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Three strikes and preventive detention: Do we really need them both?

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**THREE STRIKES AND PREVENTIVE DETENTION:
DO WE REALLY NEED THEM BOTH?**

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Abstract

This paper examines the three strikes and preventive detention sentencing schemes. They both essentially deal with how to handle repeat violent and sexual offenders, but do so in very different ways. This paper answers the question of which sentencing scheme is better and whether we actually need them both.

Four key areas are identified for comparison: consistency with our national and international human rights obligations especially under the New Zealand Bill of Rights Act 1990 and the International Covenant on Civil and Political Rights; how well each sentence fulfils the sentencing aims of deterrence and incapacitation; and how each system incorporates judicial flexibility and discretion into decision making.

This paper comes to the conclusion that, while both schemes have some flaws, the three strikes regime would create a lot more problems than it would solve. It presents major inconsistencies with our international human rights obligations especially with regards to disproportionate sentences. It fails to satisfactorily fulfil the aim deterrence and is outperformed by preventive detention in terms of incapacitation. Lastly it does not afford nearly as much discretion to judges and as such makes it a very unattractive option. While preventive detention has some flaws of its own, they are relatively minor compared to three strikes. This author believes that three strikes should be scrapped in favour of preventive detention.

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I Introduction

The Sentencing Parole and Reform Act 2010 ("SAPRA") was passed on 31 May 2010 amending the Sentencing Act 2002 ("the Act"). It introduced the "three strikes" sentencing scheme. This scheme, based on a similar system in California, was targeted at New Zealand's worst repeat sexual and violent offenders, denying them parole in order to improve public safety.¹ The scheme sets out a number of qualifying offences, which on conviction means an offender receives a warning ("strike"), which escalates in consequence to three strikes, where an offender receives a mandatory maximum sentence for that offence without parole.

Before the new provisions, New Zealand already had a mechanism in place to protect the public from repeat violent and sexual offenders - the sentence of preventive detention.² Preventive detention is an indeterminate sentence available to judges when an offender has committed a serious sexual or violent offence and is thought likely to commit another qualifying offence after serving a determinate sentence. Once imposed an offender will not be released until the Parole Board is satisfied they no longer pose a threat to society.

This essay will compare three strikes with preventive detention in a number of areas to see which scheme is more successful at achieving its aims and whether we need them both. It will assess their compliance with the New Zealand Bill of Rights Act 1990 ("BORA") as well our international obligations such as those under the International Covenant on Civil and Political Rights ("ICCPR"). It will then look at each scheme's fulfilment of the aims of sentencing, before assessing their ability to incorporate aspects of judicial flexibility to sentence according to the facts of each case. It is argued in this paper that, while neither system is perfect, preventive detention is the better option of the two, and three strikes should be scrapped.

¹ Sentencing and Parole Reform Act 2010, s 3.

² Sentencing Act 2002, s 87.

II Legislation

A Three Strikes

The list of offences that will attract a strike is found in section 86A.³ They are comprised of sexual and violent offences which carry a maximum sentence of seven years or more. Strikes will only apply if the offence is committed after the new scheme has come into force and if the offender is over 18 years at the time of the offence.⁴

On committing one of the offences set out in section 86A, the offender receives their first warning and is sentenced as usual.⁵ Once the offender has committed a qualifying offence after receiving their first warning, they receive a final warning and are sentenced normally with the exception that their sentence must be served without parole.⁶

Once an offender has received their third strike the court must sentence them to the maximum term of imprisonment for that offence.⁷ This must be served without parole unless it would be "manifestly unjust" to do so.⁸ If the second or third strike offence is murder, then the offender must be sentenced to life imprisonment without parole.⁹ This is once again subject to the "manifestly unjust" test.

Although this is a mandatory sentencing scheme, it does not preclude the court from imposing a sentence of preventive detention at any stage. Parliament made it explicit that this sentence was still available for a strike three offence.¹⁰ In this case, the minimum period of imprisonment under section 89 must not be less than the maximum available determinate sentence for that offence. For example, a person convicted of a third strike for indecent assault and sentenced to preventive detention would receive a minimum non-parole period of seven years.

³ Ibid, s 86A.

⁴ Ibid.

⁵ Ibid, s 86B.

⁶ Ibid, s 86C(4)(a).

⁷ Ibid, s 86D(2).

⁸ Ibid, s 86D(3).

⁹ Ibid, s 86E(2)(b).

¹⁰ Ibid, s 86D(7).

B Preventive Detention

The provisions for preventive detention are set out in sections 87-90 of the Act. Section 87(1) clearly states that the object of preventive detention is to protect the community, thus making it a predominately preventive rather than a punitive sentence.¹¹ The sentence is only available if the offender commits a qualifying offence, as defined in subsection 5, was over 18 at the time of the offence and is "likely to commit another qualifying sexual or violent offence" if released after a determinate sentence.¹²

When determining whether a preventive detention sentence is applicable the court takes into account a number of factors including criminal history, the seriousness of the harm, potential to commit future crimes and failure to mitigate the causes of offending.¹³ Section 87(4)(e) makes it clear that a lengthy determinate sentence is preferable if it would provide adequate protection for society.¹⁴ Subsection 5 covers almost the same set of offences as three strikes excluding murder.¹⁵

Before an order of preventive detention can be imposed, the court must consider reports from two health assessors about the offender's likelihood of committing further qualifying offences.¹⁶

If the sentence is imposed then the offender must serve a minimum of five years imprisonment.¹⁷ The court has the power to increase this length if it does not feel it reflects the gravity of the offence or does not afford enough protection to the community in light of the risk posed by offender.¹⁸ The minimum term imposed must be the one which satisfies the longer of these two goals.

¹¹ *Ibid*, s 87(1).

¹² *Ibid*, s 87(2)(c).

¹³ *Ibid*, s 87(4).

¹⁴ *Ibid*, s 87(4)(e).

¹⁵ Murder is excluded because life imprisonment is itself an indeterminate sentence with the ability to set minimum non-parole periods, and so to include it in preventive detention would be superfluous.

¹⁶ *Ibid*, s 88(1)(b).

¹⁷ *Ibid*, s 89(1).

¹⁸ *Ibid*, s 89(2).

III Bill of Rights and International Obligations Compatibility

New Zealand is bound to uphold minimum standards of human rights as a party to various international conventions and covenants such as the ICCPR and the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). It has also passed BORA reaffirming these rights at a domestic level. Both three strikes and preventive detention raise some areas of inconsistency with our national and international obligations.

A Disproportionately Severe and Arbitrary Sentences

Articles 7 and 9(1) of the ICCPR state that no one should be subjected to disproportionately severe treatment or arbitrary arrest or detention. This is codified in section 9 of BORA.¹⁹ Both three strikes and preventive detention have possible inconsistencies in this area.

Under the three strikes system, a strike is handed down to offenders simply on conviction, rather than a sentence over a certain length. Although the list has been filtered to only include serious offences, it does not differentiate between different levels of offending within an offence. This increases the risk of offenders receiving disproportionately severe treatment, and is thereby contrary to the sentencing principle of 'just deserts', which states that punishment should be proportionate to the offence committed.²⁰ Something is disproportionately severe if it is "grossly disproportionate to the circumstances";²¹ it would describe a sentence that "New Zealanders would nevertheless regard as so out of proportion to the particular circumstances as to cause shock and revulsion".²²

Another possible inconsistency is the sentence of life imprisonment without parole. When the Attorney-General vetted the bill for inconsistencies with BORA, he considered this sentence may be severe, but it does not reach the high threshold required

¹⁹ New Zealand Bill of Rights Act 1990, s 9.

²⁰ Andrew Ashworth *Sentencing & Criminal Justice* (4th ed, Cambridge University Press, Cambridge, 2010) at 84.

²¹ *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429 at [176].

²² *Ibid*, at [172]. The issue of disproportionate sentences is discussed further below at 6 A.

to breach section 9 of BORA.²³ He also noted that the sentence had been used recently in the United States and the United Kingdom.²⁴ However, just because the sentence is used in other jurisdictions does not automatically mean it is consistent with international obligations. In their report on the bill, the Ministry of Justice noted that this sentence should be limited to the most serious cases involving specific aggravating circumstances as found in section 9 of the Act.²⁵ By not taking this into account, and thus treating all murders as the same, there is the distinct possibility of disproportionate sentencing. Under this system, a person who commits murder but pleads guilty straight away and shows genuine remorse will be considered the same as someone who commits a particularly cruel, premeditated murder with a weapon having gained unlawful entry onto the premises. Usually a judge would give the former a much shorter minimum non-parole period, but under three strikes, both would receive life imprisonment without parole if they already had one previous strike.

Preventive detention has also received some criticism under Article 9 of the ICCPR. The Penal Policy Review Committee in 1981 found that it was "arbitrary, selective and inequitable".²⁶ It was arbitrary because, at the time, preventive detention only covered serious sexual offences and nothing else. Because offenders could only be released on permission of the Minister of Justice and not the Parole Board, it was arbitrary as it was in the hands of a politician who may take other factors such as public perception into account. It was also used inconsistently, which was partly due to the lack of guidelines available as to when it should be used.

These criticisms have since been addressed by new legislation. The Penal Policy Review Committee report was filed in 1981 before the passing of the Criminal Justice Act 1985 and the Sentencing Act 2002, which enhanced some of the safeguards for the sentence. The sentence has now been expanded to include non-sexual serious violent offences, and the power of release now rests with the Parole Board. The Sentencing Act

²³ Hon Christopher Finlayson *Interim Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform Bill* (2009) at [21].

²⁴ *Ibid*, at [22].

²⁵ Sentencing Act 2002, s 9.

²⁶ Penal Policy Review Committee *Report of the Penal Policy Review Committee* (prepared for the Ministry of Justice 1981) at 59.

2002 also enshrined the factors set out in *R v Leitch* that must be taken into account when deciding if a sentence of preventive detention is available.²⁷

B Removing Parole

Three strikes could also be inconsistent with section 23(5) of BORA and the corresponding Article 10(1) of ICCPR. It states that "[e]veryone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person."²⁸ In their submission to the Law and Order Select Committee on the bill, the New Zealand Council for Civil Liberties expressed concern that by forcing offenders to serve their sentences without parole for a strike two or three offence, that we are not treating them with humanity and respect.²⁹

The removal of parole eligibility undermines any form of rehabilitation that the offenders could receive in prison.³⁰ By taking away parole we are effectively saying to the offenders that we think they have no opportunity to reform themselves. While the Government is committed to rehabilitative measures, it has been made clear that this legislation is not.³¹ By imposing sentences without parole we may be causing prisoners undue mental suffering. This is inconsistent with our obligations under article 1(1) of CAT.³² It could lead to an increase in prison violence as offenders no longer need to be on good behaviour while incarcerated consequently making the jobs of our prison officers much harder and possibly endangering their lives.³³

This inconsistency is further exacerbated when we consider the provisions for murder. If an offender commits murder as a second or third strike the court must impose a sentence of life imprisonment without parole. The only exception to this is if the judge

²⁷ *R v Leitch* [1998] 1 NZLR 420 (CA) at 429. Discussed in more detail below at 6 A.

²⁸ New Zealand Bill of Rights Act 1990, s 26.

²⁹ New Zealand Council for Civil Liberties "Submission on the Sentencing and Parole Reform Bill" at 2.

³⁰ Warren Brookbanks and Richard Ekins "Criminal injustice and the proposed 'three strikes' law" (2010) Maxim Institute, at 11 <www.maxim.org.nz>.

³¹ (25 May 2010) 664 NZPD 11228.

³² "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ..."

³³ Brookbanks and Ekins, above n 30, at 11.

considers the non-parole part of the sentence "manifestly unjust".³⁴ If this is the case, the judge may impose a finite non-parole period. However the threshold to reach this exception is likely to be extremely high in practice and consequently most will receive no parole. It should be noted that it is not considered international best practice to sentence someone to life without parole.³⁵ It is not even available for crimes against humanity or genocide in the International Criminal Court.³⁶ It has been held by the Council of Europe and the European Court of Human Rights that this sentence may raise inconsistencies with Article 7 of the ICCPR.³⁷

C Review of Sentence

Although preventive detention does not present problems with regard to parole, it may raise another inconsistency with Article 9(4) of the ICCPR, which grants an offender the right to have their sentence reviewed to see if it is still valid. This was considered by the European Court of Human Rights in the context of the United Kingdom provision for preventive detention under article 5(4) of the European Convention on Human Rights. This section is almost identical to the ICCPR.

In the case of *Weeks* it was held that the punitive and preventive part of the sentence must be distinct to enable regular review of the preventive part once the punitive part has been served.³⁸ In New Zealand the punitive part of a preventive detention sentence is the mandatory minimum non-parole term which is attached to it. However, according to the Act, when considering what length this period should be the judge must also consider the minimum length of time required to protect the safety of the community from the offenders possible reoffending.³⁹ The total length of the minimum non-parole period must be the longer of these two periods. Because the judge does not say how much each factor weighed into their determination it is possible that the Parole Board may not start reviewing the sentence early enough if the preventive

³⁴ Discussed in more detail below at 6 D.

³⁵ Human Rights Commission "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2010" at [4.11].

³⁶ Rome Statute of the International Criminal Court (open for signature 17 July 1998, entered into force 1 July 2002), art 110(3).

³⁷ Human Rights Commission "Submission", above n 35, at [4.16].

³⁸ *Weeks v United Kingdom* (1988) 10 EHRR 293 (ECHR).

³⁹ Sentencing Act 2002, s 89(2).

part is longer than the punitive. This could be rectified by requiring judges to specify how long the punitive part of the sentence is.

This poses less of a problem for people sentenced under three strikes. Because the sentence is predominately determinate, it is not necessary for the Parole Board to keep assessing whether the sentence is valid. It is not within their powers to override the will of the court. This differs from preventive detention where the courts have given power to the Parole Board to determine when they should be released.

D Aims of the Penitentiary System

The three strikes scheme is aimed at the punishment and deterrence of repeat offenders and protecting the community. While these are valid sentencing principles, it may also create another inconsistency with our international obligations. Article 10(3) of the ICCPR requires that the essential aim of the penitentiary system is to be the reformation and social rehabilitation of prisoners.⁴⁰ A system which denies parole to offenders and seeks to lock them away for long periods of time to protect the community is obviously not concerned with their rehabilitation and reintegration into society. It is contended that this is undesirable because the successful reintegration of offenders into society is a much more effective way to prevent further crimes being committed.

E Presumption of Innocence

The United Nations Human Rights Committee was concerned preventive detention might be inconsistent with the presumption of innocence, specifically whether the words "satisfied that the person is likely to commit another qualifying sexual or violent offence if the person is released" in section 87(2)(c) conflict with article 14(2) of the ICCPR.⁴¹ Article 14 deals with the presumption of innocence and although the idea of proving guilt beyond reasonable doubt is not enshrined in the Covenant, it is the

⁴⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), art 10(3).

⁴¹ United Nations Human Rights Committee *Summary Record of the 1394th meeting: New Zealand* at [19], CCPR/C/SR.1394 (1994)

widely accepted standard.⁴² The word "satisfied" has been held by the New Zealand Court of Appeal to mean "makes up its mind".⁴³ This is clearly not beyond reasonable doubt. However since the offender must have already been considered guilty before preventive detention can be considered, in the author's view this is not a conflict.⁴⁴ Preventive detention thus accords with the presumption of innocence which is an important cornerstone of any democratic penal system.

F Double jeopardy

Another area of concern for preventive detention is in regards to article 14(7) - prohibition of double jeopardy. This is found under section 26(2) of the New Zealand Human Rights Act 1993.⁴⁵ The fear is that an offender is being punished for their previous crimes again by taking them into account when determining if they are a further risk to society and thus liable to an indeterminate sentence.

In a Canadian Supreme Court case the judges decided that imposing a sentence of preventive detention did not amount to being punished again for past crimes.⁴⁶ Rather, the defendant was being "prosecuted for a very serious violent crime and subjected to a procedure aimed at determining the appropriate penalty that should be inflicted upon him in the circumstances."⁴⁷ This procedure involved giving more effect to the preventive purpose of sentencing.⁴⁸

Although this has not been considered in the context of preventive detention in New Zealand it could still be of use. Before we can consider whether preventive detention is even available as a sentence, the offender must have committed a qualifying offence and be likely to reoffend. If we decide that the sentence is warranted then there are two purposes to the sentence - punitive, to deal with current offence, and preventive

⁴² Frederic Bostedt "Does the sentence of preventive detention in New Zealand impinge the human rights of dangerous offenders?" (LLM Research Paper, Victoria University of Wellington, 2003) at 18.

⁴³ *R v White (David)* [1988] 1 NZLR 264 (CA), at 268.

⁴⁴ Bostedt, above n 42, at 19.

⁴⁵ "No one who has been fully acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again."

⁴⁶ *R v Lyons* [1987] 2 SCR 309 (SCC).

⁴⁷ *Ibid*, at 328.

⁴⁸ For New Zealand see Sentencing Act 2002, s 7(1)(g).

to stop reoffending. The punitive part is reflected in the minimum non-parole period and presents no problem. The preventive part is more concerned with how likely the offender is to reoffend. The only part where their previous criminal history could be an issue is whether it presents any pattern of offending.⁴⁹ It is not directly punishing the offender for crimes they have already committed.

While both systems raise several inconsistencies with our international obligations and BORA rights, the most serious are posed by three strikes. Mandatory sentencing schemes which increase penalties with reoffending bring with them the risk that offenders will be sentenced disproportionately to the circumstances of each individual offence. Also by removing parole we are not providing help for prisoners that may need it. While preventive detention still raises issues with sentence review, most of the larger issues have since been resolved by legislative changes. This makes it a better alternative to the three strikes scheme. This paper will now consider each scheme's fulfilment of the aims of sentencing, starting with deterrence.

IV Deterrence

Deterrence is one of several rationales for criminal punishment. It relies on preventing further crime by using the threat or fear of detention. There are two different types of deterrence: general and individual. General deterrence aims to deter other people from committing a crime by showing what happens to people who do. Individual deterrence is aimed at deterring the particular offender from recommitting further crimes. Both rely on rational choice theory ("RCT") which says that offenders weigh up the advantages and disadvantages before committing an offence.⁵⁰

A Knowledge

Deterrence is stated as one of the main aims of three strike scheme by its proponents. The belief is that if criminals know they are going to face lengthy prison sentences then this will deter them from committing the crime. California is often quoted as an example of where a mandatory sentencing scheme such as this has worked to deter criminals. Although the arguments around deterrence predominantly affect three

⁴⁹ Sentencing Act 2002, s 89(4)(a).

⁵⁰ Discussed below at 4 B.

strikes because it is one of the key aims of the scheme, the following arguments also apply, to some extent, to preventive detention.

Unlike the publicity surrounding three strikes, the sentence of preventive detention is not widely known among the general population. According to Ashworth, deterrence must operate through the mind of the offender and the severity of the possible sentence must be taken into account so much so that the offender believes that if caught and sentenced that penalty will be applied to him.⁵¹ For deterrence to be a successful principle of sentencing, these reasons must cause the offender to refrain from committing the offence. If the potential offenders have no prior knowledge then this removes any deterrent effect it can have on the general public.

Simple knowledge of a sentence is not enough to deter criminals. For deterrence to be effective this knowledge must be an active part of the decision making that goes on before a criminal decides to offend, and this is the role of rational choice theory.

B Rational Choice Theory

Proponents of this theory believe that criminals weigh up the consequences of their criminal actions based on a cost/benefit analysis.⁵² They believe if criminals know they face longer sentences if they are caught, then they will be deterred from committing crime. Supporters of the three strikes scheme believe this theory to be true. However, studies have found that while this might have some application to white-collar crimes such as corporate or bank fraud, there is little to suggest offenders who commit sexual or violent crime think the same.⁵³ Even the evidence for white-collar crime is inconclusive.⁵⁴ More often than not, these offenders are driven by irrational motives. Academics have also found that other factors weigh more heavily on the offender's choice. These include alcohol or drug addiction, mental difficulties and illiteracy.⁵⁵

⁵¹ Ashworth, above n 20, at 79.

⁵² Rethinking Crime and Punishment "Second Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill 2010" at [12].

⁵³ Ibid.

⁵⁴ Ashworth, above n 20, at 80.

⁵⁵ John Pratt "Submission to the Law and Order Select Committee Concerning the 'Three Strikes' Provisions of the Sentencing and Parole Bill" at 3.

When faced with these other problems, offenders are unlikely to give priority to consideration of strikes, and other instrumental incentives are rendered irrelevant.⁵⁶

The same applies for removing parole eligibility for second and third strike offenders. The fact is that parole, or the removal of it, is far too removed from the committing of the offence itself and is insufficiently salient.⁵⁷ Once again this relies on offenders of sexual and violent crime being rational and calculating people, which is often unlikely to be the case.

C Examples from North America

The United States, and especially California, is used by proponents of three strikes as an example of mandatory sentencing having a deterrent effect on the criminal population.⁵⁸ However any reduction in crime rates should be put in context. Even though the crime rate dropped significantly in California after the introduction of three strikes, there was a massive corresponding decrease across the entire United States and Canada.⁵⁹ In fact the largest percentage decrease did not even come in California, but New York.⁶⁰ Neither New York nor Canada have similar three strike provisions.⁶¹ It is believed that the presence of extra police, aggressive policing and management reforms accounted for half of the reduction in crime rates.⁶² Thus, categorically saying that the decrease was due to three strikes is incorrect. Most criminologists believe that the nationwide drop was attributable to a diverse range of factors, including situational crime prevention such as burglar and car alarms.⁶³

⁵⁶ Rethinking Crime and Punishment, above n 52, at [12].

⁵⁷ Ibid, at [40].

⁵⁸ Dr Jennifer Walsh attributed the dramatic drop in crime rate solely to stricter sentencing and tightening parole eligibility. The Regulatory Impact Statement produced for the bill also mentions California as a successful example of this. See Jennifer Walsh "Submission on the Sentencing and Parole Reform Bill" at 1; Ministry of Justice *Regulatory Impact Statement: Sentencing and Parole Reform Bill* (2009) at 4

⁵⁹ Franklin Zimring *The Great American Decline* (Oxford University Press, New York, 2007) at 198.

⁶⁰ Ibid, at 201.

⁶¹ Although New York had a system called "broken windows" which worked on the assumption that maintaining an ordered and clean environment sends the signal that the place is monitored. This in turn leads people to conform to the common norms of non-criminal behaviour.

⁶² Zimring "The Great American Decline", above n 60, at 201.

⁶³ Pratt, "Submission", above n 55, at 2.

D Potential Effectiveness

The deterrent effect of three strikes has been criticised by many parties, with most calling it uncertain at best. In the report from the Law and Order Select Committee it was noted that the Department of Corrections thought "there is an implicit assumption that the Bill will have no deterrent impact."⁶⁴ This scepticism was also shared by the Ministry of Justice:⁶⁵

"... the deterrence effect in the three stage regime is uncertain. The proposals will add substantial direct costs to the justice system without creating any significantly improved outcomes in terms of reducing the drivers of crime, improving social outcomes or reducing reoffending and victimisation."

Because preventive detention is aimed at the reform of prisoners and stopping particular people from reoffending it is focussed on individual deterrence. Preventive detention may be more effective because even after release, offenders are subject to recall by the Parole Board for the rest of their life.⁶⁶ This acts as a further deterrent for offenders. Therefore this sentencing rationale looks more to the propensity to reoffend as the main deterrent, rather than the gravity of the crime.⁶⁷

That being said, deterrence is not one of the main reasons behind preventive detention in the first instance. The main purpose is to protect the community from those who pose a significant and ongoing risk to the safety of its members. This is achieved mainly through incapacitation and rehabilitation.

While the criticisms of deterrence as a sentencing rationale are valid, this has major implications for the three strikes scheme. Proponents of the scheme tell us that deterrence is one of the aims of the three strikes system. If deterrence is not successful as an aim, the necessity and efficacy of three strikes is called into question. Since this

⁶⁴ Sentencing and Parole Reform Bill 2010 (17-2) (select committee report) at 14.

⁶⁵ (18 May 2010) 663 NZPD 10930. This viewpoint is supported by Professor Warren Brookbanks and Dr Richard Ekins; *See* Brookbanks and Ekins, above n 30, at 10.

⁶⁶ Preventive detention is defined as an indeterminate sentence for the purposes of the Parole Act 2002; see Parole Act 2002, s 4. Any prisoner released on parole from an indeterminate sentence is subject to recall for life; see Parole Act 2002, s 6(4)(d). These conditions are imposed on the offender for life; see Parole Act 2002, s 29(3)(b).

⁶⁷ Ashworth, above n 20, at 79.

may be the case, it is submitted that we would be better served by retaining preventive detention alone, and attending to some of the deficiencies. This would be better than introducing a system which will bring a whole set of new problems while not fixing the old ones. Next we move on to deal with the other main sentencing aim - incapacitation.

V Incapacitation

Incapacitation is the main method through which both schemes seek to achieve their aim of protecting the public. Incapacitation works by removing dangerous and repeat offenders from society, thus reducing the crime rate by making them incapable of offending for substantial periods of time.⁶⁸

A Length of Sentence

Three strikes aims to incapacitate the worst repeat offenders who "cannot and will not alter their behaviour".⁶⁹ This scheme will indeed lead to an increase in the prison population and prisoners staying in jail for longer periods. By compelling judges to sentence criminals to serve the maximum sentence at stage three, and without parole from stage two, people who would previously have served a community sentence will now serve it in prison and for a longer time.

However this may lead to sentences which are not proportionate to the crime committed. One example of this could be aggravated robbery which carries a maximum sentence of 14 years.⁷⁰ Instead of using actual violence, two or three offenders "standing over" a victim demanding a jacket or some such item constitutes an aggravated robbery.⁷¹ Where one might expect a very short sentence, or maybe community sentence in this situation, if this was the offenders third strike, they would automatically get 14 years and no parole.⁷²

⁶⁸ Ibid, at 84.

⁶⁹ (25 May 2010) 664 NZPD 11236.

⁷⁰ Crimes Act 1961, s 235.

⁷¹ Rethinking Crime and Punishment, above n 52, at [33].

⁷² If the sentence would have been three months and then taking into account that they would only serve half because of parole, the offender could serve up to 112 times longer in jail. This represents an increase of 11,200%; Ibid, at [30].

Preventive detention may actually result in longer sentences for criminals than three strikes because it is not bound by the statutory maximum sentences. This is most evident for some of the lesser offences covered by the three strike regime, such as indecent assault which carries a maximum of seven years. When the courts are faced with an offence that is not a third strike it may take into account the gravity of the offence and the potential risk the offender presents to society to increase the minimum detention period as opposed to the current requirement of at least five years in just before current.⁷³ After that the prisoner is still subject to remain in prison until the Parole Board feels they no longer pose any risk. Under new provisions in SAPRA, if a sentence of preventive detention is ordered when the offender would have received their third strike, the court must now impose a minimum non-parole period which is equal to the maximum sentence for that crime.⁷⁴ This will lead to a longer sentence than under three strikes. It should also be noted that incapacitation would be more effective under preventive detention rather than three strikes because it will also be coupled with rehabilitative treatment.

B Parole and Rehabilitation

The incapacitation of prisoners allows them to go through rehabilitation so that they can reintegrate with society upon their release. Parole is the mechanism through which the Parole Board can assess the risks offenders pose and track their rehabilitation.

The three strikes scheme removes parole eligibility for all offenders convicted of a second or third strike. This undermines any form of rehabilitation that the offenders could receive in prison.⁷⁵ While incarcerated, prisoners are theoretically on good behaviour because it helps their chances of being released on parole earlier. This good behaviour can include genuine attempts to rehabilitate themselves by gaining practical skills that can be used when they are released, and in turn makes reintegration into society a lot easier which is a better outcome for the community at large. While offenders remain in prison, if they do not rehabilitate they pose no risk to the community, but a lack of rehabilitation becomes problematic once the prisoner is

⁷³ Sentencing Act 2002, s 89(1) and (2).

⁷⁴ *Ibid*, s 86D(7)(b).

⁷⁵ Brookbanks and Ekins, above n 30, at 11.

released (as they will be for offences except for those attracting a life sentence without parole). Removing parole therefore removes one of the major incentives for prisoner rehabilitation.

Unless prisoners have a genuine desire to reform themselves, removing parole takes away any other benefits it has for them. Now no matter what they do they will not be getting out early. This could have another potentially negative effect. If prisoners have no reason to behave in prison then this could lead to an increase in prison violence,⁷⁶ increasing the difficulty for prison officers in performing their role, and creating considerable safety risks.

Conversely, for preventive detention, rehabilitation works as the ultimate incentive for the prisoner. This is simply because rehabilitation presents the only chance of prisoners being released, an incentive recognised by the courts:⁷⁷

"Successful participation in a course of treatment, such that (the offender) will not pose an undue risk to the safety of the community is released, will be determinative of his final release date. The advantage of this incentive by comparison to the situation of a prisoner subject to a finite sentence is obvious."

Unlike a finite sentence, the prisoner will not be released after serving a specific amount of time. This is the entire point about sentencing a prisoner to preventive detention. They will not be released until they satisfy the Parole Board, through undergoing rehabilitative treatment, that they no longer pose a significant and ongoing risk to the safety of the community.

Prisoners who are released from a preventive detention sentence are subject to a lifetime recall at the discretion of the Parole Board.⁷⁸ This is to ensure a prisoner who is released and looks likely to reoffend again may be brought back to prison before any further offences are committed. This encourages proper rehabilitation because the

⁷⁶ Ibid.

⁷⁷ *R v Bailey* CA102/03, 22 July 2003 at [23].

⁷⁸ Parole Act 2002, s 6(4)(d). See also above n 66.

offender knows that they must continue to stay out of trouble or they will be back in prison.

While prisoners serving three strikes sentences can still be subject to conditions after release, they are not as strong. For prisoners who are released after their first strike the length of time these conditions can last is significant shorter than the lifetime recall that preventive detention offenders are subject to. Those who serve sentences for a second or third strike can no longer be recalled by the Parole Board as there is no parole.

C Future Offending

The sentence for both three strikes and preventive detention works on the notion that by taking likely re-offenders out of society we are protecting it. However it is argued here that locking people up because of possible future offending is not as effective as proponents of the scheme argue.

There is doubt as to whether incapacitation actually reduces crime. Studies have shown incapacitative sentencing draws in more 'non-dangerous' than 'dangerous' offenders, with a 'false-positive' rate of up to two-thirds.⁷⁹ This means that incapacitative methods are holding more people who actually would not reoffend. We could then say that the increased length of sentences for these people might not be justified in every single case.

This problem affects preventive detention as well. Prediction studies have shown that the authorities have only about a 50 per cent chance of getting future offending assessments right.⁸⁰ The inability of the Parole Board to accurately predict this can lead to administrative caution and therefore disproportionately long periods of detention.⁸¹ This even led the Institute of Criminology at Victoria University to recommend the abolition of the sentence as the prediction of future offending was the basis on which the

⁷⁹ Ashworth, above n 20, at 84.

⁸⁰ Pratt "Submission", above n 55, at 4.

⁸¹ John Meek "The Revival of Preventive Detention in New Zealand 1986-93" (1995) 28 ANZJC 1 at 22.

sentence lay,⁸² although in recent times it has been put forward as a better alternative than three strikes in this regard.⁸³

The inability to accurately predict an offender's future offending can actually have a harmful effect on their rehabilitation. Some studies have concluded that the imprecise nature of basing incarceration on prediction of future crimes can have a negative effect on a prisoner's psyche.⁸⁴ To some prisoners it will seem that they are being unfairly punished for something they have not yet committed. This is reminiscent of the movie *Minority Report* where people are arrested before crimes happen on the basis that a machine predicted their future offending.⁸⁵

D Prison Population

Schemes like three strikes are almost certainly going to result in an influx of people being sent to prison. New Zealand already has a problem with overpopulated prisons and this will do nothing to help that. The Regulatory Impact Statement prepared by the Ministry of Justice for this legislation pointed out that the greatest cost of this scheme will be felt from the increase in prison population resulting in an increase of the financial pressure on the Department of Corrections.⁸⁶ It has been projected that after 50 years, the increase in beds will 727.⁸⁷

In the United States and United Kingdom, studies have shown that mandatory sentencing and 'truth-in-sentencing' policies have caused prison populations to rise so much that prisoners are being granted early administrative release. This is because the population grew so much, so fast, that there just were not enough beds to house them all. In 2007 alone, England released 11,000 prisoners due to overcrowding.⁸⁸ While we may not see the same rate of increase in New Zealand as seen in the United States and United

⁸² Ibid, at 32.

⁸³ Pratt "Submission", above n 55, at 2.

⁸⁴ Meek, above n 81, at 19.

⁸⁵ *Minority Report* (Steven Spielberg, 2002).

⁸⁶ Ministry of Justice "Regulatory Impact Statement", above n 58, at 5.

⁸⁷ Department of Corrections *Sentencing and Parole Reform Bill: Departmental Report* (2010) at 80.

⁸⁸ Pratt "Submission", above n 55, at 4.

Kingdom, this policy presents the real possibility that our already overcrowded prisons are about to get even more crowded.

E Prior Convictions

An important factor in both schemes is how soon we would see them at full efficacy. In terms of the three strikes scheme the public may have false idea that it will be effective straight away. This is not true. This scheme is not retrospective which means that the full effects of the legislation are still 15-20 years away, when we are likely to see the first third strike offenders coming through. While this is not a major sticking point against the legislation itself, there is the danger of public backlash once it becomes clear that three strikes will result in relatively little change in the short term.

However, for preventive detention, no previous convictions are required for the sentence to be available. This change was brought about by the Sentencing Act 2002 and significantly broadens the number of offenders potentially eligible for the sentence. This means if there is a clear indicator that an offender is likely to reoffend, the court does not have to wait before they commit more offences to give them a lengthy sentence. All that is needed to be taken into consideration is the seriousness of the offending and the need to protect the public.⁸⁹ It has been made clear by the courts that this sentence is no longer one of last resort.⁹⁰

F Inconsistency

One of the problems surrounding preventive detention is the infrequent and inconsistent nature of its use. Studies have shown that indeterminate sentences contributed to anxiety of those subject to them because of the "inevitable inconsistencies in the length of time different inmates were required to serve."⁹¹ For many years preventive detention was rarely used by judges because of the lack of coherent guidelines as to when it should be used. In the period 1968–1986 the sentence was

⁸⁹ *R v Bryant* CA 236/03, 16 December 2003.

⁹⁰ *R v C* [2003] 1 NZLR 30 (CA).

⁹¹ Meek, above n 81, at 19.

imposed only 28 times at an average of 1.5 per year.⁹² This shows a certain amount of concern from the judges at using such a sentence, which also concerned the Penal Policy Review Committee when it looked into the offence in 1981.⁹³ However with each legislative change removing certain restrictions on the offence, the use has increased and it now averages about 17 sentences a year.⁹⁴ With the emergence of clear guidelines for when judges should use this sentence, some of the concerns around its inconsistent and infrequent use have now been remedied.

A recent development could see preventive detention used less though. The Parole (Extended Supervision) Amendment Act 2004 ("PESA") states that any offender who is subject to a determinate prison sentence for a relevant offence may, on application to the Court, be subjected to an extended supervision order ("ESO") for up to 10 years. It was held that the availability of this order should be taken into account when considering preventive detention in light of section 87(4)(e) and the preference of a lengthy determinate sentence.⁹⁵ Where a case is finely balanced, an ESO is likely to tip the balance in favour of a determinate sentence.⁹⁶ Between 8 July 2004 (when PESA came into force) and 31 December 2007, preventive detention was imposed in 24 cases where the offender qualified for an ESO.⁹⁷ However, there were a number of cases, usually involving lower level offending, where the possibility of an ESO, either of itself or in combination with other factors, resulted in the court declining to impose preventive detention.⁹⁸

Although both schemes are effective at keeping the worst repeat offenders in prison, it is preventive detention that would do a better job. It is more likely to keep offenders in prisons longer. When you couple this with the rehabilitative potential that it

⁹² Ibid, at 35.

⁹³ Penal Policy Review Committee, above n 26, at 59.

⁹⁴ Chris Hurd "The changing face of preventive detention in New Zealand" (paper presented to the Sentencing Conference, National Judicial College of Australia, February 2008) at [25].

⁹⁵ *R v Mist* [2005] 2 NZLR 791 (CA).

⁹⁶ *R v Parahi* [2005] 3 NZLR 356 (CA).

⁹⁷ Hurd, above n 94, at [65].

⁹⁸ See, for example: *R v Clark* HC Auckland CRI-2003-044-6564, 6 December 2005; *R v M* HC Auckland CRI-2004-090-7513, 21 February 2006; *R v Moore* HC Hamilton CRI-2006-019-1786, 9 May 2006.

offers, preventive detention is clearly the better option. The last and most important consideration is the amount of flexibility judges have when handing down sentences.

VI Judicial Flexibility

Sentencing has traditionally been a key part of what the judiciary does. Although Parliament sets out maximum penalties and factors to be taken into account, these have always been guidelines to help judges make decisions - not to make them for them. Preventive detention is better in this regard while three strikes goes in the opposite direction.

A Flexibility

One of the main features of the three strikes regime is that at stage three (and to some extent at stage two), it removes nearly all of the flexibility traditionally held by judges in sentencing and moves towards mandatory sentences. This is the feature that has attracted the majority of criticism in New Zealand.⁹⁹ This system overrides all factors except criminal history and excludes consideration of aggravating and mitigating factors that are usually taken into account at sentencing.¹⁰⁰ These can include issues such as: whether there was threatened or actual violence; the degree of injury inflicted; the number of victims and whether the crime was planned or unplanned.¹⁰¹ By removing these considerations, we risk treating every instance of a qualifying offence as if it were of equal seriousness. The Ministry of Justice acknowledge that some mechanism is needed to take into account these circumstances.¹⁰²

The lack of judicial flexibility could only lead to injustice and disproportionate sentencing, especially at stage three.¹⁰³ This is a prospect that the Minister in charge of the legislation finds tolerable.¹⁰⁴ She is happy for disproportionate results at the third strike stage, believing that if they have committed two serious offences beforehand then

⁹⁹ See, for example, Brookbanks and Ekins, above n 30, at 7; Pratt "Submission", above n 55, at 1.

¹⁰⁰ Sentencing Act 2002, s 9.

¹⁰¹ Rethinking Crime and Punishment, above n 52, at [34].

¹⁰² Hon Simon Power *Cabinet Business Committee: No parole for worst repeat violent offenders and worst murder cases* (Ministry of Justice 2008) at [16].

¹⁰³ Brookbanks and Ekins, above n 30, at 6.

¹⁰⁴ (4 May 2010) 662 NZPD 10674.

they deserve what is coming their way.¹⁰⁵ However, this opens the door for gross injustice. Consider someone who had two qualifying convictions in his early twenties.¹⁰⁶ Having realised the error of his ways, he turns his life around and becomes a mechanic and 20 years later is grossly negligent in repairing someone's brakes. They crash and die and this man is charged with manslaughter. This man would presumably receive life imprisonment with a 10 year non-parole period.¹⁰⁷ Life imprisonment should be reserved for the worst of the worst - not cases like this. Unless we can take other aggravating and mitigating factors into account, injustices like this will occur under the regime. The lack of judicial discretion creates an unfairness that is not present in preventive detention. This is a main reason why this paper argues that preventive detention offers a better solution than the three strikes scheme.

Another problem associated with this lack of flexibility is that it may further endanger the community. If an offender knows that they are at risk of a third strike and will be given the maximum sentence without parole, they are going to be more willing to commit further acts of violence to ensure that they do not get caught. This could further endanger the lives of victims, police officers or witnesses.¹⁰⁸

However, before an offender can be considered for preventive detention, they must satisfy three criteria. Much like three strikes, they must have committed a qualifying offence and be over 18 at the time the offence was committed.¹⁰⁹ However they must also, in the court's opinion, be likely to commit another qualifying offence after any determinate sentence that would have been handed down.¹¹⁰ This sentence does not automatically assume that everyone who commits a qualifying offence is going to do it again, unlike those who are on their third strike. The power remains with the judiciary as to when the sentence should apply and how to apply it. This is apt because the power to send someone away for an indeterminate amount of time is one that should not be used lightly.

¹⁰⁵ Ibid.

¹⁰⁶ Brookbanks and Ekins, above n 30, at 8.

¹⁰⁷ It would probably be manifestly unjust for him to serve 20 years non-parole.

¹⁰⁸ It should be noted that committing murder may result in the offender receiving a sentence of life imprisonment without parole and not simply the maximum sentence.

¹⁰⁹ Sentencing Act 2002, s 87(2)(a) and (b).

¹¹⁰ Ibid, s 87(2)(c).

B Discretion

Another result of conviction based, mandatory sentencing schemes is that it puts the onus on police. Since everything is centred around a qualifying conviction, the discretion moves to the police to charge the offender with the right crime. The Minister of Corrections is happy that police have the proper safeguards and sufficient checks in place to ensure that the appropriate charge is laid.¹¹¹ She also notes that for a potential strike three, the charge must be reviewed by a Crown Solicitor pre-appearance or by the second appearance. This is a move criticised by not only the Opposition, but also by the police union. During the Third Reading of SAPRA Grant Robertson read a quote from the Police Association. They said that "[j]udicial discretion provides a 'safety valve' for the myriad of possible circumstances surrounding any given case and is preferable to mandatory sentencing."¹¹²

Conversely, discretion still remains firmly with the judge for preventive detention. Even if an offender meets the criteria for a preventive detention sentence, they will not automatically receive one.¹¹³ To help the court in this matter, the Act lists five considerations that must be taken into account when deciding this: the offender's criminal history; the seriousness of the harm to the community; any information relating to tendency to commit future offences; the offender's lack of effort in addressing the cause of offending and the principle that a lengthy determinate sentence is preferable so long as it adequately protects the community.¹¹⁴ This provides judges with a lot of room to move when considering how to use preventive detention. It allows for a fuller picture to be taken into account as opposed to maybe just one piece of it, as in three strikes. Once all of these factors have been considered, and the conclusion is that offender poses a significant and ongoing risk to the safety of the community, only then will the sentence be appropriate.

¹¹¹ (25 May 2010) 664 NZPD 11228.

¹¹² (25 May 2010) 664 NZPD 11230.

¹¹³ *R v Leitch*, above n 27, at 429.

¹¹⁴ Sentencing Act 2002, s 87(4)(a) - (e).

Because of the difficulty associated with predicting an offender's likelihood to reoffend, the court must also consider reports from at least 2 appropriate health assessors. However, even if these reports are categorical about the risk of reoffending, they only inform the assessment not determinate it.¹¹⁵ This remains a decision for the judge.

It should also be noted that the sentence is no longer one of "last resort". Previously the Court of Appeal had said that preventive detention was only available once a lengthy determinate sentence had failed.¹¹⁶ It is now available for first time offenders for two reasons. Firstly it removed that statutory requirement that said that preventive detention could only be used on someone who had been convicted of a qualifying offence previous to the current one. Secondly, when the Act was brought into force, it reduced the minimum non-parole period from ten years to five years. This provides the judges greater flexibility in sentence administration. However, it has been held that this change is not a ground for a reduction in the level of seriousness of the offending justifying a preventive detention sentence.¹¹⁷

In all cases the court will only impose a sentence of preventive detention where it is a proportionate response to the crime committed or where it provides the best way to manage the risks posed by the offender. Case law and legislation provide judges with a number of tools for deciding when this is the case in a way which is fair to the victims and the offender. By contrast, it is submitted that three strikes does not allow any real ability to tailor sentences to the individual offence and offender.

C Guilty Pleas

A decline in the number of guilty pleas is another possibility with three strikes. If the only thing that is taken into account is a person's criminal history then there is no incentive to plead guilty. Previously pleading guilty would usually lower the sentence, but with mandatory sentences, this possibility is removed. This will result in an increase in trials and trial length. Consequently this will increase the cost of trials and will

¹¹⁵ *R v Murphy* CA 165/99, 28 July 1999.

¹¹⁶ *Ibid.*

¹¹⁷ *R v Bailey*, above n 77 at [19].

inevitably lead to more stress for victims. Brookbanks and Ekins recommend that early guilty pleas should see a discount of 25 per cent of the maximum sentence to discourage this from happening.¹¹⁸ This way, depending at which stage the offender pleads guilty, they will receive up to a 25 per cent discount on the sentence that otherwise would have been imposed. For example, an offender who is up for their third strike who pleads guilty to sexual violation at the earliest possible opportunity may receive 15 years instead of 20 years. Life sentences could have their non-parole period reduced.

For preventive detention, judges are still able to take into account a guilty plea by the offender. Since it is an indeterminate sentence, this can only be done when setting the non-parole period. It has been held by the Court of Appeal that a "discrete and measurable discount" should be reflected in the non-parole period for a guilty plea.¹¹⁹ However, this will never fall below the minimum five year period stipulated by the Act.

D Manifestly unjust

The only remaining discretion left to the judges under three strikes is the "manifestly unjust" clause attached to strikes two and three. If a judge thinks that imposing the sentence without parole is "manifestly unjust" then they may substitute something less, and has to provide written reasons for their decision.¹²⁰ It is important to note that this provision only applies to the non-parole part of the sentence. If the judge thinks that the actual length of the sentence is unjust they have no mechanism for changing that. In addition, the threshold needed before something is "manifestly unjust" is extremely high. Although it is too early to know how the phrase "manifestly unjust" will be interpreted in this context, the same wording is used with regard to rebutting the presumption of a life sentence for murder. So demanding is the standard, that it has rarely been reached. One such occasion was a very sick, elderly man who pleaded guilty to murdering his wife after they made a suicide pact but was unsuccessful in his own suicide. Both were very unwell and the court found that life imprisonment would not be just in the situation.

¹¹⁸ Brookbanks and Ekins, above n 30, at 14.

¹¹⁹ *R v Wellm* [2009] NZCA 175 at [16].

¹²⁰ *Ibid*, s 86C(6); s 86D(5).

The result of all of this is that three strikes leaves very little room for a judge to take into account the particular circumstances of a case. It essentially treats every occurrence of a particular offence the same. This will almost certainly lead to unjust sentences. On the other hand, judges have a lot of discretion when considering preventive detention and can still take into account guilty pleas. Sentencing someone to prison is the most restrictive action we can take against someone's liberty. Judges should be able to consider all the facts of the case before making this decision, not just prior criminal offences. The potential for unjust outcomes through lack of discretion is one of the main reasons why the three strikes scheme should be scrapped in favour of using preventive detention.

VII Conclusion

The passing of the SAPRA and the heralding in of the new three strikes sentencing regime has generated a great deal of discussion in New Zealand. While many were pleased that something was finally being done about serious violent crime in the country, others have expressed concern about how the Government used is doing so. One of the arguments expressed against three strikes was that we already have preventive detention to deal with our worst repeat violent criminals.

This paper sought to examine both sentencing regimes with respect to four important areas to see if we really needed three strikes at all. It was found that while both raised some inconsistencies with our BORA and international obligations, most of these had since been remedied with respect to preventive detention. On the other hand three strikes had the potential to be inconsistent with a large number of rights expressed in the ICCPR and CAT.

One of the major principles three strikes is built on is that mandatory sentences which increase with reoffending act as a deterrent for other criminals. While this is one of the rationales for sentencing, studies tend to show that neither three strikes nor preventive detention would be very effective at deterring criminals. However, as preventive detention does not rely on deterrence, this has less of an effect on it.

In terms of incapacitation, both systems seek to promote public safety by keeping violent offenders "off the streets". Although preventive detention is used infrequently it arguably would keep offenders detained longer in many cases because it relies on prisoners successfully rehabilitating themselves. If a prisoner does not rehabilitate then they will not be released.

Lastly the three strikes regime seeks to remove discretion from the judges and impose mandatory sentencing based on a qualifying offence. This effectively moves the discretion to the police, who are in charge of making the initial decision to prosecute. Any discretion by the judges is limited to the first and second strikes or the "manifestly unjust" provision. Preventive detention is far more traditional in that there are a number of factors and criteria to take into account before such a sentence is handed down. This is perhaps the most convincing argument for taking preventive detention over three strikes.

Overall the sentence of preventive detention seems to be a much more delicate and finely balanced tool to deal with a very serious problem. Three strikes is very blunt in its application and has the potential to create more problems than it purports to solve. The effectiveness of three strikes seems shaky at best when we consider that, of its two key aims, neither seem fulfilled. It is unlikely to deter criminals and preventive detention is more effective at keeping re-offenders in prison. When this is coupled with the almost complete lack of discretion for judges, the case for three strikes is not strong. This author would argue that three strikes is more likely to create more problems than it will fix. Although preventive detention also poses some problems, they are more manageable which makes it the better option of the two. Consequently, three strikes should be scrapped in favour of preventive detention.

Word Count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 8316 words.

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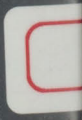
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