Arguments against the Use of Recidivist Statutes That Contain Mandatory Minimum Sentences

Anthony Nagorski

Follow this and additional works at: http://ir.stthomas.edu/ustjlp

Part of the Criminal Law Commons, and the Criminal Procedure Commons

Bluebook Citation


This Note is brought to you for free and open access by UST Research Online and the University of St. Thomas Journal of Law and Public Policy. For more information, please contact Editor-in-Chief Patrick O’Neill.
ARGUMENTS AGAINST THE USE OF RECIDIVIST STATUTES THAT CONTAIN MANDATORY MINIMUM SENTENCES

ANTHONY NA GORSKI

ABSTRACT

The goal of this article is to answer the question: Why have more states not enacted habitual offender statutes after the initial legislative enactment boom of these statutes in the 1990s? The focus of this article is on habitual offender laws, most notably Three Strikes laws, which provide for mandatory minimum sentences imposed upon a defendant after a certain number of prior offenses have been committed. Focusing specifically on Three Strikes laws limits the scope of this analysis regarding habitual offender statutes because it leaves out arguments associated with the discretionary decisions of judges and prosecutors within such statutes.

Repeat offender statutes that carry mandatory minimum sentences are inherently unfair to defendants. Additionally, these laws are being reevaluated in an effort to cut costs. The punishment a defendant serves under a recidivist statute may be disproportionate to the actual offense committed. These statutes also unfairly impose a punishment for a defendant’s prior offenses for which they have already been punished, essentially punishing a defendant for his status as a “criminal.” These statutes create unfair penalties for defendants, fail to deter criminals, overcrowd prisons, and lack any traditional criminal justice rationale for their existence. Such statutes are an ineffective way to deter crime and they impose sentences that are unfair to defendants.

I. INTRODUCTION

Recidivist statutes, also termed habitual offender laws, significantly increase the prison sentences handed down to persons convicted of a violent crime or serious felony. In fact, these statutes require that those offenders be given a prison sentence of a significant number of years (usually twenty-five years to life), rather than a lesser punishment possible in sentencing circumstances where a Three Strikes statute is not considered. This paper

* J.D. Candidate 2011, University of St. Thomas School of Law; Symposium Director, Journal of Law and Public Policy.
Arguments Against the Use of Recidivist Statutes

focuses only on those habitual offender laws that require a mandatory minimum sentence. Any reference to habitual offender statutes, or Three Strikes laws, in this paper applies only to those statutes which contain mandatory minimum sentences. Focusing solely on this specific type of habitual offender law limits the scope of the analysis and leaves out any arguments related to discretionary decisions made with regard to recidivist laws. Three Strikes laws are statutes “prescribing an enhanced sentence, esp[ecially] life imprisonment, for a repeat offender’s third felony conviction.” These statutes have been called into enactment by state and federal legislatures in an attempt to answer the question: “How do we deal with those individuals who refuse to be rehabilitated and deterred from committing future crimes?”

Economic theory holds that, all else equal, a person is less likely to commit a crime when the expected costs for committing that crime increase. The additional prison terms called for by recidivist laws increase the expected costs for persons who commit new crimes subsequent to a prior conviction for a crime defined within the statute. These laws were especially tempting to enact given the repeated statistic that six percent of criminal offenders commit nearly seventy percent of all crimes, and six percent of violent offenders commit seventy percent of all violent crimes. It would seem logical that enacting a law which both deters new criminals and keeps repeat violent offenders locked up for longer periods of time would decrease the overall crime rates. It was precisely this logic that helped recidivist laws increase in popularity in the 1990s. In 1999, twenty-six states and the federal government had enacted laws that were considered Three Strikes laws in an attempt to find a way to decrease skyrocketing

1. BLACK'S LAW DICTIONARY 719 (3d pocket ed. 2006).
2. Daniel Lungren, Letter to the Editor, Financial Costs of “3 Strikes Law,” L.A. TIMES, Jan. 10, 1996, at B8 (stating claim by California Attorney General Daniel Lungren that the state’s Three Strikes law is “having an immediate impact on the 7% of all criminals who commit between 50% and 70% of all crimes”); see also Bill Jones, Impact of “Three Strikes” Draws Praise, Criticism: Pro Evidence Shows Law is Working, FRESNO BEE, Jan. 21, 1996, at B7 (reporting that California Secretary of State who co-sponsored the Three Strikes law stated that 6% of criminals are responsible for 70% of the state’s crime); cf., Mario M. Cuomo, “Three Strikes,” Two Views: Harsh, Sure, But Fair, N.Y. TIMES, Jan. 29, 1994, at A19 (stating that a Three Strikes law “would give us a heavy hammer to use against these career criminals”); Timothy Egan, A 3-Strike Law Shows It’s Not as Simple as It Seems, N.Y. TIMES, Feb. 15, 1994, at A1 (describing claims by proponents that Washington’s Three Strikes law will remove from society a core group of incorrigible violent criminals).
4. Linda S. Beres & Thomas D. Griffith, Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation, 87 GEO. L.J. 103 (1998); see e.g., Cuomo, supra note 2 (stating that studies have indicated that 15% of offenders are responsible for 85% of personal injury offenses); and Egan, supra note 2 (noting claim by supporters of Washington state’s Three Strikes law that federal statistics show 6% of criminals commit 70% of crimes).
crime rates. Today, twenty-four states still have Three Strikes laws, but many are continuing to search for ways to decrease prison costs and are offering clemency to individuals previously sentenced to life in prison for nonviolent crimes under recidivist statutes.

The United States Supreme Court held that various repeat offender statutes are constitutional under the Eighth Amendment, and has rarely overturned a sentence under a Three Strikes law. However, nearly half of the states have yet to pass a Three Strikes statute, and many have amended current recidivist statutes to make them less severe. Also, no new state has passed a Three Strikes law since 1995. Recidivist statutes containing mandatory minimum sentences are unjust because they impose a punishment for a defendant’s prior offenses. For this reason, the punishment a defendant serves under a recidivist statute is often grossly disproportionate to the actual offense the defendant committed. These statutes are unjust to a defendant because they punish the defendant based on his status as a repeat criminal and not based on his commission of a new crime. Three Strikes laws not only impose unfair penalties upon defendants, but they also fail to deter criminals, overcrowd prisons, and lack traditional criminal justice rationale for their existence.

II. OVERVIEW OF NOTABLE AND CURRENT RECIDIVIST STATUTES

The United States codified its career offender statute in 18 U.S.C.A. §4B1.1, which reads:

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

This statute was enacted in November of 1987 with multiple amendments made to it throughout the 1990s; the most current amendment passed as recently as 2002. The statute requires that a defendant’s third conviction be a crime of violence or a controlled substance crime. It also requires that the defendant have at least two prior felony convictions for

7. See supra note 5.
9. Id. (see Historical Notes).
10. Id.
either a crime of violence or a controlled substance offense in order to be sentenced as a career offender.\textsuperscript{11}

The federal career offender law punishes fewer individuals each year and is less severe in its punishments than California’s Three Strikes laws, as is illustrated below. However, it is important to note that the federal government of the United States has taken a position in support of repeat offender laws.

Between December 1993 and January 1996, twenty-four states enacted some version of the Three Strikes law.\textsuperscript{12} The original Three Strikes law, passed in the state of Washington, ordered that individuals “who are convicted of the ‘most serious offenses’ on three occasions be sentenced to life imprisonment without parole.”\textsuperscript{13} Other states soon followed by enacting similar versions of the Washington law. The most notable state recidivist statute that followed is California’s Three Strikes law, which the legislature passed in 1994.\textsuperscript{14}

California’s Three Strikes law is significant due to the large size of the California penal system. California’s Three Strikes statute is unlike other mandatory sentencing laws because it waits for the full three strikes before requiring a mandatory sentence and increases the mandatory minimum for an offense after one prior strike.\textsuperscript{15} California’s habitual offender law is codified as California Penal Code § 667 and reads:

(a)(1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been

\textsuperscript{12} Reynolds, supra note 5.
\textsuperscript{13} Persistent Offender Accountability Act, ch.1, 1999 Wash. Legis. Serv. I.M. 593 (West).
\textsuperscript{15} CAL. PENAL CODE § 667 (West 1994).
pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

(ii) Imprisonment in the state prison for 25 years.\(^\text{16}\)

Under California's Three Strikes law, a prior conviction counts as a strike if it was for a serious or violent felony.\(^\text{17}\) If a defendant is convicted of any felony and he has two or more “strike” priors (prior convictions for what are now codified as strike offenses including convictions prior to the enactment of the Three Strikes law in 1994), he must be sentenced to at least twenty-five years to life in state prison. It is noteworthy that strikes are counted by individual charges, rather than individual cases. Under California’s law, a judge has discretion to dismiss one or more strikes.\(^\text{18}\) In deciding whether to dismiss a strike, “the court must consider whether, in the light of the nature and circumstances of his or her present felonies and prior serious or violent felony convictions and the particulars of his or her background, character, and prospects, the defendant may be deemed outside the three-strikes law’s spirit, in whole or in part, and hence should be treated as though he or she had not previously been convicted of one or more serious or violent felonies.”\(^\text{19}\) However, this has not stopped individuals from being punished to controversially long sentences. Defendants have been given sentences of twenty-five years to life in prison for such crimes as shoplifting golf clubs,\(^\text{20}\) videotapes,\(^\text{21}\) and pizza.\(^\text{22}\)

\(^{16}\) Id.

\(^{17}\) CAL. PENAL CODE § 667(d)(1) (West 1994) (“Serious felonies” are listed in CAL. PENAL CODE § 1192.7(c), and “violent felonies” are listed in CAL. PENAL CODE § 667.5(c)).


\(^{19}\) Burgos, 117 Cal. App. 4th at 1215 (citing People v. Williams, 17 Cal. 4th 148, 161 (1998)).

\(^{20}\) Ewing v. California, 538 U.S. 11 (2003) (Defendant had previous strikes for burglary and robbery with a knife.).

\(^{21}\) Lockyer v. Andrade, 538 U.S. 63 (2003) (Leandro Andrade received a double sentence of 25 years to life for two counts of shoplifting.).

\(^{22}\) People v. Williams, No. B091907 (Jerry Dewayne Williams had four previous non-violent felonies and had his sentence later was reduced to six years.).
III. INTRODUCTION TO ARGUMENTS AGAINST THE USE OF RECIDIVIST STATUTES

A defendant's prior criminal history should be taken into account by the sentencing judge when determining the length and method of sentence for a new offense. Sentencing Guideline grids use two factors in evaluating a defendant's sentence: past criminal history and the severity of the offense. A defendant's past criminal history is viewed by some as an indicator of whether the defendant is likely to commit another offense in the future and is therefore a valuable consideration when applying the federal sentencing guidelines. However, the legislature, although given the power to set a defendant's sentencing length, is not in a position to understand each defendant's factual situation. Statutes with mandatory minimum sentences result in punishments which are disproportionate to the crimes committed, impose sentences for offenses where a punishment was already given, and punish defendants solely for their criminal status.

A. PUNISHMENT MAY BE DISPROPORTIONATE TO THE OFFENSE COMMITTED

Applying a mandatory minimum sentence creates a possible situation in which a defendant could serve a sentence that would be disproportionate to the crime committed. Drawing a bright-line rule that defendants be sentenced to a set mandatory minimum takes the judge's factual considerations out of the equation. Taking factual consideration away from a judge during sentencing creates situations in which defendants are not only punished for their prior offenses, but also given a sentence that is disproportionate to the offense they committed.

In *Rummel v. Estelle*, the Supreme Court upheld a life sentence without the possibility of parole for a felony fraud crime involving approximately $120.23. The ruling upheld a Texas recidivist law that required a minimum punishment for a third felony offense committed within a fifteen year time span to be life imprisonment with the possibility of parole. On his third offense, the defendant refused to return money received as payment for unsatisfactory repairs of an air conditioning unit. All three of the defendant's crimes were felony fraud, totaling $230.25.

The Supreme Court overturned *Rummel v. Estelle*, although only for a short period, with *Solem v. Helm*. In *Solem*, the Court noted that the judicial system should give substantial deference to the broad authority that the

23. *Rummel v. Estelle*, 445 U.S. 263 (1980) (The exact amount of the fraud was $120.58.).
24. *Id.*
25. *Id.*
legislatures possess in determining the limits of punishments.26 The Supreme Court further held the final clause of the Eighth Amendment “prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.”27 The opinion called for exceptions to the statutes, protecting the constitutional freedom from cruel and unusual punishment, and declined to reject the statutes altogether. The Solem Court used the principle of proportionality and decided that the punishment handed down to a defendant should be proportionate to the present crime.28 This principle has been recognized throughout U.S. history.29 The Court explained that a state is justified in punishing a recidivist more severely than it punishes a first time offender and that prior convictions are relevant to the sentencing decision.30 Conversely, the Court continued that they “must focus on the principle felony—the felony that triggers the life sentence—since [the defendant] has paid the penalty for each of his prior offenses.”31

The Supreme Court used a three-factor test in Solem v. Helm. That test reasoned that a particular punishment was unconstitutionally disproportionate if (1) the crime was relatively minor in comparison to the punishment; (2) the sentence imposed in the jurisdiction for similarly grave offenses was less; and (3) other jurisdictions impose a lesser sentence for the same crime.32

The Supreme Court’s five to four holding in Solem was followed shortly thereafter by Harmelin v. Michigan. The Harmelin Court concluded that the mandatory life without parole sentence required by Michigan law,33 forbidding the possession of more than 650 grams of cocaine, was not cruel and unusual punishment.34 The majority wrote, “Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history.”35 The language of the opinion refrained from striking down state statutes setting minimum sentencing guidelines for recidivism, and only called for exceptions to the statutes protecting the constitutional freedom from cruel and unusual punishment.

In light of the Supreme Court’s decision in Harmelin, it is unclear whether Solem’s three-part proportionality test is still relevant in noncapital

27. Id. at 284.
28. Id.
29. Id. at 284–86.
30. Id. at 296–97.
31. Id.
32. Id. at 308–09.
35. Id. at 994–95.
cases. The *Harmelin* Court issued three separate, and somewhat conflicting, opinions discussing the scope of the Eighth Amendment’s proportionality guarantee. These opinions ranged from repudiation of *Solem* by Justices Scalia and Rehnquist; to recognition of a “narrow” proportionality doctrine by Justices Kennedy, O’Connor, and Souter; to an approval of *Solem* by Justices White, Blackmun, Stevens, and Marshall. Despite the conflicting opinions, the continuing applicability of the *Solem* test is indicated by the fact that a majority of the *Harmelin* Court either expressly declined to overrule *Solem* or explicitly approved of *Solem*.

Justice Scalia, writing for the majority in *Harmelin*, voiced his disagreement with the three-part test in the *Solem* majority opinion. Scalia argued that the *Solem* test presented difficulties in assessing the gravity of a particular crime, and thus it would be difficult to determine whether similarly grave crimes carried a lesser sentence. As for the part of the test which determined whether other jurisdictions imposed a lesser sentence for the same crime, Scalia conceded that this is easily figured out, but that this inquiry has “no conceivable relevance to the Eighth Amendment.” However, Scalia’s majority opinion in *Harmelin* never expressly overruled the *Solem* test.

Justice White, disagreeing with Justice Scalia regarding the *Solem* test, stated, “[T]he *Solem* analysis has worked well in practice.” Justice White argues that courts appear to have had little difficulty applying the analysis to a given sentence and the application of the test by numerous state and federal appellate courts has resulted in a mere handful of sentences being declared unconstitutional. “Thus, it is clear that reviewing courts have not baldly substituted their own subjective moral values for those of the legislature.” Justice White further emphasizes that courts have demonstrated they are “capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy.” *Solem* is wholly consistent with this approach, and when properly applied, its analysis affords “substantial deference to the broad authority that legislatures necessarily

---

36. See United States v. Johnson, 944 F.2d 396, 408 (8th Cir. 1991) (“The effect of Harmelin on the Solem proportionality factors is not entirely clear.”); United States v. Angulo-Lopez, 7 F.3d 1506, 1509 (10th Cir. 1993) (“Harmelin provides no guidance in articulating the proper approach for an Eighth Amendment review.”); United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994) (“[T]he holding of Solem has been put into doubt by Harmelin v. Michigan.”).
39. Id. at 989.
40. Id. at 1016.
41. Id. at 1015.
42. Id. at 1015–16.
possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals . . . .” 44 The fact that this is one of those rare instances is no reason to abandon the analysis.

More recently, the Supreme Court decided Ewing v. California and Lockyer v. Andrade. 45 In earlier decisions, the Court developed the “gross disproportionality” principle, explaining that the principle involved a “comparative analysis of sentences after determining that the sentence imposed was grossly excessive punishment for the crime committed.” 46 However, the Court’s prior cases lack clarity regarding what factors may indicate gross disproportionality and should be applicable only in the “exceedingly rare” and “extreme” cases. 47

In Ewing, Justice O’Conner wrote, “These laws responded to widespread public concerns about crime by targeting the class of offenders who pose the greatest threat to public safety: career criminals.” 48 She reasoned that Three Strikes laws were a “deliberate policy choice” by legislatures to set apart those who have “repeatedly engaged in serious or violent criminal behavior” from the rest of society in order to protect public safety. 49 O’Conner argued that such laws serve the valid penological goals of incapacitation and deterrence, and that, although controversial, the court does not act “as a ‘superlegislature’ to second-guess” the policy choices made by the states. 50

O’Conner wrote:

It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons “advance the goals of [its] criminal justice system in any substantial way.” 51 . . . In weighing the gravity of Ewing’s offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature’s choice of sanctions. 52

Although Ewing’s sentence was lengthy, the Court argued that it “reflected a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit

---

44. Id. (citing Solem, 463 U.S. 277, at 290).
47. Lockyer, 538 U.S. at 64.
49. Id. at 12.
50. Id. at 28.
51. Ewing, 538 U.S. at 28 (quoting Solem, 463 U.S. at 297 n.22).
52. Id. at 29.
felonies must be incapacitated.”

The Court thus reasoned that Ewing’s twenty-five years to life sentence did not violate the Eighth Amendment.

In *Lockyer*, the Supreme Court concluded that “[a] gross disproportionality principle is applicable to sentences for terms of years.”

Because the Court was previously vague about which factors demonstrate gross disproportionality, the rule is unclear, and, as such, has only been applied to “exceedingly rare” and “extreme” cases. In *Solem*, the sentence did not include the possibility of parole, and the Court held it was cruel and unusual. In *Rummel*, the sentence allowed for parole, and the Court held it was not cruel and unusual.

In *Lockyer*, like in *Rummel*, the defendant retained the possibility for parole. When using the gross disproportionality principle, courts will only overturn extremely disproportionate sentences; as such, the Court in *Lockyer* concluded that the California courts did not unreasonably apply the principle to the defendant’s sentence.

After *Lockyer* and *Ewing*, the Supreme Court essentially closed the door on arguments that non-capital sentences in recidivist laws were disproportional to the instant crime committed.

Partly because of the gross disproportionality theory, prosecutors and judges alike have been cautious to apply mandatory minimum sentences. The Supreme Court has now consistently held that increased sentences under repeat offender statutes are not cruel and unusual punishment under the Eighth Amendment. Still, many judges and prosecutors have been reluctant to sentence individuals under mandatory sentence laws because of the gross disproportionality in sentence that would result.

A defendant’s prior criminal history should be taken into account by the sentencing judge when determining length and method of sentence for a new offense. The legislature, though given the power to set defendants’ sentencing lengths in statute, is not in a position to see and understand each particular defendant’s given factual situation, including prior history, and make a decision regarding the length of sentencing in repeat offender situations. In *United States v. Hughes*, the Court stated that career offender provisions do not “violate the eighth amendment by ‘mechanically’ aggregating disparate offenses without regard to the seriousness of the offenses or adequately considering the defendant’s personal characteristics,” basing its judgment on the fact that the “sentencing judge retains discretion to depart downward from the [career offender

---

53. *Id.* at 30.
54. *Id.*
55. *Lockyer*, 538 U.S. at 72.
56. *Id.* at 64.
57. *Id.* at 74.
58. *Id.* (citing *Rummel*, 445 U.S. at 267).
60. *See also, e.g.*, N.Y. PENAL LAW §70.10 (Consol, 2010).
provisions].”

One might argue that because many statutes contain a provision to enhance punishment due to a defendant’s prior similar offenses, therefore judges and prosecutors may use their discretion when charging and sentencing individuals under these statutes. However, the burden for a sentencing judge to make a downward departure is very high and requires a number of different circumstances. In federal court,

[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In cases involving Three Strikes laws, this increased difficulty in obtaining a downward departure often results in a sentence that is disproportionate to the current offense.

Also, individual statutes that create elevated levels of offenses within themselves are distinguishable from the mandatory repeat offender statutes. This is because the individual enhancements are more restricted regarding who is affected and are based on specific instances of repeat conduct (i.e., drug crimes and driving while under the influence crimes).

The Supreme Court has demonstrated its reluctance to hold that a given sentence is disproportionate to the offense committed. However, it is hard to ignore the fact that defendants are being given sentences undoubtedly higher than would otherwise be given due to their prior criminal history. This brings up the following issue: if defendants are not being given excessive sentences for new crimes, are they being sentenced for their past crimes again, in addition to the new crime, in order to justify the increased length in sentences?

B. REPEAT OFFENDER STATUTES IMPOSE A PUNISHMENT FOR A DEFENDANT’S PRIOR OFFENSES

Defendants have attempted to convince the Supreme Court that repeat offender statutes constitute cruel and unusual punishment under the Eighth Amendment because they impose an additional punishment on offenses for which the defendant has already been punished. The Supreme Court disagrees. In McDonald v. Commonwealth of Massachusetts, the Court held that repeat offender statutes are valid because they impose a heavy

---

61. United States v. Hughes, 901 F.2d 830, at 832(10th Cir. 1990).
penalty upon conviction of a felony committed by one who had been convicted of two prior felonies.\textsuperscript{64} Thus, the court reasoned that the statutes do not impose an additional punishment on crimes for which the defendant has already been punished.\textsuperscript{65} In \textit{Cooper v. United States}, the Federal Court for the District of New York affirmed Congress’ power to punish repeat offenders more severely than new offenders.\textsuperscript{66} The court stated that Congress violated no constitutional mandate when it provided that those who have previously offended would be treated more severely should they offend again.\textsuperscript{67}

Often, a defendant’s previous sentence was either negotiated in a plea bargain or negotiated within a sentencing hearing. Frequently, defendants plead guilty to crimes they would have fought in court had they known a harsher penalty would be invoked. When these crimes are brought up under a repeat offender statute and are sentenced according to recidivist statutes, it raises concerns regarding the integrity of plea bargaining.

\textbf{C. REPEAT OFFENDER LAWS PUNISH A DEFENDANT DUE TO THEIR STATUS AS A REPEAT CRIMINAL}

Many defendants have attempted to make the argument that they are not being punished for a new crime when sentenced under a repeat offender law, and instead are being sentenced for their status as a career criminal. Defendants argue that because this statute does not create a new crime, their sentences under this statute constitute cruel and unusual punishment under the Eighth Amendment. In 1962, the Supreme Court supported this position when it held a recidivist statute unconstitutional under the Eighth Amendment in \textit{Robinson v. California}.\textsuperscript{68} The Court reasoned that the sentence constituted cruel and unusual punishment because it provided punishment for the defendant’s “status” as a recidivist and not as punishment for the commission of a criminal act.\textsuperscript{69} Applying this reasoning, the prosecutor should charge the defendant with a specific crime and provide him with a higher sentence rather than charge him as a career criminal due to his repeat criminal offenses. However, such rationale has not been successful in recent times, as illustrated below.

Since 1962, numerous defendants have attempted to make a similar argument using the ruling in \textit{Robinson} and have failed. Federal courts have responded by stating that habitual offender laws merely make the punishment more severe after conviction and that defendants are being

\begin{itemize}
\item \textsuperscript{64} McDonald v. Commonwealth of Mass., 180 U.S. 311 (1901).
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Cooper v. United States, 114 F. Supp 464 (D.N.Y. 1953).
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Robinson v. California, 370 U.S. 660 (1962).
\item \textsuperscript{69} Id.
\end{itemize}
punished for a commission of a crime and not due to any particular status. 70

Courts have held that a third "strike" is a recent overt criminal act which
distinguishes the situation from one in which the defendant is punished
merely because of his status as a repeat offender. 71

However, this conclusion does not solve the problem of punishing a
repeat offender more harshly than a first time offender who committed the
exact same offense. It is not disputed that a defendant who has prior
criminal offenses may receive a higher punishment. Nevertheless, this
circles back to my argument that a judge or prosecutor is in a much better
position to lay down an appropriate punishment. Further, Three Strikes laws
are not the best deterrence method. Courts are struggling to fight the variety
of attacks being launched at Three Strikes laws by defense attorneys and
politicians alike. These arguments are unlikely to disappear because
politicians continue to seek ways to decrease crime rates and serve justice at
the same time.

D. RECIDIVIST STATUTES LACK EVIDENCE THAT THEY ARE
EFFECTIVE AND COSTWORTHY

One thing proponents and opponents of Three Strikes laws agree on is
that crime rates across the nation have declined since repeat offender laws
began to be passed in the United States. Proponents of recidivist statutes
continuously credit Three Strikes laws for the decline. However, there is
plenty of evidence that conflicts with this assertion and brings into question
the true reason for lower crime rates within the United States. There is also
plenty of evidence that Three Strikes laws are expensive for taxpayers and
have not shown any concrete results proving their actual effectiveness.

California’s Three Strikes law has been widely credited for the
significant drop in California’s crime rate, while the population has
increased since its enactment in 1994. California had 345,624 incidents of
violent crime in 1992 and 336,381 in 1993. 72 By 2000, the rate had dropped
to 210,531 incidents. 73 Comparatively, in Minnesota, a state without a
recidivist statute and with a projected growth rate of five percent, crime
rates have dropped by a rate far greater than in California, a state with only
a 1.1 percent population growth rate. 74 This information could be purely
coincidental, but the fact remains that states across the country have

70. See Sanchez v. Nelson, 446 F.2d 849 (9th Cir. 1971); People v. Hendrick, 217 N.W.2d
crime/cacrime.htm (last visited Dec. 9, 2010).
73. Id.
crime/mncrime.htm (last visited Nov. 10, 2010).
Arguments Against the Use of Recidivist Statutes

experienced decreases in crime rates, dropping some rates to historically low levels. In 1998, California Attorney General, Dan Lungren, published a report attributing the dramatic decrease in crime in California over the previous four years to the enactment of California’s Three Strikes law. However, researchers, Lisa Stolzenberg and Stuart J. D’Alessio, contradicted the Attorney General’s statement by conducting a study and concluding that the decrease in the crime rate was due to pre-existing trends of falling crime rates that began before the laws ever went into effect. Moreover, the lower rates could be attributed to the enactment of any number of new criminal statutes or deterrence methods, not necessarily due to the Three Strikes laws. However, given the exorbitant number of factors that play into crime levels, both supporters and opponents of mandatory minimum recidivist statutes will continue to argue over the cause of decreasing crime rates.

Three Strikes laws have also received criticism for their lack of consistency, especially given that one goal of mandatory sentences is uniformity in sentencing. Three Strikes laws aim for uniformity by taking out the element of discretion for prosecutors and judges in sentencing decisions. However, much of the inconsistency occurs between the states’ varying uses of Three Strikes laws. Part of the problem is the reluctance of prosecutors to charge, and judges to sentence, defendants under a Three Strikes-type law. Thus, although these laws are written to be consistent for all defendants with three or more “strikes,” often they are not applied to all defendants who have three “strikes.” This results in inconsistency within the application of these laws.

Criminals who are on their final strike may be desperate and more likely to attack police because “the three-strikes penalties approach the penalties for homicide and there is little marginal deterrence to dissuade a criminal from murdering police if doing so reduces the probability of arrest.” The possibility has been suggested by numerous individuals and some empirical studies have been testing the theory. While the Moody, Marvell, & Kaminski study was not able to reach a conclusion on the issue, it remains a reasonable concern that criminals may be more desperate and willing to kill if on their third strike.

Repeat offender laws are financially burdensome on our penal systems

75. JENNIFER E. WALSH, THREE STRIKES LAWS 132–33 (Historical Guides to Controversial Issues in America Series No. 5, 2007).
76. Id.
79. Id.
and create undue expense to taxpayers in order to house the increased number of criminals who are being sentenced to prison terms, and for longer periods of time. In California, “it is estimated that the Three-Strikes law will cost $5.5 billion over a 20-year period.”\(^8\) The cost of implementation is expected to rise at least until 2019 when the first wave of third-strike offenders are released.\(^8\) At that time, other costs, such as the increased amount of parole supervisions, will likely be incurred. The cost of parole supervision for California inmates alone is estimated at about $20 million per year.\(^8\) In addition, the average prison population will rise, up to an estimated 19.8% by 2020 in California, due to Three Strikes laws and the longer sentences that come with them. With the average age increase comes increased health care costs and training costs for new specialized personnel in order to care for the aging population.\(^8\) These are clearly all expenses that create a greater burden on taxpayers, but there are also expenses for the prisoners who are being convicted of Three Strikes laws. Crowded prisons lead to poorer living conditions, poorer prison services for inmates, and increased violence between prison inmates.\(^8\) This increased violence could be due to any number of reasons, including increased prisoner stress levels and a lack of supervision due to overcrowding and state cost-cutting methods which reduce the number of supervisors per prisoner ratio. California was recently ordered by federal judges to cut its prison population by more than 40,000 within the next two years.\(^8\) Furthermore, the overcrowded system is unable to provide inmates with adequate medical care and Governor Arnold Schwarzenegger offered a controversial proposal of shipping some inmates to out-of-state facilities as a cost-cutting measure.\(^8\)

Supreme Court Justice Kennedy has spoken recently against Three Strikes laws, specifically the California Three Strikes law. Justice Kennedy used a speaking engagement at Pepperdine Law School to express his dissatisfaction with the passing and use of Three Strikes laws in California. Justice Kennedy disapproved of how the Three Strikes law imposes a sentence for 25 years to life if a defendant commits a third felony, even if

---


81. *Id.*


83. *Id.*


86. California Governor’s Proclamation 4278 at 6.
the felony is nonviolent. Justice Kennedy noted that sentences in the United States are eight times longer than those in Europe. He also told students to be aware that California has 185,000 people in prison at a cost of $32,500 each per year. "He urged voters and elected officials to compare taxpayer spending on prisons with spending on elementary education." Justice Kennedy also stated his disapproval that the law's sponsor was the correctional officers' union, calling this realization "sick."

Given the lack of evidence proving that these statutes are indeed effective, it is not surprising that states and the federal government are continuing to search for ways to decrease the cost of repeat offender laws and amend them to become less broad. Courts are also continuously changing how Three Strikes laws are interpreted with their holdings. The future will continue to be full of change as both the courts and legislature continue to wrestle with these laws.

IV. THE FUTURE OF RECIDIVIST STATUTES WITH MANDATORY MINIMUM SENTENCES

Due to the number of states struggling with budget deficits in recent years,

[w]hen lawmakers consider adopting a three-strikes law, they should evaluate whether other forms of sentencing frameworks and correctional and operational polices can achieve the same level of benefit with lower costs and less impact on vulnerable populations most likely to suffer in the operation of large impersonal bureaucracies.

No longer are quick fix legislative actions being considered as serious solutions to increasing crime rates without intensive studies into their effectiveness, as well as extensive planning for the process by which a three strikes law would be enacted.

No U.S. state has passed a new recidivist statute in recent years. Even more interesting is the fact that numerous states have amended their current repeat offender statutes to make them more lenient. This is undoubtedly due to a lack of confidence in three strikes laws as a way to reduce and deter crime in an economically responsible way. The laws have been used against fewer violent offenders than originally thought and courts are becoming

[88. Id.]
[89. Id.]
[90. Id.]
[91. Id.]
[92. Dichiara, supra note 80.]
clogged with these cases, driving out less severe and civil cases.\textsuperscript{93}

\textit{V. CONCLUSION}

Recidivist statutes with mandatory minimum punishments and Three Strikes laws are unfair to defendants for three main reasons. First, these laws impose punishment for defendants’ prior offenses, for which they have already been punished. Second, the punishment a defendant serves under a recidivist statute is often disproportionate to the actual offense committed. Lastly, these statutes punish defendants due to their criminal status. The courts continue to wrestle with these arguments and to draw lines that are fair for defendants while also serving the best interests of justice.

These statutes not only impose unfair penalties upon defendants, but more importantly, they fail to deter criminals, overcrowd prisons, and lack any traditional criminal justice rationale for their existence. These are all serious problems which increase the burden on both the taxpayers and the prisoners themselves. In these difficult financial times, it is no longer an option to consider only the impact such statutes will have upon a state’s crime rate without balancing that impact against the costs to taxpayers. Three Strikes laws are no longer a quick legislative deterrence method for dealing with increasing crime rates. The effectiveness of these laws and the processes by which they operate will further be questioned as lawmakers continue to search for new legislative solutions to further decrease crime rates in their state and across the country.

Due to the continued debate regarding the effectiveness of Three Strikes laws, and recidivist statutes in general, I recommend that lawmakers carefully reconsider recidivist statutes with mandatory minimum sentences and the costs they impose upon criminal defendants and taxpayers who carry the heavy burden of prison costs. Numerous criminal statutes can be written to contain enhancements in order to further deter criminals from committing the same crimes. Policy makers must also consider the costs of imprisoning repeat offenders and seek a solution that rehabilitates criminals and keeps prison populations from increasing at their current rates. This debate is likely to continue. Therefore, it is critical to consider the harmful effects such statutes have had on the United States in such a short time period.

\textsuperscript{93} Shichor & Sechrest, \textit{supra} note 82, at 273.