstances surrounding passage of Three Strikes.¹⁰ Those articles concluded that the enactment of Three Strikes was the result of "public panic, flamed by politicians who spurned rational debate."¹¹ Readers can digest all of the support for that position in those two articles. Here, I offer a brief summary of

8. *Id.*

9. For example, the authors discuss whether sentences under Three Strikes may violate the federal and state constitutional prohibitions against excessive sentences. Janiskee and Eler, *supra* note 1, at 56-60. While the authors do recognize that the language of the Eighth Amendment of the Federal Constitution differs from California's constitutional provisions, their discussion of Three Strikes considers only United States Supreme Court authority and ignores developed case law interpreting the California Constitution. *Id.* In fact, as interpreted by the courts, the California Constitution provides more protection against excessive sentences than the case law interpreting the Eighth Amendment. *See, e.g.*, In re Lynch, 8 Cal. 3d 410 (1972); *People v. Wingo*, 14 Cal. 3d 169 (1975); *People v. Dillon*, 34 Cal. 3d 441 (1983). Further, the authors fail to recognize the significance of the difference in textual language. The Eighth Amendment prohibits "cruel and unusual punishment," while CAL. CONST. art. I, § 17 prohibits "cruel or unusual punishment", which in fact supports the California court's more liberal reading of its constitutional provision. In addition, the Ninth Circuit recently held that the petitioner's sentence under the Three Strikes law violated the Eighth Amendment. *Andrade v. Attorney General*, 270 F.3d 743 (9th Cir. 2001).

10. *See* Michael Vitiello, *Three Strikes: Can we Return to Rationality?*, 87 J. CRIM. L. & CRIM. 395 (1997); Vitiello, *supra* note 4.

11. Vitiello, *supra* note 4, at 1652.

evidence that the political process was skewed.

Aggrieved father Mike Reynolds, along with the help of three state court judges, drafted the original Three Strikes law after a career criminal murdered Reynolds' daughter.¹² Reynolds secured financial backing from both the NRA and the California Corrections and Peace Officers Association.¹³ However, despite the backing of those two organizations, Reynolds' efforts to get the legislation passed went nowhere, as did his efforts to qualify the legislation as a ballot initiative.¹⁴

That was the case until Richard Allen Davis, a violent career criminal, kidnapped Polly Klaas.¹⁵ The twelve-year old girl's fate was unknown for a month, during which her parents were able to make her story news across the country. In an effort to bring the child home safely, Polly's parents used a videotape of the girl to keep her in the public spotlight.¹⁶ Polly's kidnapping gave Reynolds' efforts the boost it needed to get the Three Strikes legislation on the ballot. Initially, Polly's father, Marc Klaas, signed Reynolds' petition.¹⁷ Later, he disavowed his support of Reynolds' legislation, and argued that it provided too much punishment in some cases and not enough in other cases.¹⁸ Prior to Polly's kidnapping, Reynolds secured only 20,000 signatures. Within days of the report of her murder, Reynolds gathered an additional 50,000 signatures and Three Strikes was "on its way to becoming the fastest qualifying voter initiative in California's history."¹⁹

At the same time, Pete Wilson, an unpopular governor facing a difficult re-election campaign, seized on crime and Three Strikes as his primary campaign issue.²⁰ But the Democrats, often burned for being soft on crime, refused to yield that issue to Wilson. Despite doubts of politicians like Willie Brown, virtually no politician was willing to oppose efforts to secure passage of Three Strikes.²¹

In addition to Reynolds' version of Three Strikes, the California Legislature had before it several other crime bills that were less sweeping than Three Strikes.²² For example, the California District

12. *Id.* at 1654.

13. *Id.* at 1655.

14. *Id.*

15. *Id.*

16. Vitiello, *supra* note 4, at 1654-55.

17. *Id.* at 1656.

18. *Id.* at 1659-60.

19. *Id.* at 1656.

20. *Id.* at 1660.

21. Vitiello, *supra* note 4, at 1671-73.

22. Vitiello, *supra* note 10, at 412-21 (discussing the various bills).

Attorneys Association initially presented a more modest bill.²³ But the legislature, controlled by the Democrats, played a game of high stakes poker with Wilson and announced that it would pass *all* of the bills and leave it to Wilson to decide which to sign.²⁴ In March of 1994, Wilson, who began his campaign by promising to support Reynolds' bill as part of a speech that he gave at Polly Klaas' funeral,²⁵ reiterated his support for that bill despite available alternatives.²⁶ Reynolds, who was unwilling to support any proposed changes to the Three Strikes measure,²⁷ continued the initiative process despite his success in the legislature and promises to abandon those efforts.²⁸

Furthermore, despite evidence to the contrary, almost everyone involved in the debate asserted that violent crime was on the rise. In fact, crime rates had begun to decline before passage of Three Strikes.²⁹

Even a quick look at the history of the enactment of the Three Strikes legislation reveals the dissimilarities between that process and normal legislative give and take. Three Strikes represents a radical departure from traditional criminal law policy in a number of important ways. Despite what Zimring et al. demonstrate was "the largest penal experiment in American history,"³⁰ the bill flew through the legislature without careful assessment.³¹ The bill did not undergo amendment during debate³² and serious doubts about the cost of the legislation were ignored.³³ Reynolds, a private citizen, held extraordinary sway over professional legislators and made clear that he would wield that power against anyone who did not completely support his bill.³⁴ Finally, the events surrounding Polly's kidnapping turned-up political pressure to do something about violent crime to such a degree that you were either against crime, in which case you supported Three Strikes, or you were soft on crime.

My conclusion that the public and our politicians spurned

23. ZIMRING ET AL., *supra* note 2, at 6.

24. Vitiello, *supra* note 4, at 1671-72.

25. *Id.* at 1660.

26. *Id.* at 1670, 1673.

27. *Id.* at 1658-59.

28. Vitiello, *supra* note 10, at 414.

29. ZIMRING ET AL., *supra* note 2, at 87-88.

30. *Id.* at Chapter 2, entitled "The Largest Penal Experiment in American History."

31. *Id.* at 11-12.

32. Vitiello, *supra* note 10, at 413-14.

33. *Id.* at 415-22.

34. Vitiello, *supra* note 4, at 1658-59.

rational debate is supported by further and more compelling evidence. First, I want to recount a conversation that I have had with a number of intelligent people at different times since passage of Three Strikes. The conversation has taken slightly different form over time, but the conversation goes something like this. A student, friend, or acquaintance asks a question about Three Strikes, often in response to news articles about the topic. I pose a hypothetical and ask, "did you vote for Three Strikes and did you realize that you were approving a sentence of twenty years³⁵ to life for an offender who committed two residential burglaries in his early twenties and then, many years later, is charged with possession of marijuana?" The respondents are almost universally shocked that Three Strikes covers such situations.

The source of people's confusion is understandable. The campaign in support of passage of Three Strikes made outrageously misleading claims about what the legislation aimed to do.³⁶ For example, Three Strikes, according to campaign literature, was aimed at rapists, murderers, and child molesters.³⁷ While rapists and child molesters may well be Three Strikes defendants, Three Strikes does far more than that. As demonstrated by Zimring et al., violent criminals represent a small number of Three Strike defendants. Instead, Three Strikes is used far more often against burglars, thieves, drug offenders, and other non-violent offenders than against violent felons.³⁸ Prosecutors may use Three Strikes against murderers, but one doubts that Three Strikes serves much purpose in murder cases, at least in cases where a prosecutor seeks the death penalty.³⁹ That is, penalties for murder are typically more severe, or at least potentially so, than the penalties provided under the Three Strikes legislation.

Campaign literature also claimed that "3 Strikes Saves Lives and Taxpayers Dollars."⁴⁰ However, the study relied on in making this claim contained serious methodological flaws that overstated the

35. The minimum sentence is 25 years, but an offender may earn up to a 20% reduction in the sentence. CAL. PENAL CODE § 667(c)(5) (West 2000).

36. Vitiello, *supra* note 4, at 1677-88.

37. CALIFORNIA BALLOT PAMPHLET, General Election, Nov. 8, 1994, at 36.

38. ZIMRING ET AL., *supra* note 2, at 50. Specifically, the authors found that "[i]n the sample of more than 1,300 cases, burglary or drug offenses are twice as likely to be the precipitating charge for a mandatory 25-year-to-life sentence as are all of the violent offenses in the California penal code combined" and concluded that "[m]ore than 75% of the Three Strikes defendants in [the studied] sample would face a 25-year minimum sentence for a current nonviolent offense." *Id.*

39. The maximum penalty under Three Strikes is a term of life in prison as compared with the possibility of the imposition of the death penalty in some murder cases.

40. Vitiello, *supra* note 4, at 1678.

benefits of Three Strikes. The Governor's chief economist prepared a study that both overstated the number of crimes prevented by Three Strikes and the cost of those savings.⁴¹ His claim that Three Strikes would result in each offender committing between 20 and 150 fewer crimes was inaccurate at the time⁴² and, as *Punishment and Democracy* demonstrates, was a gross overstatement of the amount of crime curtailed by Three Strikes.⁴³

In addition, the report grossly overestimated the savings resulting from Three Strikes. Three Strikes has netted mostly non-violent offenders, guilty of theft and other non-violent crimes.⁴⁴ Even if a thief would have committed 10 thefts in a year at the national average of \$370 per theft,⁴⁵ society saves only \$3,700 per year by incarcerating the thief, but pays well in excess of \$20,000 per year to warehouse the offender.⁴⁶ If the offender were a burglar, committing 10 burglaries, each costing the national average of \$1400 per burglary,⁴⁷ society saves \$14,000, again a net loss. If Three Strikes in fact led to incarcerating violent offenders, the savings would be much greater. However, Three Strikes has not led to incarcerating large numbers of violent offenders, but instead, has netted a large number of non-violent offenders.⁴⁸

The report also ignored alternatives to incarceration. It considered only the cost of crime and incarceration and argued that the cost of crimes committed was far greater than the cost of imprisoning an offender. It did not compare the cost of responses other than imprisonment,⁴⁹ despite the fact that less expensive programs, including intensive supervision, have shown good results.⁵⁰ Due to the lack of opposition to Three Strikes, most of these extravagant and flagrantly misleading statements went uncontested.⁵¹

In light of a record of gross overestimation of the benefits of

41. *Id.* at 1673-85; see also ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 68-72 (1998).

42. *Id.*

43. ZIMRING ET AL., *supra* note 2, at 101-02.

44. *Id.* at 50.

45. CURRIE, *supra* note 41, at 72 (stating that the average money loss per theft is \$270 plus an additional \$100 in police and court costs).

46. *Id.* at 67 (estimating that it costs between \$16,000 and \$25,000 per year to incarcerate a felon).

47. *Id.* at 72.

48. ZIMRING ET AL., *supra* note 2, at 50.

49. Vitiello, *supra* note 4, at 1684.

50. CURRIE, *supra* note 41, at 78-79. See also CURRIE, *supra* note 41, at Chapters 3-5 (discussing specific alternatives to incarceration).

51. Vitiello, *supra* note 4, at 1678.

Three Strikes, the lack of debate despite ample evidence of Three Strikes' excesses, the lack of political courage on the part of important political players, and the political strong arm tactics used by the proponents of Three Strikes, one wonders what is "frantic" about my characterization of the process whereby Three Strikes was adopted. Janiskee and Erler are silent on that point.⁵²

Insofar as they contend that I lack trust in the democratic process in this particular instance, I concur. But the fact that they do not seem troubled by the results of an election in which voters were flagrantly misled is surprising. They make no effort to show that Three Strikes, in fact, has fulfilled promises like the promise to *target* rapists, murderers and child molesters. They do not demonstrate that Three Strikes is worth its cost.

On the question whether they believe that Three Strikes deters crime, the authors make conflicting statements. In their introduction, they contend only that they criticize Zimring's findings, but that they "do not undertake to demonstrate that Three Strikes does deter crime."⁵³ Later in the article, they claim far more boldly, "[w]e have proven . . . from the above data, that a distinct and sharp decline did indeed occur after the Three Strikes legislation went into effect."⁵⁴ They conclude, less modestly than in their introduction, that "[f]rom all available evidence it seems clear beyond cavil that Three Strikes is . . . an effective deterrent to crime. . . ."⁵⁵ Even if they are correct that Three Strikes is an *effective* deterrent, that does not respond to the issue of whether the process whereby Three Strikes came into existence demonstrates the absence of rational debate. *Punishment and Democracy* and Professor Zimring's research more than amply demonstrate the fallacy of their position that Three Strikes is an effective deterrent. At best, the co-authors must concede that the debate in support of Three Strikes did not focus on the deterrent

52. Janiskee and Erler, *supra* note 1, at 54-56. After characterizing opponents of Three Strikes as "somewhat frantic," Janiskee and Erler describe Zimring's position, and my position, and then comments that "[u]ntil the rule of experts replaces democracy, however, radical reformers are confined by the forms of democracy." *Id.* Nowhere do the authors attempt to dispute the detailed history that I developed to support my conclusion that ". . . extravagant rhetoric prevented the electorate from making a fully informed decision on 'three strikes.'" Vitiello, *supra* note 4, at 1625. At a minimum, I would like to see them make some plausible, coherent argument in support of their "conclusion" that my argument was "somewhat frantic." I would be interested to see a defense of extravagant claims made during the election. Perhaps, the co-authors think that all is fair in trying to win an election, and that voters are not entitled to a full and fair discussion of the issues before them.

53. *Id.* at 44.

54. *Id.* at 54.

55. *Id.* at 65.

effect of the law, but instead, the promise of decreased crime was premised on the effect of incapacitating high rate offenders.⁵⁶ Further, nowhere do the authors attempt a defense of the extravagant claims made during the election.

III. A GOVERNMENT OF EXPERTS AND RADICAL REFORMERS

The co-authors also contend that Zimring and I are “radical reformers.”⁵⁷ Their evidence of our radical agenda is that we appear to favor insulating penal policy from the electorate. They conclude that “[u]ntil the rule of experts replaces democracy, however, radical reformers are confined by the forms of democracy.”⁵⁸

Recognize that the co-authors are making two distinct claims. First, they claim that Zimring and I favor insulating penal policy from the electorate. Second, they believe that removing decisions like penal policy from the electorate is inconsistent with our democracy. Each point requires a separate response.

In my articles on Three Strikes, I did not take the position that penal policy should routinely be insulated from normal democratic processes. Instead, as discussed above, I focused on how inadequate the process was in enacting Three Strikes. Elsewhere, whether the issue has been passage of Proposition 215 (authorizing use of medical marijuana) or Proposition 209 (eliminating affirmative action in public employment, education and contracting), I have raised questions about the fairness of the process, in part, because of misleading campaign literature and advertisements.⁵⁹ But until I read *Punishment and Democracy*, I

56. Janiskee and Erler's precise position is a bit hard to grasp on this point. They fault Zimring for focusing on deterrence because, according to Janiskee and Erler, “[t]he principal conclusion of Zimring is that the Three Strikes legislation fails to provide any measurable deterrent effect on the target groups. In coming to this conclusion, Zimring violates the first principle of policy analysis — that any law or policy must be understood in terms of its intent.” *Id.* at 50. As Zimring's response to Janiskee and Erler indicates, shortly after Three Strikes went into effect, before any decline in the crime rate could have resulted from increased incarceration, Three Strikes proponents switched the explanation for its claimed effect on the crime rate by claiming that the decline was caused by deterrence. *See* Zimring and Kamin Rebuttal, *Facts, Fallacies, and California's Three Strikes*, 40 DUQ. L. REV. (forthcoming June 2002). Apart from that question, the authors' sharp attack on Zimring is an implicit admission that the Three Strikes law was sold as a law that would incapacitate dangerous offenders and that would result in the dramatic decline in crime.

57. Janiskee and Erler, *supra* note 1, at 56.

58. *Id.*

59. Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J. OF LAW REFORM 707, 713-17 (1998) (discussing the misleading campaign supporting passage of Proposition 215); Michael Vitiello and Andrew J. Glendon, *Article III Judge and the Initiative Process: Are Article III Judges Hopelessly Elitist?*, 31 LOY. L.A. L. REV. 1275, 1301-02 (1998) (raising questions about the

had not considered the special need to insulate punishment questions from voters. *Punishment and Democracy* makes a compelling argument that we would be better served by insulating those decisions from direct democracy. I highly recommend that text and urge the reader to make her own decision about whether we end up with excessive, and unduly expensive, punishment when we do not insulate penal policy decisions from the electorate.⁶⁰

Further, I question whether suggesting that not all policy decisions be made by the voters is a radical reform. The co-authors seem to be engaging in name calling without attempting to make a serious case in support of their "conclusion" that Zimring and I are radical in our views. Even the briefest review of basic Civics demonstrates that our political process routinely insulate numerous policy decisions from popular democracy.

As discussed in *Punishment and Democracy*, every Western democracy insulates monetary policy from popular control.⁶¹ In the United States, we have relied on the Federal Reserve system since 1913.⁶² One justification for the decision to insulate monetary policy from the electorate is that democratically responsive institutions produce undesirable levels of inflation.⁶³ Supporters of the Federal Reserve system cannot, by any stretch of the imagination, be called radical reformers, especially in an era in which Federal Reserve Chairman Greenspan has been credited with the largest economic expansion in American history.

A quick look at the United States Constitution and other institutions in American government rebuts the co-authors' suggestion that direct democracy is the norm and that departure from that norm is radical. James Madison's distrust of mob rule is woven into any number of constitutional provisions.⁶⁴ For example, Article III creates an independent judiciary, in part, to insulate judges' decisions from the political process. The Constitution creates the Electoral College,⁶⁵ which, as the 2000 Presidential election demonstrates, can lead to the election of a president without a majority of the national vote. The Presidential veto,⁶⁶ the

voters' intent in passing Proposition 209).

60. While the entire text presents compelling reading, Part IV, beginning at 149, makes an especially compelling case with regard to the role of popular democracy in crime policy.

61. ZIMRING ET AL., *supra* note 2, at 204.

62. *Id.*

63. *Id.* at 205.

64. See THE FEDERALIST NO. 10 (James Madison) (explaining that the republican form of government avoids the evils of factions and the tyranny of the majority).

65. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST., amend. XII.

66. U.S. CONST. art. I, § 7, cl. 2.

super-majority required to amend the Constitution,⁶⁷ and the Senate⁶⁸ itself are all examples of constitutional provisions that are contrary to popular democracy. Other institutions and rules underscore the ways in which our government limits the popular will. The filibuster, allowed under Senate rules, is one obvious example. Allowing committee chairmen to prevent legislation or a candidate's name to get to the Senate floor is another example of a system that has ingrained checks on popular democracy.

Often the drafters placed a specific power in a particular branch of government because they wanted to insulate that power from the most representative branch of government. For example, conducting foreign affairs is largely entrusted to the President.⁶⁹ The House of Representatives is more representative of the will of the people than is the President — for example, representatives must receive more votes than their opponents, unlike the President, who is elected by the Electoral College, not directly by the people. Further, representatives must run for reelection every two, instead of four years. Despite the closer connection between the House and the people, no one would seriously argue in favor of placing the power to conduct foreign affairs in the House rather than in the executive branch.⁷⁰

The decision to entrust a particular power with a given branch of government is often a matter of expertise and efficiency. For example, according to the Supreme Court, the President, "not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries. . . . He has his confidential sources of information. . . . Secrecy in respect of information gather by [diplomatic, consular and other officials] may be highly necessary and the premature disclosure of it productive of harmful results."⁷¹

One could examine a wide range of constitutional powers and find similar reasons why the drafters deemed one branch or another to be the appropriate repository of a particular powers.

67. U.S. CONST. art. V.

68. U.S. CONST. art. I, §3, cl. 1.

69. "[T]he President alone has the power to speak or listen as a representative of the nation. . . . As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'" *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

70. No doubt Congress has a role to play in international affairs. It has power over the "Power to provide for the common Defense, . . ." U.S. CONST. art. I, § 8, cl. 1. It may declare war and to raise an army and navy. U.S. CONST. art. I, § 8, cl. 11-13.

71. *Curtiss-Wright Export Co.*, 299 U.S. at 320.

Often, the reason for placing a power in a particular branch was confidence in that branch's expertise, as in the example of foreign affairs. Placing a power in the hands of the many, whether in the House or directly in the hands of the people, is often inappropriate.

Whether determining criminal punishment is the kind of exercise of power better left to experts and removed from political forefront is a debatable proposition. As with the previous example, conducting foreign affairs, presumably where strong policies support insulating an area of power from the popular will, we get better government when we do so.

State governments are similarly structured to place limits on the involvement of the electorate. The obvious, but common, exception is the initiative process, which allows direct participation of the electorate in passing legislation.

Does the fact that California has a provision for direct voter participation mean that criticism of that system is radical? Whether one is a fan of direct democracy often depends on the results of the most recent election. For example, some politicians showed considerably less enthusiasm for the will of the people after passage of Proposition 215 than they did after passage of Three Strikes.⁷² More importantly, main line scholars of all stripes have raised serious questions about direct democracy.⁷³ I will not reiterate all of those concerns here, but merely note again the primary concern that I raised above, that voters are often seriously misled about the nature of the choice in any given election.

Above, I argued that the framers made conscious choices to insulate some areas of governmental power from the most representative branch. In arguing whether such decisions were justified, one would focus on whether sound policies support the decision. In a republican form of government, we do not simply assume that the people should be immediately involved in decision-making. By analogy, we can argue whether placing decisions concerning criminal punishment in the hands of the electorate is sound by comparing how well the electorate or politicians or experts have performed. For example, empirical data

72. See Vitiello and Glendon, *supra* note 59, at 1285-86 (comparing Governor Wilson and Attorney General Lungren's differing support of the will of the people depending on whether the issue was three strikes or Proposition 215).

73. See, e.g., J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 338-44 (1992) (raising concerns about the initiative process). Justice Hans Linde has gone further and suggested that the initiative process may violate the United States constitutional guarantee of a republican form of government. See Hans Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951 (2001).

may educate the debate to help us assess whether the electorate has performed well in developing penal policy. That, of course, is exactly what *Punishment and Democracy* examined. Zimring and his co-authors demonstrated that both the politicians and the people did not do a very good job at assessing punishment, and that we are spending far too much for far too few benefits.

Janiskee and Erler argue to the contrary that the Zimring study did not demonstrate that Three Strikes is ineffective. The reader can examine the Zimring study, the critique of that study, and Zimring's response. I am convinced by the Zimring study and argument in *Punishment and Democracy* that we would make better use of public funds by insulating punishment decisions from the political arena. The argument for doing so is hardly radical; it is the same kind of arguments that framers considered when distributing power in different branches of government in our republican form of government.

IV. PARTING THOUGHTS

Elsewhere, I have expressed concern about the problems that Three Strikes has created for California.⁷⁴ Among other difficulties, prolonged incarceration for many Three Strikes offenders is an unnecessarily expensive solution to the crime problem. An aging prison population that includes many non-violent offenders cannot be justified by gains in public safety.⁷⁵ Data is mounting that Three Strikes is not going to deliver reasonable benefits.⁷⁶ But reform can occur only if the legislature can achieve a super-majority to modify the law. Our best hope is that serious minded scholars and others interested in sound public policy can engage in reasoned discourse. If Janiskee and Erler want to be part of the debate, they have to do a better job.

74. Vitiello, *supra* note 10 *passim*.

75. *Id.* at 437-41.

76. *See, e.g.,* ZIMRING ET AL., *supra* note 2, at Chapter 6; *see also id.* at 102-03 (citing other studies reaching conclusions consistent with the Zimring study).