

MANDATORY SENTENCING LAWS AND THE SYMBOLIC POLITICS OF LAW AND ORDER

RUSSELL HOGG*

Emerging political interest in mandatory sentencing in Australia (and the introduction of such laws in Western Australia and the Northern Territory) is generally depicted by its supporters as a necessary response to a crisis of law and order characterised by runaway crime rates and undue leniency towards convicted offenders. Even accepting here that such views accurately represent current crime problems, it is necessary to ask how mandatory sentencing is intended to work as a response to them.

The Opposition in NSW has recently floated a number of proposals for circumscribing judicial discretion in relation to sentencing with a view to imposing longer prison terms on convicted offenders. There has been talk of introducing sentencing grids such as exist in some United States jurisdictions. In one recent press report, it was suggested that such grids would require the punishment of property crime according to a formula involving one day in prison for each \$100 stolen or damaged by the offender.¹ The extent to which courts would be denied discretion to depart from such guidelines remains unclear.

In the US, the introduction of mandatory sentencing laws federally and in a majority of States are primarily justified by reference to the goal of selective incapacitation. This philosophy rests on the assumption that the substantial majority of crimes like robbery, burglary and assault are the work of a relatively small proportion of offenders. Accurate identification and long term incarceration of these serious repeat offenders during the most active years of their criminal careers will, it is reasoned, harvest a significant reduction in crime. The object is not to exact retribution for wrongs done or even deter would-be offenders (although this is a secondary objective), but simply to take active offenders out of circulation.

The most well known of these measures are the 'three strikes and you're out' laws that have been introduced federally and in many States (often by popular initiative). These laws treat an offender's prior criminal record as the best

* School of Law, Macquarie University.

¹ D Humphries, "A day in jail for every \$100 stolen" *Sydney Morning Herald*, 17 October 1998, p 3.

predictor of their future contribution to the crime rate and hence the basis for mandating long prison sentences for second and subsequent convictions. In some cases (such as California) a third felony conviction under the 'three strikes' law results in a mandatory prison sentence of 25 years to life.

Whether such laws prove to be effective in terms of their own stated objectives depends upon the efficacy of the assumptions upon which they rest. There remains substantial doubt that the criminal justice system can apprehend, identify and gaoil for long periods of time sufficient numbers of high rate offenders at the right time in their criminal careers so as to substantially reduce the crime rate. Moreover, many who are caught within the incapacitative net are likely to be 'false positives': offenders for whom their past criminal record is a poor guide to their future pattern of offending. Incarceration of such individuals for long periods of time is ineffectual, costly and unjust.

Quite apart from their impact on crime rates in the short to medium term however, such measures may have dramatic and dangerous implications for penal systems and government more generally. This is clear from the US experience. California's three strikes law, mandated by popular initiative with 72 per cent of voters supporting it, is one of the toughest in the United States. It followed a decade in which California had already tripled its prison population.

The most sophisticated mathematical modelling of the effects of the new law, carried out by the Rand organisation, projects the likely costs and benefits over a 25 year period.² It is estimated that crimes will decrease by 28 per cent of what they would have been, although most of these decreases will be assaults and burglaries. However, this will be at an additional cost on average of \$5.5 billion in the annual criminal justice budget. By 2002, the corrections budget will be required to double from 9 per cent to 18 per cent of the overall State budget. Making the fairly safe assumption that additional taxes will not be levied for the purpose and taking account of the areas in which public expenditure is already mandated (education, health and welfare), Greenwood et al estimate that spending in the other major areas of State responsibility, notably higher education and other services like pollution control and workplace safety regulation, will have to drop by over 40 per cent in the period up to 2002 in order to fund the three strikes law.

One case study projecting the impact on a local criminal justice system in California concluded that the likely effects, as those prosecuted under the law opt for trial rather than pleading guilty in growing numbers, will include increases in public defender costs, court backlogs, waiting times and remand populations.³

Of course, the more extreme projections are unlikely to come to pass as adaptive mechanisms 'kick in' to pre-empt the intolerable resource burdens threatened by the law. For it is important to recognise that these laws do not remove discretion from the criminal process so much as they redistribute it from

2 P Greenwood, C Rydell, A Abrahamse, J Caulkins, J Chiesa, K Model and S Klein, "Estimated Benefits and Costs of California's New Mandatory Sentencing Law" in Shichor and Sechrest (eds), *Three Strikes and You're Out: Vengeance as Public Policy*, Sage, Thousand Oaks (1996) 53.

3 R Cushman, "Effect on a Local Criminal Justice System" in Shichor and Sechrest, note 2 *supra* 90.

judges to prosecutors. It is the latter who choose when to invoke such laws against repeat offenders. A consequence of this may be to simply equip prosecutors with additional bargaining chips in the pre-trial process. Such discretions also provide a crucial safety valve to cope with the impact of such laws upon scarce criminal justice resources. There is an abundance of evidence that this is precisely what has happened with mandatory sentencing laws in the past and that it is already occurring under the new, more draconian laws in the US.⁴

Ironically, the decisions determining outcomes in the criminal process are as a consequence rendered less rather than more open to public scrutiny. In addition to defeating the announced purposes of such legislation to enhance the accountability of the criminal justice system to community expectations concerning punishment, this is also likely to produce inconsistencies in the use of such laws as criminal justice actors adapt in their own localised ways.⁵ In such circumstances, outcomes in individual cases become increasingly capricious without the safeguard of appeals.

Neither convicted offenders nor the general public are served by a system of laws whose actual effect is to replace publicly stated principles and open procedures involving independent judicial officers with informal ad hoc decision-making carried on behind closed doors. A draconian law (like all draconian laws in history) will be subject to capricious administration in order to avoid its worst effects. The sin of excess will be mitigated by recourse to the sin of arbitrariness. Prison populations will still rise dramatically and the budgets of other public services will have to be plundered to pay for them.

It can be said in favour of such policies in the US that at least they tend to be clearly articulated, subject to sustained public debate and their implementation and effects are often carefully monitored and evaluated. (Not that this appears to inhibit in any way the obsession with punitiveness).

In Australia, on the other hand, the stridency of the political rhetoric, the vagueness of proposals for sentencing reform and their proximity to elections are the clearest indications of what is really at stake. They usually represent the latest attempt to lift the bar in the law and order high jump. The rationale for such measures is less an instrumental one of reducing crime than it is the symbolic one of tapping and harnessing punitive public opinion behind a new program of draconian penal measures.

In late October 1998, the then leader of the Opposition, Peter Collins, gave a speech in which he promised tougher sentencing laws and measures to support victims if he has won the election to be held early in 1999. He said that he would not allow an artificial cap to be placed on the numbers in prison. If more accommodation was needed, more prisons would be built. Hearing him on the radio news I couldn't help recalling the words of one of his predecessors as parliamentary leader of the NSW Liberal Party, Nick Greiner, in 1988. Soon

4 M Feeley and S Kamin, "The Effect of 'Three Strikes and You're Out' on the Courts: Looking Back to See the Future" in Shichor and Sechrest, note 2 *supra* 135; Cushman *ibid*.

5 Cushman, note 3 *supra*.

after winning an election on a tough law and order platform centred on the promise to introduce 'truth in sentencing' and 'restore public confidence' in the justice system, Mr Greiner was referred to in the *Sydney Morning Herald* as saying that ultimately, if more jails were required in order to have a system of justice which made sense to the public, then NSW would have more jails.⁶

In the period between 1988 and 1996, and partly as a consequence of government policies, the NSW prison population increased by about 40 per cent. A similar proportional increase occurred for the Australian prison population as a whole. Yet although prison numbers have not remained static, the rhetoric is almost wholly unchanged. This contributes to a potentially disastrous spiral in which the failure of tougher sentencing regimes and growing prison populations to reduce crime or assuage public opinion occasions not a reconsideration of the punitive strategy but its intensification. That it might be intrinsically flawed is never contemplated. Rather, apparent failure is taken as evidence that the strategy has simply not been pursued with sufficient vigour.

It would be folly not to acknowledge the electoral appeal of the punitive strategy to which both sides of politics in Australia appear wedded. Indeed, the nub of the problem may reside in the fact that this is "democratic crime control by the voting majority", to quote the Norwegian criminologist Nils Christie in his recent book *Crime Control as Industry: Towards Gulags, Western Style?*⁷ Christie warns of the imminent conversion of "a system of justice" into "a system of crime control" which is "above criticism" and without limits "as long as the actions do not hurt the majority".

Politicians in Australia have in recent years increasingly looked to the US for their ideas about criminal justice policy. The lessons we have to learn from that country, however, are largely negative ones: those of a country that has more than tripled its prison population in less than two decades (and currently has an imprisonment rate more than five times that of Australia), that despite recent reductions in crime still experiences much higher crime rates (especially violent crime) than most other countries in the world and that appears incapable of relaxing its punitive obsession.

The 'war against drugs' has been a major ingredient in that obsession and a major contributor to rocketing prison populations in recent times.⁸ In what might serve as a general commentary on the contemporary politics of law and order (particularly in the US but also in countries like Britain and Australia) the authors of a recent trenchant critique of US drug law policies point to the baleful effects of partisan politics. Rather than "clarify differences, sharpen debate and provide policy alternatives"⁹ it has simply fuelled escalation of failed strategies.

6 M Moore, "Crowded jails force Lib rethink on tougher parole" *Sydney Morning Herald*, 4 May 1988, p 1; cf R Hogg, "Sentencing and Penal Politics: Current Developments in New South Wales" in University of Sydney, Proceedings of the Institute of Criminology, No 78, *Sentencing*, 1988.

7 N Christie, *Crime Control as Industry: Towards Gulags, Western Style?*, Routledge (2nd ed, 1995) p 175.

8 V Stern, *A Sin Against the Future: Imprisonment in the World*, Penguin (1998) p 62.

9 E Bertram, M Blachman, K Sharpe and P Andreas, *Drug War Politics: The Price of Denial*, University of California Press (1996) p 140.

Closer to home, a politician like Bob Carr who deeply admires American history and institutions might take both the negative and positive lessons his extensive knowledge bestows and apply it to his own (and our) local predicament. How is it that civilised and liberal minded leaders from both sides of politics will, as an election comes around, be found egging each other on to do things which they would contemplate if left to their own intelligence, good sense and political conscience? Perhaps it is time for them to inject values and an element of bipartisanship into the political debate about the quality of justice in NSW.