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## **ADDICT FIRST, CRIMINAL SECOND – ADDICTION FUELED CRIMES SHOULD BE INELIGIBLE FOR THE THREE-STRIKES PENALTY**

*Scott Lindquist<sup>1</sup>*

### **INTRODUCTION**

This article is based upon the premise that drug addiction fuels crime, and that felonies are committed to finance habits. Due to the nature of addiction, drugs must be consumed regularly and more often to not only get high, but also to prevent the ill effects of withdrawal. Those who cannot afford the financial burden of addiction turn to crime and many of them are repeat offenders. In many states their addiction is a one-way ticket to a twenty-five years to life prison sentence under a repeat offender statute called the three-strikes penalty.

The case of Gary Ewing provides an example of a repeat offender addict who was caught up in the sweeping nets of California's three-strikes legislation.<sup>2</sup> His story is also an example of what is wrong with repeat offender statutes. Gary Ewing needed rehabilitation not life incarceration. Like many others, life without addiction could have meant a life without crime.

In this article I will argue that addicts who finance their addiction through crime should be ineligible to receive a prison sentence under a recidivist statute like the three strikes penalty. Part I introduces the problem, addiction and crime among current prisoners reported by the Department of Justice. Part II discusses Gary Ewing, an addict, a criminal, and a third strike offender. The story of Gary Ewing represents the injustices levied upon an addict/criminal by enhanced sentenced statutes like the three-strikes penalty. Part III is a discussion of the history of repeat offender statutes, primarily focusing on the inception of California's three-strikes policy and its later modification. Part IV is an analysis of the relationship between the theories of punishment and the three strikes policy and, more importantly, how these models do not fit the addict/criminal. Part V is a discussion of the various constitutional issues that surround the three-strikes penalty. Part VI discusses both the various statutory and the medical community's definitions of addiction. Part VII explores defenses that are not available to the addict/criminal, but should be. Lastly, Part VIII discusses why breaking the cycle among family generations is so important and the statistics that support this proposition. This section also discusses treatment, the important role it plays in breaking this cycle, why treatment is failing in the country's penal systems, and the ultimate cost benefit of treatment compared to incarceration.

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2. *Ewing v. California*, 538 U.S. 11 (2003).

## I. ADDICTION AND CRIME

### A. The Government's Statistics Argue Against Imprisonment

In 2007, the U.S. Department of Justice (DOJ) reported that fifty-three percent of state prisoners in 2004 met the Diagnostic and Statistical Manual of Mental Disorders criteria for drug abuse or addiction compared with two percent of adult United States residents.<sup>3</sup> Of those meeting the criteria for drug abuse or addiction, more than half had at least three prior sentences, ranging from probation to incarceration, compared with thirty-two percent of non-abusers.<sup>4</sup> Among male arrestees in 2003, sixty-seven percent tested positive for cocaine, marijuana, methamphetamine, opiates, or PCP.<sup>5</sup> At the time of the offense, thirty-two percent of prisoners said they were under the influence of drugs, and almost twenty-three percent of those prisoners reported they were specifically under the influence of any combination of cocaine, crack, heroin, opiates, amphetamines, or methamphetamine.<sup>6</sup> Sixty-nine percent of state prisoners also reported that they regularly used drugs, and sixty-one percent of those prisoners stated they used any combination of cocaine, crack, heroin, opiates, amphetamines, or methamphetamine.<sup>7</sup>

Addicts have an increasingly greater and perpetual need to feed their addiction. For those addicts who do not have family, friends, and jobs, or who have simply hit rock bottom, there are few options in obtaining the financial resources required to feed their addiction. For many of these addicts, crime pays. The nature of their addiction makes addicts easy targets for prosecution and long prison sentences under repeat offender statutes.

### B. Paying for the Addiction

In 2004, individuals under the influence of drugs committed more than thirty-eight percent of the property offenses.<sup>8</sup> A DOJ report published in 1999 indicates a more troubling picture when prisoners were asked about alcohol abuse. Fifty-three percent of state prisoners reported using drugs or alcohol at the time of the property offense.<sup>9</sup> A staggering sixty-four percent of property offenses occurred within a month of the state prisoner's drug use.<sup>10</sup> Less than twenty percent of state prisoners reported money for drugs as the reason for committing their crime; however,

3. CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004 1, 7 (rev. ed. 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dudsfp04.pdf>.

4. *Id.* at 1.

5. ZHIWEI ZHANG, NAT'L OPINION RESEARCH CTR., DRUG AND ALCOHOL USE AND RELATED MATTERS AMONG ARRESTEES 6 (2003), available at <http://www.ncjrs.gov/nij/adam/ADAM2003.pdf>.

6. MUMOLA & KARBERG, *supra* note 3, at 2.

7. *Id.*

8. *Id.* at 5.

9. CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, SUBSTANCE ABUSE AND TREATMENT, STATE AND FEDERAL PRISONERS, 1997 3 (1999) (There was not a significant change between the 1997 and the 2004 survey.), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/satsfp97.pdf>.

10. MUMOLA & KARBERG, *supra* note 3, at 5.

thirty percent of those incarcerated for a property offense stated money for drugs as their motive.<sup>11</sup> Consistently, since 1991, a third of state prisoners reported using drugs at the time of the offense.<sup>12</sup>

Excluding those arrested for drug crimes, forty-five percent of second and third “strikers” committed robbery and property crimes in California.<sup>13</sup> Applying the national state prison statistics of those who stated money for drugs as their motive, California conceivably incarcerated approximately 5,500 drug addicts.<sup>14</sup> Of those, more than 4,300 individuals committed their second strike and 1,236 individuals committed their third strike and were subsequently sentenced to a term of twenty-five years to life in prison.<sup>15</sup> California courts are not blind to these statistics, and in one, third strike case the court stated, “He is an addict who finances his habit by theft and burglary.”<sup>16</sup>

## II. THE CASE OF GARY EWING

On March 12, 2000, Gary Ewing was arrested after walking out of the pro shop of the El Segundo Golf Course with three golf clubs hidden in his pants; the property’s value was approximately \$1,200.<sup>17</sup> Ewing was subsequently convicted of felony grand theft in excess of \$400 and sentenced to twenty-five years to life in prison under California’s three-strikes law.<sup>18</sup>

Ewing’s criminal history began sixteen years earlier, in 1984, at the age of twenty-two when he was charged for theft.<sup>19</sup> Between the years of 1988 and 1993, Ewing was convicted of grand theft auto, petty theft, battery, theft, burglary, possession of drug paraphernalia (1993), appropriating lost property, unlawfully possessing a firearm, and trespassing.<sup>20</sup> In late 1993, Ewing burglarized a California apartment complex, stole a VCR, forced a mailroom clerk to hand over his wallet, and took another resident’s money and credit cards.<sup>21</sup> When Ewing was arrested in

11. *Id.* at 6.

12. *Id.* at 2; MUMOLA, *supra* note 9, at 3.

13. ARTHUR CHUNG & JAY ATKINSON, CAL. DEP’T OF CORR. AND REHAB., SECOND AND THIRD STRIKERS IN THE INSTITUTION POPULATION 3–4 (2005) (Assuming that a percentage of robbery crimes were committed due to drug use. A Second Striker, “is an inmate who has one prior serious or violent felony conviction pled and proven in court who is convicted of a new offense – which results in the new term being doubled.” A Third Striker, “is an inmate who has two or more prior serious or violent convictions pled and proven in court and who is convicted of any new offense – that minimum term is tripled, or is twenty-five years, or is determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement and the maximum term is Life.”), *available* at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Quarterly/Strike1/STRIKE1d0506.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1/STRIKE1d0506.pdf).

14. *Id.* (Thirty percent multiplied by 18,394 second and third strikers).

15. *Id.*; DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, U.S. DEP’T OF JUSTICE, STATE COURT ORGANIZATION 2004 241 (2006), *available* at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf>.

16. *People v. Superior Court*, 37 Cal. Rptr. 2d 364, 380 (Cal. Ct. App. 1995), *abrogated* by *People v. San Diego County Superior Court*, 892 P.2d 804 (Cal. 1995).

17. *Ewing*, 538 U.S. at 17–18.

18. *Id.* at 19–20.

19. *Id.* at 18.

20. *Id.*

21. *Id.* at 18–19.

December 1993, he was found with a crack pipe.<sup>22</sup> Ewing was sentenced to nine years and eight months in prison for his offenses.<sup>23</sup>

Ewing appears to be just another bad apple that cannot seem to follow society's rules. The Amici's brief to the United States Supreme Court regarding the constitutionality of California's three-strike's law categorizes Ewing as one of "those who are beyond deterrence and repeatedly commit crime" and "should be incapacitated for a lengthy period in order to protect society. Arguments to the contrary are counterintuitive."<sup>24</sup>

On the surface, Ewing appears to be an individual who cannot conform to the laws of society. However, instead of examining the crimes in isolation, Ewing's motivations behind the crimes must themselves be questioned. Gary Ewing was a drug addict and addiction fueled his crimes.<sup>25</sup> Gary Ewing is a prime example of why punishments that focus on deterrence do not work. Incapacitation is successful only in the sense that addicts like Gary Ewing are forcibly kept off the streets and kept from taking drugs. Incapacitation short of a life sentence only delays the underlying forces of addiction. Addicts are not cured nor deterred by imprisonment. The only solution for addiction is treatment.

The courts are aware of the addiction issues, but instead of resolving the underlying addiction, they punish the actions that are a result of addiction. These are actions addicts do not have the power to control. Addiction is not given its day in court. This is an unfathomable reality considering the United States spends billions of dollars fighting a war on drugs in this and other countries every year. Ignoring the grasp of drug addiction is like saying social smokers are financially supporting the tobacco industry. "Arguments to the contrary are[.]" in fact, intuitive.<sup>26</sup>

### III. THREE-STRIKES HISTORY

The Federal government was the first to enact a mandatory enhanced sentence statute by passing the Armed Career Criminal Act of 1984.<sup>27</sup> The statute mandated a fifteen-year prison term for anyone illegally possessing a firearm and having three previous convictions for robbery or burglary.<sup>28</sup> The state of Washington was the first state to pass an enhanced sentence statute under the three-strikes model in 1993.<sup>29</sup> Months later, in 1994, California followed by passing its own three-strikes

22. *Id.* at 19.

23. *Id.*

24. Brief of The Criminal Justice Legal Found. et al. as Amici Curiae Supporting Respondents, *Ewing v. California*, 538 U.S. 11 (2003) (No. 01-6978), 2002 WL 1808702.

25. *Ewing*, 538 U.S. at 18-19 (noting that as early as 1993 there were signs that Ewing was suffering from a drug addiction).

26. Brief for Respondents, *supra* note 24, at 18.

27. Brief for United States at 5, *Taylor v. United States*, 495 U.S. 575 (1990) (No. 88-7194), 1989 WL 434124.

28. *Id.*; *Begay v. United States*, 128 S. Ct 1581, 1583 (2008) (The Armed Career Criminal Act of 1984 was replaced by The Career Criminal Amendment Act of 1986 which included enhanced penalties for illegal possession of a firearm by anyone who had three previous convictions for robbery, a serious drug offense, or a violent felony.).

29. JOHN CLARK ET AL., U.S. DEP'T OF JUSTICE, THREE STRIKES AND YOU'RE OUT: A REVIEW OF STATE LEGISLATION 1 (1997).

legislation.<sup>30</sup> While each of the two states enacted slightly different versions of “three-strikes”, both sets of legislation required prison sentences up to life without the possibility of parole after committing three felonies.<sup>31</sup> Between the years of 1993 and 1995, twenty-four states enacted some type of three-strikes legislation.<sup>32</sup> Many states already had habitual offender laws on the books, but these laws did not require mandatory sentences.<sup>33</sup> South Dakota had a similar three-strikes provision since 1877. However, most of the new three-strikes provisions included mandated sentences.<sup>34</sup> Some states have specific felonies that count as a strike while others, such as North Dakota, permit any Class A, B, or C felony to count as a strike.<sup>35</sup>

California’s three-strikes law was considered the broadest and the harshest of the various three-strikes statutes enacted around the country.<sup>36</sup> While an offender’s first two strikes needed to meet any one of the felonies on the State’s list of “strikeable” violent or serious felonies, the third strike could be for any felony conviction.<sup>37</sup> As a result of California’s sweeping three-strikes legislation, many drug and other non-violent offenders were incarcerated, quickly filling California’s prisons.

Mark Klass, the father of Polly Klass, was originally a major supporter of the three-strikes initiative.<sup>38</sup> Polly Klass was abducted and later killed just prior to the passing of California’s three-strikes law by a repeat offender who would have been imprisoned by three-strikes if the law had previously existed; thus, the law would have spared Polly’s life had it been enacted prior to the time of her murder.<sup>39</sup> Mark Klass subsequently withdrew his support for three-strikes after learning that non-violent offenders were eligible for the three-strikes penalty.<sup>40</sup> Years later, and after failing to get taxpayer support for a multimillion dollar prison bill, California passed Proposition 36, which rendered drug offenders ineligible for the three-strikes penalty.<sup>41</sup> Under Proposition 36, arrestees convicted of possession and drug use cannot initially be sentenced to time in prison.<sup>42</sup> The new law mandates these individuals first receive probation and drug treatment.<sup>43</sup>

Other states have recently adopted a similar initiative, thus excluding some drug crimes from the three-strikes penalty.<sup>44</sup> Offenders who commit felony crimes to support their habit are still eligible for a three-strikes conviction.<sup>45</sup>

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30. *Id.*

31. *Id.* at 5.

32. *Id.* at 1.

33. *Id.* at 2.

34. *Id.* at 2, 13.

35. *Id.* at 8.

36. *Id.* at 3.

37. *Id.* at 2; Michael Vitiello, “Three Strikes” and the Romeo Case: The Supreme Court Restores Democracy, 30 LOY. L.A. L. REV. 1643, 1647 (1997).

38. Vitiello, *supra* note 37, at 1656–60.

39. *Id.*

40. *Id.* at 1659.

41. Alex Ricciardulli, *Getting to the Roots of Judges’ Opposition to Drug Treatment Initiatives*, 25 WHITTIER L. REV. 309, 356 (2003).

42. *Id.* at 353.

43. *Id.*

44. *Id.* at 309–10.

45. *Id.* at 353.

Proposition 36 and similar initiatives are an important step in the realization that addiction requires treatment instead of punishment. However, these initiatives miss many addicts who are not caught possessing narcotics. The addict who finances his addiction through criminal activities is still an addict, and an addict requires treatment in order to cease his criminal activities.

#### IV. THREE-STRIKES AND THE GOALS OF SENTENCING

Four Utilitarian theories of punishment are considered the most important and have “dominate[d] American jurisprudence for most of the twentieth century.”<sup>46</sup> These theories are general and specific deterrence, incapacitation, and rehabilitation/reform.<sup>47</sup>

General deterrence is the theory that people will not commit certain acts or crimes because punishment may follow when they are caught.<sup>48</sup> General deterrence is also believed to work because people learn to associate another’s actions and the resulting consequences.<sup>49</sup>

Specific deterrence is aimed at the criminal himself; creating fear that if he commits the crime again, the punishment will be severe.<sup>50</sup> In the case of repeat offenders, the utilitarian principals suggest that the punishment should increase in severity because the individual did not learn his lesson the first time.<sup>51</sup>

Simply put, the theory of incapacitation protects the health, welfare, and safety of the public by imprisoning criminals.<sup>52</sup> The criminal is incarcerated and kept from committing more crimes.<sup>53</sup>

The pure utilitarian theory implies that the punishment itself will spur reform in the individual.<sup>54</sup> The more modern approach to rehabilitation and reform involves some form of intervention such as therapy, medication, education, or job skill training, thus providing the offender with more options and chances for success upon release.<sup>55</sup>

Three-strikes is, without a doubt, a utilitarian punishment. In general, three-strikes legislation focuses squarely on deterrence, both general and specific, and on incapacitation. Three-strikes aims to deter and punish the specific individual who committed and continues to commit felonies by enhancing the individual’s prison sentence. Three-strikes also embraces incapacitation by increasing the length of time a felon spends in prison; especially on a third strike conviction. Generally, deterrence is difficult to measure, other than to assume a decrease in crime is due to an effective three-strikes law. However, three-strikes laws miss the deterrence

46. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 35 (3d ed. 2003).

47. *Id.* at 35–36.

48. *Id.*

49. *Id.*

50. *Id.* at 36.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

target and completely ignore the utilitarian theory of reform/rehabilitation for those inmates whose crimes are fueled by the need to feed their addiction. Deterrence is ineffective against addicts. These people put their life at risk on a daily basis. Many use dirty needles, live on the streets, and go to the most dangerous neighborhoods in order to get their fix. Most have given up families, friends, food, and a home. What can the judicial system and society take away from them that they themselves have not already given up? Unfortunately, for these third-strike felons, deterrence may have failed, but incapacitation will surely succeed.

## V. CONSTITUTIONAL ISSUES OF THREE-STRIKES

Three-strikes legislation has brought many constitutional issues to the forefront. *State v. Manussier*<sup>56</sup> exemplifies many of the constitutional issues that surround the three-strikes penalty.<sup>57</sup> In *Manussier*,<sup>58</sup> the appellant challenged the constitutionality of Washington's three-strikes law by means of several constitutional claims, including: bill of attainder, separation of powers, the Guarantee Clause, equal protection, due process, and cruel and unusual punishment.<sup>59</sup>

### A. Challenging Three-Strikes as a Violation of the Eighth Amendment

The constitutionality of three-strikes is typically challenged as a violation to the Eighth Amendment of the United States Constitution. The Eighth Amendment prohibits cruel and unusual punishment and applies to the states through the Fourteenth Amendment of the United States Constitution.<sup>60</sup> The Supreme Court in *Solem v. Helm*,<sup>61</sup> held that disproportionate prison sentences for nonviolent felonies are a violation of the Eighth Amendment under cruel and unusual punishment.<sup>62</sup> However, the Supreme Court draws a fine line when ruling on three-strikes proportionality cases. In *Rummel v. Estelle*,<sup>63</sup> the court held that since the accused had been imprisoned for two prior felonies, Texas was entitled "to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State."<sup>64</sup> The fine line the Supreme Court seems to draw between these two cases is that disproportionate prison sentences only violate the Eighth Amendment when they are used as punishment for first time felony convictions.

Gary Ewing suffered a fate similar to Rummel in front of the Supreme Court. The Court held that "The gravity of his offense was not merely stealing three golf clubs . . . rather, Ewing was convicted of felony grand theft for stealing \$1,200

56. *State v. Manussier*, 921 P.2d 473 (Wash. 1996).

57. *Id.*

58. *Id.*

59. *Id.* at 479-88.

60. *Id.* at 484; U.S. CONST. amend. VIII.

61. *Solem v. Helm*, 463 U.S. 277 (1983).

62. *Id.* at 284.

63. *Rummel v. Estelle*, 445 U.S. 263 (1980).

64. *Id.* at 284.

worth of merchandise after previously having been convicted of at least two ‘violent’ or ‘serious felonies.’”<sup>65</sup> Not weighing the totality of the felony convictions would “fail to accord proper deference to the policy judgments that find expression in the legislature’s choice of sanctions.”<sup>66</sup> Is it not just as important to weigh the totality of Ewing’s addiction?

### B. THREE-STRIKES: A VIOLATION OF AN ADDICT’S EQUAL PROTECTION RIGHTS

An addict convicted under three-strikes could conceivably challenge the constitutionality of the law by bringing a de facto equal protection suit under the Fourteenth Amendment, claiming the application of the law discriminates against drug and alcohol addicts. “[T]he Fourteenth Amendment of the United States Constitution guarantee[s] that persons similarly situated with respect to the legitimate purpose of law must receive like treatment.”<sup>67</sup> In some cases, addicts are not similarly situated since the need to finance their addiction drives their criminal behavior. As the court points out in *Manussier*,<sup>68</sup> either a strict scrutiny, an intermediate scrutiny, or a rational basis test is utilized when analyzing equal protection claims.<sup>69</sup> If the court finds that the three-strikes penalty intentionally discriminates as it is applied, then the court will employ the intermediate scrutiny test.<sup>70</sup> Under this test, the State has the burden to prove that there is an important state interest and the enforcement of the three-strikes law is substantially related to that interest. Otherwise, the court will apply a rational basis test because, while the law does affect a class of people, addicts are not recognized as a suspect class requiring strict scrutiny. Nor are addicts recognized as a quasi-suspect class requiring intermediate scrutiny.<sup>71</sup> Under the rational basis test, a state needs only to show that three-strikes is rationally related to the state’s goal.<sup>72</sup> The defendant faced with overcoming a rational basis test for the government action has the greater burden to show that three-strikes is arbitrarily applied.<sup>73</sup>

Unfortunately for the addict sentenced under three-strikes, an equal protection argument will fail. A court will likely apply the rational basis test to a de facto equal protection claim, and without proof of intentional statutory discrimination the law will stand. Maybe the question should not be “Does the state have a rational basis?”, but rather “What rational basis does the state have for imprisonment versus rehabilitation?” when applying the three-strikes law to addict/criminals. Posing the question in the latter way strikes at the heart of the issue because the state’s goal in dealing with addicts should be rehabilitation and not incarceration.

65. *Ewing*, 538 U.S. at 28.

66. *Id.* at 29.

67. *Manussier*, 921 P.2d at 482; U.S. CONST. amend. XIV, § 1.

68. *Manussier*, 921 P.2d at 482.

69. *Id.* at 482–83 (citing *State v. Shawn*, 122 Wash. 2d 553, 560 (1993) (en banc)).

70. *Id.* at 483.

71. *Id.* at 483.

72. *Manussier*, 921 P.2d at 483 (citing *State v. Coria*, 120 Wash. 2d 156, 171 (1992)).

73. *Id.*

## VI. A DEFINITION FOR ADDICTION SHARED BY BOTH THE MEDICAL AND LEGISLATIVE COMMUNITIES PRESENTLY ELUDES THIS COUNTRY.

The medical community's definition is based upon symptoms and diagnosis, while the legislative community's focuses mainly on the illegality of substances, the resulting harm to oneself, family, and the community at large.<sup>74</sup> The issue is that, with some exceptions, lawmakers do not make good doctors. Addiction, and proper treatment, should be identified and handled by a specialist in the medical community and not by a government entity.

### A. Addiction: The Medical Definition

The medical community differentiates between substance abusers and those who are addicted to substances.<sup>75</sup> An addict, over time, will experience an increased tolerance to the drug and will continually need to increase the amount taken in order to achieve a high.<sup>76</sup> An addict will also lose control with the particular substance he or she is using.<sup>77</sup> A substance abuser will not experience either of these effects.<sup>78</sup> Addiction is defined by the American Psychiatric Association as substance abuse that leads to impairment or distress created by any three of seven specific factors over a twelve-month period.<sup>79</sup> These factors include: tolerance, withdrawal, taking the drug in larger quantities or for a longer period of time than planned, unsuccessful efforts to reduce the amount of the drug, the amount of time spent acquiring the drug, whether once important activities are abandoned, and ignoring health problems likely caused by using the drug.<sup>80</sup> The World Health Organization also defines addiction with six similar factors.<sup>81</sup>

### B. Addiction: Various Statutory Definitions

Every state appears to define addiction differently and many of them ignore the medical community's definition.<sup>82</sup> Several states focus on the negative effects of addiction while some states have definitions similar to the medical definition.<sup>83</sup> For example, Iowa turns its attention on an addict's behavior.<sup>84</sup> A "substance abuser" is someone who "habitually lacks the self-control" to not use a drug to the point where "a person's health is substantially impaired or endangered or that person's social or economic function is substantially disrupted."<sup>85</sup> Confusingly,

74. 51 AM. JUR. 3D *Proof of Facts* § 3 (2008).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. 51 AM. JUR. 3D *Proof of Facts* § 3 (2008).

83. *Id.*

84. *Id.*

85. *Id.*; IOWA CODE ANN. § 125.2(17) (West 2008).

Iowa's statute further differentiates "substance abuser" from "chemical dependency" by defining chemical dependency as, "[A]n addiction or dependency, either physical or psychological, on a chemical substance."<sup>86</sup> Minnesota, Nevada, Illinois, and the District of Columbia define addiction similarly to Iowa's definition of substance abuser.<sup>87</sup> California simply criminalizes addiction in their statute by defining an addict as "any person, adult or minor, who is addicted to the unlawful use of any narcotic as defined in Division 10 of the Health and Safety Code."<sup>88</sup> Delaware's code appears to be more medically based, but only selected portions of the medical community's definition are included.<sup>89</sup> Connecticut defines an addict as "[A] person who has a psychoactive substance dependence on drugs as that condition is defined in the most recent edition of the 'Diagnostic and Statistical Manual of Mental Disorders' of the American Psychiatric Association."<sup>90</sup> Connecticut statutes are a noteworthy exception and perhaps should serve as a model to other states as to how to define addicts and addiction.

The private medical community and states should work together on separating the addicts from the non-addicts. The medical community can provide testing and parameters that can easily weed the addicts from the non-addicts. The laws are written in a one size fits all manner, but addicts need specialized treatment, not a generic punishment.

## VII. NOT GUILTY BY REASON OF ADDICTION

"[A]lcoholism and other drug addictions are now thought to coexist with up to 50% of other mental disorders . . . as many as 37 percent of alcohol abusers and 53 percent of drug abusers have at least one serious mental illness."<sup>91</sup> Courts, however, have maintained the common law tradition of sentencing individuals who voluntarily consume an intoxicant and commit crime, because the individual knew what he was doing at the time of consumption.<sup>92</sup>

### A. Voluntary v. Involuntary Consumption

The common law tradition of relieving criminal responsibility focuses on involuntary consumption.<sup>93</sup> Courts were reluctant to punish a person for their crime when their intoxication was the result of an unskilled doctor or the "contrivance of one's enemies" because the intoxication occurred at no fault of the defendant.<sup>94</sup>

86. § 125.2(2).

87. 51 AM. JUR. 3D *Proof of Facts* § 3 (2008).

88. *Id.*; CAL. WELF. & INST. CODE § 3009 (West 2008).

89. DEL. CODE ANN. tit. 16, § 4701(1) (2008); 51 AM. JUR. 3D *Proof of Facts* § 3 (2008).

90. CONN. GEN. STAT. ANN. § 21a-240(19) (West 2008).

91. Robert Montgomery, *American and Addiction. What's it Doing to Family Law*, FAMILY ADVOC., Summer 1991, at 18, 19.

92. Philip E. Hassman, Annotation, *When Intoxication Deemed Involuntary so as to Constitute a Defense to Criminal Charge*, 73 A.L.R. 3d 195, 201 (1976).

93. *Id.* at 99.

94. *Id.* at 199-200.

When intoxication occurs as a result one's own volition, courts are unwilling to relieve criminal responsibility, even in cases of "physiological-psychological compulsion."<sup>95</sup>

The American Medical Association considered addiction a disease beginning in 1956, and within the last several years, physiological-psychological compulsion (addiction) has been argued in support of finding a defendant involuntarily intoxicated.<sup>96</sup> Some courts are reluctant to characterize an addict as involuntarily intoxicated for several reasons. Most commonly, courts reject this idea because some experts disagree that addicts are compelled to use drugs or alcohol, because addiction is voluntarily "contracted or nurtured", or simply because the defendant has failed to prove they suffer from addiction.<sup>97</sup> Not surprisingly, a defendant has difficulty proving he is an addict under current statutory construction.<sup>98</sup>

The judicially created hurdles to the compulsion and the proof of addiction defenses need to be overcome before courts will be more willing to accept that addicts are involuntarily intoxicated. First, the legal community needs to revisit the idea that addicts are compelled to use drugs. The medical community has made several advances in the last three decades regarding addiction, and the law needs to be refreshed as medical advances occur. Second, addicts can easily prove they are addicts. A simple blood test will not only show what drugs are in a person's blood stream, but also the quantity of drugs. An addict needs an ever-increasing amount of drugs to reach the same previous high, and presumably the amount of drugs in a person's bloodstream correlates to the level of drug dependence. Courts should have no problem admitting this evidence. A similar test is currently used to determine someone's blood alcohol after being arrested for suspicion of driving under the influence.

While rejecting the argument that addiction should be considered involuntary intoxication, some courts have shown willingness to consider addiction as a mitigating factor when sentencing a criminal.<sup>99</sup> In *People v. Walcher*,<sup>100</sup> the court considered the defendant's alcoholism and his alcohol related arrests over a several year period.<sup>101</sup> The defendant's death sentence for killing a man during the robbery of a liquor store was reduced to forty to sixty-five years in prison.<sup>102</sup> Twenty-four years later, three-strikes was adopted and had the opposite effect on a repeat addict offender's prison sentence. The prison sentence was increased.

95. *Id.* at 202. The year, 1976, when this article was originally published is an important factor. More than three decades later, more experts are surely to agree that an addict is "compelled" to the use of intoxicants.

96. *Id.*; Montgomery, *supra* note 91, at 18 (explaining alcoholism, addiction, disease, and chemical dependency are terms used interchangeably in current practice).

97. Hassman, *supra* note 92, at 202.

98. *See supra* Part VI.B.

99. Hassman, *supra* note 92, at 225-26 (citing *People v. Walcher*, 42 Ill. 2d 159, 166-67 (1969)).

100. *Walcher*, 42 Ill. 2d at 166-67.

101. *Id.*

102. *Id.*

## B. The Insanity Defense

“Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition . . . that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing.”<sup>103</sup>

Defendants seeking to use voluntary intoxication as a valid defense typically do so under the guise of insanity.<sup>104</sup> The argument is based on the premise that the drug intoxication causes temporary insanity; wearing off over time as the body metabolizes the drug.<sup>105</sup> In the 1926 case of *Prather v. Commonwealth*,<sup>106</sup> the defendant, accused of the fraudulent conversion of trust funds, was once a reputable real estate agent who became a morphine addict after an operation.<sup>107</sup> An expert testified in his defense, stating “he was insane and without moral or mental responsibility[.]” The expert witness went on to testify that an addict may have the instinct of right and wrong, but “will feel justified in pursuing any line of conduct that will enable him to procure the drug.”<sup>108</sup> Following that testimony, the court stated it is “common knowledge” that a drug user who wants to quit using, but cannot resist the urge, is not acting “voluntarily in its continued use.”<sup>109</sup> Furthermore, the court opined “[S]uch an addict is insane and will commit any character of crime to obtain the drug and is utterly *irresponsible* for such acts. If such insanity actually exists the responsibility for the commission of such a crime is not to be distinguished from that of other insane persons.”<sup>110</sup>

Since then, courts have struggled with addiction and the insanity defense due to the classification of addiction and its application under the Model Penal Code, the Durham, and the M’Naghten insanity tests.<sup>111</sup> The Model Penal Code requires the conduct associated with the crime to be the result of mental disease or defect, a lack of substantial capacity to appreciate the “wrongfulness” of the conduct, or lacks the substantial capacity to conform to the law.<sup>112</sup> Under the Durham test, the conduct must be shown to be a result of mental disease or defect.<sup>113</sup> The right-wrong insanity test of M’Naghten relieves criminal responsibility if the defendant can prove that he suffered a defect of reason “from a disease of the mind, as to not know the nature and quality of the act he was doing or if he did know it, he must

103. *Robinson v. California*, 370 U.S. 660, 668 (1962) (Douglas, J., concurring) (quoting ISAAC RAY, TREATISE ON THE MEDICAL JURISPRUDENT OF INSANITY 56 (5th ed. 1871)).

104. Phillip E. Hassman, Annotation, *Effect of Voluntary Drug Intoxication upon Criminal Responsibility*, 73 A.L.R. 3d 98, 106 (1976).

105. *Id.*

106. *Prather v. Commonwealth*, 287 S.W. 559, 559 (Ky. 1926), *overruled by Commonwealth v. Tate*, 893 S.W.2d 368 (Ky. 1995).

107. *Id.*

108. *Id.* at 559–60.

109. *Id.* at 560.

110. *Id.* (emphasis added).

111. Phillip E. Hassman, Annotation, *Drug Addiction or Related Mental State as Defense to Criminal Charge*, 73 A.L.R. 3d 16, 81–84 (1976).

112. *Id.* at 60.

113. *Id.* at 64.

not have known he was doing that which was wrong.”<sup>114</sup> The heart of the court’s difficulty turns on whether addiction is a “mental disease or defect.”<sup>115</sup>

The common law jurisprudence, along with the Model Penal Code, Durham, and M’Naghten insanity tests, wrongly ignore the overwhelming compulsion an addict experiences. All fail because a standard definition of addiction eludes the courts. Promisingly, a defendant may be able to rely on the insanity plea in the future should addiction be definitively determined to be a “mental disease or defect.”<sup>116</sup> Until the courts recognize that addiction is in fact a disease, the insanity defense will remain unavailable to those who commit crimes to finance their addiction.

### VIII. BREAKING THE CYCLE

In 1999, more than half of all state prisoners reported having children under the age of eighteen affecting approximately 1.5 million children.<sup>117</sup> Twenty-two percent of these children are under the age of five years old;<sup>118</sup> many of them will not be reunited with their parent until after the age of seventeen.<sup>119</sup> The majority of prison inmates with children reported using drugs in the month prior to their crime, and many others reported a history of alcohol dependence.<sup>120</sup> The vast majority of this population does not have a high school diploma.<sup>121</sup> One-fifth of fathers and one-third of mothers reported they committed their crime to get drugs or money for drugs.<sup>122</sup> Chances are that many of these inmates at one time had a family member in prison.<sup>123</sup> State prison statistics indicate that twenty-four percent of drug dependent or abusing inmates reported they once lived in a home where a parent or guardian abused alcohol, drugs, or both, and more than half reported having a family member incarcerated.<sup>124</sup> Even more shocking, prisoners who reported having a father who was incarcerated at one time were almost twice as likely to be addicted to drugs than those prisoners whose fathers had never been incarcerated.<sup>125</sup>

Many addicted prisoners share similar personal histories, which may be factors in determining who in the future is susceptible to a similar fate.<sup>126</sup> Prisoners meeting the definition for drug abuse/dependence were more than twice as likely to be homeless within the prior year compared to those inmates who were not addicted to

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114. *Id.* at 71.

115. *Id.* at 64.

116. *Id.*

117. CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN, BUREAU OF JUSTICE STATISTICS, NCJ 182335 1 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>.

118. *Id.*

119. *Id.* at 6.

120. *Id.* at 1 (sixty percent of parents reported using drugs in the month prior to their current offense and twenty-five percent reported a history of alcohol dependence).

121. *Id.* (seventy percent of prisoners with children never earned a high school diploma).

122. *Id.* at 8.

123. MUMOLA & KARBERG, *supra* note 3, at 8 (The statistics suggest that more than ninety percent of state prisoners had a family member who was incarcerated at some time and more than half are addicts.).

124. *Id.*

125. *Id.*

126. *Id.*

drugs, almost fourteen percent versus six percent.<sup>127</sup> While growing up, forty-two percent received some type of public assistance, forty-five percent reported living with only one parent, and twenty-three percent reported being physically or sexually abused.<sup>128</sup> These individuals are without a doubt drugging or drinking to mask their psychological issues. These individuals require counseling, not state corrections. Punishing addicts under three-strikes does nothing to alleviate this cycle; in fact, if the statistics are correct, three-strikes only perpetuates the cycle. If the cycle does not already exist within a family, imprisoning someone has the potential of creating the very cycle that needs to be prevented. Imprisonment creates single parent families, can force a child into foster care, and may require the family to seek public assistance if the breadwinner is locked up. A parent committed to prison for twenty-five years to life is unlikely to see their children ever again. Most inmate-parents never even get a visit from their children while incarcerated because the inmates are detained more than one hundred miles from where they last lived.<sup>129</sup>

### A. Treatment Is Essential To Reducing Recidivism and Future Drug Use

The failure to treat addiction in prison is highly associated with recidivism.<sup>130</sup> Half of drug abusing offenders return to prison within eighteen months of their release and almost three-quarters will recidivate within three years of their release.<sup>131</sup> One study revealed that inmates with a high number of prior convictions are disproportionately more likely to be addicted to heroin or crack than a first time offender.<sup>132</sup> Almost *all* of these prisoners return to drug use after three years.<sup>133</sup>

### B. Prison Rehabilitation Is Ineffective

In 2004, less than half of the prisoners who met the criteria for drug dependence or abuse attended treatment or other drug program offered in prison.<sup>134</sup> On the surface this percentage looks promising, but less than half of those inmates actually received treatment.<sup>135</sup> Most other inmates attended self-help groups, peer counseling, or a drug education program.<sup>136</sup> Even worse, these programs are not

127. *Id.*

128. *Id.*

129. MUMOLA, *supra* note 117, at 1 (fifty-seven percent of fathers and fifty-four percent of mothers reported never receiving a visit from their children, and sixty percent report being in a prison more than 100 miles from their home).

130. Joesph A. Califano Jr., *A New Prescription, Investing in Substance-Abuse Treatment Would Take a Big Bite Out of Crime*, WASH. MONTHLY, Oct. 1 1998, available at 1998 WLNR 7836351.

131. Ricciardulli, *supra* note 41, at 337.

132. Califano, *supra* note 130 (The state prison study showed that inmates with five or more previous convictions are seven times more likely to be addicted to heroin and three times more likely to be addicted to crack than first offenders.).

133. Ricciardulli, *supra* note 41, at 337-38.

134. MUMOLA & KARBERG, *supra* note 3, at 8.

135. *Id.* at 9 (fifteen percent received treatment, such as residential facility or unit, counseling by a professional, detoxification unit or maintenance drug).

136. *Id.*

working. Two-thirds of those who participated in past prison programs were under the influence of drugs or alcohol at the time of their most recent offense.<sup>137</sup> These statistics support the opinion that prisons make ineffective drug treatment centers.<sup>138</sup> The intensity, duration, and the lack of personally tailored prison programs provide are often cited as reasons why treatment is failing.<sup>139</sup>

### C. Drug Diversion Courts

A recent success in the battle against the high number of drug recidivists is due to the innovation of drug diversion courts, sometimes referred to as Drug Treatment Courts (DTC).<sup>140</sup> Over a four-year period, arrestees who participated in the nation's first drug court in Miami, were rearrested at a rate of three percent compared to thirty percent of those with similar crimes and who did not participate in the DTC.<sup>141</sup> Other DTC jurisdictions have reported a similar decline in recidivism.<sup>142</sup> While Miami's DTC handles approximately twenty percent of all drug offense cases,<sup>143</sup> some DTCs have adjudicated only a small fraction of cases in their jurisdiction.<sup>144</sup>

Among drug diversion courts there are several similar elements, however, there is no element more important than the focus on rehabilitation and not on incarceration.<sup>145</sup> DTCs also share similar requirements on who is eligible for drug treatment.<sup>146</sup> DTCs will only hear drug crime cases, specifically excluding those who have a history of felonies or violence.<sup>147</sup> These courts are also excluding those who may need treatment the most - the destitute who commit crimes to support their habit.

137. MUMOLA, *supra* note 9, at 9 (almost sixty percent of intoxicated recidivists had participated some sort of addiction program while previously incarcerated; twenty-seven percent previously received treatment and forty-one percent previously participated in other drug and alcohol programs).

138. James R. Brown, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime?* 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 77-78 (1997).

139. *Id.* at 82.

140. *Id.* at 93; Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 440 (1999).

141. Hora, et al., 74 NOTRE DAME L. REV. at 454-56 (Miami's DTC processed 4,500 individuals, two-thirds of those remained in treatment or graduated. Of the 1,700 individuals who graduated, only three percent were rearrested within a year).

142. *Id.* at 485, 489-94 (in a national survey, Miami's DTC participants recidivated at a rate of ten percent within one year, thirteen percent within eighteen months and twenty-four percent within five years of graduating. Miami officials estimate that sixty percent of non-participants recidivate. Baltimore reported a fourteen percent rearrest rate and a three percent conviction rate for DTC participants, and Oakland Municipal Court reports a fifty percent decrease in recidivism).

143. *Id.* at 484.

144. Ricciardulli, *supra* note 41, at 342 (some DTCs are handling 2% to 5% of drug crime cases).

145. Hora, et al., *supra* note 140, at 453.

146. *Id.* at 507-08.

147. *Id.* at 482, 507-08 (Miami excludes anyone with two or more non-drug felony convictions, the program in Queens, New York prohibits anyone with any felony convictions and Portland, Oregon's program excludes those with felony convictions or a Class A misdemeanor. All three jurisdictions exclude offenders with a history of violence).

Critics of the ineffective and costly war on drugs and taxpayers alike are embracing the rehabilitation model.<sup>148</sup> The rehabilitation model focuses on shutting down the demand for drugs, instead of intercepting drug supplies.<sup>149</sup> Generally, a year of DTC costs between \$900 and \$6,500 per person, compared to an average of \$23,000 a year per prison inmate.<sup>150</sup> The Dallas Divert Court estimates that for every one dollar spent on rehabilitation, society saves almost ten dollars in costs over a forty-month treatment plan.<sup>151</sup>

Applying some of these costs to thirty percent of California's three-strikers, the cost of incarcerating these individuals for life is astronomical.<sup>152</sup> California will spend an estimated \$1.4 billion to punish those who may otherwise be rehabilitated.<sup>153</sup> Each inmate could spend 177 years in treatment for the cost it takes to lock him or her up for the rest of his or her life.<sup>154</sup>

Gary Ewing, upon whom this article is loosely based, is an example of the failure of the deterrence theory of punishment as applied to addicts. Rather, he would have benefited from drug treatment if his addiction were recognized in 1993 when he was arrested for drug paraphernalia. When Gary Ewing was convicted under three-strikes in 2000, he suffered from AIDS, drug addiction, loss of sight in one eye, and had recently lost his mother and brother.<sup>155</sup>

Should Gary Ewing live to the age of seventy-five, California citizens will pay approximately \$1.3 million for his incarceration.<sup>156</sup> With that cost, Gary Ewing could have attended treatment for 207 years, but only a small fraction of that time would have been needed to rehabilitate and educate him.<sup>157</sup> This may have possibly prevented him from contracting HIV, and in return, producing a citizen who could have contributed to society.

148. Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 449-50 (1997).

149. *Id.* at 450.

150. Hora, et al., *supra* note 140, at 503; *see also* Brown, *supra* note 137, at 92; Sam Torres, *Should Corrections Treat or Punish Substance-Abusing Criminals?*, 60 FED. PROBATION 18, 22 (1996); JAMES J. STEPHEN, U.S. DEP'T OF JUSTICE, STATE PRISON EXPENDITURES, BUREAU OF JUSTICE STATISTICS, NCJ 202949 (June 2004) at 1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf>.

151. Thomas B. Fomby & Vasudha Rangaprasad, *Divert Court of Dallas County - Cost/Benefit Analysis*, at 12 (Aug. 2002), <http://faculty.smu.edu/tfomby/DivertFinal.pdf>.

152. Thirty percent represents the percentage of criminals who commit felonies to support their addiction.

153. CAL. DEP'T OF CORRECTIONS AND REHABILITATION, THIRD QUARTER 2008 FACT AND FIGURES, [http://www.cdcr.ca.gov/Divisions\\_Boards/Adult\\_Operations/Facts\\_and\\_Figures.html](http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/Facts_and_Figures.html), (last visited January 15, 2009). 1,236 (30% of 2005 addicted three-strikers) X \$36,000 (cost per year) X 32 (years in prison. Assumed maximum age of 75 - average current age is 37) = \$1,423,872,000.

154.  $\$36,000$  (cost per year to imprison) /  $\$6,500$  (maximum cost of treatment per year) = 5.5 X 32 (years in prison) = 177.2 years.

155. Reply Brief for Petitioner Gary Ewing at 20, *Ewing v. California*, 538 U.S. 11 (2003) (No. 01-6978), 2002 WL 31120962.

156. Gary Ewing was convicted at the approximate age of thirty-eight. If he lives until the age of seventy-five, he will have spent thirty-seven years imprisoned. 37 years X \$36,000 per year = \$1.3 million.

157.  $\$1.3$  million /  $\$6,500$  per year for treatment = 207 years of treatment.

## IX. CONCLUSION

Addicts who commit crimes to finance their habits should be ineligible to receive a sentence under the three-strikes policy. Three-strikes legislation seeks to deter individuals through enhanced sentences and the threat of long-term incapacitation. By the nature of addiction, three-strikes fails to deter addicts. These are individuals who come from broken homes or who have no families at all, or who are homeless and hungry. They risk life and death every day. They risk drugs cut with poisons, dirty needles, overdose, and engage in prostitution. The risks they take to use drugs far outweigh any sentence the legal system could ever levy upon them. A prison sentence for some will provide three meals a day, a roof over their head, and a bed to sleep in. This is not deterrence. For addicts, three-strikes means incapacitation. No matter how long an addict is locked up, their addiction will be ever present until they receive the proper rehabilitation.

Gary Ewing represents one of many who are addicted to drugs, commit felonies to finance their addictions, and are sentenced to twenty-five years to life under three-strikes. Three-strikes has a place in our legal system, but it needs fine-tuning. The legal and the medical communities need to work in conjunction to define addiction, signs of addiction, and to figure out what really occurs when an addict is suffering from withdrawals. Collaboration can resolve the issues that plague addicts and the law. States should appropriately and effectively write laws with very specific goals regarding addiction. Laws can be preventive and not reactive written to reflect a focus on rehabilitation and not on punishment. Addicts will not only get the help they need, but they will also have a valid defense under the law. Whether this defense is involuntary intoxication, temporary insanity, or a disease of the mind, a concrete definition of addiction will clarify an acceptable defense that eludes addicts today.

Research indicates that children who grow up in single parent homes, homes where addiction is a problem, or in homes where a family member has been incarcerated are not only more likely to become addicts themselves, but are also more likely to be put behind bars. Three-strikes perpetuates this cycle. This cycle needs to be broken. The system is throwing away the key on individuals who can be helped, educated and returned to society where they can raise their children, enter the workforce and become a benefit to society.

In some cases, crime is product of addiction. Resolve the addiction and the crime will cease. Addiction fueled crimes should be ineligible for the three-strikes penalty.