THE RHETORIC OF VENGEANCE

Sentencing law and the new penology: notes on recent developments in the USA

Jonathan Simon

During the 1980s the US criminal justice system was growing at an historically unprecedented level but sentencing law stirred little public debate. The exercise of the power to punish, a source of constitutional struggle for modern governments from the start, seemed to be replaced by a technocratic discourse of systems management. The most dramatic exercise of the sovereign power to punish in our nation's history (and perhaps in the annals of any republican government) was passing as if in a long night. It was this situation that Malcolm Feeley and I called 'the new penology' several years back (1992). More recently (Simon and Feeley 1995) we noted, as others had already observed (Garland 1990), that the new penology was only part of the way we talk about punishment. It ignored a powerful discourse about crime and punishment emerging in the media and politics, distorted by the agendas of elites but also surprisingly populist.

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These political and populist levers on penality have grown even more powerful during the 1990s. As the quadrennial Presidential nominating conventions of the major parties in the US this summer amply showcased the US electorate reacts well to identifying itself with crime victims and feels motivated by the use of government to punish malefactors. To a more and more visible degree democratic self government in the US is being exercised through crime and its punishment. At the same time the New Penology has not withered. Indeed, a brief look at several recent sentencing initiatives demonstrates how embedded the populist demand for punishment is on the technocratic capacity of the new penology.

Three strikes

A year or two ago 'three strikes' was the most politically loaded crime issue. Voters in California, stirred by the drama of 11 year old Polly Klaas, kidnapped from a slumber party in her ex-urban Northern California home and murdered by an ex-prisoner, embraced the concept of life sentences for third time offenders, and long sentences for all repeat felons, violent or otherwise. Even after the legislature passed a particularly severe version into law it was enacted as a constitutional amendment in a direct voter initiative with overwhelming support despite uncontradicted expectations that the law would double California's already swollen penal budget. President Clinton promised in his 1994 State of the Union to work for a similar measure at the federal level.

Politically 3-strikes has dropped below the horizon, for the moment, replaced by the latest child murder to capture the public imagination, that of 7 year old Megan Kanka, and a new law aimed at notifying private agencies and parents when a convicted sex offender is living in proximity. But its severe sentences are embedded in a host of laws which will remain difficult or impossible to remove or modify through legislative action. Modification through adjudication offers some hope. California's Supreme Court just held that the state version of the law does not, contrary to what most had thought, preclude judicial discretion to mitigate the sentence. Even modified somewhat, however, laws like 3-Strikes are likely to lock states into the mega-incarceration rates of recent years for decades to come.

Crack cocaine and the disparate sentencing of African-Americans

Federal and many state penal laws mandate much longer sentences for persons convicted of selling cocaine in its smokeable 'crack' form rather than in its inhalable powdered form. The population prosecuted for 'crack' offences in the federal and state systems

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is overwhelmingly composed of African-Americans. Since drug offences account for a large portion of the growth in overall incarceration rates, this 'crack' premium constitutes a not insignificant influence on the dramatic and growing racial disproportion of African-American prisoners to the general population.

Over the last few years most courts have refused to find that the disparate treatment of crack amounts to race discrimination (despite one or two decisions the other way). More recently, both Congress and the Clinton administration, loudly repudiated a recommendation from the US Sentencing Commission itself to scale back the crack/powder disparity in federal law. (The penalty for a specific weight of crack is the same as for 100 times as much powdered cocaine).

Super predators

The current Republican majority in the House of Representatives has announced its intention to remove existing federal mandates favouring non-incarcerative options for juvenile offenders and requiring that any juveniles sentenced to prison be kept away from adults. The law would also replace an existing federal research and oversight agency, deemed to have a liberal bias against incarceration, with a new agency aimed at tough measures against juvenile crime.

Even more striking has been the rhetoric of this proposal which makes use of terms like 'super predators'. They are so called because, according to the largely unexamined assumption, the current set of violent youth act with a

THE WAR..

Political capital, moral panic, and the erosion of civil liberties

Eric L. Jensen

The War on Drugs stands as a monument to the power of claims-making activities by state actors and the mass media which has resulted in the erosion of due process rights in the U.S. The current drug war was primarily a political construction of a safe campaign issue in the 1986 congressional elections (Jensen, Gerber and Babcock 1991). Most forms of illicit drug use had been on the decline for about five years prior to the declaration of this war.

A five-year mandatory minimum prison sentence was established for possession of 500 grams of poweder cocaine or 5 grams of crack; the now infamous 100 to 1 ratio.

The War on Drugs has resulted in substantial changes in the American criminal justice system. Following an era of reducing sentences for drug offences and the decriminalization of the possession of marijuana in eleven states and a number of local jurisdictions in the 1970s (i.e. possession of specified amounts for personal use was subject to only a relatively small fine), sentences for drug-related offences were once again made more punitive in the 1980s and all states overturned their decriminalization statutes. In addition, the federal government instituted sentences for crack cocaine offences which are much more stringent than those for powdered cocaine. For example, a five-year mandatory minimum prison sentence was established for possession of 500 grams of powder cocaine or 5 grams of crack; the now infamous 100 to 1 ratio.

Knock-on effects

The legislative and moral panics which changed sentencing also influenced other segments of the criminal justice system. The police began enforcing drug laws more actively. Prison populations soared, with many inmates convicted of drug possession or low-level distribution

distinctive lack of remorse or fear of consequences apparently unprecedented among past generations of young hoodlums (although not in the gangster movies I remember).

To the conservative Republicans these 'super predators' are the ultimate fruit of liberal welfare policies which have produced an unholy and monstrous generation. While liberals generally balk at the vulgarity of this picture, the violent youth issue is raised by Democrats as well, evidence of the social costs of neo-conservative social and economic policies. Virtually unchallenged is the very use of a term like 'predator' not only by politicians but by tenured criminologists.

It is difficult not to read this word as suggesting that such youth are utterly beyond the mediation of human values. What makes these youths 'predators' and not just 'killers'? Do they eat their victims? What solution can be imagined to 'predators' other than to shoot them in the head or at least cage them forever?

Governing through crime

All three of these measures reflect the power of the populist politics of governing through crime. They share, along with the recent return of the chain-gang as a punishment in some states, a trend toward explicitly 'camp' punishments whose design owes as much to nostalgic images from popular culture as it does to expertise of any sort. The juvenile 'super predators', and the gun wielding crack dealers (who themselves are said to borrow the model of gangster hood provided by Hollywood's hoodlum classics), evoke aliens, both monstrous and clownish, who at the very least must be contained and best perhaps be destroyed. If they are being produced by welfare mothers, then like the egg-bearing alien mother in the 80s hit *Aliens*, welfare must be terminated as well.

At the same time the success of populism, even in its anti-statist modes, has been to further embed the new penology. As the scale of the penal system balloons and becomes institutionalised into the machinery of state budget making, the New Penology with its emphasis on efficiently managing aggregates becomes ever more indispensable. Likewise an actuarial justice, which views the criminal process as a risk management system, can flourish so long as it parallels populist demands for vengeance against malefactors. ■

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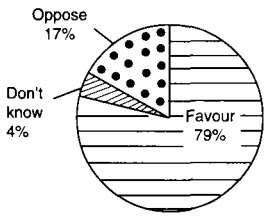
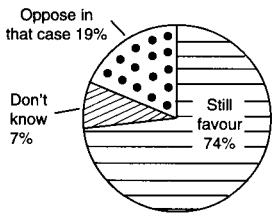
THREE STRIKES

- In 1993 Washington State approved 'three strikes' legislation requiring life imprisonment without parole for persistent offenders convicted of a third 'serious felony'
- In 1994, 13 other states passed three strikes legislation, although provisions differ. A few retained some judicial discretion.
- Opinion polls conducted by the Los Angeles Times in January and April 1994 indicated overwhelming popular support for three strikes laws.

Do you favour or oppose a 'three strikes and you're out' law, which requires any criminal convicted of three violent felonies to be imprisoned for life without the possibility of parole?



Would you favour the 'three strikes and you're out' law even if it meant your state had to take money from other programs or raise your taxes in order to build new prisons?



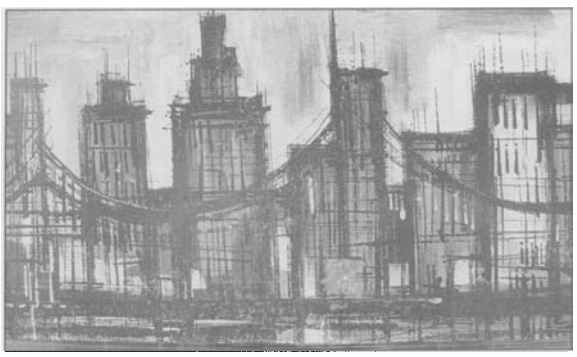
... ON DRUGS

offences. Between 1985 and 1995 rates of imprisonment nearly doubled from 313 to 600 per 100,000 U.S. residents. The force of these changes has fallen hardest on Blacks and Hispanics. In addition, the economic costs of incarceration exploded. These changes alone have generated an increasingly vocal cadre of critics.

Once again, a moral panic has influenced public policy in a manner that is antithetical to the maintenance of civil liberties and the fundamental principle of fairness in criminal justice policy.

Not only has this anti-drug crusade resulted in rather predictable changes in the criminal justice machinery, the powers of the state have been expanded in the name of fighting the drug menace. One of these has been the attempts to criminalise the behaviours of women during pregnancy based on the now largely discredited notion of severe drug-related health consequences amongst "crack babies". In some jurisdictions women who are suspected of taking illegal drugs while pregnant have been charged with criminal offences (e.g. delivery of an illegal substance to a minor). Although these attempts have met with little success in the courts, neonatal drug testing based on profiles of likely cocaine abusers which also disproportionately affects the poor and people of colour has proliferated and the child welfare system has intervened in many of these cases.

The use of drug testing has virtually exploded since the 1980s. Once a tool only used to monitor convicted felons with a history of illicit drug problems, drug testing is now also widely used on job applicants and employees in the private sector, government workers, and athletes in secondary schools (Gerber, Jensen, Schreck, and Babcock 1990).



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Policing for profit

The civil seizure and forfeiture of assets has also reached a new dimension lately. This antiquated maritime policy was revived and amplified in 1970 as a new weapon in Richard Nixon's wars on crime and drugs. As originally applied to drug offences, only controlled substances and those items used or intended to be used in manufacturing or distributing the drugs could be forfeited. As the statutes were subsequently expanded *all real property* which was used or *intended* to be used in a drug transaction could be seized and forfeited. Although asset forfeiture in drug-related cases was little used in the first decade of its existence, once real property could be seized and forfeited it became big business for law enforcement. From 1986 through 1994, nearly $4.3 billion in assets were forfeited under this policy. Unfortunately no scholarly research exists on the types of cases involved in these forfeitures, but several journalistic accounts have documented that the vast majority of them appear to be low-level distributors rather than major traffickers.

Much of the revenues from asset forfeitures are returned to participating law enforcement agencies. This has led to the criticism that law enforcement agencies are to some extent "policing for profit". With this new source of revenue, the accountability of law enforcement to the public has been diminished.

Abandoning due process

Perhaps most important from a jurisprudential perspective is that the rather extensive due process protections guaranteed defendants in criminal cases in the U.S. have been sidestepped in the civil seizure and forfeiture process. Since it is a civil action, the government must only meet the "probable cause" standard of proof which is much lower than that required in criminal cases (i.e. beyond a reasonable doubt) in order to seize the suspect's assets. Once the government has established probable cause and has seized the assets, the burden of proof shifts to the individual to show by a higher standard of proof (i.e. a preponderance of evidence) that the property was not used or intended to be used in such a manner. This has turned the U.S. system of jurisprudence upside down. As noted by Yoskowitz (1992), "... the civil forfeiture proceeding denies the owner one of the most fundamental foundations of the criminal law by placing the most difficult burden of proof on the accused .... This ability to bypass criminal constitutional rights is not simply fortuitous circumstances for the government, rather, it is precisely the reason these civil forfeiture actions are chosen" pp. 584-85). Thus, even if the evidence is not sufficient for a successful criminal prosecution, the state can extract its pound of flesh from suspected drug dealers.

As we have stated elsewhere, "The potential for excess with this asset forfeiture policy absent adequate due process protections renders it unacceptable in a society based on the rule of law. Once again, a moral panic has influenced public policy in a manner that is antithetical to the maintenance of civil liberties and the fundamental principle of fairness in criminal justice policy" (Jensen and Gerber 1996, p. 433). Of interest to our neighbours in the global village is that the U.S. government is actively lobbying other nations to adopt similar policies. ■

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