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Mandatory Sentencing

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There is a widely held belief that the imposition of a mandatory sentence for a second or third offence will have a significant deterrent effect on that individual and will send a message to potential offenders. Advocates argue that it will bring consistency in sentencing and appease public concern about crime and punishment. This proposition has been debated vigorously in the community, and has been the subject of numerous research papers.

This paper examines the evidence for and against mandatory sentencing and finds that although mandatory sentencing may result in some reduction in crime, it questions whether the costs involved justify the small decrease that may be achieved.

Efforts made to turn potential offenders into good citizens may be more productive in earlier stages of their development than seeking to deter criminal behaviour through more rigid sentencing policies. Money spent on early intervention programs, education, and better environmental and product design to reduce opportunities for criminal activity, may be a far more effective way of reducing crime.

This paper argues that judges who are publicly accountable for their decisions may be in a better position to ensure that justice is served through a greater understanding of the context of the offence than legislation introducing mandatory sentencing which cannot make allowances for the circumstances associated with the crime in question.

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Strictly speaking, mandatory sentencing refers to the practice of parliament setting a fixed penalty for the commission of a criminal offence. The recent publicity surrounding mandatory sentencing in Australia might lead us to think it is a new idea, when in fact, it has a long history. During the eighteenth and nineteenth centuries mandatory sentencing was used for a wide range of offences. In the course of the nineteenth century, however, this approach was largely abandoned in favour of parliament setting only a maximum penalty, with the sentencing judge responsible for determining the appropriate sentence for individual offenders (Morgan 1999, p. 267). Some minor offences in all jurisdictions, such as speeding, still carry mandatory penalties although these are not mandatory penalties in the strict sense as courts retain some discretion over their imposition.

Contemporary debates about mandatory sentencing usually refer to a particular form of mandatory sentencing that involves the imposition of a significant minimum penalty, usually a jail sentence, with penalties escalating for subsequent offences. Many jurisdictions in the United States (Tonry 1996, p. 134) and more recently two Australian jurisdictions, Western Australia and the Northern Territory, have enacted this form of mandatory sentencing law.

In the Northern Territory under 1997 amendments to the *Sentencing Act 1995* (NT) an adult first time offender convicted of a designated property offence must receive a minimum term of imprisonment of 14 days. Offenders convicted of their second offence must receive a minimum term of 90 days, and offenders convicted of their third offence a term of one year. The same amendments also impose mandatory minimum terms of imprison-

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ment on juveniles: 28 days for juvenile repeat property offenders (aged 15 or 16) with escalating penalties for subsequent offences.

In Western Australia, under 1996 amendments to the Criminal Code (WA) an adult or juvenile offender convicted for the third time or more for a home burglary must receive a 12-month minimum term of imprisonment or detention. These amendments are colloquially referred to as the “three strikes and you’re out” sentencing laws.

In assessing the legal, social and other impacts of mandatory sentencing, this paper scrutinises the arguments and the evidence for mandatory sentencing. The main claims made by advocates of mandatory sentencing are as follows: that it prevents crime; that it provides consistency in sentencing; and that it is a democratic response to widespread public concern about crime.

Crime Prevention

It is argued that mandatory sentencing prevents crime through incapacitation and deterrence, incapacitating repeat offenders and deterring those offenders as well as other potential offenders. Assessing the preventive effect of a policy is, of course, problematic. It is difficult enough to accurately estimate the level of crime (Felson 1998, p. 7, Brown et al. 1996, p. 39) and even more difficult to determine how policy changes affect that level.

What is required is the systematic testing of the preventive effects of mandatory sentencing laws. Unfortunately, however, there is a lack of this type of research (Tonry 1996, p. 139). Based on the available research in the United States (on the preventive effect of mandatory sentencing laws in Massachusetts, Michigan, Florida, Pennsylvania and New York) Tonry concludes that mandatory penalties prevent little or no

crime (Tonry 1996, p. 140). Qualifying this conclusion, Reitz suggests that Tonry goes too far in dismissing the possibility that mandatory sentencing can prevent crime. Reitz argues that “what Tonry might have said is that confinement-intensive laws such as mandatory sentencing statutes carry undeniable consequential benefits, but most people find them surprisingly small once they are quantified” (Reitz 1996, p. 1599).

One study in the United States, however, suggests that mandatory sentencing laws may produce better than marginal reductions in crime. After concluding that mandatory sentencing laws for firearms offences in Michigan, Florida and Pennsylvania did not have a preventive effect on crime (Loftin, Heumann & McDowall 1983; Loftin & McDowall 1984, McDowall, Loftin and Wiersema 1992), the same team of researchers later combined the data sets for the three states. On the basis of the combined data set they conclude that mandatory sentencing laws did cause a reduction in gun homicides (McDowall, Loftin & Wiersema 1992), arguing that “since there were no compensating increases in the number of homicides committed with weapons other than guns, these effects can be interpreted as truly preventive of homicides”. Other crimes of violence involving firearms, however, did not decline but this counter-intuitive result is attributed to a “lack of precision in the data”. Tonry claims that the research produced counter-intuitive findings because the findings about homicide are wrong. Tonry claims that “only through statistical sleight of hand” can the researchers conclude in their later research that the laws did reduce crime after previously finding that they did not. By putting together data from the individual cities, reductions in crime that were “tiny” were converted into statistically significant ones

simply by virtue of the larger data set (Tonry 1996, p. 140).

In Australia, mandatory sentencing laws are claimed to have reduced crime levels. Following the introduction of mandatory sentencing laws in Western Australia, the state government claimed that downward trends in car theft and juvenile convictions were due to the deterrent effects of the legislation. Broadhurst and Loh (1993), however, claim that the decline in official records of car theft and juvenile conviction had begun prior to the introduction of the legislation.

Clearly, the precise preventive effects of mandatory sentencing laws are disputed, and more systematic testing is needed. On the basis of the available research, though, it would appear that mandatory sentencing laws can bring about a small reduction in those crimes which attract mandatory sentences.

Incapacitation

Mandatory sentencing partly aims to prevent crime by preventing offenders from continuing to offend. As “past behavior is the best predictor of future behavior ... it is reasonable to attempt to prevent crime by preventing known offenders from continuing their criminal behavior” (Sherman et al. 1998, ch. 9). The way mandatory sentencing attempts to prevent known offenders from offending is simple enough: “for as long as offenders are incarcerated they clearly cannot commit crimes outside of prison” (Sherman et al. 1998). Moreover there is some evidence incapacitation works. A recent authoritative report on crime prevention concluded that “incapacitating offenders who continue to commit crimes at high rates” is “effective in reducing crime” (Sherman et al. 1998). However, it is questionable whether mandatory sentencing is the best method to pursue inca-

pacitation, and more generally, incapacitation by any means may be morally problematic and not cost effective. These two criticisms are considered in turn.

Identifying those offenders who will continue to offend is difficult. While previous offending is the best predictor of future behaviour it is still regularly inaccurate and mandatory sentencing schemes are said to be particularly poor in predicting future offending. As well as selecting some offenders who will continue to offend, mandatory sentencing schemes will also select a significant number of "false positives". "False positives" are those offenders who will not continue to offend, either because they are at the end of their offending careers, or because they will not have an offending career at all.

Crime, especially violent crime, tends to be a "young man's game". As Tonry says "by the time offenders have accumulated enough convictions to make it reasonable to conclude that they are high-rate serious offenders, many will have reached ages at which they will soon desist from offending in any event" (Tonry 1996, p. 139). Tonry argues that "extended confinement of such people will result in relatively little but very expensive crime prevention through incapacitation". Mandatory schemes such as those in Western Australia and the Northern Territory may overcome this problem by allowing the imprisonment of juvenile offenders. In relation to the risk of false positives, mandatory sentencing advocates can also argue a moral choice exists between the risk of harm to potential victims and the risk of false positives. Mandatory sentencing takes the view that the risk of harm to potential victims should take priority over the risk of false positives (see Von Hirsch & Ashworth 1992, p. 172).

If incapacitation is to be pursued as a sentencing policy,

judges are arguably in a better position than parliament to identify offenders who will continue to offend, as judges can make a prediction based on evidence about an individual offender's background and the circumstances of the offence from pre-sentence reports and related information.

Some critics have more fundamental moral concerns about incapacitation. As Duff and Garland put the argument "it is wrong, in principle, to punish offenders for their predicted future conduct: they should be punished for what they have done, not in respect of what they will or might do. We should treat individuals (unless they are insane) as moral agents who can choose whether or not to desist from future crimes" (Duff & Garland 1994, p. 239). By imprisoning to incapacitate, mandatory sentencing "offends against the principle of proportionality which requires that the penalty imposed be proportional to the offence in question" (ALRC 1997, p. 553). In its defence, one might argue that a possible moral justification for mandatory sentencing is that an offender forfeits his or her rights by his or her repeat offending (Freiberg 1999). Alternatively it is arguable that stiffer penalties for subsequent offences are proportionate because the later offences are more culpable, the offender persisting in criminal behaviour after society has made its displeasure clear (Von Hirsch in Vitiello 1997, p. 428). The nature of the crime committed may also influence our judgment about the moral acceptability of incapacitation. The moral acceptability of incapacitation is much stronger in the case of dangerous offenders.

Mandatory sentencing critics argue, though, that mandatory sentencing schemes, instead of incapacitating dangerous offenders, are routinely biased against the poor and marginalised. Poor and marginalised people are more

likely to commit the sorts of offences covered by mandatory sentencing schemes. In mandatory sentencing jurisdictions there are invariably offenders who receive lengthy imprisonment terms for committing relatively trivial offences. An Aboriginal man in the Northern Territory received considerable publicity when jailed for a year for the theft of a towel (Lagan 1999, and for other examples see Bayes 1999), as did a man in California when imprisoned for 25 years for stealing a slice of pepperoni pizza (Vitiello 1997, p. 396).

Arguably, these instances of injustice can be avoided by targeting serious offences, and defining the offences which should attract mandatory sentencing with more specificity so that only dangerous offenders are incapacitated. Opponents of mandatory sentencing contend, however, that the legislature cannot define offences, and the circumstances in which offences are committed, with the precision necessary to eliminate unjust results in individual cases. As Morgan puts it "it is inevitable that mandatories which are structured by reference to broad offence definitions will not and cannot be effective tools for selective incapacitation" (Morgan 1999, p. 275). This echoes Zimring's argument that the problems with mandatory sentences are not the result of "sloppy drafting" but the fact that, "we (simply) lack the capacity to define into formal (statutory) law the nuances of situation, intent, and social harm that condition the seriousness of particular criminal acts" (Zimring 1994, p. 169). The tenor of these arguments is that just sentencing requires an assessment of the special circumstances of each case that only a judge is in a position to make.

Any assessment of the merits of incapacitation by mandatory sentencing should also make explicit an implicit assumption underlying incapacitation

arguments. That is, policies based on incapacitation arguments are only concerned about reducing crime rates outside jails. They place little importance on what happens inside jails where offenders are “warehoused”. Arguably this is even more so the case when incapacitation is implemented by mandatory sentencing. Imprisoning offenders for a fixed sentence, with no prospect of early release arguably provides no incentive for prisoners to stop offending in jail, as they have nothing to lose by continuing to offend.

Deterrence

By imposing significant mandatory penalties, mandatory sentencing also aims to prevent crime through deterring offenders from continuing to commit crimes once they are released (specific deterrence), and deterring other members of the community from committing crime (general deterrence). Critics of mandatory sentencing argue that mandatory sentencing relies upon misconceived assumptions about the deterrent effect of punishment. Sherman argues that “(f)or too long democratic societies have assumed that all punishment has a general deterrent or preventive effect. But criminology has increasingly disproven that assumption.” (Sherman 1993, *see also* Braithwaite 1997, p. 314). Deterrence assumes that people are rational actors who weigh the costs and benefits of committing a crime before deciding whether to commit that crime. However, much crime is impulsive and to the extent that there is any deliberation, “(f)or people who see no attractive options in the legitimate economy, and who are doubtful that they will live another ten years in any event, the threat of an extended prison stay is likely to be far less threatening than it would be to a well-employed person with a family” (Blumstein, cited in Tonry 1996, p. 138).

If deterrence assumptions are correct, it is arguable that mandatory sentencing is flawed even on its own deterrence-based logic. By imposing a mandatory imprisonment term for a third offence, for example as the Northern Territory does, an offender with two previous offences has little incentive to choose to avoid committing a more serious crime for the third offence (Vitiello 1997, p. 447). Again advocates may argue that mandatory sentencing simply requires greater precision in the definition of offences, but as already discussed, critics claim that there are inherent limits on the specificity with which a legislature can define offences.

Cost Effectiveness

Any reductions in crime produced by mandatory sentencing laws must be assessed in light of their costs. Mandatory sentencing is an expensive means of pursuing reductions in crime. There are increased costs in the court system as more defendants contest charges to try to avoid the mandatory penalty that follows conviction, where they otherwise may have entered a plea of guilty.

More significantly there is the cost of housing large numbers of offenders imprisoned under mandatory sentencing laws. In Australia it is estimated that it costs up to \$60,000 to keep a prisoner imprisoned for a year (Cowdery 1999, p. 291) and approximately \$200,000 to build a new cell.

Arguably, there are much more cost effective methods of crime prevention, within and outside the criminal justice system. Within the criminal justice system it is claimed that increased expenditure on detection is a more effective deterrent than mandatory sentencing (Tonry 1996) but arguably this shares the same rational actor assumptions of mandatory sentencing. Outside the criminal justice system,

money can be more profitably spent on crime prevention by investing in improving education, pre-school care and health care, targeting especially those at risk of offending. Cost-benefit analyses done by the RAND Corporation in the United States estimate that every million dollars spent on California’s three strikes laws would prevent 60 serious crimes, whereas providing parent training and assistance for families with young children at risk would prevent 160 serious crimes, and giving cash incentives to induce disadvantaged high school students to graduate would prevent 258 serious crimes (Greenwood et al. 1996).

Consistency

Another related purpose of mandatory sentencing schemes is to eliminate inconsistency in sentencing. In this respect, mandatory sentencing is based on the principle that discretion is the enemy of consistency. Certainly, when judges have a discretion as to the sentence they impose there is the possibility of unequal treatment of offenders who have done equal wrong (Braithwaite & Pettit 1990, p. 21). Mandatory sentencing attempts to eliminate this discretion by legislating mandatory penalties.

Critics of mandatory sentencing share the aspiration of achieving consistency in sentencing but argue that sentencing left in the hands of judges is likely to be more consistent than sentencing in the hands of parliament. While mandatory sentencing sounds like it could achieve consistency, for a number of reasons it in fact does not. Firstly, the inherent imprecision in statutorily defining offences means very unequal offenders can receive the same sentence when convicted under mandatory sentencing. Secondly, mandatory sentences may encourage judges to circumvent the mandatory

penalties imposed by legislation. Thirdly, rather than eliminating discretion it simply displaces it to other parts of the criminal justice system, most notably, prosecutors. Discretion is unavoidable in the criminal justice system (Brown et al. 1996, p. 119). When that discretion is left in the hands of judges they are in a position to attempt to achieve consistency by taking into account all the relevant circumstances of the offence. Moreover, judges' decisions are publicly accountable through their visibility, which provides some safeguards against inconsistency. By contrast, the circumvention of laws and displacement of discretion means that discretion is being exercised in a less considered, and certainly less accountable way.

It is argued that judges and juries "nullify" laws or penalties that seem to them unjust. The experience of jurisdictions with mandatory death penalties provides an example of how juries often refuse to convict when they know a harsh penalty will be the inevitable result of their conviction (Tonry 1996, p. 143). It has also been suggested judges and magistrates go to some lengths to avoid inflicting mandatory sentences on offenders where they feel that sentence is undeserved. Bayes study of the effect of mandatory sentencing laws in the Northern Territory and Western Australia found that "(o)n nine occasions, WA courts have avoided the (mandatory) sentence by issuing Conditional Release Orders", and "NT courts have found young people guilty of related offences which do not attract the mandatory sentence, such as interfering with a vehicle rather than stealing it, and trespass rather than break and enter" (Bayes 1999, p. 288).

It is also suggested that mandatory sentences, rather than eliminating discretion, simply transfer or displace that discretion to an earlier part of the criminal justice system

(Braithwaite & Pettit 1990, p. 20). Tonry argues that "the record is clear from research in the 1950s, the 1970s, the 1980s and the 1990s that mandatory penalty laws shift power from judges to prosecutors" (Tonry 1996, p. 135 and referring to findings of US Sentencing Commission, p. 148; *see also* Morgan 1999, p. 278). A mandatory sentencing scheme gives prosecutors greater certainty about the penalties that will result from a particular charge, in contrast to a system where the judge chooses a sentence to match the offender's culpability. Consequently in the United States, when plea bargaining with a defendant, a prosecutor's power is increased, as a prosecutor can hold out the prospect of 1 year to the defendant if she charges him with one offence, compared with only a fine if he accepts a lesser charge (Zimring 1994, p. 170).

Democratic Arguments

Mandatory sentencing schemes are also defended on the basis that they are the product of democratic parliaments, and as such respond to, and represent, public concern about crime. Elected legislatures are sensitive to community concerns about crime in a way that appointed judges are not. Mandatory sentencing schemes respond to distress and fear within the community about criminal activity. For instance the Northern Territory Government announced that its mandatory sentencing laws "deal with present community concerns that penalties imposed are too light" (Zdenkowski 1999, p. 303). Quite apart from the effect on crime rates, mandatory sentences arguably reassure the public that politicians have listened to, and responded to, voters' fears.

The counter argument is that, while no-one disputes that there is considerable fear of crime, particularly violent crime within the community (Grabosky

1995), it is questionable whether people want harsh sentences generally and mandatory sentences specifically. Research conducted in Cincinnati found that although a large majority gave global support to "three strikes" laws, when faced with specific cases, a majority favored exceptions to the impositions of the mandatory sentences" (Brandon in Yeats 1997, pp. 382-3; on the public's punitiveness generally *see* Doob & Roberts 1987). Of course the making of exceptions is prohibited by mandatory sentences. Judges given discretion about the imposition of sentences, however, can and do take into account the sorts of factors the public considered in making exceptions, namely the seriousness of the offence, the mental state of the offender and the use of violence.

There is also a more cynical strain to the political critique of mandatory sentencing. Critics of mandatory sentencing argue that it is a policy adopted by politicians attempting to gain or retain power by playing on a community's fears, and its superficial understanding of criminal law. After concluding that mandatory sentencing does not work when assessed by its stated objectives, Morgan poses the rhetorical question "Or am I missing the point? Perhaps the real question is nothing to do with law, criminal justice or crime prevention. Perhaps it is whether the symbolic power of mandatories is such that they help politicians win elections." (Morgan 1999, p. 279).

Conclusion

Mandatory sentencing is claimed to prevent crime, introduce certainty and consistency into a criminal justice system lacking in those qualities, and reflect community condemnation of crime. Available evidence suggests that mandatory sentencing can deliver modest, but expensive crime prevention. The large govern-

ment investment required by mandatory sentencing laws would arguably return a much greater yield in terms of crime prevention if it were invested in prevention policy in areas such as education. Critics also argue that crime prevention by selective incapacitation is a difficult task laced with uncertainty and inconsistency which is done particularly poorly by legislation that imposes punishment automatically on the basis of prior offending. Moreover, they argue that the policy of selective incapacitation is morally questionable, particularly as it routinely disadvantages the poor and marginalised. The deterrence-based assumptions of mandatory sentencing are also questionable. Mandatory sentencing does not deliver the consistency it promises. In short, critics of mandatory sentencing argue that it is a crude policy resting on crude assumptions about how crime is prevented, what the public want, and what legislation can deliver.

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