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STRIKE ONE, READY FOR MORE?: THE CONSEQUENCES OF PLEA BARGAINING "FIRST STRIKE" OFFENDERS UNDER CALIFORNIA'S "THREE STRIKES" LAW

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.¹ 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

1. See Greg Krikorian, *A Look Ahead: The Three Strikes Law has Shaped the Justice System in Many Ways*, L.A. TIMES, Mar. 23, 1998, at B1.

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].

3. See CAL. PENAL CODE §§ 667, 1170.12 (West 1999).

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).

6. See CAL. PENAL CODE §§ 667(e)(2)(A)(i)-(iii), 1170.12(c)(2)(A)(i)-(iii) (West 1999).

a three-year sentence in return for two guilty pleas of armed robbery.⁷ 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.⁸ Surprisingly, the prosecutor rejected Delgado's counteroffer.⁹

Alec Henderson, Delgado's defense attorney, employed an unconventional strategy that opposes the predominant rationale for representing first strike criminal defendants.¹⁰ 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."¹¹ 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.¹²

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.¹³ The reason for this deviation is that Delgado realized the possible future consequences of accepting the prosecutor's proposed plea agreement.¹⁴ 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."¹⁵ 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.*

12. See *id.*; see also CAL. PENAL CODE §§ 667, 1170.12 (West 1999).

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.*

15. Krikorian, *supra* note 1. See Keith C. Owens, *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, 153 (1995) (discussing cases where the prosecutor charges individuals for stealing pizzas, denim pants, drug possession, robbery, joy riding, writing bad checks, and welfare fraud).

granting Delgado an early release now, the likelihood of a twenty-five year sentence in the future is substantially increased.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.¹⁷ Plea-bargaining, as well, is not a new technique used to reduce a defendant's sentence.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.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.²⁰ Mike Reynolds initiated California's "Three Strikes" law, after career criminal, Joe Davis, killed his daughter, Kimber Reynolds.²¹ The legislature and the California voters persistently ignored Reynolds' attempts to pass the bill, until the murder of twelve-year-

16. See generally Marc Mauer, *Politics, Crime Control and Baseball? "Three Strikes and You're Out,"* 9 CRIM. JUST. 30 (1994).

17. See *id.*; see also Lauren L. Barr, *The "Three Strikes" Dilemma: Crime Reduction at Any Price?* 36 SANTA CLARA L. REV. 107, 118 (1995).

18. See Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 757 (1998).

19. See CAL. PENAL CODE §§ 667(g), 1170.12(e) (West 1999).

20. See Thomas C. Castellano, *Limits of the Criminal Sanction in Controlling Crime: A Plea for Balanced Punishments*, 23 S. ILL. U. L.J. 427, 435 (1999); Barr, *supra* note 17; Mauer, *supra* note 16, at 30.

21. See Barr, *supra* note 17.

old, Polly Klass.²² 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.²³ In March of 1994, California's "Three Strikes and You're Out" bill was passed into law by the legislature.²⁴ California voters approved the law by enacting Proposition 184 in November of that same year.²⁵

Contrary to the public's perception, habitual offender statutes have existed since colonial times.²⁶ 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.²⁷ These statutes, however, were rarely employed because criminal offenders normally received capital punishment for their first offense.²⁸ In 1797, New York passed the first law mandating life sentences for habitual offenders that committed *dissimilar* criminal violations.²⁹ Many states followed suit, as well as England, which enacted the "Habitual Criminal Law of 1869."³⁰ Faced with tremendous public criticism, however, England had no alternative but to repeal the law in 1879 for being "unreasonable."³¹

The United States also experienced disapproval, but unlike England, the public inaccurately considered the habitual offender laws as an indispensable tool for unrehabilitated offenders.³² Throughout the Progressive movement,³³

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.*

23. See James Austin, "Three Strikes and You're Out": *The Likely Consequences on the Courts, Prisons, and Crime in California and Washington State*, 14 ST. LOUIS U. PUB. L. REV. 239, 239 (1994); Jody L. Sundt, *Is there Room for Change?: A Review of Public Attitudes Toward Crime Control and Alternatives to Incarceration*, 23 S. ILL. U. L.J. 519, 522-23 (1998); Michael G. Turner et al., "Three Strikes and You're Out" Legislation: *A National Assessment*, 59 FED. PROBATION 16, 16 (1995); Vitiello, *supra* note 22, at 412.

24. See CAL. PENAL CODE §§ 667, 1170.12 (West 1999); Castellano, *supra* note 20, at 431.

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).

26. See Ilene M. Shinbein, "Three-Strikes and You're Out": *A Good Political Slogan to Reduce Crime, but a Failure in its Application*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175, 179 (1996).

27. See *id.*

28. See Turner et al., *supra* note 23, at 17.

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.³⁴ 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.³⁵

In 1926, New York passed another law, mandating a sentence of life imprisonment for third time offenders.³⁶ Other states followed New York's lead, and by 1949, forty-eight states enacted mandatory sentencing for repeat offenders.³⁷ 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.³⁸ Unfortunately, judicial discretion was removed in the 1970s, when legislators required judges to impose sentences for repeat offenders, without regard to the particular individual.³⁹

Today, habitual offender statutes incarcerate a large percentage of repeat offenders, and the "Three Strikes" law is another attempt to punish chronic offenders.⁴⁰ California began imposing life sentences on habitual offenders in 1986, but still enacted the harshest "Three Strikes" law in the country.⁴¹ 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.⁴²

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."⁴³ Although this reason-

34. *See id.*; Lawrence M. Friedman, *Dead Hands: Past and Present in Criminal Justice Policy*, 27 CUMB. L. REV. 903, 910 (1996-97).

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.

41. *See* Christine Markel, *A Swing and a Miss: California's "Three Strikes" Law*, 17 WHITTIER L. REV. 651, 651-52 (1996).

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.⁴⁴

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.⁴⁵ The public, persuaded by their fear of crime, demands that the criminal justice system incarcerate all repeat offenders.⁴⁶ Proponents of the "Three Strikes" bill, under the guise of Proposition 184, used this fear to implement the bill.⁴⁷ 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."⁴⁸ Ironically, the "Three Strikes" law puts very few rapists, child molesters, and murderers behind bars.⁴⁹ Instead, the law merely enables society to institutionalize nonviolent offenders for a minimum of twenty-five years.⁵⁰

B. Historical Perspectives of Plea Bargaining

Plea-bargaining is presumed to have existed since the inception of crime and punishment.⁵¹ 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.⁵² By the 1920s, plea-bargaining had evolved into an accepted procedure throughout the court system.⁵³ Currently, settlement negotiations are a "routine" method for disposing of cases, especially in the criminal justice system.⁵⁴

44. See Turner et al., *supra* note 23, at 17.

45. See Harvard Law Review Association, *supra* note 39, at 1878; Mauer, *supra* note 16, at 30.

46. See Mauer, *supra* note 16, at 30. Society fails, however, to take into account the individual's rehabilitation. See *id.*

47. See Michael Vitiello, *Three Strikes and the Romero Case: The Supreme Court Restores Democracy*, 30 LOY. L.A. REV. 1643, 1675 (1997).

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).

50. See CAL. PENAL CODE §§ 667(e)(2)(A)(i)-(iii), 1170.12(c)(2)(A)(i)-(iii) (West 1999).

51. See Josefina Figuerira-McDonough, *Gender Differences in Informal Processing: A Look at Charge Bargaining and Sentence Reduction in Washington, D.C.*, 22 CRIME & DELINQ. 101, 102 (1985); Guidorizzi, *supra* note 18.

52. See Douglas A. Smith, *The Plea Bargaining Controversy*, 77 J. CRIM. L. & CRIMINOLOGY 949, 949 (1986); Guidorizzi, *supra* note 18.

53. See Guidorizzi, *supra* note 18, at 759.

54. See Albert A. Alshuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 934 (1983); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, at 10 (1999) [hereinafter FELONY SENTENCES IN STATE COURTS] (stating that plea-bargaining accounts for 91% of the felony convictions in state courts and this rate has not changed from 1988 to 1996).

Although plea agreements are a customary way of expediting criminal cases, there is not a standard definition for plea-bargaining.⁵⁵ 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.⁵⁶

This broad definition is required because plea negotiations vary in each jurisdiction.⁵⁷ Even with these deviations, there are two main categories of plea-bargaining; explicit plea-bargaining and implicit plea-bargaining.⁵⁸

Explicit plea-bargaining results when a criminal defendant negotiates with the prosecutor to reduce charges or sentences.⁵⁹ 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.⁶⁰ 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.⁶¹

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.*

58. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 750 (1996).

59. See Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining*, 17 J. CRIM. JUST. 253, 253 (1989); Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?* 18 B.C. INT'L & COMP. L. REV. 317, 344 (1995).

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.

72. See Gerard V. Bradley, *Plea Bargaining and the Criminal Defendant's Obligation to Plead Guilty*, 40 TEX. L. REV. 65, 70 (1999).

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.⁷⁴ First, there is not a balancing of bargaining power. Prosecutors have considerably more power in the bargaining process than the defendant.⁷⁵ This unfair bargaining power permits prosecutors to intrude on judicial functions.⁷⁶ With successful negotiations, the criminal justice system allows prosecutors to predetermine the sentence a particular defendant receives.⁷⁷ 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.⁷⁸ These bargaining practices become a daily habit for a large percentage of prosecutors and defense attorneys.⁷⁹ The ease of pleading defendants enables practitioners to utilize the negotiation process as an initial mechanism, instead of a viable option.⁸⁰

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.⁸¹ The public, the primary advocate opposing negotiation agreements, complains that criminal defendants "get away" with their criminal behavior.⁸² Defendants are only receiving inconsequential sentences compared to the sentence they would normally receive without plea-bargaining.⁸³ Critics believe these criminal defendants do not receive their just punishment for the crimes they commit.⁸⁴ 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.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.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 667.⁸⁷ 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.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.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.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.⁹¹

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

85. See sources cited *supra* note 84.

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.*

87. CAL. PENAL CODE §§ 667, 1170.12 (West 1999).

88. See *id.*

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.*

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).

91. See CAL. PENAL CODE §§ 667(e)(2)(A)(i)-(iii), 1170.12(c)(2)(A)(i)-(iii) (West 1999).

92. See *id.* §§ 667(g), 1170.12(e) (West 1999).

violent and serious felony cases.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"⁹⁴

Nevertheless, these statutes allow exceptions to the general rule against plea-bargaining strike cases.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.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.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.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.⁹⁹ The reluctance to settle results in an increase of trials, as well as a backlog of cases awaiting trial.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.¹⁰¹ In San Diego, the amount of trials was significantly lower; only forty percent of the third strike defendants proceeded to trial.¹⁰² Despite a lower percentage in San Diego, the law compelled San Diego to institute specialized courts to solely handle three strikes proceedings.¹⁰³ In Los Angeles, for example, the proportion of cases pending

93. *See id.*

94. *Id.*

95. *See id.* §§ 667(f)(2), 1170.12(d)(2).

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.*

97. *See id.*; Mark W. Owens, *Crimes; Sentence Enhancement-Repeat Offenders: "Three Strikes You're Out,"* 26 PAC. L.J. 442, 443 (1995); Tony Perry, *"Three Strikes" Law Spawns Specialist System in San Diego County Courts: Four Judges and Designated Prosecutors and Public Defenders will Handle Such Cases Exclusively in Bid to Avoid Logjams,* L.A. TIMES, Mar. 14, 1995, at A1.

98. *See* James Wall, *Three Steaks and You're Out*, 337 ECONOMIST 54, 54 (1995).

99. *See id.*

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].

101. *See* Owens, *supra* note 15.

102. *See* John Kerr, *San Diego County Gives Nearly \$3 Million Boost to DA Budget for Three Strikes*, WEST'S LEGAL NEWS, Aug. 14, 1995, at 1105.

103. *See id.*; Perry, *supra* note 97.

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.

105. See Harriet Chiang, *Uneven Justice Under 3 Strikes: Counties Vary in How They Enforce Law*, S.F. CHRON., Sept. 23, 1996, at A1; NATIONAL INSTITUTE OF JUSTICE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION, at 4 (1997) [hereinafter *THREE STRIKES AND YOU'RE OUT*]; Tony Perry & Maura Dolan, *Two Counties at Opposite Poles of "3 Strikes" Debate Crime: San Francisco is Restrictive and San Diego Takes Hard Line*, L.A. TIMES, June 24, 1996, at A1.

106. See High Times, *California's "3 Strikes" Jails Cannabis Users* (visited Oct. 13, 1999) <<http://www.hightimes.com/ht/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.

109. See Chiang, *supra* note 105.

110. See Steven Pressman & Jennifer Kaae, *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.*

112. See *People v. Andrews*, 65 Cal. App. 4th 1098, 1100 (1998).

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.¹¹⁶ 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.¹¹⁷ 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."¹¹⁸ It appears the "Three Strikes" law does not limit prosecutorial discretion, but rather judicial discretion.¹¹⁹

II. ANALYSIS

California's "Three Strikes" law is a highly debated law, and it receives adamant supporters, as well as unrelenting critics.¹²⁰ 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."¹²¹ Additionally, the law is not relieving California of violent offenders, as voters generally believe.¹²²

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.

117. See *Andrews*, 65 Cal. App. 4th at 1100.

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.

only as defined under California Penal Code section 1192.12.¹²³ Petty theft is punishable by six months in the county jail, or a fine of \$1,000 dollars, or both.¹²⁴ This crime is a “wobbler” because the prosecutor has the discretion of filing the charge as a misdemeanor or a felony after a prior theft conviction.¹²⁵

Petty theft is a crime ordinarily plea-bargained because the defendant typically receives minimal punishment.¹²⁶ If a defendant pleads guilty to both a burglary and petty theft charge, the defendant is at risk of a double sentence under the “Three Strikes” law if the defendant receives another petty theft conviction.¹²⁷ This scenario becomes more complex when the defendant pleads guilty to two burglaries, either at the same time or on different occasions. Then, if the defendant receives two petty theft convictions, a minimum twenty-five year prison sentence will follow.¹²⁸ The sentence is unduly harsh because the defendant faces a third strike for a minor misdemeanor.¹²⁹

Although the perception is that the “Three Strikes” law eliminates plea bargaining completely, that is not entirely correct. In actuality, the law encourages first strike defendants to plead guilty because they receive insubstantial sentences 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.¹³⁰

123. See CAL. PENAL CODE § 1192.12 (West 1999); see also CAL. PENAL CODE § 666 (West 1999).

124. See CAL. PENAL CODE § 666 (West 1999).

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 now 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).

126. See Associated Press, “Three Strikes” Means 200 Years for Welfare Fraud, SAN DIEGO UNION-TRIB., June 21, 1999, at A1 [hereinafter “Three Strikes” Means 200 Years].

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.

129. See Harvard Law Review Association, *Criminal Procedure-Sentencing-California Enacts Enhancements for Prior Felony Convictions-Act of March 7, 1994*, 1994 Cal. Legis. Serv. Ch. 12 (A.B. 971) (to be codified at CAL. PENAL CODE § 667), 107 HARV. L. REV. 2123, 2125-26 (1998) (remarking on how the law separates violent felonies from property crimes); Beres & Griffith, *supra* note 25, at 120; Kerr, *supra* note 102 (stating “Three Strikes” sentence may result from stealing a bottle of shampoo or a bottle of liquor).

130. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON, at 1 (1997) [hereinafter LIFETIME 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

ing the percentage increases for males, which is nine percent, and this figure climbs for black males, who have a one in four chance of incarceration at least once during in his lifetime).

131. See *id.* at 6; Beres & Griffith, *supra* note 25, at 104.

132. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 1998, at 3, tbl.2 (1999) [hereinafter PRISON AND JAIL]; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROFILE OF JAIL INMATES, 1996, at 2, 4 tbl.3 (1998) [hereinafter PROFILE OF JAIL INMATES] (stating that on June 30, 1998, 158,742 prisoners were in California prisons. The state with the next highest prison population is Texas, at 143,299).

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.

140. See Mike Males et al., Justice Policy Institute, *Striking out: The Failure of California's "Three Strikes and You're Out" Law* (visited Sept. 7, 1999) <<http://www.cjci.org/jpi/strikingout.html>>.

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.¹⁴³ As mentioned earlier, Sacramento, Los Angeles, and San Diego counties convict more third strike offenders than all other counties in California.¹⁴⁴ Specifically, San Diego, sends more second and third strike defendants to prison per capita than any county.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷

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.¹⁴⁸ San Francisco and Alameda, two counties that *infrequently* employ the "Three Strikes" law, experienced the greatest drop in the crime rate for violent offenses.¹⁴⁹ 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

143. See *id.*; Val Werier, *Jailing Them Doesn't Help*, WINNIPEG FREE PRESS, Mar. 18, 1999, at A12.

144. 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).

145. 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.

146. 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 A11 (other states have seen a decline in the crime rate without the implementation of the "Three Strikes" law); Males et al., *supra* note 140.

147. 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 (re-marking 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.

148. See Males et al., *supra* note 140.

149. 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).

the law.¹⁵⁰

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.¹⁵¹

With first strike offenders excessively committing crimes, the prospect of repeat offenses is readily apparent.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.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.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.¹⁵⁵ The consistency in plea-bargaining has continued even though a large percentage of second and

150. See Males et al., *supra* note 140; Jackson, *supra* note 120; Weinstein, *supra* note 147.

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.*

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.

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.*

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 acts, are not the types of acts that can be deterred by a harsh punishment like three strikes. See *id.*

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 931; 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.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.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.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.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.¹⁶⁰

Although there is a great deal of negotiations before the prosecutor files charges, the broad discrepancy in plea agreements is profound.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.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.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 1996.¹⁶⁴ Despite the fifteen percent decrease, it is unlikely this reduction accounted for the large discrep-

156. See FELONY SENTENCES IN STATE COURTS, *supra* note 54, at 10; THREE STRIKES AND YOU'RE OUT, *supra* note 105, at 3; American Civil Liberties Union, *supra* note 152.

157. See sources cited *supra* note 156.

158. See THREE STRIKES AND YOU'RE OUT, *supra* note 105, at 3; American Civil Liberties Union, *supra* note 152.

159. See sources cited *supra* note 158. The ACLU states the cost of plea bargaining is \$600 dollars, compared to a trial that can cost \$50,000 or more. See American Civil Liberties Union, *supra* note 152.

160. See THREE STRIKES AND YOU'RE OUT, *supra* note 105, at 3.

161. See Gatland, *supra* note 139; Reske, *supra* note 155.

162. See Gatland, *supra* note 139; Brown *supra* note 83, at 700; see also Reske, *supra* note 155 (discussing yet another possibility: that prosecutors are using their leverage with the "Three Strikes" law in order to threaten defendants into plea bargaining. Prosecutors are telling defendants "If you don't plead guilty . . . you could be eligible for three strikes." This allows coercion of defendants by forcing them to plead guilty to save time).

163. See Gatland, *supra* note 139. This was also shown in counties such as Alameda and San Francisco, but the large numbers of defendants convicted in Sacramento, Los Angeles, and San Diego suggest that there is something other than charge bargaining occurring. See *id.* Additionally, in Alameda County, third strike offenders are usually being convicted as second strike offenders, and many of these offenders are not plea bargained. See *id.*

164. See THREE STRIKES AND YOU'RE OUT, *supra* note 105, at 3.

ancy in plea bargaining because there are massive numbers of defendants sentenced under the "Three Strikes" law.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.¹⁶⁶ Plea-bargaining, however, has remained consistent nationwide and continues to be prevalent for disposing of felony cases.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.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.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.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.¹⁷¹ Prosecutors benefit from plea-bargaining first strike offenders because they know nonrehabilitated offenders continue to commit offenses when they are released from prison.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.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.¹⁷⁴ In fact, young males between the ages of eighteen and twenty-four commit the ma-

165. *See id.*

166. *See id.*

167. *See Reske, supra* note 155; Alshuler, *supra* note 54, at 931; FELONY SENTENCES IN STATE COURTS, *supra* note 54, at 10.

168. *See Brown, supra* note 83, at 700.

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, supra* note 1.

170. *See Brown, supra* note 83, at 699-700.

171. *See Krikorian, supra* note 1.

172. *See id.* Besides the longer sentence, the defendant must serve a minimum of 85% of the sentence. *See id.*; CAL. PENAL CODE §§ 667, 1170.12 (West 1999).

173. *See FELONY DEFENDANTS IN LARGE URBAN COUNTIES, supra* note 151; PROFILE OF JAIL INMATES, *supra* note 132; *see generally* THREE STRIKES AND YOU'RE OUT, *supra* note 105; 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.*

174. *See Austin, supra* note 23, at 256; *see generally* LIFETIME LIKELIHOOD, *supra* note 130.

jority of serious crimes.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.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.¹⁷⁷

The Los Angeles District Attorney, in *People v. Delgado*, readily confessed his inclination to postpone a stringent sentence until Delgado revisits the criminal justice system.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.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.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.¹⁸¹

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.¹⁸²

175. See Peter Reinhart, *For Young Guns, One Strike Ought to be Enough*, WALL ST. J., Mar. 30, 1998, at A18; Austin, *supra* note 23, at 256; Mauer, *supra* note 16, at 33.

176. See Mauer, *supra* note 16, at 33.

177. See LIFETIME LIKELIHOOD, *supra* note 130, at 6; Mauer, *supra* note 16, at 33; see generally PRISON AND JAIL, *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 LIFETIME LIKELIHOOD, *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.*

178. See Krikorian, *supra* note 1.

179. See *id.*

180. See *id.*; "Three Strikes" Means 200 Years, *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).

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

182. See Latest Statistics, *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.

187. *See generally* People v. Couch, 48 Cal. App. 4th 1053 (1996); People v. Cunningham, 49 Cal. App. 4th 1044 (1996). *But see* People v. Smith, 59 Cal. App. 4th 46 (1997).

188. *See* Allan Abraham, 25 Percent of Three Strikes Cases go to Trial, L.A. TIMES, July 2, 1996, at A18.

189. *See* Terrance D. Miethe, *Charging and Plea Bargaining Practices under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155, 165 (1987).

190. *See Latest Statistics, supra* note 122.

191. *See id.*

strike offenders sentenced under the "Three Strikes" law.¹⁹² Non-pleading defendants will automatically have their sentences reduced if the proposal is accepted.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.¹⁹⁴ First, the prosecutor gains longer sentences by using the "Three Strikes" law against the defendant.¹⁹⁵ Prosecutors have the ultimate authority to strike a previous conviction, and they can use this power as a threat in the negotiation process.¹⁹⁶ Although the defendant is sentenced under the law, the record does not show it.¹⁹⁷ The court, without any evidence to suggest the defendant was sentenced under the "Three Strikes" law, will be reluctant to reverse the conviction.¹⁹⁸

Second, the prosecutor and defendant are involved in implicit plea-bargaining.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.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.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

192. *See id.*

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.)

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.*

195. *See* Gatland, *supra* note 139.

196. *See id.*; McCallister & Bregman, *supra* note 65, at 105.

197. *See* KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE, *supra* note 100.

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.*

199. *See* KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE, *supra* note 100; Guidorizzi, *supra* note 18, at 756.

200. *See* Guidorizzi, *supra* note 18, at 756.

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 strikeable 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 as early as before 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.*

207. See Mauer, *supra* note 16, at 30.

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 appropriate 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 because 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 devastating as the third. This is especially true when no rehabilitation exists for these offenders.²¹⁵ The only possible solution is to continue plea bargaining defendants, but require defendants to undergo intensive rehabilitative sentencing. Intensive rehabilitative sentencing, however, does not imply long prison sentences because the majority of defendants do not require incarceration before rehabilitation occurs.²¹⁶ The only benefit for some first strike defendants sentenced 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 offenses because they will be unable to handle the magnitude of trials. This will benefit nonviolent 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 suggest 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, *supra* note 16, at 33; Reinhart, *supra* note 175.

criminal behavior, but instead fosters crime.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.²¹⁹ The belief that prison alone rehabilitates criminal offenders is unsubstantiated, and without rehabilitative assistance, these offenders will not stop their criminal behavior.²²⁰

Defendants not sentenced to prison must undergo intensive supervised probation programs that incorporate work and educational programs into the defendant's sentence.²²¹ Although funding is difficult, it is less costly when compared to the cost of incarceration per year in California prisons.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.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.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-

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.

219. See Wolpert, *supra* note 217. It should be noted that some prisons do incorporate work and educational programs into the system. Unfortunately, the recidivism 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.*

220. See John DiIulio, 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.

221. See generally NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, THE FRAGMENTATION OF SENTENCING IN AMERICA 1 (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.

222. See DiIulio, *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.*

223. See generally FRAGMENTATION OF SENTENCING, *supra* note 221; Thomson, *supra* note 211.

224. See Castellano, *supra* note 20, at 441.

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.²²⁵

Defense attorneys must inform their clients of the future consequences of pleading guilty without receiving rehabilitation.²²⁶ 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."²²⁷

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225. See McCallister & 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.