Chapter 21

Race and the Three Strikes Law

Brian Chad Starks and Alana Van Gundy

Three strikes laws originated from a general societal unrest and concern primarily as a result of two particularly egregious criminal cases. First, in 1988, Diane Ballasiotes was kidnapped and killed by an escaped work release inmate from a Seattle, Washington, work release facility. Second, in California in 1993, 12-year-old Polly Klass was abducted at knifepoint in her home during a children’s slumber party and killed by a repeat violent offender. Each case involved a young, white, female victim and a repeat, violent, sexual offender. While states already had legislation in place to address and incarcerate repeat offenders, these cases (among others) struck fear in many that violent and repeat offenders were being released too early. Alternatively, people saw these cases as proof that such prisoners should not be released at all. As a result, California and Washington led the charge for what we know as the “three strikes laws,” with Washington passing the first three strikes and you’re out law by voter initiative in 1993. Between 1993 and 1995, the federal government and 24 states enhanced their current legislation directed at repeat offenders by adding three strikes legislation or creating new policy that applied to repeat and violent offenders.¹

Three strikes laws were originally enacted to address perceptions that serious offenders are released from prison too early and that they are not prepared to successfully reintegrate into society. The intended consequences of this form of legislation were to protect the public from violent offenders, allay public fears that surrounded the aforementioned cases, harshly punish those that had previously been given chances at nonrecidivism (yet failed), and deter others from becoming repeat offenders. Yet in
the original time period in which these laws were enacted, some states extended the three strikes legislation for those who are repeat and nonviolent offenders. In other words, while three strikes laws were intended for repeat violent offenders, they vary greatly in their definition of a “strike,” how many strikes it takes to be “out,” and what it means to be “out.” These variations have ostensibly offered an uneven application across states, amongst individual cases, and through the overall functioning of the justice system.

The 1994 Violent Crime Control and Law Enforcement Act

In addition to the kidnapping, rapes, and murder of Ballisiotes and Klass, social unrest and concern drastically increased following a few high-profile violent crimes that resulted in mass victimization. One prolific incident that caused general alarm was the 1993 siege of Waco. Following an undercover operation, the Bureau of Alcohol, Tobacco, and Firearms attempted to serve a warrant to search the Branch Davidian complex in Waco, Texas, in February 1993. The Davidians were speculated to be in violation of the Firearm Owners Protection Act of 1986 and had reportedly stockpiled multiple forms of weapons, including M-16s and AR-15 machine guns. The attempt at executing the search warrant failed and culminated in a two-hour shootout between the Davidians and federal agents that resulted in the deaths of four federal agents and six Davidians.

The standoff with the Davidians lasted until April 1993. After being notified by the FBI that child abuse and molestation was occurring within the compound, Attorney General Janet Reno presented a case to President Bill Clinton that conditions were deteriorating, children were at risk, and a mass suicide could be imminent. Reno and Clinton approved a tank and tear gas raid on the compound. Despite live broadcast of the raid, information on the chronology and what occurred throughout this raid is inconsistent, but it was reported that three fires simultaneously started throughout the Davidian compound. The fires trapped the remaining Davidians in the compound, and 50 adults and 20 children under the age of 15 were killed. All that remained were buried alive, suffocated by the gas, or killed by the fire. Of the Davidians who managed to leave the compound prior to the fire, 12 were criminally charged with unlawful possession of firearms, conspiracy, or aiding and abetting to kill federal officers.

Shortly following the incident at Waco, in July 1993, a mass shooting occurred in San Francisco. Gian Luigi Ferri entered the building
at 101 California Street, a glass high-rise that housed a law firm with which Ferri had had previous dealings. Ferri was armed with two handguns and one pistol, and he opened fire on multiple floors of the office building and continued his massacre into the stairwells. Ferri killed nine people and injured six, and then he turned the gun on himself. To no avail, multiple victims and family members of the victims of this massacre sued the makers of the handguns and pistol that Ferri was carrying. However, this shooting spree ignited fear and anger in general society, with many calling for tighter gun control.

As a means of addressing this social unrest, generalized fear, and anger related to the massive loss of life, in 1994, the 103rd Congress passed HR 3355, The Violent Crime Control and Law Enforcement Act. The bill focused on addressing crime and created an unprecedented slew of funding for additional law enforcement officers, for prisons and new prison construction, and for prevention programs designed and implemented primarily by law enforcement. HR 3355 was originally written by Senator Joe Biden and was signed into legislation by Clinton.

The provision of interest within this Bill is Title VII, Mandatory Life Imprisonment for Persons Convicted of Certain Felonies. In subsection one of Title VII, the new federal three strikes law emerged. It states:

Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if (A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of – (i) 2 or more serious violent felonies; or (ii) one or more serious violent felonies and one or more serious drug offenses; and (B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant’s conviction of the preceding serious violent felony or serious drug offense.  

The federal provision is followed with a list of what crimes may be considered as strikes, and they include assault with intent to commit rape, arson, extortion, firearms use, kidnapping, murder, manslaughter other than involuntary, assault with intent to commit murder or rape, aggravated sexual abuse or abusive sexual contact, aircraft piracy, robbery, carjacking, conspiracy or solicitation to commit any of the aforementioned offenses, any offense punishable by a maximum term of imprisonment of 10 years
or more that has an element of force, and serious drug offenses that are punishable under the Controlled Substances Act. Felonies that do not qualify for the three strikes law include robbery at the state level if no firearm or threat of firearm was used and if the event did not result in death or serious injury and arson if the offense posed no threat to human life. There are special provisions for the three strikes law regarding Native Americans residing on semisovereign reservations/lands and for those that have had prior convictions overturned.3

Within one year of the federal enactment of the three strikes law, Thomas Farmer was given the first life sentence for his third strike under this new legislation. The New York Times published an article titled “In For Life: The Three Strikes Law; A Special Report, First Federal Three Strikes Conviction Ends a Criminal’s 25 Year Career.” It read:

Tommy Lee Farmer had never heard of the new Federal Three Strikes law until sheriff’s deputies brought him into court last October.

That was when his lawyer gave him the bad news. Mr. Farmer had expected to face state charges for his role in a botched holdup of a supermarket here. But three weeks earlier, President Clinton had signed a law intended to put incorrigible career criminals behind bars for life.

Mr. Farmer, the son of a minister and brother of a college professor, had spent most of his 43 years in prison for crimes that included murder, conspiracy to murder and armed robbery. Now he was learning that he was to be the first person in the nation charged under the law.

Last month—in a sentence that so pleased President Clinton that he interrupted his vacation to herald it as a milestone in American justice—Mr. Farmer was sent to prison for life.

“Tommy Farmer is the perfect poster child, or man, for the Three Strikes law,” said Stephen J. Rapp, the United States Attorney for the Northern District of Iowa in Cedar Rapids, who prosecuted the case. “He has been through the criminal justice system repeatedly and didn’t learn his lesson.”4

After its creation and implementation, the federal three strikes law was widely touted as legislation that worked to end the careers of violent, long-term offenders. The bill eased the fear and concern surrounding violent offenders, drug use, and drug abuse, and it extended the time individuals spent behind bars. Capitalizing on the available social support, states began enacting their own forms of this law, some even implementing two strikes legislation, for example, in Arkansas, California, Georgia, Montana, North Dakota, Pennsylvania, South Carolina, and Tennessee. Table 21.1 is
<table>
<thead>
<tr>
<th>State</th>
<th>Year Implemented</th>
<th>What Constitutes a Strike?</th>
<th>How Many?</th>
<th>Punishment</th>
<th>People Incarcerated (Percentage Nonwhite)</th>
</tr>
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<tbody>
<tr>
<td>Arkansas</td>
<td>1995</td>
<td>Murder, kidnapping, robbery, rape, terrorist act</td>
<td>Two</td>
<td>Not less than 40 years in prison; no parole</td>
<td>74 (82 percent)</td>
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<td>First-degree battery, firing a gun from a vehicle, use of a prohibited weapon, conspiracy</td>
<td>Three</td>
<td>Range of no-parole sentences, depending on the offense</td>
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<td></td>
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<td>to commit murder, kidnapping, robbery, rape, first degree battery or first degree sexual</td>
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<td></td>
<td></td>
<td>abuse</td>
<td></td>
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<tr>
<td>California</td>
<td>1994</td>
<td>Any felony if there is one prior felony conviction from a list of strikeable offenses as</td>
<td>Two</td>
<td>Mandatory sentence of twice the term for the offense involved</td>
<td>32,508 (76 percent)</td>
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<td>denoted by the state</td>
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<td>Mandatory indeterminate life sentence, with no parole eligibility for 25</td>
<td>8,828 (76 percent)</td>
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<td>Any felony if there are two prior felony convictions from list of strikeable offenses</td>
<td>Three</td>
<td>years</td>
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<tr>
<td>Colorado</td>
<td>1994</td>
<td>Any Class 1 or 2 felony or any Class 3 felony that is violent</td>
<td>Three</td>
<td>Mandatory life in prison with no parole eligibility for 40 years</td>
<td>681 (60 percent)</td>
</tr>
<tr>
<td>Connecticut</td>
<td>1994</td>
<td>Murder, attempted murder, assault with attempt to kill, manslaughter, arson, kidnapping,</td>
<td>Three</td>
<td>Up to life in prison</td>
<td>57 (67 percent)</td>
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<td></td>
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<td>aggravated sexual assault, robbery, and first-degree assault</td>
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</tr>
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<tr>
<td>Georgia</td>
<td>1995</td>
<td>Murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, aggravated sexual battery</td>
<td>Two</td>
<td>Mandatory life without parole</td>
<td>15,891 (75 percent)</td>
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<td></td>
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<td>Any felony</td>
<td>Four</td>
<td>Mandatory maximum sentence for the charge</td>
<td></td>
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<td>Murder, rape, sexual battery with a weapon, child molestation, arson, robbery, burglary with a weapon or that results in a serious injury, drug dealing</td>
<td>Three</td>
<td>Mandatory life without the possibility of parole</td>
<td>2,111 (44 percent)</td>
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<tr>
<td>Louisiana</td>
<td>1994</td>
<td>Murder, attempted murder, manslaughter, rape, armed robbery, kidnapping, any drug offense punishable by more than five years, any felony offense punishable by more than 12 years</td>
<td>Three/Four</td>
<td>Mandatory life in prison with no parole eligibility</td>
<td>12,218 (73 percent)</td>
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<td>Any four felony convictions if at least one was on the preceding list</td>
<td></td>
<td>Mandatory life in prison with no parole eligibility</td>
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<td></td>
<td>Murder, rape, robbery, first- or second-degree sexual offense, arson, burglary, kidnapping, carjacking, manslaughter, use of a firearm in a felony, assault with intent to murder, rape, rob, or commit sexual offense</td>
<td>Four, with separate prison terms service for first three strikes</td>
<td></td>
<td>262 (88 percent)</td>
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<tr>
<td>State</td>
<td>Year</td>
<td>Offenses</td>
<td>Grade</td>
<td>Sentence</td>
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<tr>
<td>Montana</td>
<td>1995</td>
<td>Deliberate homicide, aggravated kidnapping, sexual intercourse without consent, ritual abuse of a minor Mitigated deliberate homicide, aggravated assault, kidnapping, robbery</td>
<td>Two</td>
<td>Mandatory life in prison with no parole eligibility</td>
<td></td>
</tr>
<tr>
<td>Nevada</td>
<td>1995</td>
<td>Murder, robbery, kidnapping, battery, abuse of children, arson, home invasion</td>
<td>Three</td>
<td>Life in prison without parole; with parole possible after 10 years or 25 years with parole possible after 10 years</td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>1995</td>
<td>Murder, robbery, carjacking</td>
<td>Three</td>
<td>Mandatory life in prison with no parole eligibility</td>
<td></td>
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<tr>
<td>New Mexico</td>
<td>1994</td>
<td>Murder, shooting at or from a vehicle and causing harm, kidnapping, criminal sexual penetration, armed robbery resulting in harm</td>
<td>Three</td>
<td>Mandatory life in prison with parole eligibility after 30 years</td>
<td></td>
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<tr>
<td>North Carolina</td>
<td>1994</td>
<td>47 violent felonies; separate indictment required finding that offender is a violent habitual offender</td>
<td>Three</td>
<td>Mandatory life in prison with no parole eligibility</td>
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<tr>
<td>North Dakota</td>
<td>1995</td>
<td>Any Class A, B, or C felony</td>
<td>Two</td>
<td>If second strike was for Class A felony, court may impose an extended sentence of up to life; if Class B felony, up to 20 years; if Class C felony, up to 10 years</td>
<td>24 (41 percent)</td>
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<tr>
<td>South Carolina</td>
<td>1995</td>
<td>Murder, voluntary manslaughter, homicide by child abuse, rape, kidnapping, armed robbery, drug trafficking, embezzlement, bribery, certain accessory and attempt offenses</td>
<td>Two</td>
<td>Mandatory life in prison with no parole eligibility</td>
<td>395 (67 percent)</td>
</tr>
<tr>
<td>Utah</td>
<td>1995</td>
<td>Violent felonies</td>
<td>Three</td>
<td>Ranges from additional three years to life without parole, with judicial discretion</td>
<td>14 (29 percent)</td>
</tr>
<tr>
<td>State</td>
<td>Year</td>
<td>Offenses</td>
<td>Sentences</td>
<td>Cases (Percentage)</td>
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<tr>
<td>Washington</td>
<td>1993</td>
<td>Any Class A felony or conspiracy to commit any Class A felony, assault, child molestation, controlled substance homicide, extortion, incest against child under 14, indecent liberties, kidnapping, organized crime, manslaughter, promoting prostitution, vehicular assault or homicide when caused by impaired or reckless driver, any Class B felony with sexual motivation, and any other felony with a deadly weapon</td>
<td>Three</td>
<td>323 (52 percent)</td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>1994</td>
<td>Murder, manslaughter, vehicular homicide, aggravated battery, abuse of children, robbery, sexual assault, taking hostages, kidnapping, arson, burglary</td>
<td>Three</td>
<td>24 (25 percent)</td>
<td></td>
</tr>
</tbody>
</table>

*Table was reproduced and amended from Vincent Schiraldi, Jason Colburn, and Eric Lotke, 3 Strikes and You’re Out: An Examination of the Impact of Strikes Laws 10 Years after Their Enactment, Washington, DC: Justice Policy Institute.

*Note: Florida, Pennsylvania, Tennessee, Vermont, and Virginia did not provide data for inclusion and thus are not included in this table.
an amended table as provided by Schiraldi, Colburn, and Lotke (Justice Policy Institute Brief) and presents information on the states that implemented a two or three strike rule since the passage of HR 3355, what constitutes a strike in that state, how many strikes one may amass prior to striking out, the punishment, and the people currently affected by it. Importantly, the current strike legislation that exists within these states was implemented within two years of the federal legislation being enacted.

Table 1.1 shows that state three strikes legislation was initially developed in 1994 and 1995, very close to the time of the crimes that sparked such outrage and public fear. Societal pressure was placed on federal and state legislators to quickly respond to these fears of egregious crimes, habitual offenders, and violent offenders. And the government clearly listened. Importantly, even though the legislation was quickly enacted, both public support for and widespread criticism of the policy existed.

**Support for Three Strikes Legislation**

Three strikes legislation was essentially a societal backlash against an increased fear of crime, previous offenders, and violent offenders. Many people argue that the regulations have decreased the rates of offending and significantly decreased criminal careers. When examining the bills enacted at both the federal and state levels, the clear goal is to ensure long prison sentences for offenders and harsher punishment for those who commit repeat offenses. The intended consequence of this goal is to reduce public fear, ensure public safety, and incarcerate people with histories of or who are at risk of criminality.

Naomi Harlin Goodno argues that there are three reasons why three strikes laws are effective. Her arguments are based on California’s three strikes model but may translate to other states and the federal model. First, she states that supporters of the law believed it would have an incapacitation effect as well as a deterrent effect. Her evidence is that in California, the number of sentenced second and third strikers declined every year (incapacitation effect) and that the state crime rate has dropped since the law was enacted (deterrence effect). Therefore, the goal of the law has been met. Second, she argues that the initial concerns of implementing the law have not come to fruition. Goodno states that the cost of enforcing the law is lower than originally predicted, so it has not overrun state budgets or overcrowded prisons. Third, the three strikes law provides built-in safeguards to ensure that the law’s intent is met. For example, she states that
concerns that the law is unduly harsh because a minor violation can trigger the third strike is essentially invalid because the intent of the law is to address recidivism, which it does simply by incarcerating individuals at risk for recidivating. The safeguards that she refers to consist of drug treatment programming and judicial and prosecutorial discretion (she argues that 25 to 45 percent of third strikers will have a previous strike thrown out by a judge or prosecutor due to these forms of discretion), which address the goals of decreasing recidivism rates.\(^6\)

In a 10-year retrospective report titled "Prosecutors' Perspective on California's Three Strikes Law," additional support for Goodno's argument was provided.\(^7\) The authors spent a considerable amount of time addressing what they termed misinformation and fallacies surrounding three strikes legislation. They argued that the U.S. Supreme Court found three strikes legislation to be constitutional and not cruel and unusual despite the punishment possibly being disproportionate to the current level of culpability.\(^8\) They also show support for the legislation by arguing that 10 years after implementation, the law has garnered only 4.6 percent of inmates a third strike sentence; the law has not caused prison costs to bankrupt the state; it has not resulted in a decrease in funding for education; it has not overcrowded prisons; California has not had to open numerous prisons; and it has not created a backlog in the court system. Therefore, the law's goal of targeting the small portion of individuals who are violent repeat offenders has been met.

Rackaukkas, Feccia, and Gurwitz provide additional support for the use of three strikes legislation.\(^9\) They analyzed 13 years worth of three strike cases prosecuted in Orange County, California, and found that supporters of three strikes legislation have valid viewpoints. Their data showed that only 11.9 percent of all defendants subject to a life sentence under the three strikes provision were actually sentenced to a life term, which they point out is evidence that the statute is not overused or abused. Of those who were given life sentences, 55 percent of the offenses were serious or violent felonies. The researchers argued that individuals in the court system who received life sentences are not minor criminals that pose little threat to society. Rather, they represent a threat to public safety.\(^10\)

Support for three strikes legislation rests on its ability to fuel the public need to punish individuals that routinely violate the law. The intent of the law is to protect the general public by targeting a population that victimizes others and is at risk for recidivating upon release from a penal institution. An incapacitation effect will clearly be seen when increased numbers of
individuals are incarcerated, and some support is provided that those convicted of a first or second strike may be deterred from further crime. Research has shown that prosecutorial and judicial discretion may still be enacted via omitting or throwing out a previous conviction, but because most of these data come from studies conducted in California, there is some concern about whether support would be found in other states as well as at the federal level.

**Criticism and Resistance**

Despite widespread public support, three strikes legislation has been criticized and resisted on many grounds. It is important to note that while 24 states quickly enacted three strikes laws (or enhanced existing ones), more than half of our nation’s states did not. Criticism for what some considered a knee-jerk response to criminal activity was rampant. As discussed earlier in this chapter, individuals and society questioned the law’s intent, cost, impact, and effect. While few would argue that violent repeat offenders should be allowed to reintegrate into society prior to being prepared to do so, many people were concerned about offenders that may fall through the cracks of the criminal justice system, in other words, nonviolent offenders, those who would “age out” of crime, and those the prosecution or judicial system felt should not be impacted by this form of legislation.

One of the biggest criticisms of three strikes legislation is clearly the cost of funding it. Implementation of the law costs a state or federal government greatly through substantial and additional funding for preconviction jail time, case processing, trials, building jail and prison facilities, incarcerating individuals for greater lengths of time, and housing long-term and geriatric offenders. The criminal justice system is already overburdened, processing time is longer than it should be in many instances, prison facilities are antiquated and over capacity, and programs for successful reintegration are scarce. New legislation that convicts more individuals for a longer time does nothing but add to this burden.

Another criticism is the uneven application and unintended consequences of the laws themselves. The wide variation and implementation in the legal definition of what a strike is, when one is sought, and what happens when an individual has run out of them has resulted in long prison terms for those convicted of nonviolent or less serious charges. The laws also affect prosecutorial discretion because prosecutors are now expected to charge individuals with their last strike, uphold three strikes laws, and
reduce opportunities for plea-bargaining. By proxy, prosecutors have learned how to circumvent these restrictions, leading to inconsistencies in implementing three strikes legislation.\textsuperscript{11} Similarly, it has limited judicial discretion by requiring a mandatory sentence for the last strike and/or particular offenses. Limiting prosecutorial and judicial discretion is of the utmost concern to law enforcement and the courts.

Initial resistance to three strikes legislation also revolved around impact. Would this type of program work? Would the legislation allow for law enforcement, the courts, and corrections to protect society by incarcerating the most serious violent offenders while not overburdening an already troubled system? Many were concerned that the political nature of the passage and implementation of this law would not allow for a fair and unbiased assessment of the true impact of the program. Reports were scarce for the first few years, but five- and 10-year assessments of legislation (primarily assessing the impact of the laws in California, Florida, and Georgia) did evidence concern for who was being incarcerated, how long they were being incarcerated, and if crime rates were declining as a result of the laws.\textsuperscript{12}

Analysis on the legislation’s impact on crime rates is mixed, with multiple states showing no decrease in crime but some showing a slight decrease in crime.\textsuperscript{13} However, criminal justice practitioners and academics agree that while crime rate may be a variable of interest, there are many other things to examine related to impact and consequences. For example, in 2008, Radha Iyengar found that even while many would argue the three strikes law does show impact in the form of a decreasing crime rate, it offers two unintended consequences: third strike–eligible offenders are more likely to commit violent crimes, and because some laws are so harsh (in this instance, California), offenders with second and third strike eligibility migrated to neighboring states to commit criminal offenses. Findings such as these concern individuals who question whether the cost of the legislation outweighs its benefits.\textsuperscript{14}

An additional criticism surrounds the demographics of who is being sentenced under the this type of legislation. Of particular concern are older offenders and minorities. Males and Macallair showed that in California, the average age of offenders sentenced for a second strike was 32.9 and for a third strike was 36.1 (two thirds of the third strikers were between the ages of 30 and 45).\textsuperscript{15} They argue that felony offenders in their thirties and forties have had more time to commit offenses and are therefore eight to 10 times more likely to be sentenced under three strikes legislation.
This is important because of their possibility of aging out (research would argue this is the population least affected by the legislation, but in fact, they are the most affected), and they are less likely to commit a violent offense in comparison to a young offender.¹⁶

The last criticism, and the focus of this chapter, is that three strikes legislation disproportionately affects minorities. In 1999, Dickey and Hollenhurst argued that one of the unintended impacts of three strikes legislation in California was that blacks are incarcerated at higher rates and for longer periods of time: “African-Americans comprise 31% of inmates in the state’s prison, but 37% of offenders convicted under two strikes and 44% percent of Three Strikes offenders.”¹⁷ Later, they argue that according to a 1997 report, “in California, Blacks make up 7% of the state’s population but account for 20% of felony arrests, 31% of state prisoners, and 43% of those imprisoned for a third strike.”¹⁸

Ehlers, Schiraldi, and Lotke conducted a study in 2004 that focused on how California’s three strikes law had been applied to blacks and Latinos on both a statewide and county-by-county basis.¹⁹ They found that while racial inequity existed in the criminal justice system prior to enactment of this legislation, implementation of it simply accelerated racial disparity. Blacks and Latinos are incarcerated at higher rates than Caucasians. The researchers provide the following facts:

- In California, Blacks make up 6.5% of the population, 30% of the prison population, 36% of second strikers, and 45% of third strikers.
- The proportion of Latinos in the general population and the prison population is fairly similar. 32.6% of the population is Latino, 36% of the prison population is Latino, and 32.6% of the strikers are Latino.
- Caucasians in California make up 47% of the general population, 29% of the prison population, 26% of second strikers, and 25.4% of third strikers.
- Felony arrests among Blacks were 4.4 times higher than for whites, but Blacks' rate of incarceration was 7.5 times higher, their rate of incarceration for second strikes was 10 times higher and for third strikers, 13 times higher.
- The arrest rate for Latinos was 50% higher than for Caucasians, their incarceration rate was 81% higher, and their rate of incarceration as a striker was 82% higher.²⁰

Their study found that while the aforementioned statistics represented the state level, the county levels mirror the state trends. In other words, across the board in California, blacks receive the harshest punishments, followed by Latinos and then Caucasians. These findings held regardless of
size of the county, levels of use or harshness of the three strikes law, and the location of the offender.

Ehlers, Schiraldi, and Ziedenberg presented an additional report on the California three strikes law titled “Still Striking Out: Ten Years of California’s Three Strikes” in which they created what they termed a three strikes rate. This rate calculates the number of strikers in the prison population per 100,000 residents in California (11). They state that:

- The Black incarceration rate for third strikes is 12 times higher than the third strike incarceration for Whites.
- The Latino incarceration rate for a third strike is 45% higher than the third strike incarceration rate for Whites.
- For second and third strike sentences combined, the Black rate is over 10 times higher than the White incarceration rate.
- For second and third strike sentences combined, the Latino incarceration rate is over 78% higher than the White incarceration rate.

The aforementioned studies were conducted between 10 and 20 years ago. Despite support showing that three strikes legislation disproportionately impacts minorities, changes have not been made to remedy the situation. Table 21.1 shows, for example, that 12 states currently report more than 50 percent of those that are incarcerated are of minority status. Arkansas, Maryland, and New Jersey report that over 80 percent of those that are incarcerated for third-strike offenses are blacks or Latino. Only Indiana (44 percent), North Dakota (41 percent), Utah (29 percent), and Wisconsin (25 percent) report that less than 50 percent of their current third strikers are minorities. These statistics evidence the nationwide lack of concern for the disproportionate impact of three strikes legislation on minorities.

Discussion

The relationship between racial and ethnic minorities and the current system of criminal justice has been well documented and—at best—is a contentious issue. The response to and treatment of minorities by law enforcement, courts, and corrections is the basis of a large body of literature that offers rigorous and multiple debates on how to address or change this relationship. Within our discussion, we present a brief overview of the criminal justice system and minorities, discuss the development and consequences of the war on drugs, and base our argument on the premise that the three strikes legislation is an extension of policies such as the war on drugs. We argue from the viewpoint of critical race theory and provide
suggestions for amending current three strikes legislation as a means of addressing the resultant racial disparities.

**Critical Race Theory**

Critical race theory emerged in the mid-1970s from black intellectuals who feared that the work done by both black and white activists fighting for the legal rights of blacks could be oppressed and undermined by the white power structure. These intellectuals—namely Richard Delgado, Alan P. Freeman, and Derrick Bell—were critical of the legal system that historically ignored the rights of blacks and discriminated against them. The theory's main point of contention is that whites created the legal system and will do anything to maintain control of its power, in particular, utilizing it as a tool of oppression. Despite appearances that racial rights have been acknowledged and granted in the courtroom, critical race theory argues it is still in the best interest of the white community to oppress minority populations, either through policy or through practice.

For example, according to Derrick Bell, the 1954 Supreme Court ruling of *Brown vs. Board of Education* was passed to desegregate schools so that blacks could have an equal opportunity at receiving a good education. However, most of the literature fails to share with readers that the threat of international relations was deemed the major reasoning behind the integration of schools. The United States feared the Soviet Union would find issues with the treatment of blacks within the United States, so *Brown* was offered up as a way to diffuse the negativity surrounding the treatment of blacks.

Critical race, from a theoretical perspective, is in some sense a product of conflict theory, which is often used to provide a plausible explanation for racial discrimination in the criminal justice system. Walker and colleagues (2011) explain the premise of conflict theory: “The law is used to maintain the power of the dominant group in society and to control the behavior of individuals who threaten that power.” It is from this framework that we argue that the relationship between minorities and the criminal justice system is a form of oppression that occurs through the creation of policies that intentionally or unintentionally target those of minority status.

**The Criminal Justice System and Minorities**

The disproportionate representation of minorities in the criminal justice system is evidenced in arrest rates, conviction rates, and harsher sentencing practices.
For example, approximately 32 percent of black men will be in a state or federal correctional facility in their lifetime, compared to 17 percent of Hispanic men and 5.9 percent of white men (these are estimated rates of first incarceration). The statistics for jail inmates show a continuation of these racial trends. In 2002, sixty percent of inmates in local jails were of ethnic/racial minorities. Approximately 40 percent were black, 19 percent were Hispanic, 1 percent were American Indian, 1 percent were Asian, and 3 percent were of more than one race/ethnicity.\(^{24}\)

**The War on Drugs**

One contribution to the soaring population of minorities within incarceration facilities (both racial/ethnic minorities and women) is the war on drugs. The war on drugs was launched in 1982 by President Ronald Reagan in response to the rampant use of crack cocaine in inner-city neighborhoods. The government created a drug task force, took federal funds earmarked for white-collar crimes, and directed them toward addressing drug use and the related violence that seemed to be taking over the country. The amount of funding and attention giving to this crack epidemic was highly influenced and widely supported by the media, which depicted blacks as crack heads, crack whores and crack dealers. The media essentially targeted blacks and made this group the focus of the war on drugs. These attacks contributed to the racial stereotypes of blacks as criminal, which inspired a public outcry to address black drug addicts and drug dealers. As a result of the war on drugs, blacks were arrested for drug crimes at rates that contributed to their mass incarceration.

Creating and implementing the war on drugs sent many young black men to prison for life for nonviolent offenses such as possession of drug charges. The policy was implemented to address what society viewed as a perceived threat and as a result, black men are more likely to be arrested for these forms of nonviolent offenses. This idea of perceived threat has allowed decision makers to racialize crime in multiple instances, which places blacks at a strong disadvantage in society but more specifically, within the criminal justice system.

This racialization of crime has a historical and political component that must be acknowledged when examining policies such as the war on drugs and three strikes legislation. Prior to winning the 1968 presidential election, President Richard Nixon publicly announced that blacks are at fault for crime in our nation.\(^{25}\) The president’s endorsement legitimized society,
politicians, criminal justice practitioners, and scholars as they equated blacks with criminal activity. This induced fear in citizens and made the black man a target in the eyes of many, especially whites. The fact that many whites are afraid of young black men makes it easier to support targeting them as dangerous criminals that should be put away for life. Crawford and colleagues (1998) cite James Q. Wilson in a 1992 Wall Street Journal article: “It is not racism that makes white uneasy about blacks . . . it is fear. Fear of crime, of gangs and violence.”²⁶

Policies such as three strikes legislation and the war on drugs have been a means of dealing with that fear. Even though the original intent may not have been to target minorities, their overrepresentation in each phase of the criminal justice system as a result of these policies serves as support for institutionalized discrimination. Drugs are used and sold in white suburbs, yet the faces that society sees as most clearly representing the drug problem are young black men from the inner city. The notion is, “Wherever you shine the brightest light, you will find the most dirt.” This crime light is shone more frequently and much brighter on the black community.

Three Strikes Legislation

The war on drugs had a clear and intended goal—to reduce drug use and related violence in inner cities. Reaching this goal has resulted in the mass incarceration of blacks. One must understand that legislation often has both intended and unintended (or unrecognized) consequences, and one must further consider whether the war on drugs covertly intended to target minorities. Critical race theory would argue that three strikes legislation was presented under the purview of terms such as “color-blindness” or the rule of law, but the legislation has targeted those of minority status. Many egregious crimes that have sparked public outrage have involved white perpetrators and white victims, yet the three strikes policy has resulted in increased minority incarceration rates.

Three strikes legislation intended to address the social disorder caused by violent recidivists, yet the actual effects of the legislation are different. Those most affected are minorities who have committed nonviolent offenses. This was not a population targeted by three strikes legislation when it was first proposed. The fact that this policy has resulted in a disproportionate number of blacks and Hispanics sentenced to long prison terms (primarily life without the possibility of parole) should lead legislators to question the results of the policy. The fact that the war on drugs happened
to be the cause of such a disproportionate representation of blacks sentenced under a later policy targeting those with three strikes legislation, calls for a redirection and new understanding of the intent, implementation, and result of legislation and policy that has resulted in the mass incarceration of black and Hispanic males.

Three strikes legislation also has a clear and intentional purpose—to protect the general public by incarcerating the most serious, violent, repeat offenders that endanger public safety. While it may be the case that incarcerating many individuals will decrease the crime rate, it is the unintended consequences that are of concern to scholars focused on the relationship between race and oppression. Table 21.1, for example, shows that in one state, 94 percent of those incarcerated under three strikes legislation are of minority status. In many states, that number is between 70 and 80 percent, a clear statistical majority of the total imprisoned population. So while the main purpose of the legislation may be to protect society, one would be remiss to not recognize and address that one of the unintended consequences of this legislation is clearly to disproportionately incarcerate those of color.

The intended purpose of the three strikes legislation of removing violent recidivists from the community is one the authors of this chapter are in agreement with. The idea of career violent offenders being incarcerated for long periods of time makes most citizens sleep better at night and feel more confident in their general safety. Making our communities safer must be the primary focus of criminal justice legislation, so using policy to specifically deter crime is understandable. However, it is our argument that, while the intended goals of legislation such as the war on drugs and three strikes policy is appropriate, the manner in which the policy is implemented has resulted in a form of mass oppression of minorities that is highly concerning.

As evidenced throughout this chapter, three strikes legislation has contributed to the mass incarceration of nonviolent offenders, a significant number of whom are minorities. The disproportionate representation of minorities in all phases of the criminal justice system has long been a major topic of discussion, even before the mid-1990s. Blacks are and have been disproportionately arrested, denied pretrial bail, prone to take plea bargains, found guilty at trial, and given harsher sentencing in comparison to whites. Three strikes legislation has only increased these numbers. This situation must not be ignored. Was this the real intention of three strikes? Was there a hidden agenda? Were minorities again the target of criminal justice policy? We are merely suggesting that evidence of race-based
disparities should at least be a part of the conversation on the unintended consequences of the legislation. On its face, the policy appears to target a certain type of criminal; yet based on real outcomes, one can see that black non-violent offenders are most often targeted. With that in mind, we would like to offer a few suggestions that might concurrently allay public fear of violent recidivists and address racial disparities in the incarcerated population.

First, the intended purpose of this policy—removing violent recidivists—should remain its focal point. Yet we caution policy makers to adhere to outcome-based data that provides evidence that these criminal offenders were already subjected to harsh sentencing guidelines. Second, we must consider redefining the class of felonies that qualify defendants for such extreme punishment. For example, in the state of Georgia, if a defendant commits armed robbery (a class A felony), serves his or her sentence, and once released commits a class B drug felony, the judiciary has the legal discretion of applying the two strikes law. This situation must be critically examined.

Third, federal legislation encouraging state statutes to be more punitive deserves a second look. The definition of three strikes must be more clearly defined. Some states have taken the three strikes model and upped the ante to two strikes. In Georgia, if a defendant commits a violent offense such as armed robbery, serves his or her time, gets released, and commits another violent felony such as rape, the judiciary can recommend and sentence the defendant to life without parole. The federal policy should offer more equal and consistent application of the law for all states. It should not be used to circumvent get tough on crime rhetoric based on a geographical location (some regions are more punitive than others, for example, the South). We feel that the three strikes influence has allowed some jurisdictions to justify the overuse and abuse of judicial authority to incarcerate.

It is the authors’ intention to make suggestions related to alleviating some of the miscarriages of justice for the minority population. We also hope that our suggestions will improve the legislation as it relates to community protection. We hope that any amendments to three strikes legislation achieve both of these goals.

Notes

17. Dickey and Hollunhurst, 1999, p. 3.
23. Walker et al., 2011, p. 31.

References


