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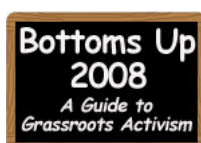
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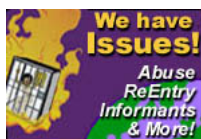
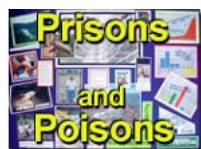
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## Petty Crime, Outrageous Punishment

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### Why the Three-Strikes Law Doesn't Work

By Carl M. Cannon



There was nothing honorable about it, nothing particularly heinous, either, when Leandro Andrade, a 37-year-old Army veteran with three kids and a drug habit, walked into a Kmart store in Ontario, California stuffed five videos into his waistband and tried to leave without paying. Security guards stopped him, but two weeks later, Andrade went to another Kmart and tried to steal four more videos. The police were called, and he was tried and convicted.

That was ten years ago, and Leandro Andrade is still behind bars. He figures to be there a lot longer: He came out of the courtroom with a sentence of 50 years to life.

If you find that stunningly harsh, you're in good company. The Andrade case went all the way to the U.S. Supreme Court, where Justice David Souter wrote that the punishment was "grossly disproportionate" to the crime.

So why is Andrade still serving a virtual life sentence? For the same reason that, across the country, thousands of others are behind bars serving extraordinarily long terms for a variety of low-level, nonviolent crimes. It's the result of well-intentioned anti-crime laws that have gone terribly wrong.

Convinced that too many judges were going easy on violent recidivists, Congress enacted federal "mandatory minimum" sentences two decades



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ago, mainly targeting drug crimes. Throughout the 1990s, state legislatures and Congress kept upping the ante, passing new mandatory minimums, including "three strikes and you're out" laws. The upshot was a mosaic of sentencing statutes that all but eliminated judicial discretion, mercy, or even common sense.

Now we are living with the fallout. California came down hard on Andrade because he'd committed a petty theft in 1990 that allowed prosecutors to classify the video thefts as felonies, triggering the three-strikes laws.

The videos that Andrade stole were kids' movies, such as *Casper* and *Snow White* -- Christmas presents, he said, for nieces and nephews. A pre-sentence report theorized he was swiping the videos to feed a heroin habit. Their retail value: \$84.70 for the first batch and \$68.84 for the second.

When Andrade's case went before the Supreme Court, a bare majority upheld his sentence. But rather than try to defend the three-strikes law, the opinion merely said the court should not function as a super-legislature.

Andre will languish in prison, then, serving a much longer sentence for his non-violent crimes than most first offenders, or even second-timers convicted of sexual assault or manslaughter.

Politicians saw harsh sentences as one way to satisfy voters fed up with the rising crime rates of the '70s and '80s, and the violence associated with crack cocaine and other drugs. And most would agree that strict sentencing laws have played a key role in lowering the crime rate for violent and property crimes.

Last June, Florida Governor Jeb Bush celebrated his state's 13th straight year of declining crime rates, thanks in part to tough sentencing statutes he enacted. "If violent habitual offenders are in prison," Bush said, "they're not going to be committing crimes on innocent people."

California, in particular, has seen a stark drop in crime since passing its toughest-in-the-nation three-strikes law more than ten years ago. Mike Reynolds, who pushed for the legislation after his 18-year-old daughter was murdered by two career criminals says that under three-strikes, "those who can get their lives turned around, will. Those who can't have two choices -- leave California or go to prison. The one thing we cannot allow is another victim to be part of their criminal therapy."

But putting thousands behind bars comes at a price -- a cool \$750 million in California alone. That's the annual cost to the state of incarcerating the nonviolent offenders sentenced under three-strikes. Add up all the years these inmates will serve on average and, according to the [Justice Policy](#)

[Institute](#), California's taxpayers will eventually shell out more than \$6 billion. For a state with a battered economy, that's a pile of money to spend on sweeping up petty crooks.

The law also falls hardest on minorities. African Americans are imprisoned under three-strikes at ten times the rate of whites, and Latinos at nearly double the white rate. While crime rates are higher for these minorities than for whites, the incarceration gap is disproportionately wide under three-strikes largely because of drug-related convictions.

Arkansas Governor Mike Huckabee is blunt when it comes to the three-strikes approach to justice: "It's the dumbest piece of public-policy legislation in a long time. We don't have a massive crime problem; we have a massive drug problem. And you don't treat that by locking drug addicts up. We're putting away people we're mad at, instead of the people we're afraid of."

There are some telling figures. In 1985 about 750,000 Americans were incarcerated on a variety of pending charges and convictions in federal and state prisons and local jails. The number of inmates is now about 2.1 million, of which some 440,000 were convicted on drug charges. A significant portion of the rest are there because drug addiction led them to rob and steal.

Early on there were signs that mandatory minimum laws -- especially three-strikes statutes -- had gone too far. Just a few months after Washington state passed the nation's first three-strikes law in 1993, a 29-year-old named Paul Rivers was sentenced to life for stealing \$337 from an espresso stand. Rivers had pretended he had a gun in his pocket, and the theft came after earlier convictions for second-degree robbery and assault. A prison term was appropriate. But life behind bars, without the possibility of parole? If Rivers had been packing a gun -- and shot the espresso stand owner -- he wouldn't have gotten any more time.

Just a few weeks after California's three-strikes law took effect, Brian A. Smith, a 30-year old recovering crack addict, was charged with aiding and abetting two female shoplifters who took bed sheets from Robinsons-May department store in Los Cerritos Shopping Center. Smith got 25 years to life.

As a younger man, his first two strikes were for unarmed robbery and for burglarizing an unoccupied residence. Was Brian Smith really the kind of criminal whom California voters had in mind when they approved their three-strikes measure? Proponents sold the measure by saying it would keep murders, rapists and child molesters behind bars where they belong. Instead the law locked Smith away for his petty crime until at least 2020, and probably longer -- at a cost to the state of more than \$750,000.

His case is not an aberration. By the end of last year, 2,344 of the 7,574

three-strikers in the state's penal system got their third strikes for a property offence. Scott Benscoter struck out after stealing a pair of running shoes, and is serving 25 years to life. His prior offenses were for residential burglaries that, according to the public defender's office, did not involve violence. Gregory Taylor a homeless man in Los Angeles, was trying to jimmy a screen open to get into the kitchen of a church where he had previously been given food. But he had two prior offenses from more than a decade before: one for snatching a purse and the other for attempted robbery without a weapon. He's also serving 25 years to life.

One reason the pendulum has swung so far is that politicians love to get behind popular slogans, even if they lead to bad social policy.

Few California lawmakers, for example, could resist the "use a gun, go to prison" law, a concept so catchy that it swept the nation, and is now codified in one form or another in many state statutes and in federal law. It began as a sensible idea: Make our streets safer by discouraging drug dealers and the like from packing guns during their crimes. But the law needs to be more flexible than some rigid slogan. Ask Monica Clyburn. You can't, really, because she's been in prison these past ten years. Her crime? Well, that's hard to figure out.

A Florida welfare mom, Clyburn accompanied her boyfriend to a pawnshop to sell his .22-caliber pistol. She provided her ID because her boyfriend didn't bring his own, and the couple got \$30 for the gun. But Clyburn had a previous criminal record for minor drug charges, and when federal authorities ran a routine check of the pawnshop's records, they produced a "hit" -- a felon in possession of a firearm. That's automatically 15 years in federal prison, which is exactly what Clyburn got. "I never even held the gun," she noted in an interview from prison.

No one is more appalled than H. Jay Stevens, the former federal public defender from the middle district of Florida. "Everybody I've described this case to says, "This can't have happened." [But] it's happening five days a week all over this country."

Several years ago, a prominent Congressman, Rep. Dan Rostenkowski of Illinois, was sent to prison on mail-fraud charges. It was only then that he learned what he'd been voting for all those years when anticrime legislation came up and he cast the safe "aye" vote. Rostenkowski told of being stunned at how many young, low-level drug offenders were doing 15- and 20- year stretches in federal prison.

"The waste of these lives is a loss to the entire community," Rostenkowski said. "I was swept along by the rhetoric about getting tough on crime. Frankly, I lacked both expertise and perspective on these issues."


Former Michigan Governor William G. Milliken signed into law his state's mandatory minimums for drug cases, but after leaving office he lobbied the state legislature to rescind them. "I have since come to realize that the provisions of the law have led to terrible injustices," Milliken wrote in 2002. Soon after, Gov. John Engler signed legislation doing away with most of Michigan's mandatory sentences.

On the federal level, judges have been expressing their anger with Congress for preventing them from exercising discretion and mercy. U.S. District Court Judge John S. Martin, Jr., appointed by the first President Bush, announced his retirement from the bench rather than remain part of "a sentencing system that is unnecessarily cruel and rigid."

While the U.S. Supreme Court has yet to strike down mandatory minimums, one justice at least has signaled his opposition to them. Justice Anthony M. Kennedy said in a speech to the 2003 American Bar Association meeting that he accepted neither the "necessity" nor the "wisdom" of mandatory minimums.

"One day in prison is longer than almost any day you and I have had to endure," Justice Kennedy told the nation's lawyers. "When the door is locked against the prisoner, we do not think about what is behind it. To be sure, the prisoner must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person. Still, he or she is part of the family of humankind."

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