Strike One, Ready for More?: The Consequences of Plea Bargaining "First Strike" Offenders under California's "Three Strikes" Law

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INTRODUCTION

Twenty-one year old Alex Delgado did the unthinkable by refusing to plead guilty when a prosecutor offered a three-year sentence for three counts of armed robbery. Delgado’s rejection was not because he was innocent, and it was not because he was waiting for a better deal. Instead, Delgado refused the deal because of the consequences associated with California’s “Three Strikes” law.2

To properly understand Delgado’s decision, it is necessary to understand the ramifications of the “Three Strikes” law, as well as the exact terms of the offered agreement. Under California’s “Three Strikes” law, a mandatory sentence is imposed for repeat offenders.3 The first violent or serious felony conviction is not subject to sentencing enhancements under this law because that is deemed to be the first strike. However, if a defendant is convicted of a second violent or serious felony, the law mandates a double sentence for that conviction.4 This is then the second strike. If a defendant is then convicted of a third violent or serious felony, he bears the greater sentence out of three options.5 Those options include either; a tripled sentence, a twenty-five year to life sentence, or an independent sentence by the court, whichever is greater.6

In this case, the offered agreement from the Los Angeles prosecutor was

2. See CAL. PENAL CODE §§ 667, 1170.12 (West 1999); see also BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS, at 1 (1999) [hereinafter TRUTH IN SENTENCING].
4. See id. The felony does not have to be a serious or violent felony before a criminal defendant receives a double sentence under the law. See id.
5. See CAL. PENAL CODE § 1192(c), as amended by 1999 Cal. Legis. Serv. Ch. 298 (A.B. 381) (West 1999); CAL. PENAL CODE §§ 667.5(c), 1170.12(a) (1999). Again, the felony conviction does not have to be serious or violent to qualify for a sentence under the “Three Strikes” law. Although the crime is not violent or serious, the sentence will still require a third strike conviction unless the judge uses discretion to strike a prior offense. See People v. Superior Ct. (Romero), 917 P.2d 628 (Cal. 1996).
a three-year sentence in return for two guilty pleas of armed robbery. Delgado refused, and instead made a counteroffer where he would plead guilty to one count of armed robbery and serve a six-year prison sentence. Surprisingly, the prosecutor rejected Delgado’s counteroffer.

Alec Henderson, Delgado’s defense attorney, employed an unconventional strategy that opposes the predominant rationale for representing first strike criminal defendants. Defense attorneys are generally required to obtain the most advantageous resolution for their clients. Fortunately, Alec Henderson had a sound justification for apprising his client of the possible future consequences of accepting the plea, namely the grave outcome of receiving two strikes. Henderson quickly realized the prosecutor was “setting [Delgado] up for a fall.” On the other hand, the prosecutor’s rationale for rejecting Delgado’s counteroffer is because of the severe sentences associated with California’s “Three Strikes” law.

Sadly, Delgado’s case is in stark contrast to other California “Three Strikes” law cases. Delgado’s case does not differ with respect to the charges against him or the manner he used to accomplish his crime. Delgado’s case deviates from other similar cases because Delgado was prepared to remain incarcerated for an additional three years in order to receive one less strike. The reason for this deviation is that Delgado realized the possible future consequences of accepting the prosecutor’s proposed plea agreement. Henderson also rationalized the prosecutor’s willingness to release Delgado from prison earlier than usual. By granting Delgado an early release, the prosecutor may “put him away for the rest of his life if he commits another crime.” Henderson realized that a “good deal” now is not a “good deal later,” and by

7. See Krikorian, supra note 1.
8. See id.
9. See id. The majority of criminal defendants would not request an additional prison term, and virtually every prosecutor would eagerly consent to a six-year term if their offer required a three year sentence. See id. This is particularly true because prosecutors realize that the majority of offenders incarcerated in prison will actually serve less time in prison than what the defendant was sentenced to by the court. See TRUTH IN SENTENCING, supra note 2.
10. See Krikorian, supra note 1. “First strike” defendants are defined as defendants that receive their first strikable offense, without regard to whether it is violent or serious. See id.
11. Id.
13. See Krikorian, supra note 1.
14. See generally CAL. PENAL CODE §§ 667, 1170.12 (West 1999). The next felony conviction, serious or not, will result in a substantial sentence, without regard to whether it is Delgado’s first or second violent or serious felony conviction. The state’s contention is that if Delgado’s strike is his second, then Delgado will be forced to serve a double sentence. However, if the next conviction is his third strike, the prosecutor gains a twenty-five year sentence. See id.
granting Delgado an early release now, the likelihood of a twenty-five year sentence in the future is substantially increased.\textsuperscript{16} California’s “Three Strikes” law results in disparate treatment of criminal defendants because it allows first strike defendants to plea bargain without requiring rehabilitation, but then severely punishes them if they commit a new offense. Part I of this Comment discusses the law, and how it emerged from the old habitual offender statutes. It also discusses the historical aspects of the plea bargaining system and the anti-plea bargaining clause contained in California’s “Three Strikes” law. Part II analyzes the ramifications of using plea bargaining under the “Three Strikes” law, and specifically the crime rate in those California counties that over-utilize the law. This section will also analyze the unproportionate increase in plea-bargaining that occurred with the implementation of the law, and the future consequences of plea bargaining if the law is ever repealed. Part III recommends that defendants cease plea bargaining first strike offenses unless they receive appropriate rehabilitation. Finally, this Comment concludes by reemphasizing the negative effects of plea bargaining under California’s “Three Strikes” law.

I. BACKGROUND

California’s “Three Strikes” law is not a modern concept in the battle against alleviating criminal behavior.\textsuperscript{17} Plea-bargaining, as well, is not a new technique used to reduce a defendant’s sentence.\textsuperscript{18} Both practices, however, have reemerged in California’s “Three Strikes” law, and both negatively affect the criminal defendant, starting as early as the defendant’s first strikable offense.\textsuperscript{19}

A. A New Law from an Old Concept

California’s “Three Strikes” law is not a novel concept to the unresolved issue of crime and punishment.\textsuperscript{20} Mike Reynolds initiated California’s “Three Strikes” law, after career criminal, Joe Davis, killed his daughter, Kimber Reynolds.\textsuperscript{21} The legislature and the California voters persistently ignored Reynolds’ attempts to pass the bill, until the murder of twelve-year-

\textsuperscript{19} See CAL. PENAL CODE §§ 667(g), 1170.12(c) (West 1999).
\textsuperscript{21} See Barr, supra note 17.
old, Polly Klass.\(^2\) After learning of Klass's heinous murder, Reynolds’ three strikes bill gained public backing. With both Reynolds’ and the public’s insistence, legislators refocused on “lock ‘em up” legislation to combat violent crime.\(^2\) In March of 1994, California’s “Three Strikes and You’re Out” bill was passed into law by the legislature.\(^2\) California voters approved the law by enacting Proposition 184 in November of that same year.\(^5\)

Contrary to the public’s perception, habitual offender statutes have existed since colonial times.\(^2\) As early as the 17th century, both England and colonial America passed criminal offender statutes imposing stringent penalties on offenders that persisted in committing similar criminal acts.\(^2\) These statutes, however, were rarely employed because criminal offenders normally received capital punishment for their first offense.\(^2\) In 1797, New York passed the first law mandating life sentences for habitual offenders that committed dissimilar criminal violations.\(^2\) Many states followed suit, as well as England, which enacted the “Habitual Criminal Law of 1869.”\(^3\)

Faced with tremendous public criticism, however, England had no alternative but to repeal the law in 1879 for being “unreasonable.”\(^4\)

The United States also experienced disapproval, but unlike England, the public inaccurately considered the habitual offender laws as an indispensable tool for unrehabilitated offenders.\(^2\) Throughout the Progressive movement,\(^3\)

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22. See id.; Michael Vitiello, Three Strikes: Can We Return to Rationality? 87 J. CRIM. & CRIMINOLOGY 395, 411 (1997). Ironically, Marc Klass first signed the proposed legislation, but after learning that nonviolent criminals would be punished under the wide net of the “Three Strikes” law, he ended up opposing it. See id.


25. See CAL. PENAL CODE § 667 (West 1999); Linda S. Beres & Thomas D. Griffith, Did “Three Strikes” Cause the Recent Drop in California Crime? An Analysis of the California Attorney General’s Report, 32 LOY. L.A. L. REV. 101, 101 (1998); Barr, supra note 17, at 112 (stating the two laws are virtually identical, but with the California voters approving the law, the only way to change the law is by a two-thirds vote by both houses).


27. See id.


29. See id.

30. Id.

31. See id.; Owens, supra note 15.

32. See Turner et al., supra note 23, at 17. See generally Castellano, supra note 20.

33. See Turner et al., supra note 23, at 17. The Progressive movement resulted from prominent leaders trying to change the laws to help rehabilitate offenders, instead of using typical punishments like capital punishment and life sentences. See id.
however, prominent leaders finally convinced the American public that these laws ineffectively deter criminal behavior. Despite this commendable effort, these laws flourished again during the Prohibition period of the 1920s. Unfortunately, the movement allowed the courts to minimize the practice of applying mandatory sentences because judges determined the appropriate sentence based on an individualized sentencing scheme.

In 1926, New York passed another law, mandating a sentence of life imprisonment for third time offenders. Other states followed New York's lead, and by 1949, forty-eight states enacted mandatory sentencing for repeat offenders. The majority of states, realizing judicial discretion is necessary in any criminal proceeding, did not require judges to impose mandatory sentences if circumstances compelled a different result. Unfortunately, judicial discretion was removed in the 1970s, when legislators required judges to impose sentences for repeat offenders, without regard to the particular individual.

Today, habitual offender statutes incarcerate a large percentage of repeat offenders, and the "Three Strikes" law is another attempt to punish chronic offenders. California began imposing life sentences on habitual offenders in 1986, but still enacted the harshest "Three Strikes" law in the country. Twenty-three other states and the federal government have developed their own versions of the law, and at least eighteen of these states had habitual offender statutes already in place.

The renewed interest in combating crime by using habitual offender statutes is not a difficult concept. The California Supreme Court quoted the Legislature, and pronounced the underlying policy behind California's "Three Strikes" law. The law is "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." Although this reason-

35. See Turner et al., supra note 23, at 17.
36. See id. (stating this law is the Baumes law).
37. See Shinbein, supra note 26; Turner et al., supra note 23, at 17.
38. See generally People v. Superior Ct. (Romero) 917 P.2d 628 (Cal. 1996); Shinbein, supra note 26.
39. See Harvard Law Review Association, Changes in Prison and Crime Demographics, 111 HARV. L. REV. 1875, 1881 (1998) (by 1979, every state has some form of mandatory sentencing for certain types of offenses); Shinbein, supra note 26; TRUTH IN SENTENCING, supra note 2. This lack of discretion for repeat offenders, or recidivists, directly resulted from mandatory sentencing, instead of indeterminate sentencing. See id.
40. See Austin, supra note 23, at 240; Turner et al., supra note 23, at 17.
42. See Harvard Law Review Association, supra note 39, at 1880; Turner et al., supra note 23, at 17; Sundt, supra note 23 (finding 88% of a public sample from Cincinnati, Ohio supported the "Three Strikes" law). See generally TRUTH IN SENTENCING, supra note 2.
43. People v. Dotson, 16 Cal. 4th 547, 556 (1997).
ing, on the surface, appears to adequately detail the strategy to eliminate repeat offenders, it fails to clearly explain the reason for using these laws when habitual offender statutes are already in place.  

Furthermore, the policy behind the "Three Strikes" law fails to clearly define the scope of the law because numerous nonviolent offenders are included under the law's wide reach.  

The public, persuaded by their fear of crime, demands that the criminal justice system incarcerate all repeat offenders. Proponents of the "Three Strikes" bill, under the guise of Proposition 184, used this fear to implement the bill. In the published argument, proponents of Proposition 184 stated, "[k]eep career criminals, who rape women, molest innocent children and commit murder, behind bars where they belong."  

Ironically, the "Three Strikes" law puts very few rapists, child molesters, and murderers behind bars.  

Instead, the law merely enables society to institutionalize nonviolent offenders for a minimum of twenty-five years.

B. Historical Perspectives of Plea Bargaining

Plea-bargaining is presumed to have existed since the inception of crime and punishment. The United States implemented plea-bargaining primarily as a time saving device for disposing of criminal cases in the late nineteenth and early twentieth centuries. By the 1920s, plea-bargaining had evolved into an accepted procedure throughout the court system.  

Currently, settlement negotiations are a "routine" method for disposing of cases, especially in the criminal justice system.

44. See Turner et al., supra note 23, at 17.
46. See Mauer, supra note 16, at 30. Society fails, however, to take into account the individual's rehabilitation. See id.
48. Id.
49. See Mauer, supra note 12, at 33 (stating that the violent criminals are already sentenced under other laws for long incarceration periods, so the only ones affected by three strikes are nonviolent offenders).
53. See Guidorizzi, supra note 18, at 759.
Although plea agreements are a customary way of expediting criminal cases, there is not a standard definition for plea-bargaining. Generally, plea-bargaining is defined as:

[a]ny arrangement arrived at by negotiations between a defendant, either with or without assistance of counsel, and the prosecuting attorney, whereby a criminal charge or potential criminal charge is resolved in some fashion other than by a trial on the merits, and either or both parties promise to do something or to refrain from doing something with respect to the matter.

This broad definition is required because plea negotiations vary in each jurisdiction. Even with these deviations, there are two main categories of plea-bargaining: explicit plea-bargaining and implicit plea-bargaining.

Explicit plea-bargaining results when a criminal defendant negotiates with the prosecutor to reduce charges or sentences. In exchange for a guilty plea, the prosecutor has many options. The prosecutor may either apply charge bargaining, which occurs when the original charges are reduced to less serious charges; count bargaining, where collateral charges are dropped; or sentencing bargaining, where the prosecutor assures the defendant a lenient sentence. It should be noted, however, explicit plea-bargaining may also include the prosecutor’s agreement to recommend a sentence to the sentencing judge or to remain silent during sentencing.

Implicit plea-bargaining occurs when the defendant and the prosecutor

55. Compare CAL. PENAL CODE § 1192(c), as amended by 1999 Cal. Legis. Serv. Ch. 298 (A.B. 381) (West 1999) defining plea-bargaining as “any bargaining, negotiation, or discussion between a criminal defendant or his or her attorney and the prosecuting attorney or judge wherein the defendant agrees to plead guilty or nolo contendere in exchange for promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge regarding charging or sentencing.”; with BLACKS LAW DICTIONARY 1152 (6th ed. 1990) defining plea-bargaining as,

the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant’s pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge.”

Id.

56. 25 AM. JUR. TRIALS § 69 (1978 & Supp. 1998) (stating the range of possibilities for resolution of criminal charges in the plea bargaining process is open-ended).

57. See id.


60. See Champion supra note 59; Frase & Weigend supra note 59.

61. See Misner, supra note 58. It should be noted that prosecutors are not restricted to only these options. See id.
bargain for concessions because the defendant realizes the likelihood of an extremely unsympathetic sentence if the case goes to trial.62 Judicial approval is not mandatory before a valid agreement occurs, and prosecutors may dismiss charges in exchange for guilty pleas.63 Implicit plea-bargaining is fraught with difficulties because the prosecutor may manipulate the system by acting as a judicial officer.64 With implicit plea-bargaining, many offenders receive the sentence that is appropriate for the prosecutor, but not for the crime, or for that matter, the court.65

Settlement negotiations, involving the prosecutor and the defendant, either implicitly or explicitly, are widely accepted in the United States.66 Respectability of the plea-bargaining process has advanced considerably, despite a multitude of protests.67 As discussed infra, these criticisms curtail many negotiation practices, but have not, and probably will not, eliminate plea-bargaining entirely.68

Before discussing the criticisms of plea-bargaining, it is first necessary to briefly comment on the advantages of plea negotiations. One primary advantage for the prosecutor is to procure a guilty plea when the strength of the evidence is questionable.69 The state also profits from these negotiations because the prosecutor saves time, expense, uncertainty, and maintains high conviction rates.70 Alternatively, plea-bargaining benefits defendants because they receive reduced sentences.71 Furthermore, pleading defendants assume responsibility for their criminal behavior.72 This is beneficial because pleading defendants are closer to reform than non-pleading defendants who defer rehabilitation until the resolution of a trial.73

As briefly mentioned above, objections stemming from the negotiation

62. See Guidorizzi, supra note 18, at 756.
63. See id.
64. See AM. JUR. Trials, supra note 56; Champion, supra note 59; FELONY SENTENCES IN STATE COURTS, supra note 54, at 10.
65. See generally AM. JUR. Trials, supra note 56; Champion, supra note 59; FELONY SENTENCES IN STATE COURTS, supra note 54; Figuerira-McDonough, supra note 51; Hunter A. McCallister & Norman J. Bregman, Plea Bargaining by Defendants: A Decision Theory Approach, 126 J. SOC. PSYCHOL. 105 (1985).
66. See Champion, supra note 59; Frase & Weigend, supra note 59.
67. See AM. JUR. Trials, supra note 56; Champion, supra note 59; FELONY SENTENCES IN STATE COURTS, supra note 54, at 10; Figuerira-McDonough, supra note 51.
68. See RUTH MASTERS & CLIFF ROBERSON, INSIDE CRIMINOLOGY 15 (1990); AM. JUR. Trials, supra note 56 (stating plea-bargaining is needed to curtail the large numbers of cases in the criminal justice system); Figuerira-McDonough, supra note 51, at 103.
69. See Misner, supra note 58.
70. See MASTERS & ROBERSON, supra note 68; Smith, supra note 52, at 950.
71. See Smith, supra note 52, at 950-51.
73. See id. This results because the plea bargaining defendants accept their punishment soon after sentencing. Non-plea bargaining defendants continue to believe that rehabilitation is unnecessary because the jury may find them not guilty of the charges against them. See id.
process are abundant, but a few criticisms are worth detailing. First, there is not a balancing of bargaining power. Prosecutors have considerably more power in the bargaining process than the defendant. This unfair bargaining power permits prosecutors to intrude on judicial functions. With successful negotiations, the criminal justice system allows prosecutors to predetermine the sentence a particular defendant receives. This is particularly unfair to first strike defendants because they may not understand the criminal justice system and would be unable to fully appreciate the consequences of pleading guilty.

Second, plea negotiations allow practitioners to rapidly finish cases without taking into account the defendant’s best interest. These bargaining practices become a daily habit for a large percentage of prosecutors and defense attorneys. The ease of pleading defendants enables practitioners to utilize the negotiation process as an initial mechanism, instead of a viable option.

The last major criticism of plea-bargaining is the general notion of how it enables offenders to receive lighter punishments in exchange for guilty pleas. The public, the primary advocate opposing negotiation agreements, complains that criminal defendants “get away” with their criminal behavior. Defendants are only receiving inconsequential sentences compared to the sentence they would normally receive without plea-bargaining. Critics believe these criminal defendants do not receive their just punishment for the crimes they commit. The legislature, responding to this attack by the pub-

74. See id. at 75-76; Jennifer F. Reinganum, Plea Bargaining and Prosecutorial Discretion, 78 AM. ECON. REV. 713, 713 (1988); Alshuler, supra note 54.
75. See Wendy Kaminer, Games Prosecutors Play, AM. PROSPECT, Sept. 1, 1999, at 20; Alshuler, supra note 54, at 933; Figuerira-McDonough, supra note 51 (stating that because plea negotiations are conducted behind closed doors, defendants may be denied their due process rights); Reinganum, supra note 74.
76. See Alshuler, supra note 54, at 933; Reinganum, supra note 74.
77. See Bradley, supra note 72, at 75-76.
78. See David Sisler, Plea Bargain, AUGUSTA CHRONICLE, Oct. 5, 1996, at 30; Alshuler, supra note 54, at 933.
79. See AM. JUR. Trials, supra note 56; Alshuler, supra note 54.
80. See Aogan Mulcahy, The Justification of “Justice”: Legal Practitioners’ Accounts of Negotiated Case Settlements in Magistrates’ Courts, 34 BRIT. J. CRIMINOLOGY, 411, 411 (1994); Alshuler, supra note 54; Figuerira-McDonough, supra note 51, at 103. A number of legal practitioners believe trials are unnecessary because a significant percentage of defendants are “morally culpable and substantially guilty.” Id. Prosecutors do not only share this opinion, but it is a common assumption between defense attorneys as well. It is particularly alarming if the court appoints an attorney with these viewpoints for the defendant because an indigent defendant cannot afford to hire another attorney. See id.
81. See MASTERS & ROBERSON, supra note 68; Guidorizzi, supra note 18, at 768; Sisler, supra note 78.
82. See Guidorizzi, supra note 18, at 768; Sisler, supra note 78.
83. See Jeff Brown, Politics and Plea Bargaining: Victims’ Rights in California by Candace McCoy, 45 HASTINGS L.J. 697, 699 (1994); Guidorizzi, supra note 18, at 768.
84. See Brown, supra note 83; Guidorizzi, supra note 18, at 768.
lic, continues to make attempts at curbing the use of plea-bargaining.\textsuperscript{85} For example, in 1982, the California voters approved Proposition 8, also known as the "Victims Bill of Rights," yet plea-bargaining continues to thrive.\textsuperscript{86}

C. The Enactment of California's "Three Strikes" Law and the Ban on Plea-Bargaining

In March of 1994, the legislators passed into law California Penal Code section 1170.12, which the California voters later validated by the passage of California Penal Code section 667.\textsuperscript{87} This Code section is now commonly known as the "Three Strikes" law. As described earlier, these two virtually identical laws require mandatory sentences for repeat offenders.\textsuperscript{88} As previously mentioned, the first violent or serious felony conviction is not subject to sentencing enhancements under this law because that is deemed to be the first strike. However, if a defendant is convicted of a second violent or serious felony, the law mandates a double sentence for that conviction.\textsuperscript{89} This is then the second strike. If a defendant is then convicted of a third violent or serious felony, he bears the greater sentence out of three options.\textsuperscript{90} Those options include either; a tripled sentence, a twenty-five year to life sentence, or an independent sentence by the court, whichever is greater.\textsuperscript{91}

The most obscure, but significantly alarming, provision introduced in California Penal Code sections 1170.12 and 667 is the anti-plea-bargaining clause.\textsuperscript{92} This clause limits the amount of prosecutorial plea bargaining in

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\item \textsuperscript{85} See sources cited supra note 84.
\item \textsuperscript{86} CAL. PENAL CODE § 1192(c), as amended by 1999 Cal. Legis. Serv. Ch. 298 (A.B. 381) (West 1999); Steven V. Vartabedian, Enhancing Sentences with Prior Felony Convictions: The Limits of "Without Limitation," 23 PAC. L.J. 1051, 1052 (1992); Brown, supra note 83; Shinbein, supra note 26, at 188. The "Victims Bill of Rights" appears to curtail the plea-bargaining practices involving serious felony cases. Despite this attempt to curb plea-bargaining, negotiations have not drastically declined as anticipated. See id. The reason for the stable amount of plea-bargaining is because Proposition 8 contained a serious flaw. See id. It only requires the prosecutor to abstain from plea-bargaining if the prosecutor files the serious felony case in superior court. See id. This loophole did not eliminate negotiation settlements because the prosecutor typically initiated the serious felony case in the municipal court, thereby enabling the prosecutor and defendant to plea bargain any serious felony. See id. This loophole may be eliminated with the consolidation of municipal and superior courts in certain California counties. See id.
\item \textsuperscript{87} CAL. PENAL CODE §§ 667, 1170.12 (West 1999).
\item \textsuperscript{88} See id.
\item \textsuperscript{89} See id. The felony does not have to be a serious or violent felony in order to receive a double sentence under the law. See id.
\item \textsuperscript{90} See id. § 1192(c), as amended by 1999 Cal. Legis. Serv. Ch. 298 (A.B. 381) (West 1999); CAL. PENAL CODE §§ 667.5(c), 1170.12(a) (1999). Again, the felony conviction does not have to be serious or violent to qualify for a sentence under the "Three Strikes" law. Although the crime is not violent or serious, the sentence will still require a third strike conviction unless the judge uses discretion to strike a prior offense. See People v. Superior Ct. (Romero), 917 P.2d 628 (Cal. 1996).
\item \textsuperscript{92} See id. §§ 667(g), 1170.12(c) (West 1999).
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violent and serious felony cases.\textsuperscript{93} Both statutes have identical clauses prohibiting plea-bargaining, and each statute states: "[p]rior felony convictions shall not be used in plea bargaining . . . The prosecutor shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation . . . ."\textsuperscript{94}

Nevertheless, these statutes allow exceptions to the general rule against plea-bargaining strike cases.\textsuperscript{95} For example, a prosecutor may move to dismiss a prior felony conviction if it is in furtherance of justice or if there is insufficient evidence to prove the prior conviction.\textsuperscript{96}

California's "Three Strikes" law is a further attempt by the legislature and the California voters to restrict the unbridled use of plea-bargaining.\textsuperscript{97} The legislature and the voters may be pleased with the law's ability to curtail the amount of negotiations, but the desired effect is not the result of the anti-plea-bargaining clause.\textsuperscript{98} The decrease of plea negotiations in second and third strike cases is a consequence of defendants' unwillingness to settle their cases because they have nothing to lose and everything to gain by going to trial.\textsuperscript{99} The reluctance to settle results in an increase of trials, as well as a backlog of cases awaiting trial.\textsuperscript{100}

During California's first year of implementing the "Three Strikes" law, prosecutors pled only fourteen percent of second strike defendants and 6 percent of the third strike cases.\textsuperscript{101} In San Diego, the amount of trials was significantly lower; only forty percent of the third strike defendants proceeded to trial.\textsuperscript{102} Despite a lower percentage in San Diego, the law compelled San Diego to institute specialized courts to solely handle three strikes proceedings.\textsuperscript{103} In Los Angeles, for example, the proportion of cases pending

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\begin{footnotesize}
\textsuperscript{93} See id.  \\
\textsuperscript{94} Id.  \\
\textsuperscript{95} See id. §§ 667(f)(2), 1170.12(d)(2).  \\
\textsuperscript{96} See id. The Penal Code states that "[t]he prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the interest of justice pursuant to Penal Code section 1385, or if there is insufficient evidence to prove the prior conviction." Id.  \\
\textsuperscript{98} See James Wall, Three Steaks and You're Out, 337 ECONOMIST 54, 54 (1995).  \\
\textsuperscript{99} See id.  \\
\textsuperscript{100} See id.; NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE: MANDATORY SENTENCING, at 2 (1998) [hereinafter KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE].  \\
\textsuperscript{101} See Owens, supra note 15.  \\
\textsuperscript{103} See id.; Perry, supra note 97.
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trial during the first year increased 144% from the previous year. 104

The percentage of cases where prosecutors dismiss, or "strike," charges vary among California counties. 105 For instance, more third strike defendants are convicted in Sacramento, Los Angeles, and San Diego than all other counties in California combined. 106 Prosecutors in these counties, however, strike sixty-seven percent in Sacramento, forty-four percent in Los Angeles, and twenty-five percent in San Diego. 107 Notwithstanding these figures, other California counties are more inclined to strike prior offenses. 108 In Alameda County, for instance, prosecutors strike virtually all third strike offenses and charge the offenders as second strike defendants. 109 Alameda County is the second most lenient county under the "Three Strikes" law, and Alameda District Attorney Thomas J. Orloff admits he selectively exercises his discretionary authority. 110 Alameda prosecutors only invoke the law when the defendant's third strike charge is a serious or violent felony. 111

The Court of Appeal for the Fourth District reviewed the discrepancy in prosecutorial discretion between San Diego and San Francisco Counties. 112 In People v. Andrews, Andrews was convicted of possessing a single rock of cocaine (.1 gram), as well as a misdemeanor possession of drug paraphernalia in San Diego County. 113 Andrews was sentenced under the "Three Strikes" law. 114 On appeal, Andrews contended he was denied his equal protection and due process rights because he would not have received a three strikes sentence if he were charged in San Francisco. 115 Despite the disparity in prosecutorial discretion in San Diego and San Francisco, the court held

104. See Wall, supra note 98.
106. See High Times, California's "3 Strikes" Jails Cannabis Users (visited Oct. 13, 1999) <http://www.hightimes.com/hit/mag/9608/calthree.html> (stating that 85% of San Diego residents voted for the "Three Strikes" law. Coincidentally, Governor Pete Wilson, who signed the bill into law, was a former San Diego Mayor); Perry & Dolan, supra note 105; THREE STRIKES AND YOU'RE OUT, supra note 105, at 3.
107. See Perry & Dolan, supra note 105.
108. See Chiang, supra note 105; THREE STRIKES AND YOU'RE OUT, supra note 105.
110. See Steven Pressman & Jennifer Kae, Three Strikes: The Law was Intended to Send a Clear Message to Repeat Offenders. But No One Agrees what the Message is, CALIFORNIA LAWYER, October, 1996, at 33.
111. See id.
113. See id.
114. See id.
115. See id. In fact, the San Francisco District Attorney would have sought a probation sentence for Andrews because the District Attorney predominately exercises its discretion in strike cases and rarely implements the "Three Strikes" law. See id.
the law did not deny Andrews of his due process rights. The court justified the San Diego prosecutor’s discretion because the prosecutor was complying with the “Three Strikes” law, and admonished San Francisco for not doing the same. San Diego Superior Court Judge Thomas Whelan stated the holding in more practical terms: “[a] guy in Alameda County [or San Francisco] with a rock of cocaine who qualifies for three strikes faces a maximum of three years and technically probation. If the guy drives down here to San Diego, it’s 25 to life.” It appears the “Three Strikes” law does not limit prosecutorial discretion, but rather judicial discretion.

II. ANALYSIS

California’s “Three Strikes” law is a highly debated law, and it receives adamant supporters, as well as unrelenting critics. Three strikes critics believe the law is poorly written, over broad, and fails to take into account the defendant’s individualized circumstances, including the “...offender’s particular disposition, rehabilitative history, [and] the likelihood of future criminal acts.” Additionally, the law is not relieving California of violent offenders, as voters generally believe.

Notwithstanding these criticisms, the “Three Strikes” law yields disproportionate results to all defendants that plea bargain, but particularly to first strike offenders. An illustration of the disparity is easily demonstrated by a typical petty theft offense. A petty theft charge is not a serious or violent fel-

116. See id; THREE STRIKES AND YOU’RE OUT, supra note 105.
118. Chiang, supra note 105.
119. See Kaminer, supra note 75; KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE, supra note 100. But see People v. Superior Ct. (Romero), 917 P.2d 628 (Cal. 1996) (stating that judicial discretion is an appropriate tool in sentencing strike defendants).
120. See Derrick Z. Jackson, Cellucci’s Wicked Pitch, BOSTON GLOBE, Mar. 5, 1999, at A17; Owens, supra note 15, at 144.
121. Owens, supra note 15, at 144. (stating the law also fails to look at an offender’s age, criminal acts, and the ability to be rehabilitated).
122. See id. According to the California Legislative Analyst’s Office, the percentage of violent offenders convicted under the “Three Strikes” law is insubstantial. See Jackson, supra note 120. Only 20% of the second strike convictions, and 38% of the third strike convictions were violent offenses. See id. The majority of three strike convictions are drug possession, robbery, burglary and petty theft. See id.; see also Antonio Olivo, Families Of Inmates March in Protest of 3-Strikes Law Courts,” Critics Say Measure is Unfair to Nonviolent Felons and has no Effect on Crime Rates, L.A. TIMES, Mar. 3, 1999, at B1 (remarking on a case involving Dan Johnson, a San Juan Capistrano resident who was sentenced for a small quantity of narcotics, his prior convictions were over twenty years old); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION, 1998: CHANGES 1997-98 WITH TRENDS 1993-98, at 1 (1999) (finding crime victims experience 22.9 million property crimes (defined as burglary, motor theft, and household theft) compared to 8.1 million violent crimes (rape or sexual assault, aggravated and simple assault and robbery)); Latest statistics by CDC (visited Oct. 23, 1999) <http://www.facts1.com/ general/stats.htm> [hereinafter Latest Statistics]; Kerr, supra note 102.
Plea bargaining is common in both felony and misdemeanor cases. In felony cases, the defendant may plead guilty to a lesser included offense or to a lesser degree of the charged crime. This scenario becomes more complex when the defendant pleads guilty to two burglaries, either at the same time or on different occasions. The sentence is unduly harsh because the defendant faces a third strike for a minor misdemeanor. Although the perception is that the “Three Strikes” law eliminates plea bargaining completely, that is not entirely correct. In reality, the law encourages first strike defendants to plead guilty because they receive substantially less time in return for their guilty plea. Unfortunately, before the defendant realizes the effects of plea bargaining to a minor crime, the defendant is facing twenty-five years to life.

A. County Comparisons of California’s “Three Strikes” Law and the Consequences to First Strike Defendants

The Bureau of Justice Statistics study based on the 1991 incarceration rates establishes that 5.1 percent of the United States population will be incarcerated, in state or federal prison, at least once during their lifetime.120

125. See id.; Barr, supra note 17. The term “wobbler” was coined because the prosecution has discretion to charge an offense as a felony or misdemeanor. See id. Under three strikes, the court has discretion to reduce a “wobbler” if the prosecutor decides to charge the defendant with a felony. See generally People v. Superior Ct. (Romero), 917 P.2d 628 (Cal. 1996).
127. See Beres & Griffith, supra note 25, at 121; Three Strikes and You’re Out, supra note 105, at 3.
128. See Three Strikes and You’re Out, supra note 105, at 3.
130. See Bureau of Justice Statistics, U.S. Dep’t of Justice, Life Time Likelihood of Going to State or Federal Prison, at 1 (1997) [hereinafter Life Time Likelihood] (stat-
Since 1991, these figures have substantially increased while the United States population has remained consistent.\(^{131}\) This incarceration rate is significantly higher in California because California imprisons more individuals than any other state.\(^ {132}\) As of July 1, 1999, California prisons housed well over 160,000 inmates.\(^{133}\) The California Department of Correction’s Master Plan predicts the figure will expand to over 176,000 by April of 2004.\(^ {134}\) The inmate population in California prisons certainly will not decrease, and more likely will exceed the maximum operating capacity with the enactment of the “Three Strikes” law.\(^ {135}\)

The California Department of Corrections (CDC) also compiles statistics on strike offenses.\(^ {136}\) CDC estimates that by 2002, at least 55,000 prisoners in California will be second or third strike offenders.\(^ {137}\) This is a well-founded estimate because 26,000 were in prison for a second or third strike offense in 1996 and 32,575 by August of 1997.\(^ {138}\) With these figures, continuing to employ the “Three Strikes” law for nonviolent offenses drastically hampers alleviating the prison population.\(^ {139}\)

Turning to the separate counties within California, it currently seems that a first strike offender’s chance of conviction under California’s “Three Strikes” law is based primarily on the jurisdiction where the defendant is first convicted.\(^ {140}\) Criminal defendants typically commit crimes in counties where they reside, and therefore are prosecuted and convicted in these same counties.\(^ {141}\) Different sentencing schemes result depending usually on where the defendant is living at the time of the offense.\(^ {142}\)

\(^{131}\) See id. at 6; Beres & Griffith, supra note 25, at 104.


\(^{133}\) See California Department of Corrections, CDC Facts (visited Sept. 7, 1999) <http://www.cdc.state.ca.us.htm>.

\(^{134}\) See id.

\(^{135}\) See id.

\(^{136}\) See Latest Statistics, supra note 122.

\(^{137}\) See id.

\(^{138}\) See id; California Department of Corrections, supra note 133.

\(^{139}\) See Laura Gatland, Three Strikes a Soft Pitch: Most States will Send Few to Prison under New Laws, 84 A.B.A. J., Feb. 1988, at 29; Truth in Sentencing, supra note 2, at 3 (stating the prison population has increased seven percent annually in state prisons between 1990 and 1997); Latest Statistics, supra note 122.


\(^{141}\) See Masters & Roberson, supra note 68, at 201-09.

\(^{142}\) See Males et al., supra note 140.
The National Institute of Justice (NIJ) conducted a study of twelve counties in California and found a pronounced discrepancy in sentencing from county to county after the enactment of the “Three Strikes” law.\footnote{See id.; Val Werier, Jailing Them Doesn’t Help, WINNIPEG FREE PRESS, Mar. 18, 1999, at A12.} As mentioned earlier, Sacramento, Los Angeles, and San Diego counties convict more third strike offenders than all other counties in California.\footnote{See Males et al., supra note 140 (stating Sacramento and Los Angeles each convict 3.6 per 1000 third strike convictions, and San Diego convicts 3.4 per 1000 third strike convictions).} Specifically, San Diego, sends more second and third strike defendants to prison per capita than any county.\footnote{See id. (stating San Diego has an average of 35.3 per 1000 cases for second and third strike cases, compared to Sacramento with 26 per 1000, and Los Angeles with 33.5 per 1000); Olivo, supra note 122; Perry & Dolan, supra note 105.} It would seem to reason that because Sacramento, Los Angeles, and San Diego imprison more strike offenders, these counties would experience a significant reduction in the crime rate.\footnote{See Janet Wilson, Rally Calls Foul on “Three Strikes” Crime: The Fifth Anniversary of the California Law Brings 50 Protesters to the Orange County Circle, L.A. TIMES, Mar. 8, 1999, at B1; Bill Ainsworth, “Three Strikes” Splits Former Comrades against Crime, SAN DIEGO UNION-TRIB., June 6, 1999, at All (other states have seen a decline in the crime rate without the implementation of the “Three Strikes” law); Males et al., supra note 140.} Surprisingly, the crime rate in counties heavily relying on the “Three Strikes” law are not experiencing as great a decline as other counties that are restrictively applying the law.\footnote{See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, at 1 (1999); Henry Weinstein, California and the West 3-Strike Law Overstated, Study Says Report: Two Professors Contend there is no Evidence it Reduces Crime Rate Among Repeat Offenders as the Attorney General has Asserted, L.A. TIMES, Oct. 11, 1998, at A3 (stating that many politicians, including Attorney General Dan Lungren, believe the crime rate has decreased because of the “Three Strikes” law. The crime rate, however, dropped before the “Three Strikes” law was implemented, and other states without the “Three Strikes” law have seen a decrease as well. The main reasons for the decline in the crime rate is because of community policing); Beres & Griffith, supra note 25, at 127 (remarking that the homicide rate is comparable to other states without the “Three Strikes” law. The greatest drop in the crime rate was in urban minority youth. Although the crime rate appears to drop more in California, it is incorrect because California has a large urban population, where other states do not); Males et al., supra note 140.}

This fact can be seen in Santa Clara County. Santa Clara, the sixth most frequent county to employ the “Three Strikes” law experienced a rise in violent crimes after the “Three Strikes” law went into effect.\footnote{See id. (San Francisco convicts .3 per 1000 of third strike defendants and Alameda at .7 per 1000 third strike defendants); Jackson, supra note 120 (stating that San Francisco had a 28% decline in the crime rate, compared to other California counties).} San Francisco and Alameda, two counties that infrequently employ the “Three Strikes” law, experienced the greatest drop in the crime rate for violent offenses.\footnote{See id. (stating San Francisco has an average of 149.1 per 1000 crimes in 1998, and Los Angeles has 148.7 per 1000 crimes in 1998); Wilson, supra note 146.} Unfortunately, the crime rate in counties uniformly using the “Three Strikes” law is not decreasing as steadily as in counties that use discretion when applying...
Combining the high number of second and third strike offenders incarcerated and the increased crime rates in those counties strictly imposing the "Three Strikes" law, there is no doubt that the majority of criminal acts are being committed by first strike offenders. Therefore, it seems that the law severely punishes second and third strike offenders, while releasing first strike offenders so that they can continue to commit criminal acts.\textsuperscript{151}

With first strike offenders excessively committing crimes, the prospect of repeat offenses is readily apparent.\textsuperscript{152} The majority of criminals in United States are repeat offenders, so the likelihood that a first strike offender will become a habitual offender is extremely plausible.\textsuperscript{153} The probability of repeat offenses increases in all California counties, but the risk is even greater in counties that uniformly implement the "Three Strikes" law.\textsuperscript{154}

B. Excessively Plea Bargaining First Strike Defendants

After the initiation of California’s "Three Strikes" law, plea agreements totaled ninety-one percent of the felony convictions.\textsuperscript{155} The consistency in plea-bargaining has continued even though a large percentage of second and third strikes.

\textsuperscript{150} See Males et al., supra note 140; Jackson, supra note 120; Weinstein, supra note 147.

\textsuperscript{151} See Bureau of Justice Statistics, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 1994, at 2 (1998) [hereinafter Felony Defendants in Large Urban Counties]; Key Legislative Issues in Criminal Justice, supra note 100 (stating there is an increase in trials, as well as the crime rate when the prosecutor fails to strike prior convictions). This conclusion only makes sense because the majority of second and third strike offenders are incarcerated and therefore unable to commit crimes. See id. However, offenders without a record and first strike offenders are not incarcerated. Therefore, these are the groups that must be responsible for the majority of criminal behavior. See id.

\textsuperscript{152} See American Civil Liberties Union, 10 reasons to oppose "3 strikes, You're out," Library (visited Sept. 7, 1999) <http://www.aclu.org/library/por4.html>; Austin, supra note 23, at 239, 256.

\textsuperscript{153} See Bureau of Justice Statistics, U.S. Dep't of Justice, Correctional Populations in the United States, 1996, at Highlights (1999); Felony Defendants in Large Urban Counties, supra note 151; see also American Civil Liberties Union, supra note 152. The percentage of prior convictions for county jail inmates in 1996 was 72.7%. Out of this figure, 63% were previously on probation, and 58.4% were previously in jail or probation. These figures are inconsistent because many inmates previously served a jail or prison sentence and a probation sentence. See id.

\textsuperscript{154} See American Civil Liberties Union, supra note 152. The ACLU Union states the "Three Strikes" law does not have any deterrent effect because many criminals commit violent acts in anger, passion, or under the influence of alcohol or drugs. These spontaneous acts, or impulsive actives, are not the types of acts that can be deterred by a harsh punishment like three strikes. See id.

\textsuperscript{155} See Henry J. Reske, Hardly Hardball: Prosecutors in Most of 22 States Studied are not using Three Strikes Laws Against Repeat Offenders, 82 A.B.A. J. 26, 26 (1996); Alshuler, supra note 54, at 951; Felony Sentences in State Courts, supra note 54, at 10 (1999) (stating that this rate has not changed from 1988 to 1996. The figure has remained at approximately 90% since 1988); Gatland, supra note 139.
third strike defendants refuse to plea bargain.\textsuperscript{156} With the ease of plea bargaining, it is unlikely that states without the "Three Strikes" laws are likely to modify their sentencing practices. Therefore, the expected reduction in plea agreements by the passage of the "Three Strikes" law is nonexistent. With the numerous strike cases awaiting trial, as well as the stable amount of plea bargaining, it becomes apparent that first strike defendants are pleading guilty to more cases than ever before.\textsuperscript{157}

The amount of settlement agreements that result between second and third strike defendants compared to first strike defendants has dramatically declined since the law went into effect.\textsuperscript{158} A review of 12,600 cases in Los Angeles County found second and third strike defendants more likely to proceed to trial than first strike felony cases.\textsuperscript{159} Second strike cases are likely to remain unresolved sixteen percent longer and third strike cases forty-one percent longer, than first strike felony cases.\textsuperscript{160}

Although there is a great deal of negotiations before the prosecutor files charges, the broad discrepancy in plea agreements is profound.\textsuperscript{161} There are two possibilities for the inconsistency between the large percentage of plea settlement agreements that occur and the number of second and third strike defendants demanding jury trials.\textsuperscript{162}

One potential reason for the disparity between the consistent number of plea bargaining agreements and the large number of second and third strike cases going to trial is that these strike cases are not recognized as strike cases. The prosecutor is involved in charge bargaining or is automatically striking prior convictions.\textsuperscript{163} This argument has some merit because in Los Angeles, the district attorney filed fifteen percent fewer cases from the second quarter of 1995 to the second quarter of 1996.\textsuperscript{164} Despite the fifteen percent decrease, it is unlikely this reduction accounted for the large discrep-
ancy in plea bargaining because there are massive numbers of defendants sentenced under the “Three Strikes” law.\textsuperscript{165} Additionally, because of the high numbers of second and third strike convictions, the number of plea-bargained cases throughout the country should have dropped.\textsuperscript{166} Plea-bargaining, however, has remained consistent nationwide and continues to be prevalent for disposing of felony cases.\textsuperscript{167}

The most logical explanation for the discrepancy in plea-bargaining and the number of second and third strike trials is that more first strike offenders are pleading guilty to open the way for second and third strike trials.\textsuperscript{168} Prosecutors are more inclined to negotiate with a first strike offender because the law does not impede the prosecutor’s ability to plea bargain.\textsuperscript{169} Prosecutors, acting efficiently, give first strike defendants a better deal so the prosecutor may spend their time trying second and third strike cases. Unfortunately, first strike defendants gladly accept the prosecutor’s offer because the prosecutor gives them a reduced sentence in exchange for a guilty plea.\textsuperscript{170}

Although the prosecutor’s eagerness to plea bargain first strike cases appears contrary to the prosecutor’s objectives, pleading strike cases actually produces favorable results for the prosecutor.\textsuperscript{171} Prosecutors benefit from plea-bargaining first strike offenders because they know nonrehabilitated offenders continue to commit offenses when they are released from prison.\textsuperscript{172} Once the defendant returns, the prosecutor charges the defendant with a second or third strike and the defendant’s prison term automatically doubles or triples.\textsuperscript{173}

The main rationale for the prosecutor’s willingness to wait for defendants to return to the criminal justice system is that the majority of defendants facing their first strike offense are under the age of thirty.\textsuperscript{174} In fact, young males between the ages of eighteen and twenty-four commit the ma-

\begin{footnotesize}
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\item \textsuperscript{165} See id.
\item \textsuperscript{166} See id.
\item \textsuperscript{167} See Reske, \textit{supra} note 155; Alshuler, \textit{supra} note 54, at 931; \textit{Felony Sentences in State Courts, supra} note 54, at 10.
\item \textsuperscript{168} See Brown, \textit{supra} note 83, at 700.
\item \textsuperscript{169} See id. This applies under Proposition 8, as well as California’s “Three Strikes” Law, but this may change with the consolidation of municipal and superior courts in California. This was also shown in People v. Delgado, where the district attorney was willing to give a three year sentence in exchange for a guilty plea. See Krikorian, \textit{supra} note 1.
\item \textsuperscript{170} See Brown, \textit{supra} note 83, at 699-700.
\item \textsuperscript{171} See Krikorian, \textit{supra} note 1.
\item \textsuperscript{172} See id. Besides the longer sentence, the defendant must serve a minimum of 85% of the sentence. See id.; \textit{Cal. Penal Code} \S\S 667, 1170.12 (West 1999).
\item \textsuperscript{173} See \textit{Felony Defendants in Large Urban Counties, supra} note 151; \textit{Profile of Jail Inmates, supra} note 132; see \textit{generally Three Strikes and You’re Out, supra} note 105; \textit{Lifetime Likelihood, supra} note 130. There is a great likelihood of an offender committing a second or third offense, based on the number of repeat offenders in prison and in jails across the country. See id.
\item \textsuperscript{174} See Austin, \textit{supra} note 23, at 256; see \textit{generally Lifetime Likelihood, supra} note 130.
\end{enumerate}
\end{footnotesize}
jority of serious crimes.\textsuperscript{175} If a defendant is convicted between the ages of eighteen and twenty-four, he still has a minimum of six years before “aging out” of criminal behavior.\textsuperscript{176} Therefore, first strike defendants are likely to commit a second or third offense because of the increased frequency of criminal behavior in young offenders.\textsuperscript{177}

The Los Angeles District Attorney, in \textit{People v. Delgado}, readily confessed his inclination to postpone a stringent sentence until Delgado revisits the criminal justice system.\textsuperscript{178} The prosecutor also admitted there was nothing wrong with waiting for a first strike defendant to reenter the system in order to impose a harsher penalty.\textsuperscript{179} Instead of placing the first strike offender in work or educational programs, prosecutors are willing to remain idle until the first strike defendant “strikes” again so an additional conviction can be obtained.\textsuperscript{180} Ironically, in the same instance, numerous defendants eagerly plead guilty to their first strike offense without receiving any rehabilitative treatment. By allowing defendants to plea bargain, it almost certainly guarantees at least one more felony conviction because the defendant is not receiving any quality assistance to reform.\textsuperscript{181}

\textbf{C. Revocation of California’s “Three Strikes” Law?}

The ramifications of pleading defendants guilty to a first, second, or third strike are somber. The consequences may be better understood if California would initiate a study bill to evaluate the effects of plea-bargaining strike offenses. Unfortunately, on October 10, 1999, Gray Davis vetoed a proposed bill designed to investigate the effects of the “Three Strikes” law.\textsuperscript{182}

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\textsuperscript{176} See Mauer, \textit{supra} note 16, at 33.

\textsuperscript{177} See \textit{LIFETIME LIKELIHOOD}, \textit{supra} note 130, at 6; Mauer, \textit{supra} note 16, at 33; see \textit{generally PRISON AND JAIL}, \textit{supra} note 132. Between 1991 and 1995, the overall prison population in state prisons in the United States dramatically increased from 792,535 to 1,078,545, but the number of new court commitments rose from 337,478 to 361,464 within the same period. See id. New commitments are prisoners entering the prison from a sentence from the court, as opposed to parole violation, transferors, or escapees. See id. Approximately half of the new court commitments entered the prison system for the first time. Because California is one of the leading states to incarcerate defendants at a faster rate, many offenders that enter prison for the first time are from California and are subjected to the “Three Strikes” law. See \textit{LIFETIME LIKELIHOOD}, \textit{supra} note 132, at 6. Additionally, even if the offender manages to “age out” of the criminal behavior, the offender still has a chance at receiving a third strike sentence if the defendant is prosecuted for a minor felony. See id.

\textsuperscript{178} See Krikorian, \textit{supra} note 1.

\textsuperscript{179} See id.

\textsuperscript{180} See id.; “Three Strikes” Means 200 Years, \textit{supra} note 126 (the law does not alleviate a defendant from a sentence under the “Three Strikes” law, no matter how long it has been since the previous offense).

\textsuperscript{181} See \textit{PROFILE OF JAIL INMATES}, \textit{supra} note 132 (discussing the criminal history of the jail inmate that is awaiting trial, sentencing, or is serving a sentence).

\textsuperscript{182} See \textit{Latest Statistics}, \textit{supra} note 122.
With this veto, the answer to questions concerning plea-bargaining under the "Three Strikes" law may not come anytime in the near future.183

Although Gray Davis is attempting to hide the fact that the law is not working, there are still repercussions to pleading guilty, without regard to the first, second, or third strike.184 It will be practically hopeless for a pleading defendant to receive the same sentence compared to a non-pleading defendant if the "Three Strikes" law is ever modified or repealed.185

Defendants plea bargain because they receive better sentences compared to sentences after a trial. Defendants contemplate this factor when debating whether to take their case to trial. Unfortunately, if California's "Three Strikes" law is ever repealed, pleading defendants will suffer serious side effects by pleading guilty to a second or third strike. With the prosecutor's ability to reduce charges before filing the complaint, defendants will not be relieved of their sentence even if the agreement was based on the threat of a three strikes sentence.186 This will occur because courts will be reluctant to set aside a felony conviction, especially if no evidence suggests the defendant was sentenced under the law.187 This is troublesome for defendants throughout California because prosecutors are striking a great percentage of second and third strike charges.188 Unfortunately, reducing charges before filing the complaint will continue when the first strike defendant returns to court for the second and third time.189

California's Three-Strikes Project recently proposed to the California Attorney General's Office an amendment to repeal the "Three Strikes" law concerning nonviolent felonies.190 The proposal seeks to amend California's "Three Strikes" law by confining the law to violent or serious offenses.191 The amendment would retroactively apply to nonviolent second and third

183. See id.
184. See id.
185. See Owens, supra note 15; Perry, supra note 97. It should be noted that there is tremendous public support for the "Three Strikes" law, and it is very unlikely that the law will be repealed or overruled by judicial interpretation. If the law is modified or repealed, uncertainty will continue to exist for the offenders that plea bargained their strike cases. The number of San Diego voters who approved of the "Three Strikes" law was 75.6%, and San Diego juries have convicted 94% of the second and third strike defendants from initiation of the law until June of 1996. San Francisco, on the other hand, voted 57.3 to 42.7, and some San Francisco juries have refused to convict strike offenders, especially if the current offense is drug possession or property crimes. See id.
186. See Key Legislative Issues in Criminal Justice, supra note 100.
190. See Latest Statistics, supra note 122.
191. See id.
strike offenders sentenced under the "Three Strikes" law.\textsuperscript{192} Non-pleading defendants will automatically have their sentences reduced if the proposal is accepted.\textsuperscript{193} Unfortunately, disparate treatment results because non-pleading defendants contemplate the possibility of a longer term of imprisonment, but pleading defendants do not realize that plea-bargaining could actually result in a greater sentence.

If the proposed amendment is accepted, pleading defendants will possibly be incarcerated longer than non-pleading defendants for two reasons.\textsuperscript{194} First, the prosecutor gains longer sentences by using the "Three Strikes" law against the defendant.\textsuperscript{195} Prosecutors have the ultimate authority to strike a previous conviction, and they can use this power as a threat in the negotiation process.\textsuperscript{196} Although the defendant is sentenced under the law, the record does not show it.\textsuperscript{197} The court, without any evidence to suggest the defendant was sentenced under the "Three Strikes" law, will be reluctant to reverse the conviction.\textsuperscript{198}

Second, the prosecutor and defendant are involved in implicit plea-bargaining.\textsuperscript{199} The prosecutor does not technically offer the defendant anything in exchange for the agreement, but the prosecutor strikes a prior conviction if the defendant is willing to plead guilty.\textsuperscript{200} Under these circumstances, the court will probably conclude the defendant would have received the same sentence regardless of the "Three Strikes" law, so the conviction will stand because it was a harmless error.\textsuperscript{201}

Although California's "Three Strikes" law requires a complete ban on plea bargaining, it becomes readily apparent that similarly situated defendants receive unequal punishments depending on whether a defendant plea

\textsuperscript{192} See id.
\textsuperscript{193} See id. (It appears the recommendation unintentionally separates non-pleading and pleading strike defendants. This, however, leaves problems for the pleading defendant because the defendant will receive an unjust sentence compared to the non-pleading defendant.)
\textsuperscript{194} See Key Legislative Issues in Criminal Justice, supra note 100. It may be argued that a pleading defendant usually does not receive the same sentence as the non-pleading defendant. However, under the "Three Strikes" law, the same defendants are receiving similar sentences with or without plea bargaining because the prosecutor uses the law against the pleading defendant. See Gatland, supra note 139. Therefore, the pleading defendants receive greater sentences under the law. Unfortunately, if the law is repealed, the sentencing disparities will be profound. See id.
\textsuperscript{195} See Gatland, supra note 139.
\textsuperscript{196} See id.; McCallister & Bregman, supra note 65, at 105.
\textsuperscript{197} See Key Legislative Issues in Criminal Justice, supra note 100.
\textsuperscript{198} See id.; Alex Ricciardulli, The Strike Zone, 8 California Defender 1 (Summer, 1998); Abraham, supra note 188. This is particularly true because of the large amount of plea bargaining in California. It is ironic that although the plea bargaining process takes considerably less time than a trial, many judges will not review the case because it is a waste of time. See id.
\textsuperscript{199} See Key Legislative Issues in Criminal Justice, supra note 100; Guidorizzi, supra note 18, at 756.
\textsuperscript{200} See Guidorizzi, supra note 18, at 756.
\textsuperscript{201} See Abraham, supra note 188.
bargains. In trying to alleviate disparities in sentencing, amending or repealing California’s “Three Strikes” law actually creates more disparities for plea-bargaining defendants. Defendants who await trial will automatically have their sentence reduced if the law is modified or repealed, yet plea-bargaining defendants will not.

III. RECOMMENDATIONS

At first glance, plea-bargaining appears convenient and rewarding to the criminal defendant who faces a short term of incarceration in exchange for a guilty plea. Unfortunately, plea-bargaining under California’s “Three Strikes” law places a heavy disadvantage on the defendant. With little to gain and much to lose, many second and third strike offenders are willing to take their chances at trial.202 This reduction of plea agreements by second and third strike defendants, however, does not cause an overall reduction in plea agreements because more first offenders are pleading guilty.203 First strike defendants have an incentive to plead guilty because they receive better agreements with shorter sentences.204 In turn, prosecutors, with great discretion to charge, try these same defendants when they return with a second and third strike charge.205

Defense attorneys must stop plea bargaining cases merely out of routine.206 The majority of young offenders are first strike defendants, and they have a long time to “age out” of their criminal behavior.207 These same defendants are also likely to be poor and uneducated.208 By allowing first strike defendants to plead guilty to strikable offenses, defense attorneys are sentencing these defendants to a life behind bars.209 It is not in the client’s best interest to plead guilty to the first strike offense without receiving rehabilitation because the defendant ultimately emerges back into the criminal justice

202. See Wall, supra note 98.
203. See generally FELONY SENTENCES IN STATE COURTS, supra note 54; Gatland, supra note 139; Alshuler, supra note 54, at 931; Reske, supra note 155.
204. See Krikorian, supra note 1.
205. See TRUTH IN SENTENCING, supra note 2, at 13 (stating individuals sentenced under mandatory sentencing schemes are not released from prison until they are at least as old as when mandatory sentencing laws were implemented).
206. See Rebecca Marcus, Racism In Our Courts: The Underpinnings of Public Defenders and its Disproportionate Impact upon Racial Minorities, 22 HASTINGS CONST. L.Q. 219 (1994). Without funds, defense attorneys will be unable to try cases, but as the system stands now, indigent defendants are receiving inadequate representation. See id. With or without these funds, defense attorneys need to make severe changes in the way they conduct plea bargaining negotiations because resources will continue to dwindle until there is nothing left. See id.
208. See McCallister & Bregman, supra note 65, at 105.
209. See PROFILE OF JAIL INMATES, supra note 132; FELONY DEFENDANTS IN LARGE URBAN COUNTIES, supra note 151; see generally THREE STRIKES AND YOU'RE OUT, supra note 105; LIFETIME LIKELIHOOD, supra note 132.
system to receive a second or third strike offense.210

A suggestion may be to take every case to trial, but this is not appropri-
ate to resolve the problem created by the "Three Strikes" law.211 First, taking
all cases to trial is too expensive and time consuming for the court system.212
Second, defendants will not engage in rehabilitative programs until the jury
convicts them.213 Next, defendants are adamant about going to trial when
they face the possibility of a third strike conviction, but they are not when it
is the first strike offense.214 Last, defendants will not benefit from trials be-
cause their sentences will continue to withhold rehabilitative programs.

Sadly, however, defendants do not conceptualize the effects of pleading
guilty to the first strike offense although this conviction is just as devastat-
ing as the third. This is especially true when no rehabilitation exists for these
offenders.215 The only possible solution is to continue plea bargaining defen-
dants, but require defendants to undergo intensive rehabilitative sentencing.
Intensive rehabilitative sentencing, however, does not imply long prison sen-
tences because the majority of defendants do not require incarceration before
rehabilitation occurs.216 The only benefit for some first strike defendants sen-
tenced to prison is they will "age out" of their criminal behavior before they
are released.217 Incarcerating numerous first strike offenders does not stop

210. See sources cited supra note 209.
211. See David R. Thomson, How Plea Bargaining Shapes Intensive Probation Supervision Policy Goals, 36 CRIME & DELINQ. 146, 158 (1990); "Three Strikes" Means 200 Years, supra note 126; Kerr, supra note 102. It may be argued that all cases that may have harsh consequences to the defendant under the "Three Strikes" law should be tried. Although this is timely and expensive, prosecutors will be reluctant to prosecute second and third strike off-
fenses because they will be unable to handle the magnitude of trials. This will benefit nonvio-

tent second and third strike defendants because the prosecutor will only file the true "violent" and "serious" cases, instead of wasting taxpayers dollars convicting nonviolent offenders. This, however, is impractical because of the sheer numbers of criminal defendants and the amount of time it takes to try one case, let alone every case. See id.
212. See generally Kerr, supra note 102.
213. See supra text accompanying note 73; see generally Figuerira-McDonough, supra note 51.
214. See Wall, supra note 98.
215. See Bureau of Justice Statistics, Criminal Offender Statistics (visited Sept. 10, 1999) <http://www.ojp.usdoj.gov/crimoff.htm>. It may be contended that many first strike offenders will not reenter the criminal justice system. There is, however, no evidence to sug-
gest which defendants will reenter the criminal justice system during their lifetime, but it is clear nearly three-fourths of the jail and prison populations are repeat offenders. In 1983, 108,580 released from prison in eleven states, 62.5% were rearrested for a felony or serious misdemeanor within three years of the release; out of this percentage of recidivist, 46.8% were convicted again, and 41.4% returned to jail or prison. Therefore, it is apparent many of the first strike offenders will see the revolving doors of justice again. See id.
216. See Thomson, supra note 211, at 146.
217. See Carolyn Wolpert, Considering Race And Crime: Distilling Non-Partisan Policy from Opposing Theories, 36 AM. CRIM. L. REV. 265, 286 (1999); Castellano, supra note 20, at 439 (stating that rehabilitative programs are the only efficient way to reduce criminal behavior because jailing offenders only results in an increasing prison population); Mauer, su-
pra note 16, at 53; Reinhart, supra note 175.
criminal behavior, but instead fosters crime.\textsuperscript{218} If, however, it is necessary for the courts to sentence the offenders to prison, then the prison system must incorporate effective work and educational programs into the system, or criminal behavior will persist.\textsuperscript{219} The belief that prison alone rehabilitates criminal offenders is unsubstantiated, and without rehabilitative assistance, these offenders will not stop their criminal behavior.\textsuperscript{220}

Defendants not sentenced to prison must undergo intensive supervised probation programs that incorporate work and educational programs into the defendant’s sentence.\textsuperscript{221} Although funding is difficult, it is less costly when compared to the cost of incarceration per year in California prisons.\textsuperscript{222} Work and educational programs, however, must be designed with the offender’s needs in sight for any of these programs to assist the offender.\textsuperscript{223}

It is time to realize that a “good deal” now is not a “good deal” later. The quicker defendants realize this, the more it allows those defendants to understand the future consequences regarding plea bargaining first strike offenses without receiving rehabilitation. Defendants must be willing to deviate from the standard practice of plea bargaining, and require treatment programs that will enable the offender to actually be rehabilitated before there can be any “justice” under California’s “Three Strike” Law.\textsuperscript{224}

**CONCLUSION**

Under the current “Three Strikes” law, defense attorneys must make new alternatives in sentencing in order to sidestep the unjust law. It is virtu-

\begin{itemize}
  \item \textsuperscript{218} See David M. Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 Val. U. L. Rev. 449, 470 (1997); Thomson, supra note 211, at 146-47.
  \item \textsuperscript{219} See Wolpert, supra note 217. It should be noted that some prisons do incorporate work and educational programs into the system. Unfortunately, the recidivist rate continues to remain high because of the offenders association with other offenders. Additionally, sentencing defendants to long periods of incarceration does not prevent criminal behavior. This occurs because young persons commit criminal acts. By incarcerating a person for a long period of time in prison only manages to “age out” the individual offender, but it does not alleviate crime because the young offenders continue to commit deviant acts. See id.
  \item \textsuperscript{220} See John Dilulio, Jr., *The Question of Black Crime*, Pub. Interest, Sept. 1, 1994, at 3; Harvard Law Review Association, supra note 129 (stating improvements must be made in education, housing, drug rehabilitation programs in order to prevent criminal behavior); Olivo, supra note 122; Reinhart, supra note 175.
  \item \textsuperscript{221} See generally National Institute of Justice, U.S. Dep’t of Justice, *The Fragmentation of Sentencing in America I* (1999) [hereinafter FRAGMENTATION OF SENTENCING]; see also Thomson, supra note 211, at 146-47 (stating drug and alcohol treatment must be implemented into these programs); Olivo, supra note 122.
  \item \textsuperscript{222} See Dilulio, supra note 220; Friedman, supra note 34, at 921 (stating California spends more on incarceration than education); Austin, supra note 23, at 257. It costs over $20,000 per offender per year to be incarcerated in California prisons. See id.
  \item \textsuperscript{223} See generally FRAGMENTATION OF SENTENCING, supra note 221; Thomson, supra note 211.
  \item \textsuperscript{224} See Castellano, supra note 20, at 441.
\end{itemize}
ally impossible for a defendant to reject an offer to stay out of prison when faced with a long prison sentence. Defense attorneys must be willing to deviate from the standard practice of plea-bargaining, and reject all offers unless the prosecutor incorporates rehabilitative programs into the defendant’s sentence. Defendants do not realize that there are dire consequences to pleading guilty to a first strike offense. Without programs designed to improve the offender’s behavior, these individuals will continue to commit crimes.

Defense attorneys must inform their clients of the future consequences of pleading guilty without receiving rehabilitation. Many defendants are ignorant of the “Three Strikes” law. Allowing defendants to plea bargain their first strike offense practically opens the door for additional criminal behavior. Plea bargaining first strike offenses under California’s “Three Strikes” law allows unrehabilitated defendants to reenter the criminal justice system. Unfortunately, their return to the criminal justice system means they will spend the majority of their life in prison. Without educational and work programs that accomplish the goals of rehabilitating these offenders, there is no reason to plea bargain just to get less prison time. It is up to the defendants themselves, with the help from their attorneys, to “see the writing on the wall.”

Tina M. Olson

225. See Mcallister & Bregman, supra note 65, at 105 (stating that in a majority of plea negotiations, the prosecutor and the defense attorney ignore the defendant, although the defendant is the one who will suffer the consequences of the agreement).

226. See id.

227. Krikorian, supra note 1; see also McCallister & Bregman, supra note 65, at 105.

* To James, with all my love. Thank you for your love, support, and belief in me because without you, I would not be where I am today. You mean the world to me, and I will love you forever. I also want to thank my loving daughter, Samantha, who is my guiding light and inspiration for everything I do. I am so proud of you, and I want you to remember that as long as you believe in yourself, nothing can stop you from reaching your goals.