Unshackling the Budget

By Jeffrey A. Lowe

The debate over the state budget has been focused on cutting the funds for our public schools, health care for the poor and financial assistance to the most needy of our citizens, especially the frail and elderly.

What is not debated, but should be brought into the discussion of fiscal responsibility for the state, is the waste of billions of dollars each year on failed policies in criminal justice. Specifically, a parole system that simply does not work, a three strikes law that costs the taxpayers billions of dollars each year to house nonviolent offenders and a death penalty policy that is at best dysfunctional.

Joan Petersilia, now a professor at UC Irvine School of Law, told the San Francisco Chronicle last year, "The state's parole system is the major contributor to the prison population, sending about 70,000 parole violators back to prison each year. About 20 percent of those violators go in and out of prisons without ever committing a violent offense. Many are returned to prison for repeatedly failing drug tests or other parole violations such as failing to notify parole agents of an address change. Each time, they typically serve less than four months in prison and get no rehabilitation."

The Public Policy Institute of California's Amanda Bailey has noted, "The current parole system increases the likelihood that parolees will return to prison. California does not use any intermediate level punishment. If an offender violates parole, they would go back to prison, no matter how minor the violation."

According to the Little Hoover Commission, "California's current system of parole is a billion dollar failure."

The most common way to alleviate the expense of housing repeat parole violators is to employ substance abuse treatment centers and electronic monitoring for those who commit minor parole violations. Intermediate sanctions should be used for technical parole violations, rather than a return to custody.Low-risk parolees should be given the opportunity to shorten their parole terms through good behavior.

Currently, the three strikes law in California means that many inmates are incarcerated at public expense for minor nonviolent crimes.

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The three strikes law was born out of passion surrounding the gruesome murder of Polly Klaas in 1993. The intent of the law was clearly to put away killers such as Richard Allen Davis, Klaas' murderer, and other violent offenders like him.

Yet many inmates are serving lengthy time in California prisons at taxpayer expense for crimes not even remotely violent. Examples of three strikes cases include a 25 years to life sentence for stealing golf clubs and the theft of a videotape.

Although challenged in the courts, the three strikes law was affirmed as constitutional in two U.S. Supreme Court decisions, *Lockyer v. Andrade*, 538 U.S. 63 (2003), and *Ewing v. California*, 538 U.S. 11 (2003).

According to the nonpartisan Legislative Analyst's Office, from 1983 to 2004, the California prison system budget increased from $1 billion to $5 billion, a fact that coincides with the passage of the three strikes law.

The majority of people imprisoned under the law are second strikers who have committed nonviolent felonies such as property crimes and drug offenders, and the law has in fact led to excessive incarceration rates for nonviolent offenders.

Currently the death penalty in California is multimillion-dollar failure. In fact, it has become a mere symbol without substance, a facile solution to crime that has no effect on crime prevention. Incredibly, the leading cause of death for death row inmates is literally dying of old age. Death row inmates currently must wait four to five years to be assigned to attorneys who will merely begin the appeals process.

California Supreme Court Justice Ronald George has said that this backlog reflects the consequences of a careful appeals process that is designed to ensure due process for those facing executions. George told the New York Times in 2004, "We take great care to try to appoint competent counsel … I could take care of the backlog in two days if I were not following the very rigorous standards that California has established."

The rigorous standards that death penalty cases require translate into constitutional safeguards that include a more extensive jury selection process, an increased amount of pretrial motions to be filed and argued in court, a longer duel trial process, extensive investigator costs and expert testimony; and automatic and mandatory appeals.

All of these factors translate into increased costs for a capital trial. The average cost to the taxpayer in Los Angeles County for a death penalty trial is estimated to be more than $2 million per case. This is in excess of six times more than other murder trials.

According to a Department of Justice report, states without the death penalty have lower homicide rates than those with the death penalty.

As the debate over the California state budget becomes more focused and intense in the coming weeks, systemic reform in the areas of parole, three strikes and the death penalty should be brought into the discussion as a means to solve these issues and lessen the impact of the budget's shortfall on our most vulnerable citizens.

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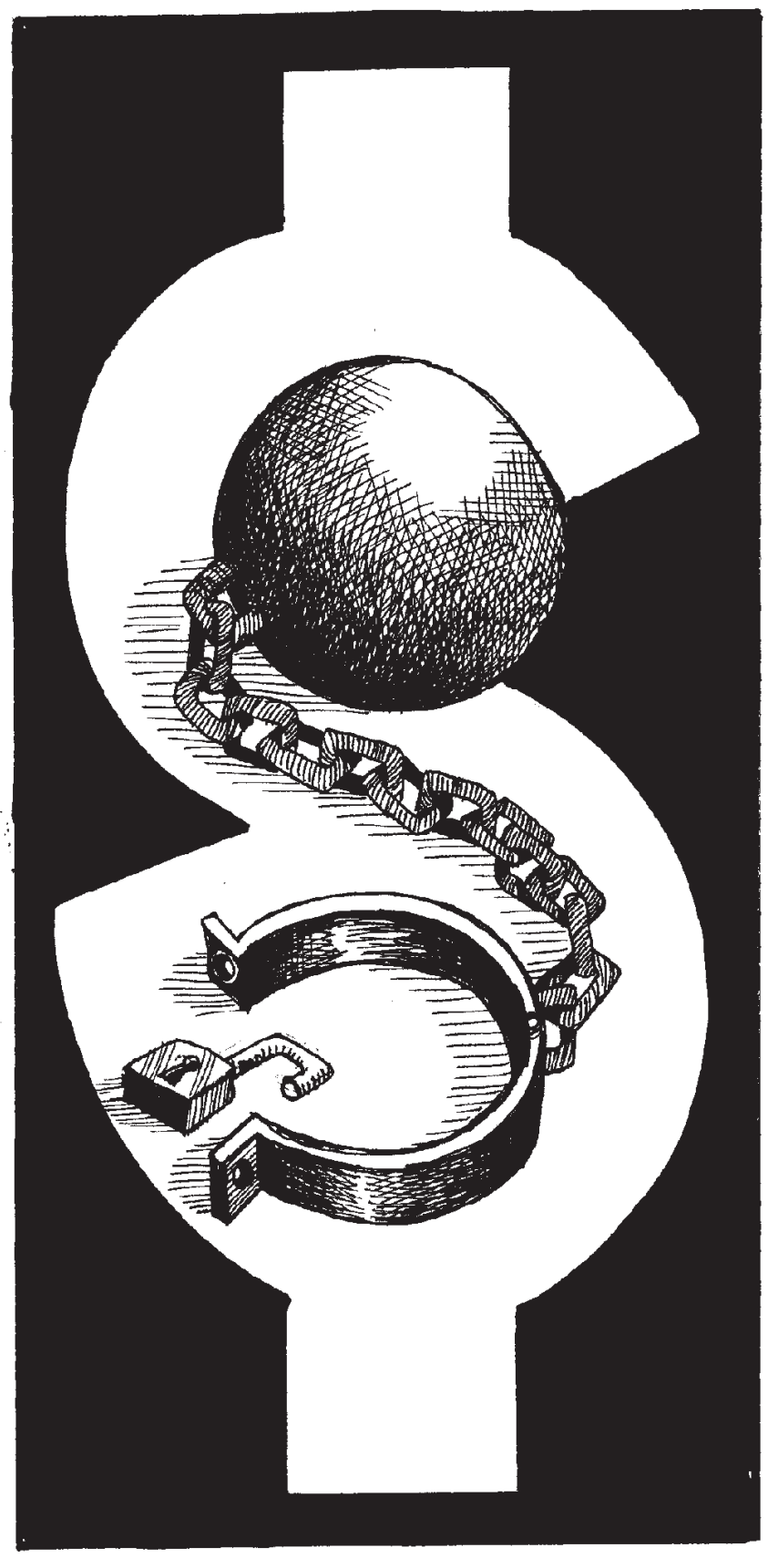


At Your Service? Ruling Makes It Too Easy to Serve Foreign Corporations

By Erin L. Burke, Erik Swanholt and Jason C. Wright

Recently a California Court of Appeal invited Supreme Court review of case law regarding service of process for foreign corporations. The Code of Civil Procedure provides that service of process may be accomplished by serving a corporation's general manager, which courts have historically defined as a person or entity with general control over the corporation. Under this rubric, courts expressly rejected service of a parent corporation via service of the subsidiary because the subsidiary lacked the requisite control over the parent corporation.

In contrast, several recent cases disagreed and relied on an old line of cases that held a sales agent is a general manager because it was "reasonably certain" the sales agent would apprise the corporation of service of process.

In *Yamaha Motor Company v. Superior Court*, 2009 DJDAR 7473, the Court of Appeal felt constrained by this latter precedent and upheld service on a foreign corporation via its subsidiary, but the court questioned the validity of the precedent and welcomed the Supreme Court to revisit the case law. The *Yamaha* court noted the method of service "just seemed too easy a way to get around the Hague Service Convention." While recognizing that "easy is not necessarily better," the Court of Appeal held that there was nothing it could do in the face of binding precedent.

The *Yamaha* court held that *Cosper v. Smith & Wesson Arms Co.*, 53 Cal.2nd 77 (1959), which makes service on the foreign parent valid by serving the California representative, was non-overruled and non-distinguishable precedent. In *Cosper,* the California Supreme Court allowed a plaintiff to serve a Massachusetts corporation by serving its California sales representative.

> The California rules for service of process could be used to completely avoid an international treaty. But it is a basic rule of our federal system that state laws must effectuate and not nullify international treaties.

The court held that the representative was a "general manager" of the Massachusetts corporation because of his "ample regular contact." Because the California representative was a "general manager," the plaintiff could effectuate service on the Massachusetts corporation by serving the California representative.

The court reasoned that any other holding would have rendered the foreign corporation "perpetually immune from service of process" and hence immune from suit in California.

The Court of Appeal in *Yamaha* was not subtle in questioning the continuing vitality of *Cosper,* as evidenced by the heading of the opinion's final section: "The Supreme Court is Welcome to Revisit Cosper." Its opening salvo in this section left little doubt as to the court's view of *Cosper,* characterizing its discussion of the applicable statutory provisions as "abbreviated" and noting that its entire substantive analysis fit into one footnote of the *Yamaha* decision.

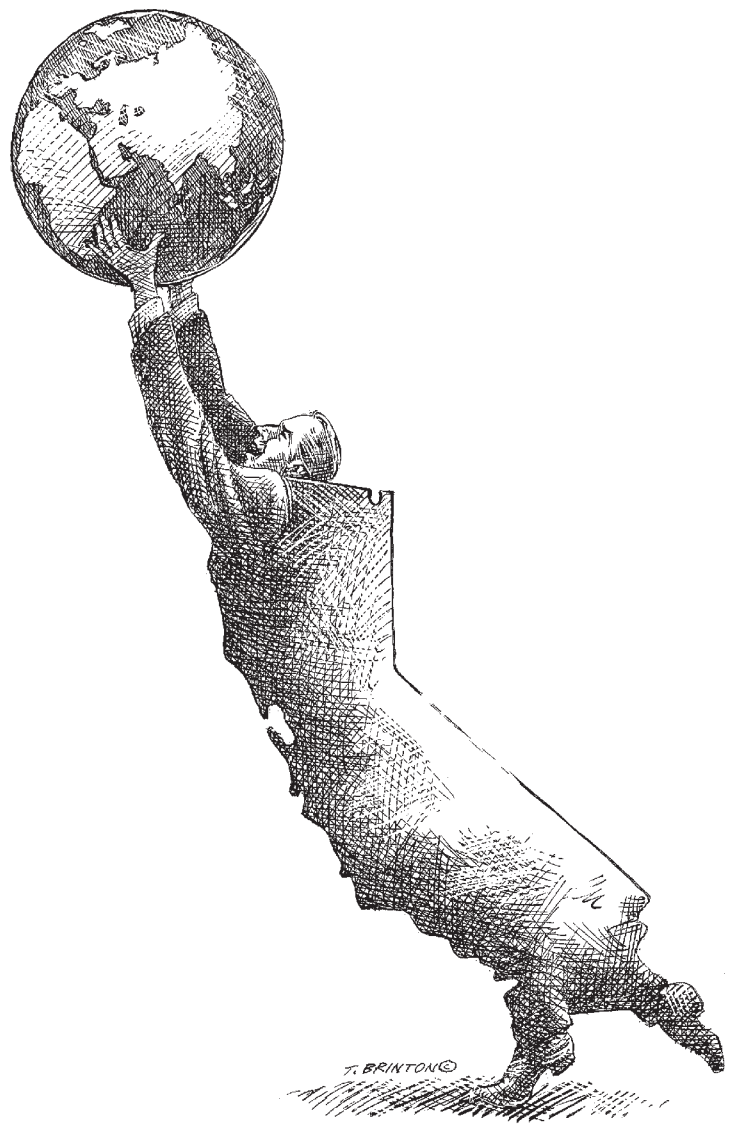
In setting forth the result it likely would have found if not constrained by the *Cosper* opinion, the court noted that *Cosper* "never really grappled with the anomaly that a mere non-exclusive sales representative could not really be described as a general manager in this state."

The Court of Appeal agreed with a different line of cases that held a "general manager," for the purposes of service of process, implies a high measure of control over the corporation.

The Court of Appeal found that neither Yamaha's U.S. subsidiary nor the sales representative in *Cosper* had any control over the foreign corporations; rather, the Yamaha subsidiary and Cosper's sales representative merely did their masters' bidding. In the end, the Court of Appeal had "no choice" but to deny Yamaha's writ seeking the vacation of the trial court's order denying the motion to quash because of its respect for stare decisis.

Given the Court of Appeal's unusual invitation to the California Supreme Court, the high court should take this opportunity to address the growing split of authority within the California courts regarding the meaning of the term "general manager." In particular, the *Cosper* line of cases effectively nullifies the Hague Service Convention on the basis of a rationale that has been mooted by subsequent changes in the law. Indeed, the Hague Service Convention had not even been drafted when *Cosper* was decided, yet that case continues to bind Courts of Appeal to *Cosper's* outdated holding based on a fear that foreign corporations could avoid service in this state. Of course, because the Hague Service Convention provides a means to serve foreign corporations, it all but eliminates the possibility that international corporations would be immune from service of process, the very concern *Cosper* addressed.

Though there is some contradictory case law, with *Cosper* in full force, foreign entities that have subsidiaries in California can be validly served with summons and complaint when those documents are provided to that entity's local subsidiary. There is no need to abide by the Hague Service Convention and serve a certified translation in the parent's language.



Worse yet, the service can be effective without any guarantee that the subsidiary will actually provide notice to the parent. Under this rubric, the notice requirements guaranteed by due process will suffer.

This application of *Cosper* also does not respect the Supremacy Clause. Under *Cosper,* plaintiffs will virtually always find a local representative for service of process. Thus, the California rules for service of process could be used to completely avoid an international treaty. But it is a basic rule of our federal system that state laws must effectuate and not nullify international treaties.

The importance of this issue to international business and California's economy cannot be overstated. Given the many other obstacles and impediments to conducting business profitably in California, providing an "easy" method for plaintiffs to drag foreign entities into court will be an additional and unnecessary impediment to foreign investment in California. If the California Supreme Court elects to "revisit" this issue, amici should line up to persuade it to make a change.

The California Supreme Court should overrule *Cosper* and affirm a different line of cases that held a "general manager," for the purposes of service of process, means a person who possesses general direction and control of the business of the corporation.

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