Contemporary Comment

Law and Order Commonsense

One of the major obstacles confronting those who wish to see the implementation of more effective policies to reduce the levels of serious crime are prevailing 'commonsense' views on crime and law and order issues. This commonsense is an effect of the constant repetition by popular and authoritative sources of a number of questionable views and assumptions which have assumed the status of a set of givens within debates about crime. These assumptions form a sort of bedrock of mainstream policy debate about law and order, the taken-for-granted starting point for what should be done about crime.

For those who resist this commonsense logic the intellectual and political tasks are indeed forbidding, for they are confronted, not simply with matching evidence and ideas with those who differ on equal terms, but with establishing that the obvious, the unquestioned and unquestionable, the taken-for-granted truths, are indeed ideological notions which are open to question on empirical and logical grounds. This task is made no easier by the fact that popular commonsense, by its very nature, prevents systematic empirical examination of its elements. It is the starting point, not the object, of most empirical research and analysis.

In Australia the level of systematic empirical knowledge we have about the workings of our agencies of criminal justice is poor, and this is largely because the critical actors and '*primary definers*' in crime debates such as police, judges, Royal Commissioners, Ministers, Attorneys General, and so on, rely on practical methodologies and understandings which largely deny the need or worth of research or of any more rigorous analysis of social reality. In 'framing what the problem is' the primary account 'provides the criteria by which all subsequent contributions are labelled as "relevant" to the debate, or "irrelevant" — beside the point.' (Hall, 1978:58)

Some years ago the American sociologist, Howard Becker (1967) coined the term '*hierarchy of credibility*' to highlight how in any hierarchical situation or society the right to define reality is not equally distributed. The 'hierarchy of credibility' is not the effect of any grand conspiracy, but rather derives from differences of power and status within particular institutional settings. It is not fixed and unchanging; on the contrary, it is always, to one degree or another, being resisted or contested by subordinate groups. But the hierarchy of credibility accords the accounts of the primary definers great force. When circulated in the public arena — primarily the news and entertainment media and the political process — these take on the mantle of popular commonsense.

This article seeks to identify the key elements of that popular commonsense in the law and order arena, drawing predominantly on print media sources by way of illustration. We suggest that the key elements of law and order commonsense are the rhetoric of soaring crimes, the idea that crime is worse than ever (oh for the tranquil past), the constant comparison with New York (just around the corner), the notion that the criminal justice system is 'soft on crime', that it is loaded in favour of criminals, that the 'solutions' are more police, with greater powers, tougher penalties from the courts, and greater satisfaction of victims demands for retribution through the courts.

The elements of law and order commonsense

The rhetoric of 'Soaring Crime Rates'

The first element of popular commonsense about crime is the assumption that we are currently afflicted by crime problems of unprecedented size and seriousness. The news media regularly depict crime as a monolithic entity which is constantly and inexorably rising. The following are fairly typical of the daily fare:

GANGS OF BODGIES IN CRIME WAVE (*Sunday Truth* 17/6/56)

ONLY THE BRAVE WALK AT NIGHT (*Sun Herald* 22/1/67)

THE VIOLENT AUSTRALIANS (*The Australian* 21/7/73);

CRIME HITS ONE FAMILY IN FOUR (*The Australian* 27/4/74);

OUR STREETS OF FEAR (*Sunday Telegraph* 22/8/82);

A new crime wave of monstrous proportions is engulfing us (*Daily Telegraph* 26/5/83)

HOW CRIME IS RUNNING WILD (*Daily Telegraph* 26/2/87);

WE HAVE BECOME THREE TIMES MORE VIOLENT (*Sydney Morning Herald* 20/6/87);

STATE CRIME FEAR RISES PENALTIES TOO LIGHT SURVEY (*The Courier Mail*, 17/3/94)

URBAN TERRORISM NEW WAVE CRIME HITS SA HOMES (*The Sunday Mail*, 17/4/94)

ANGUISH OVER VIOLENT CRIME SOARS — CITY OF FEAR (*Daily Telegraph Mirror* 17/12/94)

Consider the following longer extracts —

> We feel that we are in circumstances of imminent danger to our property, and danger to our very lives. Robberies and murders, increasing both in numbers and in audacity, infest our streets ... Anxiety and alarm have seized our families, and in many instances have almost banished sleep from their eyes ... Something must be done — done effectually, and done forthwith (*The Sydney Morning Herald* 8 June 1844).

> Hooliganism and vandalism have reached epidemic proportions in this city ... The Government, to its credit, is doing its best to remedy this. But what is more disturbing than this is the seeming social decline and the deterioration in moral outlook which makes more police necessary. Gangs of young hoodlums and would-be 'tough guys', oddly arrayed and hunting in packs, terrify shopkeepers, attack innocent strangers in the streets (just for kicks apparently) and do untold stupid damage in trains, buses and anywhere else they think they can get away with it (*The Sydney Morning Herald*, Editorial, 19 January 1967).

> SYDNEY, THE VIOLENT CITY
> Sydney is becoming an imprisoned city. Louts, rapists and ... even killers roam its streets virtually at will. No sane man strolls its parks at night, no woman in her right mind dares venture out after dark ... What is needed is a return to a system of uniformed men on the beat and regular 'prowl car' patrols of the suburbs. Until then, Sydney will increasingly become a community living in fear, a city afraid of its own shadows (*The Sun* 27 July 1975).

> OUR STREETS OF FEAR
> If you're thinking of taking a quiet stroll tonight, think twice. You may never get home in one piece. Gangs of muggers, drug addicts and teenagers driven desperate by unemployment are turning Sydney's streets into scenes of terror. Experts are already predicting that within as little as five years sidewalk violence will be as bad as New York ..
> Darlinghurst is a tough and bloody piece of real estate ... a gaudy jungle of neon lights

> and tangled, darkened streets, where fear is the reigning monarch (*Sunday Telegraph*, 22 August 1982).
>
> Anguish over violent crime soars, CITY OF FEAR
> Bands of children, some as young as five, are terrorising elderly Sydney residents, smashing windows, hurling rocks and knocking pensioners off their feet (*Daily Telegraph Mirror* 17 December 1994).

The constancy of this theme can be judged from the fact that this sample of commentaries on the state of law and order goes back exactly *150 years*, with no discernible shift in assumptions or analysis. Such assumptions are not confined to the popular media, but are also constantly reiterated in similarly generalised and unqualified terms in more specialist journals and by various '*experts*'. Judges and lawyers commonly preface calls for reforms with a reference to rising crime rates —

> 'Crime rate alarming, judge says' (*The Sydney Morning Herald* 10 March 1984: then Chief Justice of the High Court, Sir Harry Gibbs proposing some fundamental changes to criminal procedure, such as abolition of the right to silence).

Frank Costigan, QC, then royal commissioner looking into the Federated Ship Painters and Dockers Union, argued in 1984 for radical changes in the organisation of the criminal justice system with the forecast that unless something was done '... within five years this country will have become a jungle' (1984:8). The retired New South Wales Supreme Court judge, Athol Moffitt, presented an equally apocalyptic picture in his dramatically titled book, *A Quarter to Midnight* (1985).

Where empirical research is drawn on in such accounts, the credibility given statistics is rarely qualified by reference to their serious limitations as a reliable measure of crime trends and patterns. Their appeal and widespread use derives in part from the credibility of hard quantitative information. It appears to sum up reality in concise, clear and dramatic terms. The effect tends to take precedence over any close interrogation of what is reflected in such crime data. They often conceal far more than they reveal about actual trends and patterns in crime. They hide the enormous behavioural diversity that invariably exists within specific statistical categories themselves. Also changes are often an effect of shifts in reporting and recording behaviour, making any claims about trends in criminal behaviour based on statistics extremely hazardous.

None of this is intended to suggest that some categories of crime are not currently on the increase or that crime is not a serious problem. However, the *hyperbolic* terms in which it is depicted — as if our civilisation is constantly on the brink of moral collapse — *trivialises* rather than promotes more serious analysis. Ironically, even when the statistical evidence suggests a drop in crime, as in New South Wales prior to the 1995 state election, this may not disturb the general commonsense assumption that crime is increasing. The evidence may simply be ignored, referred to in passing, or actually relied upon to implicitly confirm the commonsense image as the norm, as in the heading provided to Ross Gittins' thoughtful story 'The Shocking Truth of Falling Crime Rates' (*The Sydney Morning Herald* 4 May 1994).

Denigration of those who depart from the commonsense assumption of 'Soaring Crime Rate' is common. An editorial in the *Daily Telegraph Mirror* in the lead up to the 1995 NSW election stated:

> Relying on columns of figures and numerically quantifiable analyses, statisticians and sociologists are fond of assuring the public there is no discernible increase in crime. ... While ivory tower academics and bureaucrats, comfortably insulated from the realities of day to day life compile their lists of numbers ordinary people have learned to live in a society in

> which verbal abuse, in which obscene behaviour, in which petty attacks and assaults have become so commonplace they are hardly worth reporting (10 March 1995).

The editorial speaks in populist terms, against the 'ivory tower academics and bureaucrats', on behalf of 'ordinary people'. Bob Carr, the then New South Wales Opposition ALP leader (in similar vein) accused the Director of the New South Wales Bureau of Crime Statistics and Research (BCSR), Dr Don Weatherburn, of being 'out of touch with community perceptions on crime' after a BCSR report showing falling crime rates. Weatherburn's response was 'it is not my job to sit here and reflect community perception, my job is to report statistical information' (*SMH* 13 July 1994). Weatherburn's response to Bob Carr highlights the *significance of statistics* as a potential tool in policy debate. And yet in the law and order realm there is often a glaring lack of statistical data. Two examples illustrate this clearly, the first the issue of National Crime Statistics. Prominant criminologists called for uniform national crime statistics from the mid 1960s onwards. And yet it is only in 1994 that such statistics have finally become available (ABS: 1994). Second, when the Royal Commission into Aboriginal Deaths in Custody realised that a significant proportion of the deaths was occuring in police custody rather than in prisons they sought to calculate these against the number of people held in police custody. Special research had to be commissioned when it was found that no such data were kept (McDonald 1992:277).

One of the effects of such a lack of basic information is that routine processes with potentially fatal consequences, are kept below the threshold of public scrutiny and accountability. Another effect is that in the absence of basic statistical data the litany of commonsense assumptions we have been outlining can maintain their hold. The lack of very basic information that would be regarded as an absolute prerequisite for informed policy debate in other areas provides a convenient space for the unchallenged operation of commonsense. It is for just such reasons that it is important for bodies such as the NSW Bureau of Crime Statistics and Research to have overall responsibility for the collection, interpretation and release of crime statistics data, rather than agencies such as the police and prisons departments.

'Worse than it ever was': law and order nostalgia

A second element in the popular commonsense view of crime is an *historical amnesia.* The depiction of crime as a problem of novel proportions is heightened in the press by juxtaposing the menacing present with nostalgic references to an apparently harmonious and peaceful past —

> Australia has embarked on an orgy of crime — particularly violent crime — during the last decade which has indelibly changed the pattern of Australia's traditionally easy-going society (*Weekend Australian* 23–24 February 1985).

> Armed robberies became widespread only a decade or so ago ... Muggings in Hyde Park are a relatively new experience ... there is, without a doubt, a new climate of violence in Australia, of a kind not experienced by earlier generations, and more disturbing as a result (*Sydney Morning Herald*, Editorial 17 January 1989).

Such nostalgia is largely misplaced and misleading both as to the past and the present. We see, for example, similar things being said in *The Sydney Morning Herald* in 1844 as in the 1970s and 1980s. In the longer perspective of the last 100 years or so Australia has probably become a less violent society, although it is not clear that such historical comparisons are very meaningful.

Geoffrey Pearson, in an historical study of crime in Britain, titled *Hooligan: A History of Respectable Fears* (1983) has documented how in every era authoritative commentators

have perceived the society as being in an unprecedented state of decline, torn by violence and imminent moral collapse. The perception of crisis is heightened via a nostalgic longing for an imaginary tranquil past. The local themes and examples provided above suggest a similar process is at work in Australia (see Grabosky 1977; Finnane 1994). Pearson sees the perennial 'discovery' of the novelty of the crime problem as a persistent 'law and order myth'. He refers to the phenomenon as mythical, not because concern about crime is wholly mistaken and based on fantasy, but because it derives from a limited and highly selective reading of the available evidence.

> Each era has understood itself as standing at a point of radical discontinuity with the past. But when we reconstruct these bursts of discontent into a continuing history of deterioration, must not the credibility snap ...? (1983:210).

Pearson argues '... we must find some way of holding onto the realities and specificities of street violence, and the anxieties that surround it, while throwing out the claim of novelty' (1983:211). He maintains this is the means by which we might take crime problems *more* seriously, *not less* so. The other obvious comment to be made about the staple diet of news stories dealing with crime as a generalised threat to the community is the equation of the crime problem with a highly partial representation of the crimes that threaten us. Thus the constant implicit reference is to *stranger-to-stranger violence* and property crime. The overwhelming tendency is to emphasise the protection of private property against alien intrusion and the vulnerability that attends the use of public space. There are also frequent references to *youth* as the main contributors to the crime problem. In these general depictions of the nature of the crime problem the realities of private violence (the real patterns of homicidal and sexual violence, for example), and of corporate depredations and the crimes of other powerful sections of society are not acknowledged. These crimes may be recognised in other contexts, but rarely if ever in general prognoses of the state of crime and society.

New York, New York: the shape of things to come

A third element of popular commonsense on crime is the invocation of urban crime in other places, especially *New York*, as a *benchmark* for local developments and as a menacing harbinger of the future:

> Anyone thinking life in Sydney is becoming as violent as the dark alleys of New York will find no comfort in a new police report (*Daily Mirror* 21 May 1984).

> Sydney today is a city under siege. Its residential suburbs are barred, double deadlocked and electronically guarded fortresses. Its night trains are vandalised, graffiti-scarred and ominously empty. Its streets after dark are becoming increasingly unsafe. In some suburbs, householders have a one-in-six chance of being burgled. In central Sydney, three people in every hundred are being assaulted each year. The situation, depressingly similar to the residents of New York, San Francisco, London and Paris, is now as close as the footpath outside your home (*Sun Herald*, 'Fortress Sydney' 27 April 1986).

Mimicry of key US signifiers and fashions was highlighted in the then NSW ALP Opposition's 'Anti-Gang' strategy released in April 1994. It referred to 'the occurrence of *LA style drive-by shootings*' and pledged that a Carr Labor Government would not 'allow roaming gangs of youth, their *baseball caps turned back to front*, to stop citizens walking the streets, shopping or using public transport', and would 'banish from our schools items like emblems and *colours* which promote gangs' (emphasis added). This hyperbolic assimilation of life in suburban Sydney to that in South Central LA and 'Boyz in the Hood' switches suddenly to local vernacular with 'reports of '*dingo pack*' youth and bikie gangs who roam the streets in Sydney's *West*'. The references for this apocalyptic view of life in NSW include Channel Seven's *Real Life* , press reports and the *Australian Police Journal.*

The solutions offered are '*tough*' policies, '*aggressive* legislation to fight *hard-core* gang members', pledges to '*rid* our streets ... of gang crime', '*beat* the gangs ... which *plague* our schools', 'ensure violent gang activity is met with *harsh punishment*', and so on. In September 1996 Premier Carr announced plans for a *Street Safety Bill* which would give police power to request groups of more than three people gathering in a public place to provide their names and addresses and power to request them to disperse where the police had a 'reasonable suspicion' that the group was likely to obstruct, intimidate or harass other people. The proposed legislation is portrayed as a 'crackdown on gangs' (*SMH* 3 September 1996).

The criminal justice system does not protect us: 'soft on crime'

A fourth and key element in the popular commonsense on crime is the view that the criminal justice system offers citizens little in the way of protection because it is '*soft on crime*'. The taken-for-granted status of crime as a monolithic, urgent and growing problem sets the scene for proposed changes commensurate with the crisis at hand. The *metaphor of war* is ubiquitous in popular responses, its effect more than just hyperbolic. Its use structures and prepares the ground for the necessary tough responses. For war is the realm of the exceptional and the exceptional state of affairs obviously requires exceptional measures in response. War is also a time when the usual understandings about individual rights and freedoms must be sacrificed for the common, collective good. The practical implication thus becomes obvious: the need for more resources, powers, tougher penalties, and so on. Overwhelmingly *crime is seen to be essentially a criminal justice problem*, one that can be alleviated by enhancing the powers and resources of agencies such as the police and courts.

An article in the *Bulletin* in 1987 by Martin Warneminde clearly illustrates the passage from the rhetoric of 'war' to the need for exceptional measures in the criminal justice system ('Battle for the Streets' *Bulletin* 7 April 1987). 'Reporting from the frontlines' Warneminde invokes 'the spectre of a lawless society', a 'crime wave' caused by juveniles, 'renegade Aborigines' and 'louts infesting inner-city streets'. Predictably the article blamed 'a society concerned with civil liberties', insufficient police, lack of police powers to control street crime, juvenile cautioning schemes and abuse of police complaints procedures which leads to 'police being afraid to take strong action'. The populist character of this 'battle' is stressed by highlighting 'a rash of law and order committees', some formed out of dissatisfaction with Neighbourhood Watch schemes and 'threatening to become a nucleus for the broader law and order movement'. Warneminde commends 'The Dubbo answer to crime' — demands put to a meeting of the Law and Order Forum in Dubbo, NSW on September 10 1986, which attracted two thousand people. These included: increased police powers; minimum sentence legislation; life imprisonment for drug dealers; a minimum one year sentence for burglary, vandalism, drug possession, etc. doubling for repeat offences; abolition of the Aboriginal Legal Services; repayment of legal aid upon conviction; reduction of the cut out rate for imprisonment for fine default from $50 to $5 per day; strengthened consorting provisions; 'restoration of full control of prisons to prison authorities to ensure stricter discipline'; 'disciplinary authority of school teachers to be firmly re-instated'; scrapping of the juvenile cautioning system; reduction of age of juvenile culpability from 10 years to 8 years; building more prisons; teaching of religion in schools; and the establishment of an unarmed auxiliary police force. (For a detailed analysis of the background to claims of a law and order crisis in northwest NSW in the mid 1980s, see Cunneen and Robb 1989, and for the full text of the 'Proposed Aims' of the Forum see Appendix 2 pp 231–234).

The principal unifying theme underpinning the demands centred on the criminal justice system is that we live in a society that is soft on crime. This is invariably coupled with the view that our criminal justice system pays too much heed to the civil liberties and rights of criminal suspects and too little to those of victims.

Similar themes are to be found almost daily in newspaper headlines and articles. However, such sources are also able to invoke and legitimise themselves by reference to the apparently sober and considered views of experienced and expert commentators. Frank Costigan, in the *Final Report* of the *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* claimed:

> There has been remarkable success in chaining the powers of the State to interfere in the life of the citizen. It has had and is still receiving intensive attention from influential parts of the intellectual community. ... There is nothing like the same alertness and concern about the illegal oppression of civil liberties by criminals and their organisations.
>
> In western democracies in general, and in Australia in particular, the major oppressor of civil rights and liberties is the criminal. He injures the person, steals the property and invades the privacy of the innocent without remorse or compunction. He affords no warning, gives no opportunity to be persuaded otherwise and does his best to ensure there is no sanction. ...
>
> The victims, and other citizens, look to the State for protection, and for redress when injured. They receive scant attention. ...
>
> On the other hand, the oppressor is given every advantage. The resources of law enforcement are small with the result that eight out of ten offenders may be confident they will escape detection. Those who are detected are given every protection. The investigators are subjected to every form of restriction that the human mind can devise short of absolute prohibition. The offender is given the protection of the general civil rights and liberties in full measure. He is equipped, often at State expense, with lawyers and allowed the benefit of all reasonable doubts and the advantages of every procedure. ...
>
> The balance could not without some difficulty be tilted further in favour of the criminal. Law enforcement agencies are subjected to constant critical examination. They are mocked, scorned and ridiculed. The criminal is given every means of attack. ...
>
> The only source of vocal complaint about this state of affairs is the Police Force. Its spokesmen constantly draw attention to it and call for redress. They ask for the additional powers and resources they require. Their cry is treated with suspicion (1984:19–21).

Bob Bottom is another oft-quoted expert who rarely disappoints the tabloid press:

> The authority of the law has been so eroded in Australian society that the 'scales of justice' now weight very heavily in favour of criminals rather than victims of crime (1984:156).

Invoking a different version of nostalgia, commentators such as P P McGuiness (*The Australian* 8 March 1995) hark back to a time when police exceeded their powers in 'apparently arbitrary fashion':

> In cruder, more realistic days the legal and policing system was much more ready to recognize that criminals have always had a high rate of recidivism, and that measures needed to be taken to deal with the propensity of released offenders to repeat the crime. Moreover, it was recognised that there is a large penumbra of quasi-criminal behaviour and milieu where police need to be able to act in an apparently arbitrary fashion, in effect inflicting relatively light penalties without concrete proof of an offence ...
> In many cases this gave the police powers to exercise a degree of low-level terror against young people who looked as if they might get into mischief — especially if they were roaming the streets or hanging around unsavoury places late at night.

Sadly, for McGuiness, 'this apparatus of social control disappeared in the new-found discovery of the importance of civil liberties for the criminal classes' and a

> combination of naivety and Utopian social theory, together with civil libertarianism which was really rooted in resentment of police roughness directed against middle class demonstrators, led to the relaxation and virtual abolition of all the mechanisms of control over criminals (and anti-social behaviour, like street prostitution) which had developed over previous years (*The Australian* 8 March 1995).

Further examples could be repeated virtually ad infinitum. Tabloid journalists do not have to embellish such views and remarks of the authoritative commentators in the crime debate to make good copy and sensational headlines.

What is of concern about such views is their sweeping and highly rhetorical nature. There may well be sound arguments in favour of various reforms, some of which may entail increasing police powers and resources, but this depends upon much more careful and specific argumentation than is apparent in such claims as these. Quite apart from the highly questionable assumptions that are made about current powers and practices within the criminal justice system, these arguments assume that there is a close relationship between the general extent of state (especially police) powers and levels of crime, without demonstrating this to be the case. This may well be true within limits. But such generalised and rhetorical claims as to the relationship between crime levels and criminal justice resources and powers are extremely dubious. Contrary to this assumption it might be the case that increased efficiencies and effectiveness would result from changes in the organisation of criminal justice which are unrelated to the rights of suspects.

'The system is loaded in favour of criminals'

A fifth element of popular commonsense closely allied to the 'soft on crime' perception is the frequent claim that all the safeguards and advantages enjoyed by criminal suspects enable them to manipulate the criminal justice process to their advantage. Two of the main vehicles of this widespread manipulation are claimed to be entitlement to and reliance on legal aid and the operation of the jury system. The availability of legal aid is the subject of regular public comment by some conservative judges in particular, who claim that it allows and encourages guilty accused to defend and delay charges which have no merit, thus wasting court resources at the expense of the taxpayer.

The Greiner Government targetted legal aid as a major area for reform during its first term, overhauling the management of the Legal Aid Commission, tightening the means test for legal aid, introducing a contribution requirement for the first time, and cutting the legal aid budget by 5.5 per cent at the same time as increasing capital expenditure on law and order by 27 per cent. In an editorial supporting this proposal *The Sydney Morning Herald* reflected the general view that legal aid is abused:

> The Government's determination to rein in the cost of legal aid is laudable. It clearly has the support of the judiciary and a significant part of the legal profession. It probably also has the support of many in the community who believe that much legal aid is wasted on over-servicing, especially in criminal cases, and that it is therefore unfairly apportioned (12 July 1988).

The editorial went on the suggest that the availability of legal aid for all criminal trials, without a merit test, ensured that '... some trials are unnecessarily prolonged, exacerbating the problem of court delays ...' and drew the conclusion that legal aid for criminal trials should not be available as of right to those whose means did not enable them to pay for legal representation.

In July 1996 the Coalition Federal government made a shock announcement that contrary to their election promise to maintain legal aid funding the Commonwealth was to cut $100 million from Commonwealth legal aid funds to the States. Criminal legal aid is the hardest hit, in particular 'legal representation for domestic violence vicitms, advice for prisoners and their families, and advice for those charged with criminal offences' (*Sydney Morning Herald* 1 July 1996).

This is yet a further aspect of the general commonsense that the criminal defendant is exceptionally indulged and mollycoddled in our system of criminal justice and that we all pay for this socially and economically. Of course, some slippage is apparent here, as the apparently fundamental principle that an accused is presumed innocent until proven guilty is openly subjected to so called fiscal rationality. You are still presumed innocent, even if poor, but there is no guarantee that you will be enabled to effectively defend yourself in a criminal trial if your case is deemed to be without merit. Issues of guilt and innocence, represented as being the province of a fiercely independent and open judicial system, are thereby delegated, in crucial respects, to an anonymous bureaucrat.

Some years ago Robert Mark, then Commissioner of Police in Metropolitan London, launched a major attack on the criminal trial claiming that far too many guilty accused were being acquitted by juries. At the time this represented something of a break with tradition for a senior British police officer to so openly enter the political arena, demanding changes to the laws he was sworn to uphold and enforce. This is no longer the case, as senior police officers and police unions have come to be key actors in the political debates surrounding reform of the criminal justice system. The former Victorian Police Commissioner, Mick Miller, followed Mark's lead both in entering the political arena and taking up the issue of the criminal trial. He argued repeatedly over the eighties that too many people are acquitted in the criminal courts and that the jury is not reliable:

> The legal system is involved in a search for proof, not a search for truth ... Ultimately, I'd like the whole jury system to be done away with ... (quoted in *The Age* 13 June 1985).

These assumptions about the unreasonably high rate of acquittals and the incompetence or perversity of juries have also attained the status of commonsense in some circles in recent years. The legal correspondent for *The Sydney Morning Herald* in an interview with the Chairman of the National Crime Authority posed the question, which is less interesting than the unquestioned presuppositions upon which it is based — 'Does the high rate of acquittals in criminal cases generally in NSW mean that the NSW police, the NCA and the prosecuting authorities are falling down on the job?' (*Sydney Morning Herald* 17 July 1986) This is a glaring example of law and order commonsense at work. Quite apart from whether any juggling of the figures would allow it to be said that there is a high rate of acquittals (what is to be regarded as the norm?), the assumption that there is a high rate simply ignores the fact that the overwhelming majority of persons prosecuted are convicted because most of them plead guilty.

Such exchanges between journalistic commentators and key actors within the major law enforcement agencies frequently obscure important empirical and normative questions about the administration of criminal justice. The assumption that the criminal justice system is failing in some way that requires remedying — through more resources, more powers, etc. — constitutes the tacit starting point for discussion. Questions such as whether this is a correct assessment, what is and should be meant by failure and success are never permitted to intrude on the debate.

'We need more police'

The call for *more police* is a constant one. It emanates from police administrators, police unions, newspapers, legal and other 'expert' commentators. At the 1988 and 1995 NSW elections both the Government and the Opposition sought to outdo each other with their promises to increase the size of the police force. In 1988 the Unsworth Labor Government promised an additional 2000 police over the following three years and the Liberal/National Party Opposition a further 1600 in the next four years. In 1995 both parties promised 600 extra police, more 'front-line police' and each attacked the other's policies as merely 'recycling' police from other duties.

The view that the problem is that there are not enough police on the beat is also popular. The various Police Associations (police unions) as might be expected, are only too happy to promote such assumptions and policies. The political momentum for 'more police' and 'more police on the beat' is often built through paid advertisments, advertisng campaigns and industrial action by the associations. Again such quantitative claims rarely descend to the level of actually discussing police priorities or specifying how more police, or more police on the beat, will actually contribute to lowering the crime rate. Whilst the more effective and efficient use of police resources received considerable attention in recent years in NSW, with the civilianisation of many police jobs (against the resistance of police and their unions), it is exceptional to encounter much public or media discussion of how police resources should be organised and deployed, beyond simplistic demands for more police on the beat.

There are indications, however, of greater skepticism on the part of some media commentators and politicians that the simple call for more police will have a salutary effect on crime levels. Ross Gittins, economics editor for *The Sydney Morning Herald* raised the issue in December 1989 of whether it makes economic and social sense to go on demanding the investment of simply more resources in law and order (13 December 1989). The fact that he began by acknowledging that this might appear to be an 'odd topic for an economics editor ...', indicates the extent to which law and order commonsense has been free from critical scrutiny. Consequently the policies which have flowed naturally from that commonsense have escaped the demands of fiscal accountability that have attached increasingly to all other areas of government. He simply pointed out that despite the common assumptions that crime was increasing and that the way to deal with it was to employ more police, there was no way of knowing whether either assumption was correct given the lack of basic and reliable information upon which 'sensible decisions can be based'.

A glaring example of the problems identified by Gittins is to be found in the major Commission of Audit initiated by the Greiner Government soon after winning government in 1988. The report of this commission (commonly known as the *Curran Report*) laid down the basic framework for reform undertaken by the Government in its first term, with its emphasis on reducing the size of government and subjecting government activities to the discipline of market principles. Despite the fact that law and order was the area of major government expenditure which experienced by far the most sizeable relative increases over the eighties (almost 25 per cent in excess of the CPI compared to less than 5 per cent for each of the areas of education, health and public transport), the *Curran Report* simply assumed that such increases were the natural and understandable result of rising crime rates (Curran, 1988:18–19). Increases in spending on policing were recommended whilst it was suggested that certain '... 'soft' areas ...' of law and order expenditure, such as legal aid, needed review due to the '... lax approach ... in the control of expenditure ...' as did 'expenditure on rehabilitation of prisoners' (Curran, 1988:58). The Premier indicated at various times that the Government would spend what was necessary to '... restore public

confidence in the justice system ...' (Hogg and Brown, 1990:221). The Government did spend massively on law and order, amongst other things embarking on the largest prison building programme this century (Brown, 1991;1990).

'Police need more powers'

Along with more police the cry goes up that police powers of investigation must be increased. Earlier quotes from persons like Frank Costigan and Bob Bottom echo the common call for greater powers to be invested in law enforcement agencies. In some cases, this had led to the establishment of special law enforcement agencies such as the National Crime Authority and the New South Wales State Drug Crime Commission. The news media habitually repeat such calls made by police commissioners, police unions, judges, and other commentators who enjoy an authoritiative status within the 'hierarchy of credibility' on law and order issues:

> what Mr Miller [then Victorian Police Commissioner] does argue, and argue passionately, is that the community has become alarmed by escalating crime rates and is therefore demanding more effective policing. More effective policing *inevitably* means wider police powers ... (*The Age* 13 June 1985, emphasis added).

Perhaps the most concerted and misleading campaign on police powers was that conducted by the NSW Police Association and sections of the NSW Police Force over the repeal of the *Summary Offences Act*, 1970 by the Wran Labor Government in 1979. Few opportunities were missed by police, editorialists and conservative politicians to lay crime problems in NSW in the eighties at the door of this reform. Three weeks after the proclamation of the Act the Police Association placed a full page advertisement in the *Daily Telegraph*: 'You can still walk on the streets of New South Wales, but we can no longer guarantee your safety from harassment' (20 August 1979).

Police would be 'laying their jobs on the line every time they arrested anybody' according to the Secretary of the Association (*SMH* 31 August 1979). The NSW Labor Attorney-General, Frank Walker, seen as the architect of the changes, was singled out for special attention. A police officer stood against him in the 1981 election. Most significant however, was a campaign of selective non-enforcement of the law in Walker's Georges River electorate. A study of the pattern of law enforcement of summary offences before and after the changes, carried out by Sandra Egger for the NSW BCSR found that there was a 93 per cent decline in public order court appearances in the Kogarah court, in Frank Walker's electorate (Egger and Findlay 1988; see also Travis 1988). The study stated:

> A failure to enforce the law in this region of Sydney was clearly a powerful political weapon. It had the potential to exert public pressure on the Attorney-General where it hurt him most: in his own electorate.
>
> During this period many complaints were received at Frank Walker's electorate office. Citizens complained that when an offence was reported to the police in these southern suburbs of Sydney, they were told that because of the change in the law the police were "unable to do anything". In many cases the citizens were advised to "talk to Mr Walker".
>
> The findings ... thus demonstrate how the collective industrial and political claims of the police can translate into law enforcement policies which may deliberately undermine the intention of the reforms to the law. It could be interpreted that the police were effectively on strike although there was no declaration of a strike and hence no responsibility incurred for the consequences of the strike. The consequences were in fact deflected onto the government (Egger and Findlay 1988:220).

Over the 1980s the Wran government were forced to back-peddle on the original changes, and the Greiner Government restored some of the original powers under a new *Summary Offences Act* after winning power in 1988. The case of the *Summary Offences*

Act in NSW illustrates the effectiveness of police, especially police unions, at resisting changes which they perceive as eroding their powers by invoking and affirming some of the key themes within law and order commonsense. There are other significant examples, such as the prolonged police campaign against more effective regulation of police interrogation practices, and in particular the successful campaign against the 6 hour detention rule by the Victoria Police.

'We need tougher penalties'

The call for 'tougher penalties' is a perennial theme of law and order debate. It ranges over a number of sub-themes, from the regular calls for the reintroduction of capital punishment to complaints about the leniency of prison sentences, the generosity of parole and remissions and the unduly comfortable conditions enjoyed by prisoners. The regular opinion polls and press excursions on the issue of capital punishment and common calls (usually by police administrators, politicians, etc) for its reintroduction are perhaps one of the most symbolically powerful, and practically irrelevant, dimensions of law and order debate. As these calls indicate capital punishment provides fertile ground for populists within the press and politics to 'speak for the people' against the liberal establishment ('You demand long jail and hanging' *Sun Herald* 8 June 1986).

More commonly still, we witness demands for greater use of imprisonment and for longer sentences of imprisonment:

> I would like to be remembered as someone who has put the value back in punishment (Michael Yabsley, NSW Minister for Corrective Services, October 1990, as cited by O'Neill 1988).

> Opposition Leader Bob Carr raised the stakes in the law and order battle yesterday when he promised even tougher measures than the Fahey Government's "three strikes and you're in" policy.
> Mr Carr said his policy would include the Coalition's pledge to put criminals away for life after a third serious offence but would also have tougher penalties for drug pushers and burglars.
> Mr Carr said Labor's law and order policy would propose an extra five years in jail for drug dealers who sell to schoolchildren.
> He said Labor was also committed to increasing penalties for home burglaries and giving life sentences to big drug dealers (*Daily Telegraph Mirror*, 11 March 1995).

At the 1988 NSW election the Coalition promised a variety of law and order measures such as the *Sentencing Act* which introduced so-called 'truth in sentencing', a 'natural life' imprisonment sentence, the lifting of maximum penalties for some offences, using habitual criminal legislation against recidivists, and abolishing remissions. Despite the obvious likely consequences, increased sentence lengths and a significantly increased prison population, the Minister (quite inappropriately) in charge of sentencing reform, *Prisons* Minister Michael Yabsley, denied it was the government's intention to increase the length of sentences: 'the government is not seeking to make sentences longer' (*Hansard*, 10 May 1989).

Confronted with a rapid increase in the prison population (60 per cent since 1988), rising levels of prison violence and a severe deterioration in prison conditions, all Mr Yabsley could say was that 'as far as we look into the future we are going to have record highs' (*Sydney Morning Herald* 12 March 1990). He also indicated his view of what sort of a prison system he was happy to administer when in response to an alleged sexual assault on a prisoner he said that rape was 'inevitable' in prison (*Sydney Morning Herald* 22 February 1991). Indeed he went further, suggesting that the fear of prison rape might be a useful 'deterrent factor' to those thinking of offending (*Sydney Morning Herald* 27 February

1991; see also Brown 1988, 1990, 1991; O'Neill and Harvey 1990; Hogg and Brown 1990).

The then Labor Opposition leader, now NSW Premier Bob Carr, went into the 1995 election promising increased penalties as the major public response to concerns about crime. While British Labour leader Tony Blair's slogan, 'tough on crime, tough on the causes of crime', was quickly plagiarised by Bob Carr, little was heard about the causes of crime in the election campaign. The problem with such populist commitments is that they assume it is possible to generate public confidence simply by putting more people in prison. The short term exploitation of popular concerns and expectations can turn into a long term disaster in public policy as expectations are fuelled which simply cannot be met by a simplistically punitive penal policy. There is little evidence that rising levels and rates of imprisonment can of themselves reduce levels of crime.

A problem here is that penal measures reflect a range of forces and cannot be reduced merely to the terms of a utilitarian calculus, that is to open to evaluation solely in terms of 'what works'. The desire for vengeance is a very powerful and deeply rooted one which is not entirely met by pointing out the failure of imprisonment to deter, the social and economic costs it entails, and so on. We are not going to stop people being punitive and vengeful about crime. Those who gather outside courtrooms and police stations when someone accused of a terrible crime is brought to trial, displaying nooses and waving placards with 'Hang the Bastard' and 'Put the Mongrel Down', are essentially calling for *a sacrifice* to be made.

While it is important to acknowledge the power of such sentiments it is imperative that the processes of criminal justice operate in such a way as to ensure that yet further crimes are not committed in the name of punitive sentiments. It is essential for example, to resist the conflation of suspect or accused with that of guilty or criminal. It is also essential that as a society we recognise the fallibility of the criminal justice system. Yet whenever the various components of law and order commonsense are paraded, especially the exploitation of the figure of the victim, and calls for heavier punishment, the death penalty and so on, a complete disconnection is made between such concerns and those over *miscarriages of justice*. It is as if miscarriages occur in a completely different world. But how satisfying is it to victims if someone who is innocent is convicted of the crime, or executed, as has happened on more occasions than is often realised?

There have been sufficient highly publicised cases of miscarriages of justice in Australia and other countries in recent years to warn us of the dangers of wrongful conviction when passions are most aroused. In the 'Birmingham Six' case in Britain the accused were attacked and beaten by police, prison officers and other prisoners, convicted, and forced to spend 18 years in prison for a crime they did not commit, becoming themselves victims of the criminal justice system and public desires for revenge. Meanwhile the actual perpetrators went unpunished. Further, their families were abused, attacked and driven out of the community. Lord Denning's statement in relation to the 'Guildford Four', released after yet another British miscarriage of justice, that if there had been capital punishment then they would not have been around to appeal makes the point fairly clearly.

The Ronald Ryan case, the last official hanging in Australia is a case in point. First there is considerable doubt about Ryan's guilt. Second, as the excellent ABC documentary, *The Last Man Hanged*, made clear, Ryan was chosen for execution in order to enhance Henry Bolte's election chances. In other words the choice of who is to hang is invariably political, random, and capricious. Third, the enduring psychological damage inflicted on those forced to partake in the execution, the prison governor and his wife, prison officers, the priest, journalists and others, is testament to their continuing feelings

of pain and guilt at having been involved in the premeditated killing of a human being. It is to these more practical effects, to the fallibility of the system and the importance of not committing further crimes in the name of justice, punishment, sacrifice or vengeance, that criminal justice policy should be directed.

'Victims should be able to get revenge through the courts'

A corollary assumption in this commonsense discourse on the need for harsher penalties is that the welfare of victims is dependent on the harshness of the criminal justice system. The tendency is for the 'rights of victims' to be invoked in a nebulous way so that it is not clear what is meant other than a code for increased punitiveness towards suspects and offenders, statuses that are often conflated.

In the leadup to the 1995 NSW state election both parties sought influential, high profile, victims families to give their imprimatur to parties' law and order policies. The Liberal Party law and order policy was released to an audience including representatives of the *Homicide Victims Support Group* such as Anita Cobby's father, Garry Lynch. They were strategically placed in the audience so that their applause could be conveyed to electors' living rooms. Many of the post-launch media interviews and commentary focussed not on the Premier and Attorney-General but on reactions of the victim's relatives to the policies, including the highly rhetorical 'three strikes and you're in' life sentence.

The ALP Opposition actually launched its law and order policy for the 1995 election at the home of Mrs Gwen Hanns. Mrs Hanns is the mother of a young child brutally murdered by John Leuthwaite in 1974. In keeping with the auction atmosphere over law and order the Liberal's 'three strikes and you're in' was trumped by a mandatory life penalty for the newly created category of 'horrific crime', a category so populist and non-legal that shadow Attorney-General Jeff Shaw had considerable difficulty explaining it to journalists. Again, much of the post-release comment came from the clearly distressed Mrs Hanns.

In both launches the most important aspect of the event appeared to be to secure a media endorsement of the respective policies by prominent and recognisable victim's relatives. Such exercises amount to an *unseemly exploitation of grief*, and a psychologically damaging requirement that it be constantly relived as media spectacle.

Clearly victims' concerns should be addressed by the law and order policies of political parties. But their terrible trauma and desire for revenge should not be the basis for the formulation of state legal policy. Nor should they be subject to exploitation and manipulation, paraded like stage props. Law and order policies must leave behind the nebulous rhetoric of victims rights as a code for increased punitiveness and abandonment of protections against miscarriages of justice and actually address the material welfare needs of victims.

Independent member for Manly, Dr Peter Macdonald, who had dared to question the government's abolition of the unsworn statement, was attacked in an open letter sent by an organisation called *Parents of Murder Victims* to all voters in the marginal electorate, 12 days before the poll. The letter concluded 'we urge you to protect the rights of victims of crime by voting against Dr Peter Macdonald'. Some of the high profile victim relatives signatories later claimed they could not remember signing or were not consulted about the contents of the letter. Significantly the source of finance for the $20 000 mailout was not disclosed. Such tactics draw the victims organisations into the web of electoral 'dirty tricks' and do little to advance their standing or cause. As it happened Dr Macdonald won in a cliff-hanger.

Politicians, media and other commentators frequently raise the question of the needs and rights of the victim. However, this is invariably followed by a call for increased police powers, the removal of some procedural safeguard or harsher penalties. The victim is invoked, not in order to advance the case for practical measures of assistance for actual victims of crime, but to tap the retributive nerve in popular opinion in support of tougher measures against suspects and proven offenders. The two cannot be so simplistically equated.

Most practical measures for the benefit of victims after the event — adequate compensation, counselling, provision of information, etc. — have little, if any, connection with police investigative powers and punitiveness. Victims are not invariably punitive in their expectations of the criminal justice system, but rather desire greater consideration in terms of the provision of information, recognition of their experience and practical support and assistance. It might also be expected that those most affected by crime would be more concerned about measures which would prevent and minimise it, rather than a punitive response after the event. But there is a tenuous connection between this objective and the workings of the criminal justice system. The popular and political discovery of the crime victim in recent times has not for the most part concerned itself with the concrete patterns and experiences of criminal victimisation so much as the ritual invocation of an abstract '*ideal victim*' in order to advance a punitive law and order agenda against suspects and offenders (see Brown 1994; Anderson 1995).

Conclusion

We have attempted to identify the key assumptions in what we have called law and order commonsense. These assumptions tend to form the bedrock of much public and policy debate around crime. They are routinely unquestioned and frequently regarded as unquestionable by the major public actors in law and order debates. These include politicians, police, judges, lawyers, administrators, newspaper executives and journalists. However the body of commonsense assumptions is neither monolithic nor unchallengeable. We have been concerned in this article to outline the key elements of law and order commonsense in order that these may be more readily scrutinised and contested, not consolidated. There are tensions amongst and within the dominant ideas of the major agents of law and order commonsense, including police organisations. Recent debates over the philosophy of community policing in NSW have brought many of these tensions to the surface, as have debates over specific issues such as gun control, tax fraud, the relationship between legal and illegal economies, and domestic and sexual violence.

Law and order commonsense is also being contested from other directions. Feminists have increasingly, and successfully focused attention on the predominantly private, domestic nature of violence, challenging the assumption that crime largely consists of so many random and unpredictable individual tragedies. Feminists have also highlighted the ambivalence of legal and social institutions to violence where it does not conform to this dominant image and they have, through measures like rape crisis centres and refuges, initiated alternative strategies for responding to the needs of victims (Stubbs 1994). These challenges confound virtually every element of the law and order commonsense described in this chapter. Yet they are often seen as an exception to the basic commonsense framework of assumptions and priorities. In general talk about crime, the commonsense is invariably left undisturbed.

Departing in large measure from the (non)policies with which they fought the 1996 federal election, the new Coalition government brought down a first budget which bore

more than a trace of the 1988 Coalition Manifesto, *Future Directions*, and its 1993 economistic successor, *Fightback. Future Directions* in particular, took law and order as one of its central themes, allying the problem of crime to state-induced family breakdown, permissiveness and to the sapping of individual responsibility and initiative by social welfare. No mention was made at any point that violence is overwhelmingly a problem that afflicts families *from within*, that generates family breakdown, that pushes children and adolescents onto the streets and that contributes directly and indirectly to myriad other aspects of the crime problem. The silences of such a document and of the contemporary policies being constructed upon it, are some measure of the extent to which a dominant law and order commonsense continues to shape the contours of public discourse about crime, even in the face of the many forces seeking to challenge it.

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