Legal Communication & Rhetoric: JALWD

Fall 2014 / Volume 11

ARTICLES & ESSAYS

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As Justice Sandra Day O'Connor described it in the five–four opinion[1] of a Supreme Court judgment offered in March of 2003, the story was a simple one that could be narrated in simple language:

> On November 4, 1995, Leandro Andrade stole five videotapes worth $84.70 from a Kmart store in Ontario, California. Security personnel detained Andrade as he was leaving the store. On November 18, 1995, Andrade entered a different Kmart store in Montclair, California, and placed four videotapes worth $68.84 in the rear waistband of his pants. Again, security guards apprehended Andrade as he was exiting the premises. Police subsequently arrested Andrade for these crimes.[2]

Because Andrade had two prior felony convictions, the incidents of petty theft that O'Connor recounts were treated by the local prosecutor as felonies[3] and Andrade was charged, convicted, and sentenced under

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1 O'Connor was joined in her opinion by Justices Kennedy, Scalia, and Thomas, and Chief Justice Rehnquist. *Lockyer v. Andrade*, 538 U.S. 63 (2003). In another opinion addressing the constitutionality of California's three strikes law, which was issued the same day as *Lockyer*, Justice O'Connor also wrote the majority opinion; but, in this case, Chief Justice Rehnquist and Justice Kennedy joined the majority and Justices Scalia and Thomas concurred in separate opinions that rejected any Eighth Amendment proportionality review of a noncapital sentence. *See Ewing v. California*, 538 U.S. 11 (2003). *See also* Sara J. Lewis, *The Cruel and Unusual Reality of California's Three Strikes Law:* Ewing v. California *and the Narrowing of the Eighth Amendment's Proportionality Review*, 81 Denv. U. L. Rev. 519 (2003).

2 *Lockyer*, 538 U.S. at 66.

3 Technically, the charges against Andrade are known as "wobblers," which comprise a category of criminal violations that may be regarded by the prosecutor as either felonies or misdemeanors. The judge similarly has the opportunity at sentencing to reduce the charges to misdemeanors if he or she sees fit. *See* Joy M. Donham, *Third Strike or Merely a Foul Tip?: The Gross Disproportionality of* Lockyer v. Andrade, 38 Akron L. Rev. 369, 374 n. 41, 387 (2005). In Andrade's case, a previous conviction in 1990 for petty theft meant that the two 1995 shoplifting cases could be charged as felonies if the prosecutor so

California's original Three Strikes law, a law that would be modified by California voters in 2012.[4] For his offence of shoplifting $153.54 worth of videotapes, Leandro Andrade received a sentence of fifty years to life, without the possibility of early parole.[5]

When the United States Supreme Court held in March 2003 that Andrade's sentence, along with that of Gary Albert Ewing, sentenced to twenty-five years to life for trying to steal three golf clubs from a southern California golf shop, did not violate the Eighth Amendment's prohibition of "cruel and unusual punishments," it gave sanction to a penal philosophy that has had profound consequences[6] for California and many other states of this nation. By the time the Court issued its decisions in *Lockyer v. Andrade* and *Ewing v. California*, the United States already housed the largest prison population in the world, with over two million individuals incarcerated in a vast system of jails and prisons,[7] the end result of a decade or more of "tough on crime" policies. In fact, at the start of the new century, the United States maintained a criminal-justice system "significantly more punitive than that of any other Western democracy, and an incarceration rate that [was]—by a large margin—the highest in the world."[8] Three Strikes laws played a major role in creating what political-science professor Marie Gottschalk terms this "carceral state that is

chose. The prosecutor did, and Andrade thus faced the maximum penalty for each conviction, twenty-five years to life. *See* Doyle Horn, Lockyer v. Andrade*: California Three Strikes Law Survives Challenge Based on Federal Law That Is Anything but "Clearly Established,"* 94 J. Crim. L. & Criminology 687, 704-05 (2004). For a detailed examination of the increased use of prosecutorial discretion in favor of the lesser misdemeanor charge in states with Three Strikes laws, including California, see David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & Econ. 591 (2005). Obviously, Andrade was not the beneficiary of such prosecutorial discretion.

4 In November 2012, California voters overwhelmingly passed Proposition 36, which amended the original law's harshest elements. Aaron Sankin, *California Prop 36, Measure Reforming State's Three Strikes Law, Approved By Wide Majority Of Voters*, Huffington Post, http://www.huffingtonpost.com/2012/11/07/california-prop-36_n_2089179.html (Nov. 7, 2012). This initiative, approved by a more than two-to-one margin, *id.*, provides that only offenders found guilty of a serious or violent felony as their third strike will be subject to the 25-years-to-life penalty. Furthermore, the new law authorizes the resentencing of those third-strike offenders currently serving 25-to-life sentences if the third-strike offense was not a serious or violent offence and a judge determines that a new sentence would not constitute an "unreasonable risk to public safety." *See* California Attorney General, *Proposition 36: Official Title and Summary*, http://vig.cdn.sos.ca.gov/2012/general/pdf/36-title-summ-analysis.pdf (last accessed Mar. 14, 2014).

5 Donham, *supra* n. 3, at 387. Because Andrade was found guilty of two separate, albeit relatively simultaneous, offenses, he received two sentences of twenty-five years to life; per the Three Strikes law, the two sentences had to be served consecutively. *Id.* at 387 n. 123.

6 O'Connor refers to this new approach as initiating a "sea change in criminal sentencing." *Ewing v. California*, 538 U.S. 11, 24 (2003).

7 Donham, *supra* n. 3, at 369.

8 Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 Wm. & Mary L. Rev. 397, 400 (2006). Using figures developed by The Sentencing Project, Beale reports that "[b]y 2004, the rate of imprisonment in the United States was estimated at 724 per 100,000 population, by far the highest in the world." Russia occupies second place at 564 per 100,000 population. *Id.* at 406. Marie Gottschalk points out that based on data from the International Centre for Prison Studies, "[t]he United States, with 5 percent of the world's population, has nearly a quarter of its prisoners." *See* Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* 1 (2006).

unprecedented among Western countries and in U.S. history"[9] precisely because such laws mandated—and continue to mandate—that repeat offenders receive significantly longer sentences than first offenders and that those who are found guilty of a third offense (like Andrade and Ewing) must serve very lengthy sentences on the order of twenty-five years to life. Although a number of states and the federal government enacted Three Strikes laws during the 1990s, none was as harsh nor cast as wide a net as the measure signed into law in California on March 7, 1994.[10]

My essay, however, is not intended as an evaluation of the policy merits of California's Three Strikes law, even if numerous studies have shown that it fell woefully short of its expressed goals.[11] Nor do I have much to add to the already vigorous debate on Eighth Amendment cases and proportionality reviews,[12] not least because it was California voters, and not our appellate-court system, that would ultimately overturn the harshest elements of California's 1994 version of the law.

Instead, I examine these two 2003 Supreme Court decisions upholding the Three Strikes law as rhetorical performances and narrative constructions that sustain, support, and justify a particular version of criminal justice. Reading the stories of individuals in California who received sentences of twenty-five years to life for such offenses as stealing a pair of tennis shoes or shoplifting $2.69 worth of AA batteries forces the reader to confront a harrowing form of American justice.[13] All legal punishments are, in a fundamental sense, acts of communication, but never

9 Gottschalk, *supra* n. 8, at 1.

10 Justice O'Connor, in her *Ewing* opinion, notes that "[b]etween 1993 and 1995, 24 States and the Federal Government enacted three strikes laws." *See* 538 U.S. at 15; *see also* Donham, *supra* n. 3, at 407–08.

11 *See e.g.* Franklin E. Zimring, Gordan Hawkins & Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (2001); Douglas W. Kieso, *Unjust Sentencing and the California Three Strikes Law* (2005); Michael Vitiello, *Reforming Three Strikes' Excesses*, 82 Wash. U. L.Q. 1 (2004). For an enthusiastic counterpoint, see Edward J. Erler & Brian P. Janiskee, *California's Three Strikes Law: Symbol and Substance*, 41 Duq. L. Rev. 173 (2002), and for an argument that the law has "met its goals," see Naomi Harlin Goodno, *Career Criminals Targeted: The Verdict is In, California's Three Strikes Law Proves Effective*, 37 Golden Gate U. L. Rev. 461 (2007). *See also* Robert Clinton Peck, Ewing v. California*: Upholding California's Three Strikes Law*, 32 Pepp. L. Rev. 191 (2004). In addition, Justice James A. Ardaiz, one of the original group from Fresno, California, that developed the initial proposals that would become the Three Strikes law, has offered a highly sympathetic account of the law's history and impact on crime and the criminal-justice system. *See* James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 McGeorge L. Rev. 1 (2000). Finally, it is worth noting Marie Gottschalk's claim in *The Prison and the Gallows*, *supra* n. 8, at 23–24, that "hard-line" proponents of the Three Strikes law have fought against any state funding for studying the impact of the law because "[t]hey feared the data might show . . . that this draconian penal policy . . . had no significant effect on lowering the crime rate."

12 *See e.g.* Michael M. O'Hear, *Mandatory Minimums: Don't Give Up on the Court*, 2011 Cardozo L. Rev. de novo 67 (2011); Richard H. Andrus, *Which Crime Is It? The Role of Proportionality in Recidivist Sentencing After* Ewing v. California, 19 BYU J. Pub. L. 279 (2004); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?* 89 Minn. L. Rev. 571 (2005); Blake J. Delaney, *A Cruel and Unusual Application of the Proportionality Principle in Eighth Amendment Analysis:* Ewing v. California, 538 U.S. 11 (2003), 56 Fla. L. Rev. 459 (2004).

13 Joe Domanick, *Cruel Justice: Three Strikes and the Politics of Crime in America's Golden State* 4 (2004).

more so than when they involve draconian sentences for relatively minor crimes.[14] Three Strike prisoners in particular function as graphic dispatches bespeaking the state's power; they are the embodied rhetoric of an avenging criminal-justice system.

In this essay, therefore, I consider the Court's jurisprudence not as the coolly rational process of interpreting legal doctrine and principles, though to be sure, O'Connor explicitly adopts the principles of proportionality review set forth by Justice Kennedy in his 1991 concurring opinion in *Harmelin v. Michigan*.[15] Rather, I wish to highlight the acts of storytelling and narrative persuasion present in these opinions that are rhetorical before all else. More to the point, I seek to demonstrate that the narratives (of the offenders' lives and of the Three Strikes law itself) deployed by Justice O'Connor in her upholding of the California law's constitutionality rely upon the tropes and mechanisms of a kind of ritualized exclusion. This manner of storytelling locates the origins of all cultural violence and disorder in a unique set of individuals who are then conclusively banished in the expectation that their removal will bring a renewed sense of communal order and peace. Ultimately, these decisions will be seen to follow the cultural theorist René Girard's account of an "archaic" mythic structure:[16] it is through the act of scapegoating Andrade and Ewing that the Supreme Court works to substantiate its endorsement of their extreme sentences and to maintain that Three Strikes laws promise the conclusive resolution of the nation's "crime problem."

I. Narrative and the Law

We should not be surprised that narrative comes to play a strategic role in Sandra Day O'Connor's defense of the Three Strikes law's constitutionality, for her authorial choice is an entirely reasonable one. Many legal scholars have, for a number of years now, argued that law and narrative are inseparably connected and that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."[17] Against the long-defended position that law is a system of

14 *See* Deirdre Golash, *The Case Against Punishment: Retribution, Crime Prevention, and the Law* 117 (2005) (asserting that moral-reform theories premise the justification of punishment on the moral message communicated by punishment).

15 *See* 501 U.S. 957, 998–1008 (1991) (Kennedy, J., concurring in part and concurring in judgment); *see also* O'Hear, *supra* n. 12, at 69 (characterizing Justice Kennedy as "the pivotal figure" in a series of 5–4 cruel-and-unusual-punishment decisions).

16 René Girard, *Mimesis, Sacrifice, and the Bible: A Conversation with Sandor Goodhart*, in *Sacrifice, Scripture, & Substitution: Readings in Ancient Judaism and Christianity* 48 (Ann W. Astell & Sandor Goodhart eds. 2011).

17 Robert Cover, *Nomos and Narrative*, in *Narrative, Violence, and the Law: The Essays of Robert Cover* 95–96 (Martha Minow, Michael Ryan & Austin Sarat eds. 1992). Few did as much as Robert Cover to make the case for the fundamental place of narrative in law and the legal system. Cover's essays in *Narrative, Violence, and the Law* are especially important in this regard.

rules and principles rationally interpreted and applied, an array of legal voices have asserted that law is instead fundamentally constituted of "stories, explanations, performances, [and] linguistic exchanges."[18] As scholars of legal rhetoric Austin Sarat and Thomas R. Kearns remark, "[d]espite its need to appear to do so, law cannot escape its own rhetoricity."[19] Nor can it escape its dependency upon narrative. Witnesses offer testimony in the form of stories of the past, judges ground their decisions in the narratives of the cases that they compose, and even the body of the criminally accused may become the "bearer of seminal political messages."[20] Law, as a form of communication, works primarily as narrative, or the bringing together of "story, form, and power."[21] Its stories are, in fact, everywhere, for "all courts have is stories. Judges and jurors are not witnesses to the events at issue; they are witnesses to stories about the events."[22]

For jurists like O'Connor, as for all authors writing about the past, the rhetorical power of narrative exists chiefly in its ability to justify its particular rendition of events and the actions that may derive from the telling of that story in that way. Stories in the law are central to mastering the inherent "indeterminacy" of human affairs, to imposing order and controlling interpretations.[23] As historian Hayden White suggests, "narrativity . . . is intimately related to, if not a function of, the impulse to moralize reality."[24] Court opinions, as a genre, almost invariably contain a substantial narrative account of the historical circumstances of the case, wherein the appellate court takes the purported facts of the case and, under the guiding hand of the opinion's author, manipulates, reshapes, and finally composes a story of the past that separates right from wrong, just from unjust, and thereby proclaims the legitimacy of the court's decision.[25] Whereas facts themselves may be "slippery things,"[26] the legal "fictions" found in appellate decisions seek to create a textualized world of moral and legal certainty,[27] and to do this they call upon narrative's

18 Paul Gewirtz, *Introduction: Narrative and Rhetoric in the Law*, in *Law's Stories: Narrative and Rhetoric in the Law* 2 (Peter Brooks & Paul Gewirtz eds. 1996).

19 Austin Sarat & Thomas R. Kearns, *Editorial Introduction*, in *The Rhetoric of Law* 12 (Austin Sarat & Thomas R. Kearns eds. 1994).

20 Allen Feldman, *Formations of Violence: The Narrative of the Body and Political Terror in Northern Ireland* 8 (1991).

21 Gewirtz, *supra* n. 18, at 2.

22 Kim Lane Scheppele, 87 Mich. L. Rev. 2073, 2082–83 (1989).

23 Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 Leg. Writing 17, 19, 40 (2008).

24 Hayden White, *The Content of Form: Narrative Discourse and Historical Representation* 14 (1987).

25 Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1386–90 (1995).

26 Foley, *supra* n. 23, at 19.

27 L. H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* 8 (1995).

inherent capacity to characterize and categorize, the very trait that led Hayden White to declare all successful stories as akin to allegory because they endow events with clear meaning and significance.[28] As we shall see, in O'Connor's Three Strikes narratives the "true" villains and victims are readily identifiable as the monstrous career criminals and the innocent victims of crimes, even if these are cases in which it is the incarcerated who seek relief as the victims of cruel and unusual sentences.

As for the law itself, its stories most fundamentally concern authority and the idea of order.[29] Law and story are both attempts to impose order and meaning on an inchoate collection of events and actions, to organize experience around rules, conventions, and the possibility of the discrete event or individual functioning as exemplar or illustration:

> Narrative appears to be one of our large, all pervasive ways of organizing and speaking the world—the way we make sense of meanings that unfold in and through time. The law, focused on putting facts in the world into coherent form and presenting them persuasively—to make a "case"—must always be intimately intertwined with rhetoric and narrative.[30]

In criminal cases particularly, narrative becomes critical to the construction of a unified and legally responsible subject who can function as the appropriate site for the exercise of law's (and the state's) force.[31] In other words, from the state's perspective, Leandro Andrade and Gary Albert Ewing must be depicted as responsible for and deserving of their lengthy sentences, and the Court's versions of their stories are intended to make this evident. But, O'Connor's narratives do more than simply help set forth the state's conclusive determination of appropriate justice; more crucially, these narratives work in conjunction with the other parts of the opinions toward a resolution of America's perceived crisis of law and order by affixing onto two men guilty of petty theft a set of charges that transform them into purveyors of widespread disorder and cultural calamity. These versions of the Three Strikes offender will be shown to threaten "the very foundation of cultural order, the family and the hierarchical differences" upon which the social order is founded, which in these

28 Hayden White, *The Value of Narrativity in the Representation of Reality*, in *On Narrative* 13 (W.J.T. Mitchell ed. 1981).

29 "[N]arrative in general, from the folktale to the novel, from the annals to the fully realized 'history,' has to do with the topics of law, legality, legitimacy, or, more generally, *authority*." *Id.*

30 Peter Brooks, *Introduction: The Law as Narrative and Rhetoric*, in *Law's Stories: Narrative and Rhetoric in the Law* 14 (Peter Brooks & Paul Gewirtz eds. 1996).

31 *See* White, *supra* n. 24, at 36 (discussing the role of narrative in society as shaping "the narcissistic, infantile consciousness into a 'subjectivity' capable of bearing the 'responsibilities' of an 'object' of the law in all its forms").

cases primarily takes the form of the absolute difference between the state's violence and that violence labeled by the Court as "criminal."[32]

II. O'Connor's Rhetorical Fashionings of Andrade and Ewing

Perhaps surprisingly, given the weighty task I am suggesting, Justice O'Connor appears to use a rather innocent-looking narrative structure and style in both her Andrade and her Ewing opinions.[33] Both Andrade's and Ewing's life-long encounters with the criminal-justice system are narrated in a fashion that at first seems little more than a simple rendition of the critical "facts":[34]

> Andrade has been in and out of state and federal prison since 1982. In January 1982, he was convicted of a misdemeanor theft offense and sentenced to 6 days in jail with 12 months' probation. Andrade was arrested again in November 1982 for multiple counts of first-degree residential burglary. . . . In 1988, Andrade was convicted in federal court of "[t]ransportation of marijuana" . . . . In 1990, he was convicted in state court for a misdemeanor petty theft offense and was ordered to serve 180 days in jail. In September 1990, Andrade was convicted again in federal court for the same felony of "[t]ransportation of marijuana" . . . . And in 1991, Andrade was arrested for a state parole violation—escape from federal prison.[35]
>
> In 1984, at the age of 22, [Ewing] pleaded guilty to theft. . . . In 1988, he was convicted of felony grand theft auto and sentenced to one year in jail and three years' probation. . . . In 1990, he was convicted of petty theft with a prior and sentenced to 60 days in the county jail and three years' probation. In 1992, Ewing was convicted of battery and sentenced to 30 days in the county jail and two years' summary probation. . . . In January 1993, Ewing was convicted of burglary and sentenced to 60 days in the county jail and one year's summary probation. In February 1993,

32 René Girard, *The Scapegoat* 15 (Yvonne Freccero trans. 1986).

33 Or perhaps vice versa, since both decisions were issued on the same day, and it is not clear which one was composed first. To be precise, however, *Ewing* deserves priority since it offered judgment on the broader constitutionality of Three Strikes laws, while *Andrade* was decided on "narrow, technical grounds" involving the writ of habeas corpus. *See* Vitiello, *supra* n. 11, at 19.

34 "The conventional wisdom is that the 'Facts' portion of an appellate opinion merely recites neutral, predetermined 'facts' found by the lower court or an agency. . . . Yet nothing could be farther from the truth. When an appellate judge sits down to write up a case, she knows how the case will come out and she consciously relates a 'story' that will convince the reader that it has come out right." Wald, *supra* n. 25, at 1386. So too say Anthony G. Amsterdam and Jerome Bruner in *Minding the Law* 111 (2000): "We now understand that stories are not just recipes for stringing together a set of 'hard facts'; that, in some profound, often puzzling way, stories *construct* the facts that comprise them."

35 *Lockyer v. Andrade*, 538 U.S. 63, 66–67 (2003) (brackets in original).

> he was convicted of possessing drug paraphernalia and sentenced to six months in the county jail and three years' probation. In July 1993, he was convicted of appropriating lost property and sentenced to 10 days in the county jail and two years' summary probation. In September 1993, he was convicted of unlawfully possessing a firearm and trespassing and sentenced to 30 days in the county jail and one year's probation.[36]

Together, these parallel versions of the long course of two men's lives offer the outlines of a powerful typology of the Three Strikes criminal, convicted of relatively minor offenses, yet guilty of far greater crimes against the state and society. O'Connor's rhetorical and stylistic choices may seem to lack literary polish, but they work in a highly efficient manner to reduce Andrade and Ewing to little more than types, collectivized markers of familiar tales already told. This fits with typology of the contemporary criminal law and its prison system, itself, which work to "insure that powerful images of vagrants, social outcasts, and misfits can be transmitted to a receptive public. The generality of 'the criminal type' is all that matters."[37]

O'Connor's narratives appear as the unadorned chronicles of the faceless lives of those who commit multiple offenses, wherein the repetitious sentence structure of another year, another criminal conviction, underscores the primary charge against Andrade and Ewing: they are nothing more than "career criminals"[38] locked in a recurring pattern of crimes against the social order. O'Connor withholds any possibility of change or development in these men as she flatly, and without variation, registers the austere formula of year, arrest, conviction, punishment. The reader can predict the next sentence in O'Connor's version of Andrade's or Ewing's life story as readily as the State of California would claim to predict the future actions of third-strike defendants under a law that is as at least as much preventive detention as it is proportionate punishment for a past deed.[39] This iterative structure seems intended to be both reassuring and persuasive, as it accords with mnemonic narratives in which readers gain "the benefits of followability, and whatever is followable is on the way to being acceptable."[40] Repeat offender rendered through repeti-

36 *Ewing v. California*, 538 U.S. 11, 18 (2003).

37 Joan Dayan, *Held in the Body of the State: Prisons and the Law*, in *History, Memory, and the Law* 210 (Austin Sarat & Thomas Kearns eds. 1999).

38 *Ewing*, 538 U.S. at 24.

39 *See* Domanick, *supra* n. 13, at 8 (observing that California's three strikes law embodied a "new philosophy of punishment with heavy racial and class overtones . . . —a radical notion of preventative detention").

40 Frank Kermode, *The Genesis of Secrecy: On the Interpretation of Narrative* 118 (1979).

tive prose—O'Connor's stylistic choices become a potent form of legal argument.

To be sure, O'Connor's choice of an impersonal narrative voice to record the piling up of year after year of crimes and convictions is a mode common to legal opinion writing, as her rhetorical style itself becomes the legal argument that the Court's decision was inevitable and rendered by "neutral decision makers."[41] But it is also true that her Three Strike narratives, numbingly repetitive in their stripped down, formulaic structure, closely resemble the generic medical case history, and that too is precisely the point. The recitation of criminal incidents in the life of Andrade or Ewing functions as the linguistic register of illegal acts, which acts become quasi-medical symptoms, symptoms that point to the presence of an underlying disease. The case histories composed by O'Connor lead inexorably to a single diagnosis: Andrade and Ewing are both "habitual felons" who "must be isolated from society in order to protect the public safety."[42] They are manifestly dangerous, and they must be separated out. As with any identification of a dangerous disease threatening the public health and necessitating the quarantine of the infected individuals, the symptoms—that is to say, the "facts of the case"—are said to speak for themselves.

Thus, O'Connor not only embraces the genre's conventional "rhetoric of inevitability that translates into a language of obedience,"[43] of judges seeming only to affirm a judgment already authoritatively determined by past events and actions, but she also employs a mode of characterization that is fundamental to the persuasive power of the appellate judge. In her Three Strikes narratives, O'Connor deploys the powerful trope of Andrade and Ewing as terrifying contagion needing isolation, locating her stories' key players in sharply etched tales of evil unleashed upon a quiescent public. Such persuasive deployment of metaphor has been labeled "an essential technique" in opinion writing,[44] and O'Connor's ominous figures of the third-strike felon suggest that she has learned the technique well.

But O'Connor's opinions do more than deploy a single evocative trope or a formulaic mode of narrativizing the past. She also employs a carefully constructed external narrator in her recounting of the significant events of the cases in order to control the narrative voice and to

41 Lauren Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 Wash. & Lee L. Rev. 193, 212 (2002).

42 *Ewing*, 538 U.S. at 15, 24.

43 Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 Yale J.L. & Human. 201, 215 (1990).

44 Benjamin L. Berger, *Trial by Metaphor: Rhetoric, Innovation, and Juridical Text*, 39 Court Rev. 30, 32 (2002).

restrict further the reader's sympathies and potential identification with the ostensible subjects of her stories, Andrade and Ewing. As is typical of appellate opinions,[45] the reader is permitted no insight into the thoughts, feelings, or noncriminal pasts of the accused men. Only at a single point in the entire length of both narratives does the reader hear the voice of either criminal defendant. Interestingly, these brief words appear through the mediating figure of Andrade's probation officer, who reports the confessions of the accused:

> The defendant [according to the report from which O'Connor quotes] admitted committing the offense. The defendant further stated he went into the K-Mart Store to steal videos. He took four of them to sell so he could buy heroin. He has been a heroin addict since 1977. He says when he gets out of jail or prison he always does something stupid. He admits his addiction controls his life and he steals for his habit.[46]

Andrade speaks, but only through the apparatus of the criminal-justice system, and only to admit his guilt and to affirm the state's judgment of him as a "habitual felon." In this way, Andrade is made into the author of his own condemnation and into a proponent for the reasonableness of his sentence.[47] He serves as a witness for the prosecution (or better, for the sentencing authority), rather than as a voice that might challenge the state's representation of the law and those it condemns. As such, and even as Andrade appears to speak his own words in the Court's narrative, he is silenced: "Law, and especially criminal law, seeks to prevent the victim of law from generating a public version of his or her life's argument, and law is usually successful. The public version is, almost always, law's word, and law's word is bounded by law's silences . . . ."[48]

To be sure, every narrative is composed of silences; legal narratives, and O'Connor's stories of Andrade and Ewing in particular, are by no means exceptional in their dependency on those silences to shape a linear history of events. The silences can in fact be stories untold: "a narrative history is a structure of exclusion in the sense that it bears the traces of other stories, stories that are not told, stories that are excluded, stories of the excluded."[49] Much indeed is left out of O'Connor's narratives, much

45 Foley, *supra* n. 23, at 41 ("appellate judges focus on logos").

46 *Lockyer v. Andrade*, 538 U.S. 63, 67 (2003).

47 Ewing's voice is never heard in the opinion, but his "record" does speak for him in a way that is similarly made to voice its support for the legitimacy of the harsh sentences: "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and *amply supported* by his own long, serious criminal record." *See Ewing v. California*, 538 U.S. 11, 29–30 (2003) (emphasis added).

48 Douglas Hay, *Time, Inequality, and Law's Violence*, in *Law's Violence* 142 (Austin Sarat & Thomas R. Kearns eds. 1992).

49 Mark Currie, *Postmodern Narrative Theory* 84 (1998).

that pertains to questions of moral culpability, criminal guilt, and the function of state violence in the control of its citizens and the protection of property. These narratives exhibit a "complicity between narrative exclusion and a broader and more systematic kind of exclusion from economic and political power,"[50] a nexus that is almost impossible to ignore in the Supreme Court's decisions on California's Three Strikes law.

In her tale of Andrade's life of crime, for instance, O'Connor begins with the bare recounting of the defendant stealing five tapes from a K-Mart store. She locates the origin of the case in a criminal act, apparently undertaken without reflection or any motive save unlawful gain. There is no history of Andrade's life prior to the shoplifting incident or of what might have motivated his act, and, when other bits of his history are revealed in the narrative, they consist only of other "encounters with law enforcement" narrated in the bare chronological structure of O'Connor's facts.[51] His story has no beginning, save as a life lived in criminal behavior; all prior circumstances and events of his life have been erased, even if, paradoxically, the Three Strikes law claims to know definitely which individuals will commit crimes in the future based solely on the state's claim to an authoritative understanding of their past. According to O'Connor's account of the "habitual felon," Andrade's life begins only when he is arrested for misdemeanor theft,[52] and any explanation for his crimes—any context or justification for his consecutive twenty-five-years-to-life sentence—resides solely in his repeated violations of the criminal code. He is defined utterly by his history as a convicted felon.

In such an account, the opinion's audience plays the role of passive observer of a "reality that is both dispassionate and fixed. Faced with what has been shown to be the case, one accepts."[53] The compelling orderliness of O'Connor's stark narratives becomes the reassuring sign of a coherent reality where criminal violence "can be isolated, understood, . . . [even] mastered and eliminated."[54] And should any gaps in her accounts be perceived, the audience is invited to fill them in with cultural stereotypes of

50 *Id.* at 85.

51 *Lockyer*, 538 U.S. at 66–67. O'Connor's narratives conform in this respect to the convention of their legal genre: "Every step of the [opinion] process requires an unavoidable series of simplifications. Judgment must reduce event to an incident and further reduce incident to a narrative about acceptable behavior. . . . Everything about the enterprise, including the listener-reader of the judicial opinion, welcomes the declarative tones that make it possible." Ferguson, *supra* n. 43, at 211. I would not necessarily count myself among those welcoming the tone and simplifications of O'Connor's narratives.

52 "The starting points [of stories] are particularly noteworthy because the time at which a narrative begins will ordinarily serve to both delimit the action . . . and also to frame what follows so that occurrences become *events* that have a particular meaning and narrative necessity." *See* Amsterdam & Bruner, *supra* n. 34, at 152–53 (citations omitted).

53 Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 Vt. L. Rev. 681, 689 (1994). Sherwin goes on to point out that inducing this kind of passivity "is a classic (although by no means exclusive) formula for prosecutorial success." *Id.*

54 Leo Bersani & Ulysse Dutoit, *The Forms of Violence: Narrative in Assyrian Art and Modern Culture* 51 (1985).

the career criminal. Andrade and Ewing are not individuals; they are types, cardboard characters in a familiar story. For just as California's lawmakers claimed to know the future, just as O'Connor and a majority of the Court's justices agreed that the state could know what it claimed to know, readers of the opinion are prompted to accept these more-than-twice-told tales[55] as fixed reality—the state's prediction of future criminal acts is not a supposition-laden forecast, but rather the simple, inevitable truth.

By way of contrast, one might note the "life of Leandro Andrade" composed by his appellate lawyer, Erwin Chemerinsky, in the wake of the Supreme Court's decision on his Eighth Amendment argument. Although Chemerinsky begins his account in much the same stripped down narrative fashion as found in O'Connor's version of Andrade's life, Chemerinsky crucially chooses to include as one of the "facts" of the case the evocative titles of the stolen videotapes—specifically, *Snow White*, *Casper*, *The Fox and the Hound*, *The Pebble and the Penguin,* and *Batman Forever*.[56] Further, in his brief narrative, Chemerinsky goes on to offer rather more insight into Andrade's personal history prior to the shoplifting incident, including, most significantly, a mention of his nine years of military service in the Army. Chemerinsky even offers something of what might have motivated Andrade's illegal acts, including that Andrade's drug addiction had developed while in he was in the Army.[57] Obviously, as Andrade's lawyer, Chemerinsky had his own reasons for proposing his alternative version of Andrade's "story." But such competing versions of a single life certainly highlight the significance of narrative choice for all authors, including Supreme Court justices.

Supreme Court opinions do not necessarily have to engage in the kind of strict erasure of the convicted individual's past and fundamental humanity that we see in O'Connor's version of Andrade's story. A compelling example of this is the dissenting-in-part opinion composed by Justice Stevens in *Hudson v. Palmer* (1984).[58] In this case involving the rights of prisoners to maintain personal possessions, Justice Stevens paints a much richer portrait of the incarcerated individual affected by the law in question: "Rather than [treat] the prisoner simply as a body to be managed by institutional rules, Martha Nussbaum observes, "[Stevens]

55 These narratives are told and retold in this culture, and O'Connor's opinions participate in those retellings. *See also* Nathaniel Hawthorne, *Twice-Told Tales* (1865); Nathaniel Hawthorne, *The Snow Image, and other Twice-Told Tales* (1853). Both Hawthorne collections include stories that concern collective violence and scapegoating.

56 Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 Drake L. Rev. 1, 1 (2003).

57 *Id.* at 1–2.

58 *Hudson v. Palmer*, 468 U.S. 517, 541–57 (1984) (Stevens, J., concurring in part and dissenting in part).

treats him as a citizen with rights and with a dignity that calls forth respect."[59] In Stevens' version, the incarcerated Palmer is even allowed to speak at some length in his own voice and on his own behalf.[60] By contrast, the majority opinion "obscure[s] from view the humanity of the prisoner, the interests and rights that link him to other constitutionally protected members of society."[61]

For O'Connor, however, the simplicity of her two narratives, the inevitability of their conclusions (both narrative and moral) refute any possibility that complex explanations might be needed to understand the workings of the Three Strikes law upon the citizens of California. Obviously, the human lives of Andrade and Ewing extend far beyond the bare "facts" of their criminal records, just as the reasons for their illegal actions surely cannot be easily isolated or simply narrated. Even more, the tortuous intersections of "race, crime, and punishment"[62] in this nation are wholly absent from O'Connor's histories¾and from the entirety of the Court's opinions. Her stories are instead constructed as narrative arguments that insist upon closure and the elimination of uncertainty or doubt (strategies common to appellate decisions, to be sure). This device has been labeled "one of the great functions of the law," as the semblance of justice seems able to appear only after the complex truths of human lives have been "suppressed."[63] Such a rhetorical move may be understood as a "noble lie" uttered in the interest of the "greater truth" of justice.[64] Richard Andrus, in his review of the *Ewing* decision, endorses this narrative strategy by arguing that the petitioner's criminal record rendered him unsympathetic, and therefore O'Connor "rightfully highlighted Ewing's long history in the criminal justice system."[65] Perhaps, though I suspect Andrade and Ewing harbored rather less sanguine interpretations of the nobility of O'Connor's closed stories of their lives.

The denial of complexity in the lives of the accused and of the socioeconomic conditions that helped produce these "habitual felons" is perhaps the most glaring silence of all in O'Connor's texts. Erased is the "systemic violence" of "racism, poverty, and despair," its powerful contours hidden by the law's insistence on the primacy of statutory crimes committed by individuals against person and property.[66] Also absent

59 Martha Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. Chi. L. Rev. 1477, 1500 (1995).

60 *Hudson*, 468 U.S. at 541 (Stevens, J., concurring in part and dissenting in part).

61 Nussbaum, *supra* n. 59, at 1501.

62 Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (1995).

63 Sherwin, *supra* n. 53, at 688 n. 39.

64 *Id.*

65 Andrus, *supra* n. 12, at 291.

66 Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, in *The Rhetoric of Law* 140–41 (Austin Sarat & Thomas R. Kearns eds. 1994). *See also* David Cole, *No Equal Justice: Race and Class in the Criminal Justice System* (1999).

from her opinions is the singularly harsh truth that among those admitted to today's prisons, three of every four will be either African-American or Hispanic,[67] and that, as Erwin Chemerinsky points out, "African-American and Latino [like Andrade] defendants are much more likely to have the three strikes law used against them than white defendants."[68] So very much is missing from the stories O'Connor tells: even in the very act of restricting the entire narrative to the convicted men's "encounters with law enforcement,"[69] she directs attention away from the social and economic origins of the illegal actions and "reinforces a strongly individualistic view of responsibility for crime and its social consequences."[70] Her rhetorical choices are gravely important in this matter of affirming extremely heavy penalties for relatively minor offences because, as Judge David Bazelon once famously argued, "[t]he issue of criminal responsibility, like other subjects in the criminal law, does not [and should not] permit us to ignore the relationship between antisocial conduct, on the one hand, and poverty and social injustice, on the other."[71]

O'Connor is not blind to all appearances of the social, however, and in her *Ewing* opinion she offers a brief narrative history of the Three Strikes law itself, noting that it had its origins in "widespread public concerns about crime."[72] Quite legitimately, O'Connor suggests, the citizenry's fears of a breakdown in the social order led it to "target[] the class of offenders who pose the greatest threat to public safety: career criminals."[73] To oppose these figures of chaos and mayhem, she offers the "rational legislative judgment" that produced the sentencing measures in question and the figure of a morally outraged public whose "profound disappointment with the perceived lenity of criminal sentencing (especially for repeat felons) led to passage of three strikes laws in the first place."[74] Captured rhetorically and literally in the figures of Andrade and Ewing, the "habitual felon" in these opinions carries the specter of dangerous unrest and threat, and his arrest, conviction, and sentencing

67 Gottschalk, *supra* n. 8, at 19. *See also* Jerome G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (2d ed. 2011).

68 Chemerinsky, *supra* n. 56, at 8. *See also* Michael Vitiello, *Three Strikes: Can We Return to Rationality?* 87 J. Crim. L. & Criminology 395, 457 (1997).

69 *Lockyer v. Andrade*, 538 U.S. 63, 66 (2003).

70 James F. Doyle, *A Radical Critique of Criminal Punishment*, in *Radical Critiques of the Law* 254 (Stephen M. Griffin & Robert C. L. Moffat eds. 1997).

71 David L. Bazelon, *Questioning Authority: Justice and Criminal Law* 51 (1988).

72 *Ewing v. California*, 538 U.S. 11, 24 (2003).

73 *Id.*

74 *Id.* at 30, 24 n. 1.

become the acts of "individualizing disorder."[75] Indeed, the very repetitiveness of their criminal acts becomes reassuring, as it suggests a regularity and, even more, a predictability that seems to promise the possibility of rational action to reassert the primacy of order.

Thus, O'Connor finds no quarrel with the "deliberate policy" of state legislatures' decreeing that repeat offenders "must be isolated from society in order to protect the public safety."[76] Law functions here to draw boundaries, to push to the outside (or to incarcerate, or quarantine, within) those who are contaminated, to seek purity and order through an act of expulsion. We thus encounter here, in this purportedly most dispassionate and rational of legal documents, the stark appearance of the Girardian scapegoat. In a rather remarkable passage, O'Connor offers as a culminating argument for the efficacy of California's Three Strikes law the "dramatic" report of the state's Attorney General: "An unintended but positive consequence of 'Three Strikes' has been the impact on parolees leaving the state. More California parolees are now leaving the state than parolees from other jurisdictions entering California."[77] Of course, the Court's own logic would suggest that these banished California parolees ("habitual felons," to be sure) only migrate to another state and commit further crimes in their new local communities, at least until that new state institutes its own, even more draconian sentencing law to propel them back again, in a new "race to the harshest" among states.[78] But the overpowering desire to cast out people like Andrade and Ewing is such that O'Connor seems to overlook the rather glaring inconsistency in her own argument.

In her rhetorical (and very real judicial) expulsion of the criminal Other, O'Connor echoes, perhaps unconsciously, tropes favored by the earliest proponents of the Three Strikes campaign in California. As she explains in her *Ewing* opinion, Assemblyman Bill Jones of Fresno first introduced a version of the law to the state legislature in March 1993.[79] What O'Connor does not explain is that the impetus for Jones' sponsorship of the Assembly bill lay in his close association with Mike Reynolds, a Fresno businessman whose teenage daughter had been murdered during a street robbery in 1992 and who shortly thereafter joined with

75 Feldman, *supra* n. 20, at 109.

76 *Ewing*, 538 U.S. at 24.

77 *Id.* at 27 (quoting Cal. Atty. Gen., "*Three Strikes and You're Out"—Its Impact on the California Criminal Justice System After Four Years* 1, 10 (1998)).

78 Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 Buff. L. Rev. 1, 41 (2010).

79 *Ewing*, 538 U.S. at 14.

several other local law-enforcement officials to draft and promote the first version of the Three Strikes law in California.[80] Prior to borrowing the title of "Three Strikes" from a Washington-state version of the law, this group had considered calling their proposal "The Street Sweeper" because, as Reynolds would later explain, the law "was designed to get all the criminal garbage off the streets."[81] In this description of a plague of criminal filth, Reynolds' language eerily evokes Girard's characterization of a culture in the grip of perceived crisis, where "there's a monster in the community, so to speak, and he wants more and more victims."[82]

Mike Reynolds shares more with Justice O'Connor than a clear affinity for metaphors of exclusion. Just as O'Connor uses narrative in her opinions to establish the reasonableness and constitutionality of the Three Strikes law, so too did Reynolds and his associates deploy the persuasive powers of stories—especially his own story and that of another grieving father, Mark Klaas—to argue the case of Proposition 184 (the "Three Strikes" initiative) when it came before California voters in 1994. In talk show appearances, newspaper articles, and magazine stories, the case for the Three Strikes law was made not in terms of its public-policy merits, but was instead rendered almost exclusively in relation to the stories of two murdered young women: Kimber Reynolds and Polly Klaas.[83] In the public mind, these murders became conflated with the proposed law: "The period prior to the California gubernatorial election was a time of intense symbolic campaigning on behalf of three strikes, and the Polly Klaas kidnapping and murder became the key symbolic crime for the pro-three strikes campaign."[84] O'Connor herself acknowledges the power of this narrative in deciding legal questions raised by the law when she begins her *Ewing* opinion with an account of Polly Klaas' abduction and murder by a man who had several prior felony convictions.

80 Domanick, *supra* n. 13, at 37.

81 *Id.* at 41 (quoting Mike Reynolds, interview (Summer 1998)). Martha Grace Duncan's careful review of the rhetoric of criminal justice concludes that "one of the most common metaphors in our culture is that of the criminal as filth," its favor derived in large part from the trope's expression of a "view of criminals as diseased and contagious and [that leads] to a policy requiring segregation of criminals from uncontaminated non-criminals." Martha Grace Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 Tul. L. Rev. 725, 727, 729 (1994).

82 Girard, *supra* n. 16, at 48.

83 For representative examples, see Elizabeth Gleick, *America's Child: The Kidnap-Murder of 12-Year-Old Polly Klaas Left An Entire Nation Feeling Helpless and Outraged*, People 84-88 (Dec. 20, 1993) (available at http://www.people.com/people/archive/article/0,,20107057,00.html), as well as Reynolds' own book written after the campaign, Mike Reynolds, Bill Jones & Dan Evans, *Three Strikes and You're Out! A Promise to Kimber* (1996). More broadly, see Sara Sun Beale, *supra* n. 8, for a comprehensive discussion of how media coverage of crime, particularly during the 1990s, was a significant influence on public opinion and worked to "bolster support for punitive penal policies." *Id.* at 402. Beale likewise highlights the media's packaging of crime news in an "episodic" frame, a choice that, she argues, "may affect punitiveness" in the public's attitude toward crime and punishment. *Id.* at 447–48.

84 Ray Surette, *News from Nowhere, Policy to Follow: Media and the Social Construction of "Three Strikes and You're Out,"* in *Three Strikes and You're Out: Vengeance as Public Policy* 185 (David Shichor & Dale K. Sechrest eds. 1996).

O'Connor offers that the story of Polly's murder "galvanized support" for Proposition 184 and made it "the fastest qualifying initiative in California history,"[85] and in this she is surely correct; but this conclusion in no way exhausts the ideological function of narrative in these opinions.

O'Connor's interest in the story of Polly Klaas actually extends well beyond a simple consideration of its impact on California voters. The incident plays a key role in her demonizing of Gary Allen Ewing, for Polly's abduction and murder reappears at a critical moment in O'Connor's narrative of Ewing's criminal activities. Although Ewing received a sentence of twenty-five years to life for the act of stealing three golf clubs, this crime garners scarcely any descriptive attention in O'Connor's account of the case. She instead saves her narrative energies for describing two of his previous crimes, one involving an unlawful entry into an occupied apartment to steal property and the other an armed robbery that also concluded in the victim's place of residence. In these passages—the longest and most detailed in her narrative—O'Connor chooses to foreground the shock and fear of Ewing's victims, reporting that each "scream[ed] for help" as they were assailed in their own homes,[86] just as Polly was seized in her own living room by the man who would eventually murder her. And while no one was injured in either of Ewing's crimes, the specter of Richard Allen Davis, the confessed killer of Polly Klaas, looms as the unmistakable third in these scenes. To underscore the connection, O'Connor informs the reader that Ewing failed to serve the full term of his sentence for these crimes and ended up trying to steal golf clubs at a time when he should have been incarcerated, just as she had earlier pointed out that if Davis had "served his entire sentence, he would still have been in prison on the day that Polly Klaas was kidnapped."[87]

O'Connor discursively constitutes Ewing—and ultimately all other third-strike defendants—as the moral and legal equivalent of Richard Allen Davis, as a predatory monster threatening all of society.[88] Ewing

85 *Ewing v. California*, 538 U.S. 11, 15 (2003).

86 *Id.* at 19.

87 *Id.* at 15.

88 In this move O'Connor's prose most resembles the rhetorical fashionings of Pete Wilson, California's governor during the debate over the Three Strikes law. In campaigning for the approval of Proposition 184, Wilson urged that passage of the law was tied directly to the aggressive prosecution of sex offenders (such as Davis), declaring "for those animals, their first strikes should be their last." Donham, *supra* n. 3, at 373 n. 33 (quoting California Voter Foundation, *Remarks by Governor Pete Wilson on Primary Night LAX Westin Hotel*, (June 7, 1994) (available at www.calvoter.org/archive/94general/cand/governor/wils/wilsspeech1.htm)). For Davis as a "monster" and "vampire," see Richard Klaas's widely read interview in Thomas Fields-Meyer, *Odyssey of Violence*, *People* 44-49 (May 13, 1996) (available at http://www.people.com/people/article/0,,20141262,00.html). Brian Foley also notes O'Connor's conflation of Ewing, and all other recidivists, with Davis. *See* Brian J. Foley, *Reframing the Debate Over Excessive Sentences to Move Beyond the Eighth Amendment*, 38 New Eng. J. on Crim. & Civ. Confinement 3, 18 (2012).

and his like are shown always to be lurking just outside the door, poised to invade and violate the domestic space of the home, that nostalgic "symbol of American health and unity."[89] They are the disruptive carriers of violence and mayhem, they are "the class of offenders who pose the greatest threat to public safety."[90] The social danger present in "career criminals" like Ewing is unmistakable in O'Connor's text, and the public's "outrage" and "profound disappointment" at the state's leniency toward these felons prior to the adoption of the Three Strikes law is characterized as not only legitimate, but also as just.[91]

O'Connor notably gives expression to this collective fear in her insistent characterizations of Ewing's crimes as serious and dangerous. Ewing's past was not strewn with violent incidents (his early conviction for battery carried a sentence of only thirty days), and the crime that initiated the twenty-five-years-to-life sentence was for concealing three golf clubs down his pants leg and walking out of a pro shop.[92] He was "a public nuisance, not a public danger."[93] Yet, in O'Connor's narrative, Ewing is rendered as a monstrous menace, and the aggrieved victim in the story she tells is not Gary Allen Ewing, serving twenty-five years to life for stealing three golf clubs, but instead the law-abiding and frightened public, appearing in the form of a murdered Polly Klaas, or the woman startled awake by Ewing's entry into her home seven years prior to his shoplifting arrest.[94]

III. The Rhetoric of Vengeance

By equating, rhetorically at least, a kidnapper and murderer of a young girl with shoplifters like Ewing and Andrade and the other "habitual felons" snared by California's law, O'Connor directly introduces the theme of retribution and vengeance into her narratives and the opinions they support, even as she insists the law is consistent with the

89 Edward J. Ingebretsen, *At Stake: Monsters and the Rhetoric of Fear in Public Culture* 73 (U. of Chicago Press 2001).

90 *Ewing v. California*, 538 U.S. 11, 24 (2003).

91 *Id.* at 14, 24.

92 Foley, *supra* n. 88, at 16–17.

93 *Id.* at 17.

94 It seems worth noting that in this latter incident, Ewing was the one who fled the scene when he was discovered attempting to steal the woman's videocassette recorder. *See Ewing*, 538 U.S. at 18–19.

95 Stacy's summary of the case is instructive on the issue of proportionality: "Ewing was sentenced to 25 years to life under California's 'three strikes' law. The Court upheld this harsh sentence even though it was almost without precedent compared to sentences in other jurisdictions. The State of California, other states filing amicus briefs on California's behalf, and the Solicitor General came up with only three instances in which prisoners elsewhere had received a similarly harsh sentence in comparable circumstances. In his dissent, Justice Breyer found only one of these instances truly analogous, conceding 'a single instance of a similar sentence imposed outside the context of California's three strikes law, out of a prison population

Court's prior decisions on proportional punishment.[95] In his concurring opinion to O'Connor's *Ewing* decision, Justice Scalia declares that the notion of proportionality in sentencing is "inherently a concept tied to the penological goal of retribution,"[96] an end O'Connor also finds just and appropriate.[97] Interestingly, O'Connor will, in *Ewing*, complicate the easy equation of recent laws mandating long prison sentences for recidivists with a public desire for retribution by arguing that these laws look more to the future than to the past and thus are more fundamentally aligned with the policy aims of incapacitation and deterrence than of retribution.[98] Yet several scholars have established that these recidivist laws were manifestly products of "the new penology of retribution and vengeance" arising in the late 1970s,[99] and there can be no doubt that contemporary legal theory today is dominated by retributivists. O'Connor's opinions offer little to contest this tide, for as British psychoanalyst D. W. Winnicott once asserted, "it is impossible to get away from the principle that the first function of the law is to express the unconscious revenge of society."[100]

The goal of the Court's Three Strike opinions is to convince the public "that the harmful acts that are crimes have a moral value precisely opposite to that of the harmful acts that are punishments."[101] According to Deirdre Golash, this demonstration of the balance of wrongs "is the central task of retributive theory."[102] Yet, by relying so overtly upon the concept of retribution, we are compelled, by the very definition of the word vengeance, to confront the workings of an *imitative* violence, where each blow is modeled on and justified by the prior blow, and where a tit-

now approaching two million individuals.'" Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 Wm. & Mary Bill Rts. J. 475, 487 (2005) (quoting 538 U.S. at 46 (Breyer, J., dissenting); other citations omitted). O'Connor, invoking primarily *Rummel v. Estelle*, 445 U.S. 263 (1980), was obviously not persuaded by such a circumstance.

96 Scalia argues that proportionality is a virtually unworkable concept when applied to a theory like retribution, so he defers judgment in Ewing's case, even while he maintains the constitutionality of the sentence. *See Ewing*, 538 U.S. at 31–32 (Scalia, J., concurring).

97 *Id.* at 25. This is not to say that O'Connor is unusual in her endorsement of retribution as a rationale for criminal punishment. Contemporary criminal justice theory is dominated by retributivists. *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 Am. Crim. L. Rev. 1313 (2000). In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980), Chief Justice Burger had declared that the public yearns to see justice done and their desire for retribution satisfied. *See also* Richard K. Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* 161 (2000) (discussing same).

98 *Ewing*, 538 U.S. at 24–27.

99 Carpenter, *supra* n. 78, at 35. *See also* Keith C. Owen, *California's "Three Strikes" Debacle: A Volatile Mixture of Fear, Vengeance, and Demagoguery Will Unravel the Criminal Justice System and Bring California to its Knees*, 25 Sw. U. L. Rev. 129 (1995).

100 Wendy Lesser, *Pictures at an Execution: An Inquiry into the Subject of Murder* 44 (1995) (quoting D.W. Winnicott).

101 Golash, *supra* n. 14, at 49.

102 *Id.*

for-tat economy threatens to blur all differences. In this world of revenge and retribution, violence is met by violence, and future acts of violence are said to be prevented and deterred by sentences equivalent to life in prison. Derrida has described this state as the "circular economy" of retribution, the "equal exchange" of violence for violence.[103] According to Girard, these "efforts to stifle violence with violence achieve no more, ultimately, than an increase in the level of violence. Counterviolence turns out to be the same as violence."[104]

Such a condition of violent reciprocity seems to be disclosed even by those justices who dissent from the majority opinion in the cases under our consideration. Justice Souter declares in his *Andrade* dissent that the state of California has decided Andrade's violations must be met in kind:

> The State, in other words, has not chosen 25 to life because of the inherent moral or social reprehensibility of the triggering offense in isolation; the triggering offense is treated so seriously, rather, because of its confirmation of the defendant's danger to society and *the need to counter his threat* with incapacitation.[105]

Souter thus acknowledges the mimetic nature of the state's response, its matching blow for blow, threat for threat in its dealing with Three Strikes' defendants. Indeed, it is the lack of proportionality in Andrade's *consecutive* twenty-five-years-to-life sentences that Souter offers as the primary ground for his finding in favor of Andrade's appeal.[106]

Of course, O'Connor refuses this equation of violent adversaries locked in struggle with the state by deploying the language of reason when describing the state's actions. Repeatedly, she affirms that the government's determination to impose extraordinarily long sentences on repeat offenders has a "reasonable basis" in public policy and that the punishments meted out are "justified by the State's public-safety interest in incapacitating and deterring recidivist felons."[107] The Justice will not herself question the legitimacy of the state's judgment, insisting instead that Three Strikes laws emerge from the "deliberate policy" of state legis-

103 Jacques Derrida, *The Gift of Death* 105 (David Wills trans. 1995).

104 René Girard, *The Plague in Literature and Myth*, in *"To Double Business Bound:" Essays on Literature, Mimesis, and Anthropology* 139 (1978).

105 *Lockyer v. Andrade*, 538 U.S. 63, 81 (2003) (Souter, J., dissenting) (emphasis added).

106 The Court's struggle with proportionality in criminal punishment here is nothing unusual. Tom Stacy remarks that "one would be hard pressed to identify any other area of constitutional law [than the Eighth Amendment's cruel-and-unusual-punishment clause] plagued by such confusion at its very roots," Stacy, *supra* n. 95, at 477, in large part because "the Court's recent cases addressing punishments other than death reduce proportionality to a purely theoretical principle devoid of practical significance." *Id.* at 497.

107 *Ewing v. California*, 538 U.S. 11, 28, 29 (2003).

108 *Id.* at 24.

latures[108] and the clear and apparently conclusive will of the people.[109] They work in support of the "legitimate penological goal" of identifying and separating out those who will not conform to the "norms of society."[110] And though it is imperative to note that O'Connor's deference to the California legislature is consistent with Kennedy's principles of proportionality as outlined in *Harmelin*[111] and with the general historical trend of the Court in dealing with Eighth Amendment cases,[112] this deference also plays a critical role in differentiating the state's violence from that of those it would condemn. Like the law for which she speaks, O'Connor insists upon the legitimacy of the violence the law exercises against those who would resist or violate it. In this version of justice, one "presumes that we know who the criminals are and the victims are, and that we know the difference between them. Brutality, the vengeful voice utters, must be met with brutality."[113]

Certainly O'Connor and her fellow justices, in passing on the constitutionality of the twenty-five to life terms mandated by the Three Strikes law, are brought face to face with the power of law to do violence and even to mimic the violence it locates in the "career criminals" it banishes from society. Prison sentences, and especially very lengthy ones of the kind imposed on Andrade and Ewing, are, next to the death penalty itself, the most concrete expressions of the law's brute force. James Boyd White proposes that legal punishment is fundamentally a "system of meaning" that organizes itself around the assignation of blame, an action that "seems to entail retaliation or retribution."[114] In addition, the violence

109 Interestingly, O'Connor cites the "3 to 1" voting margin for a Three Strikes law in Washington state during her opening discussion of California's law. *See id.* at 15. Yet it is just in her avowed and widely cast deference to public opinion, legislative fiat, and ultimately, to common practice (or at least her representation of it), that O'Connor follows the Court's declared tradition of defining cruel and unusual punishment according to "prevailing punishment practices." Such a judicial principle and rhetorical gesture is noteworthy, for, as Tom Stacy argues, such deference "conflicts with the independent role the Court has assumed in interpreting other countermajoritarian constitutional rights," Stacy, *supra* n. 95, at 478, and "produces incoherence both within and without the Court's Eighth Amendment case law," *id.* at 493. See Foley, *supra* n. 88, and James J. Brennan, *The Supreme Court's Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. Crim. L. & Criminology 551 (2004), for useful discussions of this deferential element in the Court's decisions in sentencing review cases. It must be noted that in relation to O'Connor specifically, this kind of deferral to legislative will is common throughout her judicial opinions and is not unique to Eighth Amendment cases. See Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (2008), for numerous examples of this element of her judicial philosophy.

110 *Ewing*, 538 U.S. at 29 (internal quotation marks and citation omitted).

111 *See id*. at 20 ("The Eighth Amendment . . . contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'") (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in judgment)); *see also* O'Hear, *supra* n. 12, at 69 (discussing principles of proportionality review emerging from series of 5-4 decisions in which Justice Kennedy played a pivotal role).

112 *See generally* Kenneth A. Sprenger, *Pass the Discretion Please—The Supreme Court Defers to State Legislatures in Interpreting What Is Left of the Eighth Amendment's Proportionality Principle*, 58 Ark. L. Rev. 425 (2005).

113 Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* 37 (2001).

114 James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* 205 (U. of Wisconsin Press 1985).

meted out here is a collective one, what Girard terms an act of "violent unanimity,"[115] since judges act in the name of the people in handing down their sentences, just as O'Connor invokes the will of the voter in California to legitimate and justify the Three Strikes law. Judges never act alone, and the violence their judgments initiate is not only carried out by many others in the vast penal system, but the judgments themselves always carry the signs of collective action.[116]

In the *Andrade* and *Ewing* opinions, the reciprocity of the law's violence takes a particularly striking form. These two men, described by O'Connor as "habitual felons" who will perpetually commit crimes against the social order, are themselves condemned by the state to perpetual prison sentences. Souter, in his *Andrade* dissent, uses the phrase "permanently incapacitating" to describe the kind of sentences repeat offenders like Andrade must serve.[117] Career criminals receiving what amounts to career punishment. Of course, the terrible irony in this reciprocal relationship is that the state's violence overwhelms the petty crimes of Andrade and Ewing, just as it far exceeds the nonviolent offenses for which the majority of felons in California received their third strike under the original law.[118] The severity of twenty-five to life does more than call into question the notion of proportionality in punishment; it also gives the lie to O'Connor's language of reasonableness and rationality in the state's responses to repeat offenders. As Austin Sarat reminds us, "putting law's violence into discourse threatens to expose law as essentially similar to the antisocial violence it is supposed to deter and punish." And as he even more pointedly suggests, "[t]he violence of the law threatens to expose the facade of law's dispassionate reason, of its necessity and restraint, as just that—a facade—and to destabilize law by forcing choices between the normative aspirations of law and the need to maintain social order through force."[119]

115 René Girard, *Violence and the Sacred* 107 (Patrick Gregory trans. 1977).

116 Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1627–28 (1986).

117 *Lockyer v. Andrade*, 538 U.S. 63, 81 n. 2 (2003).

118 Various studies during the first decade of the twenty-first century demonstrated that approximately 75 to 85% of the crimes triggering second and third strikes for California offenders were nonviolent, property-related or drug-related offenses. *See* Donham, *supra* n. 3, at 400 n. 205.

119 Sarat, *supra* n. 66, at 181.

IV. Narrative, Sacrifice, and the Reassertion of Difference

In order to overcome those challenges to the law's good name posed by Sarat, O'Connor's narrative comes to take on the structure of a mythic tale of sacrificial violence, with the "good" violence of the state vanquishing the "bad" violence of the dangerous Other.[120] In their organization, O'Connor's texts recall Girard's account of those myths and stories, ubiquitous in human culture, that lay claim to being "the true and universal version of events," but that are, in reality, merely "the camouflaged victory of one version of the story over the other, the polemical version over its rival."[121] Their ultimate aim is not to disclose "the facts of the case," but to reassert difference, to represent the social order as stable and supreme, and to label those who would threaten it as evil, violent, and dangerous. Thus, Ewing will be cast in the likeness of the killer of Polly Klaas in order to differentiate the Three Strikes law from the violence of those "habitual felons" it mirrors and replicates. Andrade and Ewing are irrational and the bringers of chaos to an otherwise safe and tranquil California, while the acts of the state and the Court are "rational . . . judgment[s]," dispassionate, legitimate, and conducive to civil peace and order.[122] The law's violence is thereby hidden, transferred onto the criminal Other who is separated out and,[123] as O'Connor characterizes it, "isolated from society."[124]

In O'Connor's texts, Andrade and Ewing function chiefly as the "monstrous double" of the structural violence that has produced them, the judicial violence that condemns them.[125] We witness here the individualizing of disorder in the symbolic form of the "career criminal," the

120 The terms "good" and "bad" violence follow Girard's study of the operations of myth across human cultures. Girard argues that cultures typically develop primary narratives (myths and rituals) to support and sustain the social order, wherein "a certain form of violence [is designated] as 'good,' as necessary to the unity of the community, and [the society] sets up in opposition to it another sort of violence that is deemed 'bad,' because it is affiliated to violent reciprocity." Girard, *supra* n. 115, at 115.

121 *Id.* at 73.

122 *Ewing v. California*, 538 U.S. 11, 30 (2003). Although O'Connor claims that it is the California legislature that has the "primary responsibility" to determine sentencing policy, she nevertheless includes in *Ewing* a lengthy justification (based on a nonscholarly and somewhat dated article published in the *Sacramento Bee*) for the efficacy of the Three Strikes law, a rhetorical choice that not only violates her claim to judicial deference to legislative judgment, but also flies in the face of nearly all scholarly studies examining the effectiveness—or lack thereof—of the law. *See id.* at 26 (citing Andy Furillo, *Three Strikes—The Verdict: Most Offenders Have Long Criminal Histories*, Sacramento Bee A1 (Mar. 31, 1996)).

123 Sherwin, *supra* n. 96, at 184.

124 *Ewing*, 538 U.S. at 24 ("Throughout the States, legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety.").

125 Girard, *supra* n. 115, at 161.

figure of violence that must be expelled violently to restore order, redraw boundaries, and right the balance of justice. Law thus becomes, in the words of Girard, akin to sacrifice, as "it conceals—even as it also reveals—its resemblance to vengeance" and insists on its power to identify rightly the "guilty" party and enact its punitive judgments toward that figure.[126]

Sacrifice lies at the heart of ritual and myth and of narrative itself, and the narratives that the law authorizes are therefore typically epic stories with the heroic figure of the law vanquishing the forces of chaos and restoring order. Yet, as Andrew McKenna suggests, "there is no hero without a monster to slay who is but the double of the hero, whose bad violence is doubled by the hero's good violence."[127] It is laws like Three Strikes and the judicial decisions and narratives that uphold them that grant the state the right to exercise its violence and assert its difference from the violence it condemns.[128] Even more, the mythology O'Connor offers in her opinions finds in the collective expulsion of "habitual felons" a definitive answer to the public's fears of crime and social unrest. These fears are not Californians', alone. The recent wave of legislation setting out harsh sentences for recidivists has been seen as akin to a "pandemic"[129] sweeping the states, driven by a "societal panic" that is blind to the downward trend in violent crime numbers and that instead sees only the perceived danger of "strangers residing in their communities."[130] In *Ewing*, O'Connor approvingly cites the *Sacramento Bee*'s conclusion that the law is successfully "snaring" those who most endanger the public safety, endorses the California Attorney General's claim that the law reduces recidivism, and most "dramatically," notes the flight of parolees from California as an unintended positive outcome from the law.[131] Both of her opinions ultimately promise the same salvation avowed by the law's authors: the cessation of social violence and crime.

However, as Andrew McKenna argues, "[a]ny decision by the courts bearing on a single agent, a single culprit, must emerge as a frameup . . . . The attempt to trace the origin of violence to a single culprit is destined to cover up its complex origin; it is a sacrificial gesture par excellence."[132] Crime in America is a complex matter; California's original version of the Three Strikes law was a simple, and simplistic, remedy. But O'Connor's opinions succeed in another very important way, as rhetorical perform-

126 *Id.* at 22.

127 Andrew J. McKenna, *Violence and Difference: Girard, Derrida, and Deconstruction* 85 (1992).

128 *See id.* The crucial nexus between the law and the state's violence is a theme that runs throughout McKenna's book.

129 Carpenter, *supra* n. 78, at 2.

130 *Id.* at 36–37.

131 *Ewing v. California*, 538 U.S. at 26–27 (quoting Andy Furillo, *Three Strikes—The Verdict's In: Most Offenders Have Long Criminal Histories*, Sacramento Bee, Mar. 31, 1996, p. A1).

132 McKenna, *supra* n. 127, at 160.

ances, and specifically as rhetorical performances that enact a sacrificial cleansing that mirrors the law's own, very real, collective violence against those it deems "habitual felons." The judicial retribution O'Connor authorizes is sustained and promoted as much through the narratives she tells as the legal principles she propounds. Through her accounts of the lives (and quasi-life sentences) of Andrade and Ewing, through her story of the birth of California's Three Strikes law, she establishes the state's claim to a monopoly on violence and "rationalizes revenge"[133] under the guise of law scrupulously examined and upheld.

Andrade and *Ewing* thus serve to illuminate something of the dependency of the Supreme Court's rhetoric on the mechanisms of mythic representation and the narrative strategies of ritualized exclusion. The expulsion of the criminal Other accomplished through prison sentences of twenty-five years to life is completed by means of a rhetorical transformation of Andrade's and Ewing's histories into political texts that find their full social significance only within a strict economy of sacrificial banishment. From beginning to end, O'Connor's narratives construct her subjects as the sole bearers of cultural violence and disorder (Girard's classic "stereotypes of persecution"[134]), while the state and its powers are shown to bring only the assurance of peace and restored order. By representing California's Three Strikes law as a "rational legislative" response to "public outrage" over crimes not punished nor deterred,[135] by reading the legal question of the law's proportionality through images of home invasion and the killing of the innocent, O'Connor mimics and joins with those pervasive media accounts of rampant street crime in contemporary American culture.[136] Even more to the point, she casts her texts in something like the form of Girard's persecution text, wherein "[t]here is only one person responsible for everything, . . . and he will be responsible for the cure because he is already responsible for the sickness."[137]

Likewise, her simple and stark outlines of the criminal lives of Andrade and Ewing can be understood to function in a kind of ritual manner, as their very orderliness and structure promise a secure and triumphant political hegemony.[138] And though O'Connor's promise of order conclusively restored may be attributable more to rhetorical performance than effective social policy, her stylistic choices suggest the rather unavoidable conclusion that a ritualized form of narrative lies at the heart of her effort to redeem the power of the state and to fictionalize its violence.[139] If her texts, so fundamentally concerned with the construction of

133 Girard, *supra* n. 115, at 22 (emphasis removed).

134 Girard, *supra* n. 32, at 12–23.

135 *Ewing*, 538 U.S. at 30, 14.

136 Carpenter, *supra* n. 78, at 37.

137 Girard, *supra* n. 32, at 43.

138 Bersani & Dutoit, *supra* n. 54, at 6.

social order through the identification of those held responsible for its disruption, can in any way be judged as exemplary, then we might well conclude that sacrificial violence "still remains the founding language of social representation."[140]

V. Epilogue

When, in November 2012, California voters resoundingly chose to amend the portion of the Three Strikes law that had condemned Andrade and Ewing to 25 years to life sentences for the commission of nonviolent felonies, the voters fundamentally transformed several key elements that had made California's law among the very harshest of this nation's recidivist statutes. These voters altered not only the unique fates of the over 3,000 Three Strikes prisoners who have petitioned to be resentenced,[141] but they also modified one of O'Connor's rhetorical pillars, that of the monstrous "career criminal" who must be banished if the besieged public is to find abiding respite from disorder and fear.[142] Whether this new statement by the collective citizenry of California affects our culture's rhetoric of crime and punishment or minimizes the deployment of narratives of sacrificial displacement in our discourse about this subject and the judicial opinions that animate it remains to be seen.

139 *See* Feldman, *supra* n. 20, at 115 (discussing ritual and symbol as "foundations for the rationalization of power and thus the fictionalization of its violence").

140 *Id.* at 260.

141 In the first nine months after the passage of Proposition 36, over 1,000 Three Strikes inmates were released, while an additional 2,000 cases were waiting to be heard. *See* Stanford Law School Three Strikes Project and NAACP Legal Defense and Education Fund, *Abstract, Project Report: Three Strikes Reform (Proposition 36)*, http://www.law.stanford.edu/organizations/programs-and-centers/stanford-three-strikes-project/proposition-36-progress-report (last accessed Mar. 21, 2014). Gary Ewing was not among these petitioners, as he passed away in prison in the summer of 2012. *See* Eric Metaxas, *Enough of Three Strikes: Unjust and Expensive*, http://www.breakpoint.org/bpcommentaries/entry/13/20657 (Oct. 31, 2012). At the time of the writing of this essay, the legal fate of Leandro Andrade remains uncertain.

142 Interestingly, of the more than 1,000 Three Strikes prisoners released in the months immediately following the passage of Proposition 36, the recidivism rate was, according to a recent study, "well below state and national averages over similar time periods." Stanford Law School Three Strikes Project, *Three Strikes Basics*, http://www.law.stanford.edu/organizations/programs-and-centers/stanford-three-strikes-project/three-strikes-basics (last accessed Mar. 21, 2014).