

## CAPTURING CRIMS OR CAPTURING VOTES? THE AIMS AND EFFECTS OF MANDATORIES

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After defining the basic terminology, this paper outlines the objectives which generally are sought to be achieved by mandatory components in the sentencing process ('mandatories'). It then asks whether these objectives have been met and explores the collateral effects of such sentences. Many of the examples are drawn from Western Australia because, in terms of detailed research findings, Western Australia probably has the best data in Australia. However, reference is also made to other jurisdictions and these comparisons show that the lessons from Western Australia are of general application.

### I. WHAT ARE 'MANDATORIES'?<sup>1</sup>

Strictly speaking, a 'mandatory' sentence describes the situation where the sentencing court has only one possible option. In the eighteenth and early nineteenth centuries, mandatory penalties in this strict sense existed for a wide range of offences and it was only in the course of the nineteenth century that such strategies were largely abandoned in favour of greater discretion, with parliament generally just setting the maximum penalty. A mandatory component can feed in to a sentence in a number of different ways. Since these mechanisms may have different aims, it is important to avoid generalisations about whether they 'work' or not. In some jurisdictions, life imprisonment remains the mandatory penalty for murder but even then it is rare for judges to have no choice at all in the matter.<sup>2</sup>

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1 This term was used by Tonry in an overview of mandatory sentences: M Tonry, "Mandatory Penalties" in M Tonry (ed), *Crime and Justice: A Review of Research*, University of Chicago Press (volume 16, 1992) 243 at 244.

2 For example, the judge may well be able to set the minimum period for which the person must be detained under the life sentence; see I Morgan, "Sentences for Wilful Murder and Murder" (1996) 26 *UWAL Rev* 207.

'Three strikes' laws and their variants are different; they generally do not prescribe 'mandatory penalties' as such but mandatory minimum penalties for offenders who exhibit the requisite 'track record' of offending.<sup>3</sup> In other words, the sentencer's discretion is confined within far narrower limits. Although the baseball analogy may be new, the idea is not. For example, systems of minimum and maximum penalties, with enhanced penalties for persistence, have been in operation for many years under traffic legislation in Western Australia.<sup>4</sup> A crucial difference with the new laws is, however, that the minima take the form of custodial terms.

Another variant is the 'sentencing grid'. Grids in various forms exist in the US both at the federal level and in a number of States, some being far more restrictive than others. Until recently, they appeared alien to Australian legal culture, especially to those judges who espouse the view that sentencing is a matter of 'instinctive synthesis' on the facts of each case.<sup>5</sup> However, the Attorney General for Western Australia recently spoke of the need for a 'sentencing matrix' and has tabled a Bill to pave the way for this. The Bill envisages a three stage process. The 'information gathering' stage will require courts to report in more precise terms on the factors they took into account and the weight placed on those factors. The second stage will be the publication of 'benchmarks' giving an 'indicative sentence'. The final stage is the production of 'presumptive sentences' from which it will be difficult for courts to deviate.<sup>6</sup>

Although most attention focuses on 'front end' examples such as three strikes burglary laws, it must be recognised that mandatory requirements at other stages can have an equally serious impact. In Western Australia at present, parole is automatically cancelled if a parolee is sentenced to a term of imprisonment for an offence committed during the parole period.<sup>7</sup> However, the Parole Board does have the discretion to re-release that person on parole. A Bill before the Parliament will remove this power and require the person to serve the whole of the balance of the sentence in prison.<sup>8</sup> This is likely to impact on far more offenders than some of the more dramatic and widely criticised front end measures.

In the rest of this paper I shall use the word 'mandatories' to embrace all of these different ways in which a mandatory component is found in the imposition and implementation of sentences.

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3 Or, as in the Northern Territory, for 'first strike' property offenders.

4 For example, under s 63 of the *Road Traffic Act 1974* (WA), a first offence of driving under the influence (DUI) carries a fine of "not less than \$500 or more than \$1,200" and mandatory disqualification for a minimum of six months; for a second DUI offence it is \$1,000 to \$1,800 and a minimum two years disqualification. For a third or subsequent DUI offence, \$1,200 to \$2,500 and permanent disqualification.

5 In Victoria see *R v Williscroft, Weston, Woodley and Robinson* [1975] VR 292 and *Young, Dickenson and West* (1990) 45 A Crim R 147. In Western Australia see *Punch* (unreported, WA CCA, Pidgeon, Murray and Anderson JJ, 31 May 1994) 18 *Crim LJ* 53 and *Verschuren* (1996) 91 A Crim R 1.

6 The Sentencing Legislation Amendment and Repeal Bill 1998 (WA) was tabled in late October 1998. It raises a whole host of issues but a detailed review is beyond the scope of this paper.

7 *Sentence Administration Act 1995* (WA) s 70.

8 The current provisions are contained in s 42 of the *Sentence Administration Act 1995* (WA). The proposed amendments are in the *Sentence Administration Bill 1998* (WA).

## II. EVALUATING MANDATORIES

Moves towards mandatories reflect the proposition that matters can no longer be entrusted to the 'good sense' of judges or other decision makers. There are two quite distinct arguments underpinning this general proposition. The first is reflected by the US sentencing grids. Originally at least, these were driven not by law and order politics but by legitimate concerns with respect to 'fairness' and problems of disparity on the part of judges. The grids were based on long term planning by Sentencing Commissions, including detailed consultation with relevant stakeholders. The grids reflected a desert based philosophy which sought to get away from the unpredictable and pernicious effects of indeterminate sentencing practices. The aim was greater 'justice' through greater 'uniformity'.<sup>9</sup>

Recent Australian and US debates, especially those surrounding three strikes laws, are replete with populist rhetoric and with the language of general deterrence and incapacitation.<sup>10</sup> These arguments are usually underpinned by the notion that judges are 'not doing their job' in that they are not being 'tough enough' in the fight against crime. The lines are so clearly drawn that Western Australia's sentencing matrix legislation has been designed – and this must have been a deliberate policy decision – without any consultation with the judiciary and other interested parties.

More recently, grids in the US have been manipulated for political gain.<sup>11</sup> Debates on mandatories in Australia have always been highly politicised. In 1995, the New South Wales State election was dominated by an unseemly 'bidding war' on law and order issues. In Western Australia in early 1992, the Labor Government enacted the infamous and short lived *Crime (Serious and Repeat Offenders) Sentencing Act* in its cynical efforts to cling to office.<sup>12</sup> Western Australia's three strikes burglary laws were introduced in late 1996 in the run up to a State election early in 1997. The Attorney General's 'sentencing matrix' was proclaimed in the aftermath of a public rally to protest about attacks on the elderly in their homes and the perceived inadequacy of sentences.

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9 See, for example, D Parent, *Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*, Butterworths (1988) chapters 2 and 3.

10 For a discussion of 'populist punitiveness' see A Bottoms, "The Philosophy and Politics of Punishment and Sentencing" in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press (1995) 17.

11 Tonry, note 1 *supra*.

12 Senior Labor Party figures from the time have conceded as much. One acknowledged to the writer that the Act was "dictated by political exigency". Another has conceded publicly that the law was wrong.

This political dimension has numerous ramifications, most of which are beyond the scope of this essay.<sup>13</sup> However, two points are of direct concern. First, the political process can move with unseemly haste: there is a clear pattern of mandatories being introduced at times of political pressure without adequate data to support their introduction and to permit effective follow-up evaluation. In Western Australia, both the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* and the three strikes burglary laws were introduced without any proper data being available on the number and type of people likely to be caught.<sup>14</sup> On 3 December 1998, the Attorney General for Western Australia declined to release figures on the projected impact of parole and sentencing reforms, claiming that they were only ‘hypothetical’. This begs the question: if there is no clear projection as to the expected or intended impact of a measure, how can there be serious evaluation of its actual impact and effectiveness?

Secondly, changes to sentencing laws may well be accompanied by changes to the substantive law. In Western Australia, for example, the definition of burglary was revised at the same time as the three strikes sentencing laws were introduced. There were three main reforms: higher maximum penalties for residential burglaries; a mandatory minimum of 12 months imprisonment or detention on a person’s ‘third strike’ for residential burglary; and enhanced penalties for ‘aggravated burglary’. These changes present major problems for effective evaluation of the impact of the new laws. First, although data on reported crimes do distinguish burglaries of dwellings from other burglaries, residential burglary was not previously a separate legal category; it is therefore hard to be sure that figures are directly comparable. Secondly, some offences which were previously simple ‘burglary’ will now be ‘aggravated burglary’. Thirdly, some ‘home invasions’ involving the use of violence which would previously have been dealt with as robbery, or perhaps as two separate counts of burglary and assault, may now be classified as aggravated burglary.<sup>15</sup>

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13 Those involved in law reform ignore the political dimension at their peril. Recently, the Model Criminal Code Officers Committee recommended the abolition of the provocation excuse (Discussion Paper, *Fatal Offences Against the Person*, June 1998). They proposed, instead, that provocation should be a matter which is taken into account by a sentencing judge. Given the conceptual problems with the provocation excuse, there is much to be said in principle for such a change but it seems *politically inconceivable* that the mandatory penalty for murder will be abolished in those jurisdictions which retain it. Equally, in those jurisdictions which currently give the sentencing judge a discretion, it is quite conceivable that a mandatory penalty will be *reintroduced*. The consequence of abolition may be that there is less for the defence to ‘hang its hat on’ in order to argue for a manslaughter verdict and that the mandatory life sentence will be imposed in more undeserving cases.

14 On the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA), see R Broadhurst and N Loh, ‘Selective Incapacitation and the Phantom of Deterrence’ in R Harding (ed), *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia*, Crime Research Centre, University of Western Australia (2nd ed, 1995) 55. Broadhurst and Loh point out that the Government of the day proudly proclaimed that it had identified about 100 ‘hard core offenders’. In fact, the “number of offenders likely to be caught by its inconsistent logic was reckoned to be between 38 and 400, depending on which data source or authority one relied”: Broadhurst and Loh at 59.

15 This is because one of the circumstances of aggravation is doing bodily harm.

### III. THE 'PHANTOM OF DETERRENCE'<sup>16</sup>

It is notoriously difficult to measure general deterrence and it is striking that "few studies attempt to examine the mandatory penalty laws' deterrent effects".<sup>17</sup> However, there is a steadily accumulating body of research to the effect that increased penalties do not have a demonstrable deterrent effect.<sup>18</sup>

The *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) provided an extraordinarily good research opportunity in that all the key preconditions appeared to be present for a measurable deterrent effect:

- the legislation was officially justified, in part at least, on grounds of deterrence;
- the legislation did not involve marginal changes in penalties but was dramatic and draconian in effect (mandatory 18 month custody time followed by detention at the Governor's pleasure for the main target group);
- it was extremely well publicised and therefore well known (a crucial component for any anticipated deterrent effect); and
- it was specifically targeted at reducing the number of high speed pursuits involving stolen motor vehicles rather than being very general in scope. This made measurement of the intended effect potentially easier.

Nevertheless, the question remained as to how to measure its deterrent impact. Ironically, there was another car chase death on the day following the passage of the legislation but thereafter there were no such deaths for around seven months. The Government pointed to this lull as evidence of a deterrent effect. However, figures relating to deaths on the roads are a wholly inappropriate measure as they reflect too many other variables. In particular, police pursuit practices had changed from early 1992, with many more pursuits being aborted. Broadhurst and Loh,<sup>19</sup> therefore, examined a number of different measures, including the rate of motor vehicle theft: the 'trigger' for many pursuits. Their findings were striking. As the following figure shows,<sup>20</sup> the rate of motor vehicle theft and associated arrests had significantly declined in the period prior to the new Act but increased significantly following its introduction.

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16 Taken from the title of Broadhurst and Loh's article, note 14 *supra*.

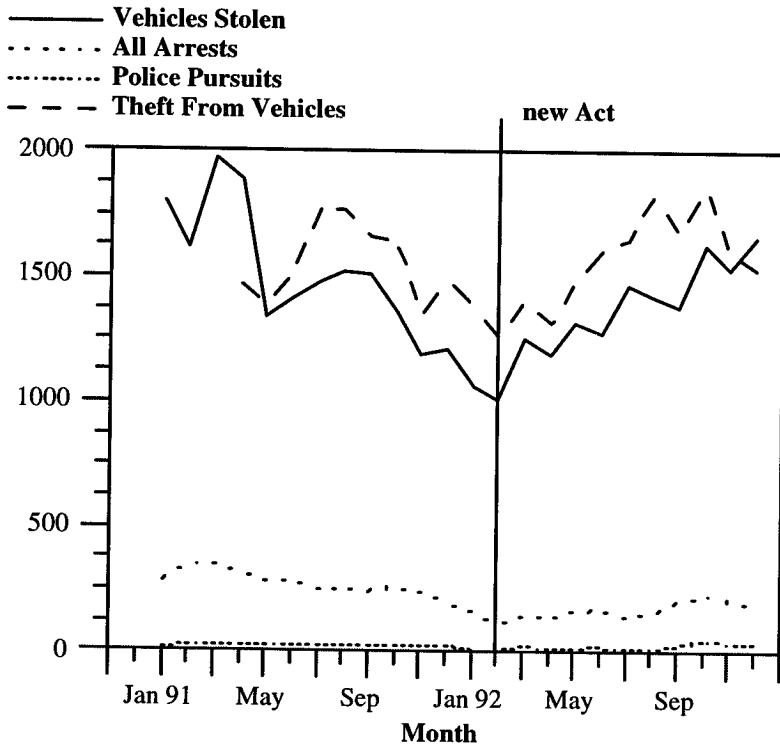
17 Tonry, note 1 *supra*.

18 See, for example, F Zimring and G Hawkins, *Deterrence: The Legal Threat in Crime Control*, University of Chicago Press (1973); A Blumstein, J Cohen and D Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, National Academy of Sciences, Washington DC (1978).

19 Note 14 *supra*.

20 *Ibid* at 67.

### Reported Stolen Motor Vehicles, Thefts from Vehicles, Police Pursuits of Stolen Motor Vehicles and Arrests for Vehicle Theft: 1991-1992



The obvious conclusion is that the 1992 Act had no deterrent effect. This is fully in line with research from other jurisdictions. Drug offences have been a particular target of mandatory penalty laws in the US but there is no evidence that such laws have had any impact on the drug trade or on the price of illicit drugs.<sup>21</sup> Instead, the effect of the incarceration of one drug dealer appears simply to have been 'replacement' by another. Mandatory penalties aimed at the use of firearms in the course of violent offences have not, in the US, had any sustained impact; at most there is evidence of a short term effect.<sup>22</sup> In England, the moral panic surrounding 'mugging' led, in the late 1970s, to some very long and well publicised sentences. These sentences had no discernible effect on mugging rates in three major English cities but changes in policing practices did have some effect.<sup>23</sup>

21 M Tonry, *Malign Neglect: Race, Crime and Punishment in America*, Oxford University Press (1995) pp 81-123.

22 Tonry, note 1 *supra* at 244.

23 R Baxter and C Nuttall, "Severe sentences: no deterrent to crime?" 31(369) *New Society* 11, (2 January 1975).

Ultimately, therefore, crime rates appear to have a life independent of punishment rates. Crime rates are more likely to be affected by 'target hardening' crime prevention measures than tougher punishment. At the very least, the onus is clearly on those who argue for a deterrent effect to produce evidence to support their thesis. Furthermore, even if it could be shown that mandatories for one type of crime have led to a reduction in such crimes, it would be necessary to measure any 'displacement' effect. Most 'home burglaries' are committed by people desperate for money for drugs. Unless this 'trigger' is alleviated it is quite conceivable that a decline in 'home' burglaries will be counterbalanced by an increase in offences against other targets.

For reasons canvassed earlier, there are a number of problems with drawing definite conclusions with respect to the impact of Western Australia's three strikes burglary laws. However, recent statistics, summarised in the following tables, make interesting reading. First, the home burglary rate increased in the period from 1991 to 1995, with 1995 as a peak year, but declined (in both numerical and per capita terms) in 1996 and 1997. It is important to emphasise that this trend clearly predates the three strikes laws which were not introduced until November 1996; any decline is not attributable to those laws.<sup>24</sup> Secondly, there may have been a degree of displacement. At the same time that burglary rates declined, the rate of robberies and armed robberies increased dramatically in both 1996 and 1997.

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24 Other statistics suggest that in fact the rate of reported home burglaries *increased* immediately following the introduction of the three strikes laws: Judge MA Yeats, "Three Strikes' and Restorative Justice: Dealing with Young Repeat Burglars in Western Australia" (1997) 8 *Criminal Law Forum* 369.

### Burglary and Robbery Offences Reported to Police in Western Australia: 1991-1997<sup>25</sup>

<b>BURGLARY</b>		<b>YEAR</b>					
	<b>1991</b>	<b>1992</b>	<b>1993</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>
<b>Dwelling number</b>	29 497	30 030	32 798	37 596	41 722	39 210	39 913
rate per 1 000 dwellings	48.7	48.3	50.9	56.5	60.9	56.1	55.9
rate per 100 000 population	1 802.9	1 811.9	1 956.5	2 209.1	2 409.4	2 271.6	2 219.7
<b>Other premises number</b>	26 728	22 606	20 304	18 592	19 309	16 850	16 642

<b>ROBBERY</b>		<b>YEAR</b>					
	<b>1991</b>	<b>1992</b>	<b>1993</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>
<b>Armed robbery number</b>	255	406	461	576	672	968	1 059
rate per 100 000 population	15.6	24.5	27.5	33.8	38.8	56.1	58.9
<b>Other robbery number</b>	510	501	501	611	684	719	1 064
rate per 100 000 population	31.2	30.2	29.9	35.9	39.5	41.7	59.2

25 Figures taken from AM Ferrante, NSN Loh and J Fernandez, *Crime and Justice Statistics for Western Australia: 1997*, Crime Research Centre, University of Western Australia (1998).



#### IV. INCAPACITATION

Mandatories tend to be justified on grounds of incapacitation as well as deterrence. Incapacitation finds stark expression in phrases such as “excising the hard core” of young offenders from society.<sup>26</sup> For the purposes of this paper I will not explore the philosophical objections to incapacitation but will limit analysis to the empirical evidence. This evidence is clear; as a strategy for selective incapacitation, mandatory sentences are ineffective.

Western Australia’s *Crime (Serious and Repeat Offenders) Sentencing Act 1992* again provides a classic example: its target was young offenders involved in dangerous high speed pursuits in stolen vehicles in the metropolitan area. In fact, only two juveniles were sentenced to indeterminate detention under the legislation and one of these did not fall within the target group. Eight adults were caught, all of them being older Aboriginal men from more remote areas of the State who had a number of assaults on their records, usually fairly minor public order incidents. The ‘repeat burglary’ laws have had the same problem. The primary target was supposed to be ‘home invasion’, conjuring up images of violence having been inflicted on the occupants. However, neither the current offence nor the previous strikes need to have involved any violence; it is sufficient if they were offences against residential premises.

It might be argued that things are being done badly out West and that a more refined and sophisticated approach would work. The first proposition is undoubtedly true. The second is a complete non sequitur which misses two crucial and obvious points. First, our criminal law offences are defined in broad terms which embrace a wide range of criminal activities. Consequently, offence definitions in themselves tell us very little, either in terms of the nature of the current offence or in terms of any previous ‘strikes’. For example, an assault on a public officer can be a very violent attack, a push in the course of a scuffle, or, as in one of the Western Australian cases, turning on a water sprinkler when the police paid a visit. This remains the case even when offence definitions are specially redrawn to accommodate three strikes laws; for example, ‘residential burglary’ covers a multitude of situations. Western Australia is not, therefore, just an example of things being done badly: it is inevitable that mandatories which are structured by reference to broad offence definitions will not and cannot be effective tools for selective incapacitation.

Secondly, ‘hard core’ offenders who commit serious offences will receive heavy sentences under ordinary principles of sentencing with the result that the mandatory minimum has no relevance or impact.<sup>27</sup> For example, the person who commits a violent ‘home invasion’ will, under ordinary sentencing principles, receive far more than the one year mandatory minimum under the three strikes

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26 This particularly unpleasant phrase was used by the Acting Premier of Western Australia in defence of the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA).

27 See N Morgan, “The Courts Respond to the Carnage on Our Roads”, in Harding (ed), note 14 *supra*, especially at 14-21.

legislation.<sup>28</sup> In this sense, mandatories seem profoundly irrelevant to the problem.

However, although mandatories may be irrelevant to the ‘hard core’, history shows that they impact dramatically on less serious but persistent offenders. Witness Jerry Williams, a rather incompetent but persistent small time offender who hit the big time (international media attention) in the early 1990s when he stole a small amount of pizza and was sentenced to twenty years imprisonment under California’s three strikes laws.<sup>29</sup>

## V. MANDATORIES AND DESERT

The US sentencing grids were desert based, designed to promote proportionality and consistency in sentencing. It is a matter of debate as to how ‘desert’ is assessed and the relevance of factors such as prior record<sup>30</sup> but at least the early grids such as that in Minnesota were documents of principle which provided a clear ranking of the relative seriousness of different offences. It is important to stress that they also allowed some flexibility in that judges could depart from the grid in certain circumstances.

Clearly, three strikes laws and their variants are not based on a rational evaluation of the principles of desert. Indeed, they subvert desert in two fundamental ways. First, they iron out differences in terms of the punishment of offences of a particular type. For example, a very minor residential burglary which attracts a mandatory sentence of one year’s imprisonment may now end up being treated as harshly as a more serious burglary offence. Secondly, mandatories subvert the relativities between offences of different types.<sup>31</sup> In Western Australia, for example, a very trivial burglary may well attract a much harsher penalty than a relatively serious fraud.

## VI. DISCRIMINATORY IMPACT

This last example leads on to a more general concern: the discriminatory impact of mandatories. On the face of it, mandatories are not discriminatory. Indeed, they appear to be the very opposite; they allow for no differentiation according to race, sex or age. However, it is clear that mandatories are discriminatory in effect. Numerous examples can be given but they all boil down to one simple point: mandatories involve the policy choice to select certain

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28 The leading cases in Western Australia on the ‘tariff’ for burglary are *Cheshire v The Queen* (unreported, WA CCA, Malcolm CJ, Brinsden and Pidgeon JJ, 7 November 1989) and *Pezzino* (1997) 92 A Crim R 135.

29 *Los Angeles Times*, 18 September 1994.

30 The Minnesota Grid, for example, places a great deal of weight on prior record; a matter with which Von Hirsch and others have taken issue: A Von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, Rutgers University Press (1986) pp 77-91.

31 Yeats, note 24 *supra*.

types of criminal activity for special attention. These policy choices invariably involve the selection of offences (for example burglary or car stealing) in which minority and lower socio-economic groups are over represented.

An indicative example from the US Federal Sentencing Guidelines is that a transaction involving five grammes of 'crack' cocaine can attract the same mandatory penalty (five years imprisonment) as 500 grammes of powder cocaine.<sup>32</sup> Despite the moral panic about crack, it has been held in some US courts that the two substances are pharmacologically indistinguishable. But the young and the poor, especially African Americans, are disproportionately high consumers of crack cocaine. Powder cocaine is the drug of choice amongst the 'higher echelons' of society. As we have seen, Western Australia's *Crime (Serious and Repeat Offenders) Sentencing Act 1992* disproportionately affected Aboriginal men. Recent research has confirmed expectations with the three strikes burglary laws; Aboriginal children constituted a staggering 80 per cent of the three strikes cases in the Children's Court of Western Australia from February 1997 to May 1998.<sup>33</sup> We also know that Aboriginal offenders are more likely to breach parole than non-Aboriginals, often through relatively minor public order offences. If Western Australia's mandatory breach of parole laws are passed, they will have particular impact on our already excessive Aboriginal imprisonment rate.

## VII. COLLATERAL DAMAGE

Mandatory penalties are like SCUD missiles; however sophisticated and accurate their makers proclaim them to be, they may miss their target and cause immense 'collateral damage'. The damage is not only to the lives of people caught in their path but also to the fabric of our legal system. Mandatories inevitably encourage avoidance techniques on the part of participants in the criminal process. This phenomenon has a long history dating back at least to the eighteenth century when juries would frequently commit 'pious perjury' in capital cases and would either acquit the accused or convict of a lesser, non-capital offence. The eighteenth century also saw strict adherence to procedural and evidential rules, with prosecutions failing because of minor flaws such as incorrectly spelt names or descriptions.<sup>34</sup>

These all have modern parallels. There are numerous examples from Western Australia of the prosecution being put to strict proof of the offender's prior

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32 Tonry, note 21 *supra*, pp 188-90.

33 C Stokes, *Three Strikes and You're In: Mandatory Minimum Sentences for Repeat Home Burglars in Western Australia*, unpublished Honours thesis, University of Western Australia, 1998.

34 Classic discussions of such practices are to be found in D Hay, "Property, Authority and the Criminal Law" in D Hay, P Linebaugh, JG Rule, EP Thompson and C Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, Pantheon (1975) 17; and EP Thompson, *Whigs and Hunters: the Origin of the Black Act*, Allen Lane (1975).

'strikes'<sup>35</sup> and of the courts interpreting legislation to permit at least some flexibility in deserving cases.<sup>36</sup> If traditional 'criminal law' arguments fail, lateral thinking lawyers will strive to find new arguments, including constitutional and human rights perspectives.<sup>37</sup>

All of these avoidance techniques have the benefit of being matters which are determined in open court. An even more fundamental objection is that mandatories undermine open decision making. The problem is that they do not remove discretion from the criminal system but, in effect, make pre-trial decisions the key to the outcome of a case. It is indisputable that mandatories encourage plea bargaining or negotiation (for example aggravated burglary to burglary; robbery to stealing; assault on a public officer to assault) and can be a powerful bargaining chip. An extraordinary example of this occurs in Arizona where, in 1990, a staggering 24 per cent of all felony cases were for inchoate offences (conspiracy and attempts). Criminals in Arizona are not particularly inept nor do they have such high morals that they pull back from completing their crimes. The point is simply that mandatory penalties apply only to completed offences and there is routine bargaining down to an inchoate offence.<sup>38</sup> In Australia, we do not have formalised plea bargaining in which courts are involved but discussions between prosecution and defence are commonplace. Mandatories will inevitably result in more 'behind the scenes' deals in which the negotiating skills of the defence lawyer count more than the objective circumstances of the case.

## VIII. CONCLUSION

Mandatory penalties do not operate as a general deterrent. They do not work as a tool for selective incapacitation. They do not promote 'just deserts'. They do work to undermine justice, to discriminate against minority groups and to encourage the subversion of open and accountable legal processes.

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35 For example, under the *Crimes (Serious and Repeat Offenders) Sentencing Act 1992 (WA)*, courts would get into lengthy debates about whether a person had been 'convicted' on the previous occasions or had been dealt with without a formal conviction: see N Morgan, "The *Sentencing Act 1992*: Subverting Criminal Justice" in Harding (ed), note 14 *supra* 39. Under the three strikes burglary laws, courts faced a problem in that offenders' criminal records did not categorise burglaries into residential and non-residential. Naturally, the courts insisted on strict proof of the previous strikes.

36 For example, the *Young Offenders Act 1994 (WA)* permits the court to make an 'intensive youth supervision order', with or without making an order for detention. The Children's Court has held that it is possible, under s 101, to impose an intensive supervision order with detention but to order immediate release under a 'conditional release order'. See also *G (A Child)* (1997) 94 A Crim R 586 (on the meaning of a 'conviction') and *P (A Child)* (1997) 94 A Crim R 593 (on 'stale' convictions).

37 For example, in 1993, I floated some constitutional arguments relating to 'separation of powers' and the 'independence of the judiciary' in a chapter entitled "Conditional Release From Indeterminate Sentences: Executive and Judicial Roles and Practices" in Harding (ed), note 14 *supra* 96. These arguments were developed without success before the Supreme Court of Western Australia in *S (A Child) v The Queen* (1995) 12 WAR 392 but not dissimilar arguments did succeed in *Kable v DPP (NSW)* (1996) 189 CLR 51.

38 K Knapp, "Arizona: Unprincipled Sentencing, Mandatory Minima and Prison Overcrowding" 2 *Overcrowded Times* 10, quoted in Tonry, note 1 *supra*.

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. Even here, they may not be all that good. Come election day, silly sentencing laws and over the top 'bidding' will not prevent the electorate 'excising hard core politicians'.<sup>39</sup>

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39 For example, neither the Labor Party in Western Australia in 1992 nor the Conservative Party in the UK in 1997 were re-elected.