THREE STRIKES: NEW ZEALAND'S EXPERIENCE

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Abstract: This article critically reviews the "three-strikes" sentencing-regime law that was introduced by the New Zealand Parliament in May 2010. The article addresses the fundamental question of whether it constitutes good law reflecting sound penal policy, or does it represent an excessive penal response to the perceived problem of violent crime. It is asserted that no overarching benefits are provided beyond previously adopted sentencing options. It lacks a sound rationale and conflicts with existing and established sentencing principles.

Keywords: *three strikes; New Zealand; California; serious offences; sentencing*

I. Introduction

When, in May 2010, the New Zealand Parliament passed legislation introducing a "three strikes" sentencing regime law into New Zealand law, public opinion was polarised. The legislation was broadly modeled on Californian legislation introduced in 1994, although the New Zealand model was significantly less draconian than its Californian counterpart. The legislation's purpose was to identify and punish the "worst of the worst" offenders. Whether it has achieved that aim is something that is considered in this article. While the legislation was highly controversial in the months prior to its enactment, in the five years since its introduction it has become an almost invisible aspect of the New Zealand criminal justice landscape, with few highly visible effects, whether for good or for bad. For the most part, and for most citizens, the three-strikes law has flown largely under the radar of public debate.

New Zealand's three-strikes law raises a fundamental question. Is it good law, reflecting sound penal policy, or does it represent an excessive penal response to the perceived problem of violent crime — a manifestation of rising penal populism? Clearly, a case may be made for the imposition of tough sentences on those occasions when grave offending warrants a punitive response from the courts. Such options have long been available under New Zealand law, including the imposition of lengthy prison sentences (up to, and including, life imprisonment) for the most violent offenders and preventive detention for those whose, violent or grave sexual conduct justifies indeterminate incapacitation. These sentences nevertheless preserve such fundamental sentencing principles as proportionality — the idea that a penalty should not be out of proportion to the gravity of the offence

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committed — and the principle of restraint — the recognition that imprisonment is "a severe deprivation for most of those incarcerated …[and] that it should be used with restraint".[1] These principles are designed to ensure that all offenders are treated equitably within the existing sentencing framework, while ensuring that behaviour that poses an appreciable risk of further harm is sanctioned in ways which best protect the public.

Regrettably, the three-strikes law ignores, if not actually subverts, these principles. Indeed, it might be argued that the three-strikes law is a manifestation of the notion of "bifurcation", the idea that "soft-end" offenders (for example, status offenders and victimless crimes) are diverted out of the criminal justice system, while "hardcore" offenders are targeted for more severe penalties by enforcement agencies.[2] Such policies are often ill thought-through and over-extensive.[3] Bifurcation is not a grounding rationale of sentencing theory, yet it is an idea that has evidently influenced the way in which sentencing policy has developed in New Zealand. Its focus upon the risk posed by persistent offenders dis-empowers the ameliorative function of proportionality and ensures a continuing dependence upon incarceration, while offering, at best, illusory protection to the public. We are thus exposed to a law which is manifestly anti-therapeutic, and imprisonment-focused, and which is unlikely to deliver on its much-vaunted promise of "…making our homes, our businesses, and our communities safe again".[4]

This article shall have four principal aims. First, to summarise the history and the key elements of the New Zealand three-strikes law. Second, to consider how the law has evolved and impacted on the criminal justice system. Third, to consider the extent to which the law has achieved its intended goals. Fourth, we will examine a range of suggested strategies that have been advanced for limiting the impact of a three-strikes law. The article concludes by considering the question "what is the future of three strikes in New Zealand?"

II. History of Three Strikes in New Zealand

The Sentencing and Parole Reform Bill was introduced in February 2009. It was the outcome of a political compromise. Prior to the 2008 General Election the National-ACT Party Confidence and Supply Agreement had provided that the National-led government would support the legislation up to second reading stage.

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1 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge: Cambridge University Press, 4th ed., 2005) p.94.

2 See David Shichor and Michael J Gilbert, *Privatisation in Criminal Justice: Past Present and Future* (Cincinnati: Anderson Publishing Co, 2000) p.306.

3 See Andrew Ashworth, "Avoiding Criminal Justice: Diversion and Sentencing" in Arianna Silvestri (ed), *Lessons for the Coalition: An End of Term Report on New Labour and Criminal Justice* (London: Centre for Crime and Justice Studies, 2011) p.25.

4 ACT, A Message to Constituents — "Three Strikes Policy, the Sentencing and Parole Reform Bill", circa 19 January 2010.

This, in fact, did occur, and with the weight of numbers in Parliament the Bill's successful final reading was effectively a foregone conclusion.

The real origins of the legislation appear to lie in an earlier fact-finding tour of Arizona and California to the United States by a delegation comprising members of the Sensible Sentencing Trust, an active and influential sentencing-reform lobby group in New Zealand. The delegation included the bill's principal promoter, a lawyer, and future ACT Party MP, David Garrett. It would appear that it was during this visit, in August 2007, which included a stopover at Sheriff Joe Arpaio's Chain Gang Tent City in Phoenix, Arizona, that interest in the three-strikes model took root. Ultimately, the national government decided to adopt the Sentencing and Parole Reform Bill, and used it as a conduit to channel its campaign promise to increase sentences for the worst murderers, while making violent offenders ineligible for parole. Curiously, while the bill was progressing, responsibility for legislation shifted from the Minister of Justice, who would normally have oversight responsibility for sentencing legislation, to the Minister of Police. The Police and Corrections Minister effectively "drove" the bill until its enactment on 12 May 2010.

From all accounts, the process of Parliamentary investigation, and ultimate enactment, of the bill left much to be desired. When the Law and Order Select Committee issued its Final Report on 26 March 2010 the Report contained a separate and damning minority report by the Labour Opposition. The minority report represents a powerful criticism of what is portrayed as an unseemly manipulation of the Parliamentary process by the National/Act coalition, in order to ensure the rapid passage of the controversial legislation. Amongst other things, the Opposition claimed that the majority on the committee used the weight of their majority to "ram through" resolutions that negatively impacted the process for receiving oral submissions.[5] In addition, the minority lamented the fact that the Government's refusal to allow committee members access to advice from Ministry of Justice advisers constituted a "serious threat to our open and transparent system of Government that does not fit well with our democratic principles".[6] This curiously parallels Ashworth's criticism of the UK Labour government's "relatively low and distant" engagement with experts in addressing the question of whether imprisonment was a deterrent to crime. According to Ashworth the government "studiously ignored" the results of a report on deterrence it had commissioned from the Cambridge Institute, when it failed to back up the populist policies thought to be electorally best.[7] This feature of the process is relevant to the claim, made later in this article, that the whole foundation of this legislation was pre-textual, serving interests other than the public protection it purported to enhance.

5 Law and Order Select Committee, Final Report, p.11.
6 *Ibid*., p.12.
7 Ashworth, "Avoiding Criminal Justice: Diversion and Sentencing" (n.3) pp.25–26.

III. Rationale

As regards the statutory framework, the Sentencing and Parole Reform Act 2010 amended the Sentencing Act 2002 and the Parole Act 2002 and introduced the "three strikes" sentencing regime. The aim of this new sentencing model was to significantly increase penalties on certain repeat offenders. However, as criminologist Oleson points out[8] it was not a "stand alone" legal reform, but one of a number of statutory innovations which gave effect to a citizen-initiated referendum in 1999, which was instrumental in driving major criminal justice reforms in the early 2000s. In particular, the referendum mandated a greater focus on the needs of victims, support for minimum sentences and harsher penalties for serious violent offenders. The particular rationale for three strikes was that it would protect the public, deter serious sexual and violent offenders, and improve public confidence in the criminal justice system.

A concern expressed by the writer and Ekins, at the time the legislation was passed, was that it was unjust in that it departed from the central principle of just sentencing, namely, proportionality, and was likely to punish many relatively minor offenders more harshly than they deserved.[9] Many critics of the legislation saw it as an expression of "penal populism", whereby politicians serve their own ends by tapping into the public's punitive sentiments,[10] often accompanied by alarmist media accounts of particular sexual and violent crimes.[11] This populist aspect of the legislation is also considered later in the article. It could be argued that the three-strikes law was simply a manifestation of what has been termed the "new informalism" of criminal procedure, which involves a shift away from due process towards targeting dangerous cohorts of offenders.[12] It reveals a new authoritarian and quite oppressive aspect of state power.

There is nothing ethically or legally wrong in punishing severely people who commit terrible acts of violence against other citizens. But for punishment to be just, it must be deserved. When legislators characterise offenders as "dirtbags", or "career criminals", or "the worst of the worst", as happened with the introduction of the three-strikes law, there is a danger that people are punished retrospectively because of who they are, rather than because of what they have done. There is certainly a sense that in intending to target "the worst of the worst" offenders the three-strikes law became an exercise in criminalising criminality itself. It was not enough to punish their actual offending. The law went further, to punish their

8 James C Oleson, "Habitual Criminal Legislation in New Zealand: Three Years of Three-Strikes" (2015) 48(2) Australian and New Zealand Journal of Criminology 277–292.

9 See Warren Brookbanks and Richard Ekins, "The Case against the 'Three Strikes' Sentencing Regime" (2010) 4 New Zealand Law Review 689.

10 Oleson, "Habitual Criminal Legislation in New Zealand" (n.8) p.282.

11 Sophie Klinger, "Three Strikes for New Zealand? Repeat Offenders and the Sentencing and Parole Reform Bill 2009" (2009) 15 Auckland University Law Review 248.

12 See Hilary Sommerlad, "The Ethics of Relational Jurisprudence" (2014) 17(2) Legal Ethics 281, 296.

disposition to be offenders — criminality itself. In focusing on the incorrigibles and "career criminals", habitual offender legislation like three strikes tends to concentrate as much on "the social status of economic and racial marginalization" as it does on measuring, and responding to, "individual depravity".[13]

IV. Key Features of Three Strikes

The New Zealand three-strikes regime applies to a range of 40 qualifying offences, which comprise all major violent and sexual offences attracting a maximum penalty of seven years or more. They include murder, manslaughter, rape, robbery, aggravated robbery, sexual violation, indecent assault, wounding with intent, abduction and kidnapping.[14] The list is augmented by a range of additional offences characterised by the use of firearms and other injurious behaviour.[15] The three-strikes regime is triggered wherever an offender has committed any one of the qualifying "serious violent offences" and has received a warning by the sentencing judge as to the consequences if he or she is convicted of a further "strike" offence after the warning is given.[16] The legislation imposes a graduated scale of harsher sentence applications as offenders accumulate convictions for "strike" offences.

The Sentencing and Parole Reform Act 2010 creates a three-stage regime whereby the consequences for repeat serious violent offenders are aggravated with every "strike" conviction.

To explain the process in a little more detail, when an offender aged 18 or over at the time of the offence, and who does not have any previous warnings, is convicted of a "qualifying offence" he or she receives a first warning (strike one). That warning is not accompanied by any unusual or additional penal consequences. If an offender is convicted of a qualifying offence committed after a first warning the judge must issue a final warning (strike two), and the offender must serve the whole sentence imposed by the judge without parole. If an offender is then convicted of a qualifying offence committed after a final warning (strike three) very unusual consequences follow. The judge must sentence the person to the maximum term of imprisonment prescribed for the offence and order that it be served without parole, unless the removal of parole would be "manifestly unjust".[17] A third-strike sentence varies according to the offence: 7 years' imprisonment for indecent assault, 10 years' for robbery,

13 Ahmed A White, "The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control" (2006) 37 University of Toledo Law Review 705, 742.

14 See s.86A of the Sentencing Act 2002, as inserted by s.6 of the Sentencing and Parole Reform Act 2010.

15 Including, for example, infecting with disease (s.201 of the Crimes Act 1961) and kidnapping (s.209 of the Crimes Act 1961 (NZ)).

16 Sentencing Act 2002 (NZ), s.86B(1).

17 *Ibid.*, s.86D(3).

14 years' for kidnapping, 20 years' for rape, life imprisonment for manslaughter. The "manifestly unjust" exception only applies to parole eligibility. There is no discretion regarding sentence length for a third-strike offence.

It is useful to consider the offences of manslaughter and murder to see the potential harshness of the law in operation.

V. Manslaughter

On a third-strike conviction for manslaughter the court must impose a life sentence but need not order that the sentence be served without parole.[18] Instead, the court is required to impose a minimum period of imprisonment (ie, a non-parole period) of at least 20 years unless that is manifestly unjust, in which case the period must be at least 10 years.[19] An example may assist in demonstrating how the legislation works. A is convicted of sexual connection with a child.[20] He receives a first warning and is sentenced to, say, 12 months' imprisonment. This becomes strike one. The offender may some years later commit the offence of an indecent act on a young person and, after a warning, is sentenced to 18 months' imprisonment. That is strike two. He must serve the whole of the sentence imposed by the court and is ineligible for parole. Six years later (there is no time limitation on the accumulation of strike offences), while in stable employment as a car mechanic, and supporting a young family, A is working on a motor vehicle. He negligently fails to replace a brake pad on one of a vehicle's front wheels. The car is picked up, and its owner loses control because of the defect in the brakes, crashes the car and is killed.

A is then charged with manslaughter based on his negligence. Since it is his third strike he must be sentenced to life imprisonment, but the court must order that the offender serve a minimum period of imprisonment of not less than 20 years. If that term is considered to be manifestly unjust the court must order that A serve a minimum period of imprisonment of not less than 10 years.[21] The decision to do so must be accompanied by written reasons.[22] That is to say, upon any conviction for manslaughter, regardless of the nature of the offence and the offender's culpability, he or she can never serve less than ten years on a third strike. Mitigating factors which might, in other circumstances, have significantly affected the length of sentence are wholly irrelevant in this case. It should also be said that the history of the expression "manifestly unjust" in other contexts in New Zealand sentencing legislation does not offer any hope the courts will use this exclusion as a means of avoiding the harshness of the no parole provisions on second- and third-strike offences.

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18 *Ibid.*, s.86D(4).
19 *Ibid.*, s.86D(4).
20 Crimes Act 1961, s.132(1).
21 Sentencing Act 2002, s.86D(4).
22 *Ibid.*, s.86D(5).

VI. Murder

The rules governing murder are different. The normal law is that murder is punishable by life imprisonment unless that is manifestly unjust.[23] Generally, where the court imposes a life sentence it must impose a minimum period of imprisonment of at least 10 years,[24] or where the murder has some special aggravating feature, at least 17 years, unless that sentence would be manifestly unjust.[25] Where an offender commits murder after a first or a final warning (strike two or strike three), the normal law no longer applies. Instead, where the offence is a second strike, the court must impose life without parole, unless parole ineligibility is manifestly unjust. If parole ineligibility is found to be manifestly unjust then the court must instead impose life with at least 10 years without parole, or 17 years in particularly serious cases.

Where murder is a third-strike conviction, the judge must impose life without parole, again, unless that is manifestly unjust. If it is manifestly unjust the court must impose life and a minimum non-parole period of at least 20 years, unless that also is manifestly unjust. In those circumstances, as with a second-strike murder, the minimum sentence is 10 years, or 17 years in really serious cases.

VII. No Scope for Mitigation

What is especially disturbing about this regime, as it applies to homicide offences, is that there is absolutely no scope for mitigation once a second or third strike has been triggered. So whether the killing is the mercy killing by an elderly man of his aged, demented wife, the killing by a woman of her bulling and abusive partner, a killing in excessive self-defence or the cold-blooded slaying of a child by a hardened criminal, it will make no difference in terms of the sentence the court is mandated to impose. Evidence of gross provocation, diminished responsibility or serious impulse control disorder will have no bearing whatsoever on the penalty that must be imposed by the court. What is more, the three-strikes scheme makes it likely that a less grave second- or third-strike murder (eg killing in a barroom brawl) will be sentenced more severely than a more serious type of murder on a first strike (eg the rape and murder of a child).

In effect, the scheme allows for the imposition of arbitrary and disproportionate sentences simply because an offender has a previous (albeit not necessarily serious) qualifying conviction. While provocation, no longer a defence in New Zealand,[26]

23 *Ibid.*, s.102.

24 *Ibid.*, s.103.

25 *Ibid.*, s.104(1).

26 The defence of provocation, formerly defined in s.169 of the Crimes Act 1961 (NZ), was repealed, as from 8 December 2009, by s.4 of the Crimes (Provocation Repeal) Amendment Act 2009. For further discussion, see N Wake and A Reed, "Re-Conceptualising the Contours of Self-Defence in the Context of Vulnerable Offenders: A Response to the New Zealand Law Commission" (2016) 3(2) Journal of International and Comparative Law 195–247.

may be taken into account in "normal" sentencing to determine whether or not it would be manifestly unjust to sentence the offender to life imprisonment for murder,[27] it is necessarily excluded from consideration in the three-strikes regime. The reason is that the legislation does not permit the courts to consider any mitigating factors going to an offender's culpability where a second or third strike murder has occurred. The expression "manifestly unjust" in this context relates exclusively to whether an offender ought to be eligible for parole. It is not intended, as with the expression when used in s.102 of the Sentencing Act 2002, to engage consideration of the purposes or principles of sentencing in ss.7 and 8 of the Sentencing Act 2002 or the aggravating and mitigating factors under s.9.[28] These are wholly irrelevant to the three-strikes regime.

VIII. Social and Psychological Consequences

It is, of course, impossible to predict precisely how new legislation is likely to impact existing processes, or the "downstream" consequences that may flow unintentionally from its enactment. However, that there will be consequences may be taken as a given, granted that the promoters of the legislation themselves have already calculated the numbers of extra prison beds that will be required after 50 years and both the operating and capital costs incurred by the new regime.[29] What are not so readily ascertainable are the likely social and psychological consequences that will follow in the legislation's wake. These are not only the impacts on the mental health of those most directly affected by the new model and the availability, or otherwise, of legal protections against the application of unjust law. The consequences also include the extent to which the three-strikes law may have endorsed what has been described as a "populist blitzkrieg", in New Zealand.[30] I wish to briefly explore this theme before summarising my vision of the direct psychological sequelae of three strikes.

In the article, "Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on 'Three Strikes' in California", Zimring describes in some detail the process that led to the three-strikes law in California. It is not my intention to rehearse that history in this context. It is enough to observe that, according to Zimring, the Californian three-strikes law "swept through the law making process in California without any significant influence by powerful legislative or executive

27 See Sentencing Act 2002, s.102(1). Evidence of provocation might be one of the "circumstances of the offence or the offender" relevant to manifest injustice.

28 See *R v Rapira* [2003] 3 NZLR 794 (CA).

29 See discussion on this issue in Brookbanks and Ekins, "The Case against the 'Three Strikes' Sentencing Regime" (n.9) pp.695, 713.

30 See Franklin Zimring, "Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on 'Three Strikes' in California" (1996–1997) 28 Pacific Law Journal 243.

branch personnel" and that the legislative and initiative processes were "almost entirely devoid of expert scrutiny from governmental specialists or scholars".[31] The parallels with what occurred in New Zealand are too striking to ignore. Zimring laments the fact that, to the extent that three strikes was "an extreme example of populist preemption of criminal justice policy making",[32] it represents a penal practice without a theory.[33] As he observes "adhering to the letter of the new law will not elevate any particular purpose of criminal sanctions in the penal treatment of recidivists because there is no principled basis for the new provision".[34]

A similar criticism may be made of the New Zealand model. Since it does not appear to reflect any clearly articulated penal theory, beyond the populist demand for condign punishment for violent offenders, we may assume that the law is simply opportunistic and unconcerned with broader theoretical concerns. At this stage no justification of the legislation has been advanced to suggest otherwise.

IX. Pre-textuality

One problem, not directly identified by Zimring, is that, as with its Californian counterpart, the New Zealand legislation is pre-textual. As has been observed "pretext" is a dirty word; "it connotes something that is shady and underhanded".[35] In the current context the claim is that the three-strikes legislation serves undeclared interests other than simply protecting the public from violent offenders. In the case of the New Zealand law, the well-known fact that the legislation was a political trade-off between the National majority and its junior coalition partner, ACT, may suggest that without that imperative it would never, in all likelihood, have appeared on the National Party's criminal justice agenda.[36] The legislation is also pre-textual in that it promotes the legal fiction that imposing longer sentences and making some offenders ineligible for parole increases confidence in the justice system.[37] There is simply no evidence that the enactment of the three-strikes law has led to increased public confidence in criminal justice. It is well known that where punishment is just and salient, the likelihood and speed of conviction are the most important factors in deterring offenders[38] and more likely to engender respect for the processes of the criminal justice system.

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31 *Ibid.*
32 *Ibid.*
33 *Ibid.*, p.248.
34 *Ibid.*, p.249.
35 See Daniel C Richman and William J Stuntz, "Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution" (2005) 105 Columbia Law Review 583, 584.
36 In Parliament the legislation was largely driven by David Garrett, an ACT list MP, who later resigned from Parliament.
37 Law and Order Committee Report (n 5) p.1.
38 Ashworth, *Sentencing and Criminal Justice* (n.1) pp.79–80.

The pre-textual character of the legislation is also evident in the fact that during the course of the parliamentary process responsibility for the bill was passed from the Minister of Justice to the Minister of Police and Corrections. In commenting on the change, which he thought "speaks volumes for the bill", Grant Robertson, the Labour MP for Wellington Central, continued:

> "I suspect Simon Power [the former Minister of Justice] is somebody who understands that this bill is unjust, unworkable. And simply should not be going through our Parliament today, and it has gone to Mrs Collins [the then Minister of Police and Corrections] to put it through, leading the charge on behalf of the Act Party. I think that as the Minister of Justice and the Ministry of Justice do not seem to want to be part of this bill, surely that must raise questions for this Government and for the country as to whether the bill should be passed". [39]

An even more powerful criticism came from another MP, Ruth Dyson, who described as an "absolute outrage" the fact that Ministry of Justice officials "who are entitled to give their opinion to the executive and to Parliament through the select committee process" were stopped by the Minister of Police from giving their advice on the bill to the Law and Order Committee.[40] In this context, the exclusion of officials from the role of advising the select committee reflected an unwillingness to allow salient criticisms of the proposed legislation to negatively impact existing support for the bill. In Ruth Dyson's view "This bill is just a way of keeping ACT quiet".[41] The pre-textuality speaks for itself.

In a final comment on the issue of pre-textuality, Stuntz writing in *The Collapse of American Criminal Justice*,[42] speaks about the problem of "prosecution by pretext" — charging defendants with crimes other than the ones that prompted their prosecution. The difficulty, as he notes, is that pretext cases render criminal prosecution opaque, thereby unaccountable. A major concern in relation to the three-strikes regime is the inordinate power it gives to prosecutors to frame charges to fit within the matrix of a "specified offence" when, on the facts of the case, a lesser, non-"strike" charge would have sufficed. Yet such decisions, being opaque, can seldom be challenged. The problem is compounded by the fact that because the legislation has ruled out judicial discretion in sentencing, in these cases, prosecutorial discretion reigns supreme, with a real risk of arbitrary and selective law enforcement.[43]

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39 See Hon Grant Robertson, Sentencing and Parole Reform Bill — Third Reading Debate (25 May 2010) 663 NZPD 11226.

40 Hon Ruth Dyson, Sentencing and Parole Reform Bill — Third Reading Debate (25 May 2010) 663 NZPD 11226.

41 *Ibid.*

42 William J Stuntz, *The Collapse of American Criminal Justice* (Cambridge, Massachusetts/London: Belknap Press, 2011) p.300.

43 See Brookbanks and Ekins, "The Case against the 'Three Strikes' Sentencing Regime" (n.9) p.715.

X. Populism

The impact of penal populism cannot be understated in this context. Zimring argues that the social authority previously invested in criminal justice experts may have provided "insulation" between populist sentiments, which he views as always punitive, and criminal justice policies at the legislative, administrative, and judicial levels.[44] As such it prevented the "direct domination" of policy by those holding anti-offender sentiments, which Zimring believes are consistently held "by most citizens at most times".[45] He argues that change in recent years is reflected in the fact that the insulation previously separating public sentiments and criminal justice decisions has "been eaten away".[46] In New Zealand this is powerfully demonstrated by the emergence of the Sensible Sentencing Trust and the deference shown to it by successive governments. The Trust is often outspoken in its criticism of persons and organisations that do not subscribe to its narrow perspective on the role of criminal justice. Yet at the same time it has managed to influence the development of criminal justice policy and the shape of legislation, in ways that go well beyond what is warranted by the organisation's principally lay focus. The implicit preference for lay perspectives on solutions for violent crime represents a corresponding denigration of the role of professional experts whose perspective, had it been listened to, might well have led to the demise of the legislation before it became law. However, evidence of anti-elitist denigration of key criminal justice personnel, including judges, lawyers, academics and policy analysts for being "out of touch" with popular sentiment around necessary penalties, and their length, is not new. This effect is well enough known in modern criminal justice writing. Brown observes that the rise of the "public voice" has taken place alongside "the declining influence of social expertise".[47] At the same time criminal justice professionals have experienced a loss of status and credibility as policy making becomes more politicised.[48]

Insofar as the three-strikes law is an expression of penal populism, it reflects an unwillingness to engage in constructive debate around the purposes, and consequences, of harsh penal laws. While there was a great deal of public debate and information offered about the proffered penological benefits of the new regime, there was little engagement with criminology and other experts who might have offered a more sober account of the likely true effects of this sentencing model. They will only be fully known once the legislation has become embedded and penal institutions are required to manage the demands created by a growing cohort

44 Zimring, "Populism, Democratic Government, and the Decline of Expert Authority" (n.30) p.255.
45 *Ibid.*
46 *Ibid.*
47 See David Brown, "Recurring Themes in Contemporary Criminal Justice Developments and Debates" in Julia Tolmie and Warren Brookbanks (eds), *Criminal Justice in New Zealand* (Wellington: LexisNexis, 2007) p.30.
48 *Ibid.*

of "strike" offenders. By October 2011 an estimated 575 inmates had earned a first strike in the 14 months since the law came into effect, with only one prisoner — a recidivist robber — having, at that stage, earned a second strike.[49] By 2013 these numbers had escalated significantly, as noted in the next section of the article. Of the first strike offences more than a third were for robbery or aggravated robbery, 31 per cent for sexual assault and 24 per cent for serious assault. Interestingly, this offender profile is unchanged at the time of writing. Clearly, these are not the "worst of the worst" offenders the legislation purported to target, but a fairly typical cohort of serious offenders. Of interest was the fact that at the time these figures were made available convictions had been entered for only 9 of the available 40 "specified offences", including 3 murders and 2 attempted murders.[50] Evidently, the vast majority of available "strike" offences are not being committed, suggesting that the legislation is significantly overly broad in its reach. This issue is considered in the following section.

XI. "Worst of the Worst" Offenders — Impact of Deterrence

From its inception in New Zealand, one of the most vigorously affirmed features of the three-strikes regime was that it would target the "worst of the worst" repeat offenders and deal with them accordingly. In a Cabinet paper, entitled "Sentencing and Parole Reform Bill: Final Approval for Introduction" the Minister of Justice outlined the Government's policy to remove eligibility for parole "for the worst murderers and the worst recidivist violent offenders". A National Party broadsheet on 6 October 2008, made the same claim.[51] However, eight years on it is doubtful whether this goal has been realised. The figures are revealing. Rather than applying to the worst of the worst, it would appear that the three-strikes law may simply be targeting the same kinds of offenders and offences that already fill New Zealand prisons.[52]

In his 2015 article, Oleson drew on publicly available sentencing data to paint a picture of the operation of the three-strikes law following the first 42 months of the regime's operation. At the time of publication of the article there had been 3,623 first-strike warnings issued, while between June 2010 and November 2013, 28 final warnings had been issued. By April 2015, a total of 5382 first-strike warnings had been issued and 76 final warnings. However, as Oleson notes, Ministry of Justice data shows that, as at 30 April 2013, only 9 of the 40 strike-eligible offences had

49 See D Cheng, "575 Inmates on 'Three Strikes' Ladder" (17 October 2011) *New Zealand Herald*, available at www.nzherald.co.nz/nz/news/article.cfm (visited 21 September 2016).

50 *Ibid.*

51 See National Party, Law and Order Policy: No Parole for the Worst of Violent Offenders (6 October 2008).

52 Oleson, "Habitual Criminal Legislation in New Zealand" (n.8) p.285.

triggered a warning.[53] Just three offences (sexual assault, robbery/aggravated robbery and serious assault) accounted for 89.8 per cent of all first-strike warnings imposed. These three offences also accounted for 95 per cent of all second strike warnings during the same period. By contrast, between them manslaughter, murder and attempted murder, undoubtedly the worst of the worst offences, accounted for only 2.9 per cent of the first strike warnings issued. Clearly, the "worst of the worst" offences were not attracting the majority of first and second strike warnings. It is an open question whether the legislation was targeting the "worst of the worst" offenders.

This data suggest two possible conclusions. First, that the legislation may have seriously overreached in targeting a wide range of offences that seemingly do not pose an intolerable risk to public safety. If only 9 of 40 nominated "serious violent offences" are attracting strike warnings then there is an argument that the legislation is overly broad and should be amended accordingly to reflect the true reality of a narrower band of relevant offending. Second, that a very small group of serious offences constitute the greatest level of risk to public safety, and stand glaringly apart from the remaining qualifying offences. There is thus an argument for reducing the list of qualifying offences, rather than increasing it, as some have claimed, while developing policy for dealing specifically with the most prolific strike offences.

There is also evidence that the three-strikes law has not been applied consistently by the courts because of conflicts over statutory interpretation, or a simple failure to issue strike warnings in appropriate cases. There is anecdotal evidence that some judges are simply forgetting to give strike warnings. In some cases interpretative problems arising from the three-strikes legislation itself have led to judges refusing to issue warnings in what would appear to be strike offences.[54] At this stage it is not known how many other cases may have been affected by such legal uncertainties; But the failure to issue strike warnings in cases where they would otherwise be warranted inevitably distorts the statistics, and suggests that figures for both first and second strikes may be higher than the statistics indicate. For example, in *R v Kahia*,[55] although the accused were convicted of murder and assault with intent to injure, both "strike eligible" offences, no strike warnings were issued by the court, at least not as is stated in the unreported decision). Similarly, in two other cases the sentencing judge failed to issue a strike warning, despite the offence being strike-eligible.[56] In a decision of the High Court, involving an offender charged with wounding with intent to cause grievous bodily harm arising from a prison "shanking", and where the defendant would have been eligible to become New Zealand's first "third-strike" offender, the Court only issued a

53 *Ibid.*, p.283.
54 *Police v Maipiara (AKA) Murphy* (2012) 25 CRNZ 662.
55 [2015] NZHC 344.
56 See *R v Takao* [2015] NZHC 1657; *R v Mark* [2015] NZHC 1225.

second-strike warning because an earlier court had neglected to give him a warning for his previous offence.[57] There is simply no means of knowing in how many other sentencing cases strike warnings have not been issued for what would otherwise be strike-eligible offences.

However, the problem of interpretation, together with those cases in which judges have forgotten to issue warnings, suggests that the numbers of "first strikers" may be higher than the published figures suggest.

XII. Deterrence

One of the early claims made concerning the three-strikes law was that it would deter offenders from committing serious offences of violence. The fact that New Zealand had, at the time of writing, around 81 second strikers is said to support that claim. However, at the same time there were around 5,382 first strikers, who might also have been expected to be deterred by this new law, but apparently were not. Deterrence in this domain, if it is effective at all, should operate across the full criminal justice spectrum, not simply once a first strike conviction has been entered. Arguably, the fact that figures suggest a high number of first strikers implies that offenders in the band of sexual, serious violent and robbery/type offences, are simply not being deterred, regardless of what sentencing regime is in place. This may be because many of the offences are opportunistic and impulsive, or associated with excessive alcohol consumption, in circumstances where the offenders do not consider the long-term consequences of their actions. Considering the first-strike numbers, an arguable case could be made that the three-strikes law has not had the impact it was designed to have. It has made little difference to the pattern of serious offending in relation to the offences most commonly associated with a first strike warning.

As for the deterrent value of the risk of a second or third strike for those who have received a first-strike warning, the small numbers of those receiving a second strike is, at best, equivocal. It could mean that first strikers have been deterred. However, that could not be determined until a detailed empirical study has been undertaken of the deterrent effects of this law. Equally, however, it could be related to the fact that because offences for which an offender may receive a strike are serious, it is going to take some time for offenders to receive their first-strike warning, complete their sentence, commit further offences and become eligible for a final warning. Over the passage of time many more offenders may receive final warnings, thereby further degrading the claims of the deterrent value of this law.

The New Zealand Ministry of Justice considers it unlikely that any significant impact from third strikers will be noticed in the prison population

57 See *R v Wereta* [2015] NZHC 2248.

forecast 2014 to 2024.[58] This suggests, as with the second-strike figures, that the time estimate between strike-eligible offences is such that third strikes will simply not register until many years after the first strike. This has little to do with deterrence but everything to do with how long it takes cases to work their way through the criminal justice system.

There is no doubt that the three-strikes law has a declaratory function. It declares "if you commit these types of offences, this is what will happen to you". If it were, however, a truly deterrent regime, people should be deterred by its harshly punitive provisions *per se*, not only once a person has committed a first strike.

XIII. Demographics of Strikers

An important issue for the purposes of the New Zealand criminal justice system concerns the demographics of three strike offenders. In his research, Oleson noted three key features concerning the demographics of the "striker" population: they are predominantly male; they are predominantly young; and, minority groups are over-represented.

The third feature is the most disturbing, because it tends to reinforce the problem of overrepresentation of ethnic minorities in New Zealand's criminal justice system. As Oleson notes[59] 67.6 per cent of New Zealanders are of European descent, 14.6 per cent are Maori and 9.2 per cent are Pasifika. The remaining categories need not concern us here. When we look at the "striker" figures we find that 32.9 per cent are European, 47.6 per cent are Maori and 15.2 per cent are Pasifika. This means that, compared to Pakeha, Maori are 6.68 times as likely to be first-strikers and Pasifika are 4.49 times as likely. When we compare strikers to the general population we see a "dramatic ethnic overrepresentation of both Maori and Pasifika, akin to that of African-Americans under California's three strikes…".[60] A similar point has been made by Rumbles, who has argued that because of the general sense of alienation amongst New Zealand Maoris in the criminal justice system, which is perceived as treating them unjustly, the three-strikes sentencing regime is simply another blow for Maori.[61] Rumbles argues that applying this type of habitual sentencing legislation to a criminal justice system "which already has systematic bias towards apprehending, prosecuting and convicting one social group within society" is incapable of leading to greater public security.[62]

Furthermore, the problem of over-representation of Maori is compounded by the nature of the offences typically associated with this racial minority.

58 Justice Sector, Justice Sector Forecast — Prison Population Forecast 2014–2024, December 2014.
59 Oleson, "Habitual Criminal Legislation in New Zealand" (n.8) p.284.
60 *Ibid.*, p.285.
61 Wayne Rumbles, "'Three Strikes' Sentencing: Another Blow for Maori" (2011) 19(2) Waikato Law Review 108, 116.
62 *Ibid.*

Oleson notes that because three strikes is triggered by serious and violent crimes, which typically result in prison sentences, "we would expect striker demographics to resemble those of the prison population".[63] This is, in fact, what the data confirms. Oleson is thus correct in stating that the three-strikes law is being applied to the same kinds of common offences that already fill New Zealand prisons. Rather than targeting the worst of offenders, three strikes appears to target mainly young and Maori or Pasifika male offenders, who in many cases have committed quite ordinary, albeit serious, offences of their type, hardly qualifying as the "worst-of-the-worst" offender category!

XIV. The Costs of Three Strikes

Although much could be said about the social costs of the three-strikes regime, the discussion here will be limited to its present and projected financial costs. It seems to be generally accepted that the three-strikes law will increase the prison population and will drive up both the financial and social costs associated with imprisonment. This has certainly been the experience of California, although an analysis of the costs of the three strike law in the decade from 1994–2005 found that initial estimates were high, and that much of the growth in the budget of the California Department of Corrections and Rehabilitation could be attributed to costs unrelated to three strikes.[64]

The cost of incarcerating a prisoner in New Zealand is estimated at almost $91,000 annually.[65] Oleson suggests that by increasing the mean sentence length for second strikers (to the full term of the sentence imposed, without parole) and for third strikers (to the maximum statutory penalty, unless this is manifestly unjust), the costs of imprisonment will inevitably increase.

Immediately prior to the enactment of the three-strikes law in 2010, the New Zealand Government estimated that although the major direct implications of the implementation of the three-strikes policy would be an increase in the prison population, this impact would not be felt for about ten years. At that stage it was estimated that a total of 25 additional prison beds would be needed to accommodate prisoners sentenced under the policy. At today's imprisonment figures that would account to an additional $2,275,000 per annum.

The numbers were estimated to increase to 46 additional beds after 15 years and to 70 after 20 years. After 50 years, with the full effects if implementation kicking in, an additional 132 new prison beds would be required, at a cost of

63 Oleson, "Habitual Criminal Legislation in New Zealand" (n.8) p.285.

64 See Legislative Analyst's Office, "A Primer: Three Strikes — The Impact after More than a Decade" (October 2005), available at http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm (visited 1 June 2016).

65 New Zealand Department of Corrections, 2011, cited in Oleson, "Habitual Criminal Legislation in New Zealand" (n.8) p.287.

around $12,012,000. This, however, may be a radical underestimate. More recent figures from the Ministry of Justice's Prison Population Forecast 2014–2024 suggest that second strikes "may account for around 250 extra prison places by 2024".[66] That is to say that within less than a third of the original time-scale projection of 50 years, it is now thought that three strikes will count for almost double the number of beds originally estimated, at a cost, in today's terms, of about $22,750,000.

In fact, it is probably impossible to accurately estimate what the three-strikes regime will cost the New Zealand economy. But if the Californian experience is anything to go by, the fiscal cost of supporting this law will be considerable.[67] Yet because judicial and prosecutorial discretion is more tightly circumscribed in New Zealand than in California, it is unlikely that New Zealand will see a diminution of costs associated with greater exercise of those discretions. As has already been noted, New Zealand judges do not have the discretion not to impose a strike warning once the mandatory provisions have been triggered. Nor does New Zealand have the same regional variations in prosecutorial decision-making as operate in California.

XV. Three Strikes: Has It Achieved Its Goals?

The truth is that at the present time there is no accurate way of judging whether or not three strikes has achieved its goals. There was initial optimism that the new law would deter offenders from committing serious sexual offences and offences of violence, because of the threat of lengthy sentences without parole. The fact that there are now approaching 6,000 convictions for first-strike offences over the relevant period seems to defeat the early optimism surrounding the introduction of the legislation. Furthermore, the actual numbers of convictions for first-strike offences may not represent the true position because, as was noted earlier, it would seem that some judges are not consistently giving first-strike warnings. In other words, the numbers of first warnings issued and the numbers of people who received a first-strike warning may not match the actual numbers of people convicted of strike-eligible offences, but not given a warning.

Again, the numbers of offenders given a final warning, although very small, cannot be taken as an indication of the deterrent effect of the new law. The numbers are highly equivocal. They might indicate a powerful deterrent effect of the three-strikes law. Equally, and more probably, they may indicate that it takes time for offenders to proceed through the system, before they are liable for conviction for further strike offences that might trigger a final warning. It is generally accepted that

66 Ministry of Justice, Prison Population Forecast 2014–2024 (2014) p.7.

67 As Parker points out, Three Strikes in California has contributed significantly in amplifying the impact of multiple revenue-shortage problems in that state by consuming an ever-increasing portion of the general fund budget each year. See Robert Nash Parker, "Why California's 'Three Strikes' Fails as Crime and Economic Policy, and What to Do" (2012) 5(2) California Journal of Politics and Policy 206, 225.

the reason there are no third-strike convictions is precisely because potential third-strike offenders are still in the prison system, and it may be many years before they are back in the community and eligible for a third-strike conviction. It is clearly not a case of deterrence operating, but simply lack of opportunity to offend. I suspect the small numbers of second-strike offences may be attributable to the same reasons.

XVI. Anticipated Public Safety Outcomes

Public safety outcomes can only be judged by the incidence of serious violent and sexual offences over the last five years. The numbers of intentional assault offences include, but are not limited to, the five most serious criminal assault offences listed as "serious violent offences" in s.86A of the Sentencing Act 2002. As was noted previously, the three most highly represented amongst the specified strike-offence categories are the offences of serious assault, robbery/aggravated robbery and sexual assault, together accounting for 89.8 per cent of all first-strike offences. What needs to be determined is whether there has been a marked decrease of cases resolved for strike offences from 2010 onwards as compared to the rate of resolved cases for strike offences, prior to the enactment of the three-strikes legislation. This may provide some indication of whether the legislation is working as a deterrent.

The writer examined the figures for crimes resolved by the New Zealand Police over the period 2008/2014 to see if there was any discernible reduction in the number of offences being committed, especially post 2010, that might indicate that the new sentencing regime was having the hoped for deterrent effect. Crimes "resolved" is not the same as "convictions" entered.

It is likely that a significant proportion of the offences resolved by police do not, for a variety of reasons, proceed to a conviction, which may explain why the numbers of first strikes does not match the raw numbers of offences resolved within particular categories of offences. The offences of serious assault, sexual assaults and robbery offences were examined, on the basis that these constitute the majority of strike convictions.

XVII. Sexual Assault

For the year 2008 a total of 1,523 cases of "sexual attacks" were recorded as "resolved". In 2009 that figure had slipped marginally to 1,486. However, in 2011 the figure had climbed to 1,984 resolved sexual assault cases. In the year 2012/2013 there were 2,079 cases and in 2013/2014 there were 1,856 cases.

What these figures suggest is that over the relevant period 2008/2013, while there have been some minor variations in the numbers of resolved crimes within the category of serious sexual offences, the numbers have, overall, remained relatively stable. In particular, there is no evidence whatsoever of a dramatic decline in the numbers of cases resolved during the period 2011/2013, as might have been expected

if the three-strikes regime, enacted in 2010, had been acting as the deterrent it has been claimed to be. The numbers simply do not support that view.

What, however, is revealing, looking at the overall Crime Trends in New Zealand provided by the New Zealand Police, is that from 1995 there has been a steady overall decline in the number of recorded offences, from approximately 1,300 recorded offences per 10,000 of population in 1995 to just under 800 per 10,000 of population in 2014.

Yet when the offences that are most susceptible for a three-strikes warning are considered it is clear that that serious assaults resulting in injury spiked in 2008/2009 but then declined from 2009/2013. However, since 2013, there has been a sharp increase in serious assaults. The decline began before the enactment of the three-strikes law, but since 2013 has been rising again.

When the figures for sexual assaults are considered an entirely different picture emerges. From 2008/2009 the numbers of sexual assaults recorded per 10,000 of population actually began to rise appreciably and have continued to rise, apparently despite the enactment of three strikes. However, since 2013 there appears to have been a levelling out of these figures and, for the meantime, sexual assaults seem to be beginning to decline slightly.

By way of contrast, cases of robbery peaked, with a high of about seven offences per 10,000 of population in 2006 and then began a gradual decline during the period 2006/2014. Again, the three-strikes law appears to have had little impact on this crime.

Although reading statistics is never an entirely accurate means of measuring crime trends, it is hard to avoid the message that crime overall in New Zealand has been declining since 1995, consistently with international trends. While it is possible that three strikes may have made some contribution to this decline, it is clear that other factors are also at work, which are not fully understood. Given the fact that some crime categories actually increased following the enactment of three strikes, its deterrent effect may be much less significant than had been anticipated.

XVIII. Three Strikes in California

Before concluding this section of the article, it may be useful to make some observations about the three-strikes law in California. In some important respects there are significant parallels with New Zealand's experience.

For a long time, Californian political and law enforcement officials have powerfully advocated the idea that three-strikes law has been the main reason for the drop in violent crime witnessed in that state in the period from 1990–2010. However, a major recent study suggests that the imposition of three strikes in 1994 has had *no impact* on violent crime in the state, but that alcohol consumption and unemployment have had important impacts on the rate of violent crime. In particular, the study found that when California's violent crimes rates were compared both

with states that had a three-strikes law and those that did not, all the states surveyed showed a dramatic decline in rates of violent crime from 1990, which had nothing to do with the three-strikes policy. The study concluded that the research studies undertaken found no evidence that three strikes had had an impact on crime in California.[68]

This is remarkable in light of the fact that New Zealand's overall crime rate has also been declining since 1995, which apparently has nothing to do with the impact of the introduction of three strikes in 2010.

In other jurisdictions where three strikes or other oppressive mandatory minimum sentences have been legislated for both counsel and judges have worked hard to craft means and methods of avoiding mandatory minima. This is not a new phenomenon. It is well known that in Victorian England judges opposed to harsh sanguinary laws regularly encouraged juries to soften their verdict in cases of minor crime that were punishable by death. In particular, there is evidence that juries often refused to convict, or would convict on lesser uncharged crimes, out of a belief that the punishment was disproportionate to the crime.

Given that the New Zealand model is destined, on projected figures, to significantly impact the New Zealand prison population, it might be useful to consider how the operation of the law could be restricted by the operation of trial tactics in order to minimise some of its harsh penal effects.

XIX. Strategies for Limiting the Impact of Three Strikes Laws

Given the highly punitive nature of a three-strikes sentencing regime, an important question arises as to what strategies might be employed by defence counsel to ameliorate the harshness of the law. In this section I will examine a number of possible options which have been used in other jurisdictions, or suggested, in an attempt to limit the impact of these laws and their likelihood of success.

A. Informing the jury about consequences of a mandatory sentence

As a general rule it is inappropriate in a criminal trial for counsel to mention to the jury the meaning and legal effect of a sentence or disposition, on the basis that the consequences of a verdict are not the concern of the jury and legally irrelevant to any issue they have to determine. However, the issue really is whether the consequences of a verdict are commonly understood. It is, I think, arguable that where there is a risk that a jury may, on the basis of a fundamental misunderstanding of the consequences of a verdict, convict the accused, a case could be made that

68 *Ibid.*, p.213.

considerations of fairness and the rational administration of justice impel the view that the jury should be informed of the disposition that will be made of the accused. Typically, this issue has arisen in insanity trials and, as noted above, the prevailing rule is that the consequences of a verdict are not a concern of the jury. However, in *R v Lorimer*[69] the New Zealand Court of Appeal did concede that, at least in the case of insanity, it may sometimes be thought necessary to inform the jury of the legal consequences of a verdict of not guilty by reason of insanity. While it is a matter in the Judge's discretion the Court held that "there may be cases where it is just in the interests of the accused to do so".[70] I would suggest that this is a general proposition, not limited to insanity cases.

Three-strikes laws challenge the prevailing view that consequences of a verdict are irrelevant to jurors. Although I do not have time to develop the idea here, there is now empirical evidence supporting the suggestion that jurors, even if generally supportive of harsh sentencing laws, will be reluctant to convict if made aware of the applicability of an unusually disproportionate punishment. With the advent of the three-strikes law there may now be an arguable case, perhaps exceptional, for counsel to petition a Judge to allow punishment information to go before the jury. The basis of argument might be, for example, that jurors would conceivably be alarmed to learn that a 20- or 21-year old, convicted on a third strike for aggravated wounding, involving a minor open flesh wound, inflicted in the course of avoiding arrest, will be liable to a full 14-year sentence of imprisonment without parole.[71] It may be an argument that will not often succeed. However, with the high stakes on a third-strike conviction it is definitely worth considering.[72]

B. Defending charges

Under a three-strikes regime there is a greater onus on counsel to actively explore defence possibilities in order to achieve an acquittal on charges or to invite conviction on a lesser offence than the offence charged. Wherever such an offence is charged, counsel need to be diligent in investigating possible defences in order to defeat the charge and avoid, wherever possible, a first warning being given by the court. Particularly with truly violent offences, counsel need to investigate defences based on lack of voluntariness negating responsibility for the *actus reus* or mental states producing, for example, impulse control disorders that may negate *mens rea*.[73]

There may be many unexplored defences worth investigating, even in the absence of provocation, which may be used to negate intention and/or recklessness

69 See [1966] NZLR 985; *A-G for South Australia v Brown* [1960] AC 432, 454.

70 *Lorimer* (n.69), 988.

71 See Crimes Act 1961, s.128B(1) and Sentencing Act 2002, s.86D(2) and 86D(3).

72 For a useful article examining this issue, see Jeffrey Bellin, "Is Punishment Relevant after All? A Prescription for Informing Juries of the Consequences of Conviction" (2010) 90(6) Boston University Law Review 2223.

73 See, for example, Warren Brookbanks, "Provocation: Psychological Precursors for Loss of Self-Control as a Mitigatory Claim" (2009) 16(2) Psychiatry, Psychology and Law 196.

where there has been a relevant loss of self-control caused by some pathological condition. Alternatively, some impulse control disorders may actually deprive the offender of the capacity to control their behaviour, supporting a claim that the *actus reus* was involuntary. These issues, where evidence supports the possibility, ought to be raised for the jury's consideration and, of course, must be put to the jury once an evidentiary burden has been discharged.

C. Negotiating charges

In principle, plea bargaining does not exist in New Zealand. However, the realities of three strikes makes a strong case for plea negotiations to become an established, and accepted aspect of pre-trial procedure. The recent adoption, in some American states, of the use of settlement conferences for the more effective management of cases and the more orderly management of plea negotiations, suggests the emergence of a rapidly changing curial environment aimed at facilitating the early settlement of criminal cases. These processes go beyond mere plea negotiation and suggest a new type of judicial environment where solutions may be arbitrated by judges in order to achieve the best interests of both offenders and the victims who have been offended against. Giving judges the power to resolve criminal cases earlier through a settlement conference is not inconsistent with their mandated role to conduct fair and accurate trials, and may remediate the problem that prosecutors have a virtually untrammelled discretion in the framing and presentation of criminal charges.[74] Clearly, there is no duty to frame charges with the interests of offenders in mind. That may seem counter-intuitive. Nevertheless, recent writing on plea bargaining makes the case that plea bargaining should be turned into a "dialogical process" aimed at giving defendant's a greater sense of participation and acknowledgement in a process that intimately concerns them.[75] In addition, since the exercise of prosecutorial discretion is an art, not a science, prosecutorial decisions should not be viewed as set in concrete, but as ambulatory decisions which are negotiable according to recognised justice principles. Therefore, in a three-strikes context the demands of zealous advocacy may require counsel to actively negotiate with prosecutors for the reduction, or substitution of charges, in exchange for guilty pleas to non-strike offences.

D. Use of disputed facts hearings

The right to determine disputed issues of fact before sentence has existed at common law for a long time. Where a defendant has pleaded guilty there may

74 See Jennifer Brown, "The Use of Mediation to Resolve Criminal Cases: A Procedural Critique" (1994) 43 Emory Law Journal 1247; Maureen Laflin, "Case-Management Criminal Mediation Offers Promise but Requires Caution" (2004) 47 Advocate 15.

75 See Rinat Kitai-Sangero, "Plea Bargaining as Dialogue" (2016) 49(1) Akron Law Review 63.

still be disputed issues of fact relevant to sentence which must be determined by a trial judge before he or she may pass sentence. For example, since aggravated burglary[76] is a nominated serious violent crime carrying a maximum penalty of 14 years it will be highly relevant on a second or third strike that the "weapon" the defendant stuck into a window jamb or a door frame to establish a relevant "entry" was a wooden gardening implement, not a vicious weapon like a knife or a bayonet. Such evidence, not adduced in the summary of facts to which the accused has pleaded, may be relevant to the level of penalty that the court might otherwise impose and should properly be the subject of a disputed facts hearing.[77]

In New Zealand, provision for disputed facts hearings is now made in s.24 of the Sentencing Act 2002. It is designed to cover cases where facts relevant to sentencing are disputed and the dispute cannot be resolved by the Judge on the basis of submissions or by agreement between counsel.[78] It is recognised that often a formal determination of guilt does not establish an adequate or accurate factual basis on which the sentencing Judge may assess an offender's culpability, because of the way in which offences are so broadly defined. In the three-strikes era I would suggest that disputed facts hearings will be of increasing importance for establishing the actual level of culpability for an offence provision which encompasses a widely diverse spectrum of conduct, such as the nominated offences in s.86A do. This will especially be the case with stage-2 offences, where there is no parole eligibility, yet scope for a judge to limit the severity of the sentence which might otherwise be imposed. For example in a conviction for sexual violation by digital penetration to which the offender's sexual partner, on the occasion in question, did not consent, the offender may well want to dispute findings of fact with respect to lack of consent, or the degree of force used in the alleged assault. This could be done by adducing evidence that the assault occurred in a difficult period in their relationship, and/or that the impugned behaviour was common in their usual sexual encounters. A court may well be persuaded on such evidence that imposition of 20 years imprisonment on a third strike would be manifestly unjust, at least justifying eligibility for parole.

E. A forgotten warning defence

A curious possibility arises from the structure of the New Zealand three-strikes law. As has been noted, jurisdiction for the operation of the three-strikes

76 Crimes Act 1961 (NZ), s.232.

77 See, for example, *People v Garcia* 121 Cal App 4th 271, 281 (2004) where evidence that appellant had stuck a wooden tool into a door jamb was sufficient to establish "entry" on a third strike under Californian law for which he received 25 years to life.

78 For a full account see Geoffrey Hall, *Sentencing — 2007 Reforms in Context* (Wellington: LexisNexis, 2007) pp.164–180.

regime depends upon the judge giving the offender a written warning of the consequences of conviction of a serious violent offence. Indeed, the whole regime depends on warnings being effective to alert the offender to the risk of further offending of the kinds specified. But what if, with the passage of time, or for other reasons, the offender forgets the warning, such that it is no longer operative in his conscious memory. It is as though the warning has been expunged from his mind. In the context of drug possession offences the Courts have acknowledged that forgetfulness can negate knowledge of the presence of the thing, one of the mental elements for possession of a controlled drug. In *Martin v Police*[79] the court expressed "considerable reluctance" in accepting that criminality should be determined "by the lottery of the timing of apprehension and in terms of whether the memory is oscillating between conscious recall and unconscious mental recall". Anderson J also expressed awareness of the difficulties of attending "a jurisprudential evaluation of subtle psychological conditions [such that] over-sophisticated or over-subtle distinctions could lead to utter impracticality". Nevertheless, his Honour did acknowledge that where lack of knowledge was in issue there was a need for a more "specific evaluation of the nature of the offender's absence of recollection"[80] in particular, whether it was a case of where memory had been "extinguished" or simply where knowledge was not "at the forefront of [the offender's] mind".

In the present context a claim that the offender "forgot" he had been warned of the consequences of a subsequent strike offence is likely, for fairly obvious reasons, to rarely be successful. Nevertheless, since the deterrent value of the new regime depends on a warning being remembered, it must matter that an offender, whether through intellectual insufficiency, mental impairment, pathologically poor recall or the simple passage of time, had forgotten an earlier warning, such that it had effectively been expunged from his mind. Where evidence supports that possibility there might be an arguable case for a submission that the court should ignore the previous warning. This would be on the basis that at the time of committing the most recent offence the offender was factually unaware "of the consequences if [he] is convicted of any serious violent offence committed after the warning given…"[81] The new offence in those circumstances should be treated as if it were a new strike offence but unaffected by the previous forgotten warning.

It is also worth observing that the idea of an express "warning" (something other than the threats inherent in the criminal justice system itself) is a notoriously middle class idea. It may have little significance to many offenders, whose experience of disciplinary sanctions is often sudden physical violence unaccompanied by any explanation or warning. That aggravated penalties should depend on whether an

79 See eg *Police v Rowles* [1974] 2 NZLR 756, *Martin v Police* (1987) 3 CRNZ 373.
80 *Martin* (n.79), 375.
81 See Sentencing Act 2002, ss.86B(4) and 86C(7).

offender has responded appropriately to a judicial warning, completely ignores the lived experience of many offenders, whose lives are often characterised by chaotic disruption, violence and coercion rather than the cloistered order of statutorily mandated cautionary tales.

F. Arguing manifest injustice

Under the New Zealand three-strikes regime manifest injustice is a relevant consideration only in relation to stage-3 offences, both murder and offences other than murder. It is relevant in three circumstances: where on a stage-3 offence other than murder the court orders the sentence be served without parole; where on conviction for manslaughter the court orders the offender serve a minimum period of imprisonment of not less than 20 years; where on a conviction for murder at stage-1 or stage-2 the court orders the offender serve a sentence of imprisonment for life. If in any of those situations the court is satisfied the sentence without parole would be "manifestly unjust", it can order the imposition of a minimum non-parole period.

Because the provisions are new there is no interpretative history as to the meaning of "manifestly unjust" in this context. It will be for the courts to determine what is manifestly unjust in the circumstances of a particular case. This has been the case where the expression appears in s.102(1) of the Sentencing Act 2002 (NZ). However, it should be noted that the qualification based on manifest injustice operates in a qualitatively different manner as between the different provisions in the Sentencing Act. In relation to s.102 "manifestly unjust" relates to the type of sentence imposed. In relation to the three-strikes rules it relates to the non-eligibility for parole, not to the type of sentence. For this reason the case law on manifest injustice in relation to s.102 is likely to be of limited precedential value in assisting a court to determine whether a sentence should be served without parole.

It is arguable, in the context of the three-strikes "manifestly unjust" exception, that it must relate to the impact on the offender's prospects of rehabilitation and restoration in the event that parole eligibility is withdrawn. However, because parole ineligibility on second strike and third strike offences goes to the heart of the rationale for this law it will be necessary to prove truly exceptional hardship arising from parole ineligibility before the exception is likely to be triggered. What sorts of situations are likely to be implicated? The following are possible situations in which an argument for manifest injustice might be made:

(1) where the offender is young and the consequences of non-parole are grossly disproportionate when measured against his/her chances of rehabilitation under normative sentencing conditions;
(2) where the offender is mentally impaired/intellectually disabled but not otherwise eligible for a therapeutic disposition;
(3) where the offender is very old and facing or experiencing imminent dementia or other age-related illness;

(4) where the offence was committed under extreme provocation, such that the offender would have had a defence of provocation had that been available (this may be the sort of issue that will need to be tested at a disputed facts hearing);
(5) where the events surrounding of the offence are such that in other circumstances the offender would almost certainly not have received a custodial sentence, but that a mandatory minimum sentence of imprisonment is mandated by the operation of the new law; and
(6) where the ineligibility for parole conflicts with other mandated sentencing principles such that there exists a major conceptual distortion between the sentence required to be imposed and the sentence that would have been imposed absent the three-strikes law.

However, each case will have to be argued on its own facts. In any event, it would be up to counsel to craft arguments which raise the manifestly unjust exception in realistic, compelling and imaginative ways.

(i) Psychological effects

There is probably little dispute that the three strikes law will impact more severely on those who, on account of mental impairment, are unable to properly evaluate the consequences of their behaviour and, more importantly, to learn from previous experience. Whether this might give rise to a "forgotten warning" defence, as I have explored in another context, has yet to be tested. However, given that the scheme of the legislation is dependent upon the efficacy of previous warnings given to offenders convicted of "strike" offences, we might seriously question whether this law can ever be fair on those, predisposed because of mental illness and impairment, to not be impacted by previous court sanctions. If, as is commonly said, deterrent sentences have little effect on offenders with mental impairment, we should hardly expect that a three strikes law, with its axiomatic warning system, will be any more effective in deterring the majority of offenders who fall foul of its prescriptive regime.

A further concern is that the three-strikes law will itself be psychogenic. The stress of being subjected to lengthy periods of imprisonment without any prospect of parole law, suggests an additional cohort of highly unstable offenders which may already be presenting at the doors of our prisons, further stressing an already overloaded system. There are many salutary reminders of how the overcrowded, often unsanitary, privacy-deprived, violent and predatory communities of modern prisons exacerbate symptoms of mental illness and increase the vulnerability of mentally ill inmates.[82] How then can we strategise to reduce the impact of this harsh law on society's most vulnerable offenders?

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82 See, for example, Terry Kupers, *Prison Madness: The Mental Health Crisis behind Bars and What We Must Do about It* (Somerset, NJ: Jossey-Bass Publishers, 1999).

I think one way is to recognise that mental impairment and disorder is on a spectrum and that many offenders who commit violent crimes will suffer, in some degree, from some form of mental impairment. This possibility must always be borne in mind when considering sentence and the danger of offenders with active mental illness being subjected to lengthy indeterminate sentences. There is also the fact that three strikes will itself be psychogenic. It will produce mental illness and disorder in offenders who were mentally vulnerable before the offending but who, upon conviction and sentence are at risk of decompensation into more serious forms of mental illness because of the hopelessness inherent in the mandatory penalties that will be imposed on them. Their personal needs and psychological dispositions will require management within a regime that is wholly unsympathetic to mental disorganisation and despair.

One issue that will inevitably arise is whether an offender sentenced to life imprisonment for murder on a second or third strike will be eligible for placement under a hospital order under s.34 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ). Eligibility for a hospital order depends on evidence of one or more health assessors (one of whom must be a psychiatrist) that at the time of sentence the offender was mentally disordered and that compulsory treatment or compulsory care is "required" either in the offender's interests or for reasons of public safety. There is no limitation on the availability of a s.34 order simply because the offender has committed a strike offence. However, because of the availability of the hybrid order under s.34(1)(a) it is unlikely that a court would ever make a therapeutic order under s.34(1)(b) on a second or third strike for a homicide offence because of the perceived relative lack of security attending such an order.

XX. The Future of Three Strikes in New Zealand

The question for New Zealand law is how to envision the three-strikes law going forward. Over the five years since its enactment has it had a chance to prove its worth? Are its full benefits yet to be discovered? Or can we conclude it has been an abject failure?

Whenever there is a call for new legislative offences, or new criminal justice initiatives that result in greater penalisation, they should be based on clear empirical evidence that the present law is failing to achieve its aims.[83] This was not the case when the New Zealand three-strikes law was enacted. In reality, the New Zealand legislation was the product of a political trade-off and had little to do with a clear empirical justification.[84] Certainly there was minimal public consultation.

83 Oliver Quick, "Medicine, Mistakes and Manslaughter: A Criminal Combination?" (2010) 69 Cambridge Law Journal 186, 198.

84 Brookbanks and Ekins, "The Case against the 'Three Strikes' Sentencing Regime" (n.9).

But the question now is whether, five years on, three strikes has contributed to the goal of improving the safety of the public from the impact of violent offending.

There is no simple answer to this question. Limited empirical research has been undertaken to give a clear sense of offending patterns in the light of the new law. However, none of the empirical data available so far points strongly to three strikes having a powerful deterrent effect on criminal offending. It may be deterring some offenders. At this stage there is no means of knowing for certain.

However, it is clear, at least in respect of those specified offences that account for the vast majority of the first strike warnings imposed, that New Zealand's three-strikes law has had little, if any, effect. This is evident from both the numbers of first strike warnings issued and the total numbers of offences being committed in these categories of offences. Police statistics seem to suggest that there may have actually been an increase in some of these categories of offending, despite the three-strikes law. Perhaps rather than persisting in trying to deter these offenders by judicial warnings and ratcheting penalties, we might be better to look at what is causing this offending and think about how we might deal with that. Undoubtedly, much violent offending is associated with alcohol, as the Californian study also found. New Zealand has a significant problem with alcohol and substance abuse, with alcohol in particular being a major factor in much violent offending. No doubt this will continue to be the case as long as younger age groups of people have ready access to seemingly unlimited amounts of alcohol, and society's sanctioning of its use.

As for sexual offending, that is also largely socially determined, and not amenable to any "quick fix" solutions. An important, albeit unquantifiable, factor is the impact of the Internet, and the ready access offenders have to unlimited amounts of pornography and sexually violent and explicit material. While lawmakers may have some success in changing the procedures for how a society deals with sex offence prosecutions and in crafting new approaches to victims of sexual offending,[85] a bigger challenge may be how to deal with the hidden problem of sexual addiction and its causative impact on violent sexual offending. This is a societal problem of significant proportions that will not be remedied simply by imposing deterrent criminal sentences, as exemplified in the three-strikes law. Indeed, recent academic writing appears to question the efficacy of deterrent sentencing generally, suggesting that the continual reference to deterrence by sentencing judges may be more related to habit, public expectation and the solicitations of higher courts than to evidence that it works.[86]

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85 The New Zealand Law Commission currently has a reference from the New Zealand Government to review the legal response to sexual violence in New Zealand and whether it can be improved in its fairness, effectiveness and efficiency.

86 See Geraldine McKenzie, *How Judges Sentence* (Sydney: The Federation Press, 2005) pp.104–105.

Robbery offences in New Zealand are relatively few in number, but may be difficult to deter. Many are associated with other antisocial conduct like substance abuse, and will continue to occur as long as there are desperate people willing to chance their arm in order to secure drugs to feed their addictions. Other robbery offences are the product of a more calculating cost/benefit analysis that may be impervious to three strike warnings.

XXI. Conclusion

It may be, in the final analysis, that the three-strikes law is a symbol of an administration that is "tough on crime". But simply being "tough" on crime does not do the work necessary for reducing the incidence of serious and violent crime. Deterrent sentences, as exemplified in the three-strikes law, may deter some offenders but can never be expected to totally eliminate offending which has deep societal roots and demonstrates engrained patterns of societal dysfunction. Other solutions, which address the causes of crime and the psychological drivers of criminalised dysfunction, must also be looked to.

I want to conclude with a quote from Stuntz. He has spoken at length about the problem of the American criminal justice system's "seemingly insatiable desire" to punish young black men.[87] This has some resonance with the state of affairs in New Zealand, given that 50 per cent of New Zealand's prison population are indigenous Maori.[88] Stuntz says:

> "We must remember that Thomas Jefferson was utterly wrong about slaves and slavery. Black slaves were not wolves ready to devour their white oppressors at the first opportunity. On the contrary, they were human beings being victimized by a mind-bogglingly unjust social and legal order. The oppression could stop whenever their oppressors chose to make it stop. The massive number of young black men (and the increasing number of young black women) who live in prison cells are not victims in the same sense: their conduct has more than a little to do with their condition. But they are human beings — creatures entitled to 'life, liberty, and the pursuit of happiness' as long as they permit their fellow human beings to seek those same ends. Their humanity entitles them to something else: a measure of understanding, and the mercy that flows from a justice system whose rulers remember that they too are tempted to do wrong, and often yield to the temptation. That understanding and that mercy, in turn, flow

87 Stuntz, *The Collapse of American Criminal Justice* (n.42) p.310.

88 See John Pratt, "The Dark Side of Paradise: Explaining New Zealand's History of High Imprisonment" (2006) 46(4) British Journal of Criminology 541, 541.

> from an idea that once was so well understood that it needed never to be expressed, yet now is all but forgotten: the idea that legal condemnation is a necessary but terrible thing – to be used sparingly, not promiscuously".[89]

New Zealand's three-strikes sentencing regime is precisely the sort of promiscuous use of legal condemnation that Stuntz rejects. For this reason alone it should be condemned. It provides no benefit that was not already provided by existing sentence options, it lacks a sound rationale and it is in conflict with existing and established sentencing principles. It will, undoubtedly, generate psychological dysfunction at a time when forensic services will struggle to cope with the additional burden that this law will create. It should be repealed at the first opportunity.

89 Stuntz, *The Collapse of American Criminal Justice* (n.42) p.310.