

Criminology Issues of Zero Tolerance Policing

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Introduction

The concept of zero tolerance policing has been circulating in New York City political and law enforcement circles since the early 1980s.¹ However, it was in the early 1990s that the practical effects of this policing strategy began to permeate the city's policing methods. It is critical to evaluate the political process of this 'hardline get tough' policing methods and strategies which have become prevalent in Western democracies. This approach has its fundamental basis in the law and order campaign from the right wing of the political spectrum. Law and order issues are essential to the maintenance of civil society and the scope of this article is to examine, assess and critique zero tolerance policing in the US and Australian jurisdictions. There have been attempts to import many aspects of zero tolerance policing methods and strategies in Australia in recent years. However, there is consistent empirical evidence that it is the people at the bottom of the socioeconomic ladder, those poor and marginalised, who inevitably suffer the most from failed aspects of tough punitive policing measures.

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¹ Wilson JQ and Kelling G, (1982) 'Broken Windows' March *Atlantic Monthly*. In this article the principle focus is on the metaphor of the 'Broken Windows' thesis that focuses on the strategic civil order maintenance concept which theoretically means that major crime can be drastically reduced if petty offences, minor incivilities and perceived disorderly behaviour are punished more severely.

While it is beyond the scope of this article to reconvaass all of the criminological issues of zero tolerance policing written in Australia, this article will complement prior arguments on the subject matter. Further, issues of zero tolerance policing always seem to emerge at the various state and federal elections as right wing politicians try to convince the populace that more laws and police powers are needed to combat rising crime rates. In the political and policing arena the focus more often than not is on getting tougher on crime, instead of an emphasis on preventative and alternative methods of reducing crime. These alternatives to punitive measures will do more in the long term to aid the overall crime reduction in various Australian jurisdictions than perpetuating this 'crime fighting fallacy' of zero tolerance policing.

The New York City model of zero tolerance policing

The main counter argument against zero tolerance policing is that other policing strategies have been used in various jurisdictions in the world with similar success in urban and rural crime reduction. The fear of crime itself, moral panic and rising crime rates are aspects of a wider social problem that affects people from different socioeconomic backgrounds. In New York City and Australia issues of crime fighting strategies are always a priority on the political agenda for every new administration that comes into power. It is imperative for people to keep in mind that irrespective of the geographical location policing is one of the most important activities in establishing cohesion and trust.² In New York City arrest for minor offences appear to have discouraged the carrying of firearms, which in turn reduced the overall crime rate by 35 per cent and homicides by almost 75 per cent.³

The end result was that the Federal Bureau of Investigation (FBI) Index Crime Rate⁴ had the figures to support Mayor Giuliani's claim that the crime wave and rate was being drastically reduced. The Mayor's office reported that from 1993 to 1997 the number of felony complaints in New York City dropped by 44.3 percent; there was a 60.2 percent drop in murders and non negligent homicides, a 12.4 percent drop in forcible rape, a 48.4 percent drop in robbery and a

² Australian Institute of Criminology, Media Release 4 February 1999 'Zero Tolerance Policing' at p 1.

³ Note 2

⁴ Green J, 'Zero Tolerance: A Case Study of Police Policies and Practices in New York City' (1999) 45 (2) *Crime and Delinquency* 171.

45.7 percent drop in burglary.⁵ Are these crime statistics the result of policing strategies employed with the primary focus on zero tolerance policing against petty offences? More critically, however, is the fact that this policing miracle with its populist appeal in political and law enforcement circles did not go unnoticed elsewhere including Australia.

Socioeconomic factors are inseparable from a reduction in the crime rate not only in New York City but also in Australia. Moreover, the critics of zero tolerance policing strategies have pointed to the fact that the reduction in the declining crime rate coincided with other critical factors as follows:

- A sustained period of economic growth;
- A significant reduction of crack cocaine use;
- The stabilisation of the cocaine market;
- A concomitant reduction in warfare between the drug gangs;
- The ageing of the baby boom generation beyond the crime prone years;
- Concerted efforts in large metropolitan areas to restrict teenagers' access to firearms particularly hand guns;
- Increased police-community cooperation;
- Longer sentences particularly for perpetrators of violent crime.⁶

Only some of these criminogenic elements are applicable and transferable to Australian jurisdictions. Apart from the above factors the underlying crux of zero tolerance policing is in the implementation of policing tactics on the street level. Basically, the argument for dealing with petty street crime is that if it is unchecked the social environment then becomes more conducive to serious criminal activities. More importantly, is the fact that spatial and behavioural conditions sometimes create the perfect breeding ground for criminal offending. Prominent American criminologists James Q. Wilson and George Kelling promulgated the combined criminological theory of physical and behavioural criminogenic conditions that manifest

⁵ Note 4 at p 171. The Federal Bureau of Investigation (FBI) Index Crime Rate is a crime indicator that calculates the number of persons indicated on the FBI nationwide crime data system, which periodically produces national crime statistics for selected offences reported to police.

⁶ Grabosky PN, Australian Institute of Criminology, *Zero Tolerance Policing, Trends & Issues*, No. 102 January 1999, at p 3.

incivility and disorder as being inseparable from preventative crime fighting strategies.⁷

Ordinarily, there is no shortage of petty offences in New York City similar to public order or good order offences in Australian jurisdictions. At the street level, policing of these relative minor offences like offensive behaviour and offensive language do not require assertive, heavy handed and sometimes aggressive police tactics.⁸

The cost of zero tolerance policing on the community

Zero tolerance policing is a law and order policing strategy principally designed to deal with the perception of quality of life issues in a campaign to reclaim the streets for law abiding citizens. However, its heavy-handed tactics has its consequences particularly for the powerless working class. Unfortunately, as the empirical evidence indicates in pluralistic societies like America and Australia more often than not it is Indigenous, ethnic and racial minorities who suffer the consequences of abuse of power (cop it sweet)⁹ by some members of the police force. Zero tolerance policing only increases the level of distrust between the police and minorities who are the ones most targeted by this assertive style of policing method.

From the perspective of many people in these communities zero tolerance policing means that some police officers are unleashed on the streets to stop and search citizens who are violating the most minor laws on the statute books (eg. swearing in a public place, etc).¹⁰ Logically, this raises the question, is zero tolerance policing the most effective crime fighting strategy that should be used in the war against street crime? Other community policing methods have been used in other areas with similar criminogenic conditions with approximately the same results as zero tolerance policing. Again, it is the people in ethnic and racial minority communities who have to suffer the negative

⁷ See note 1.

⁸ See the *Summary Offences Act* (1988) NSW Part 2 Offences in Public Places section 4 subsection (1) a & (b).

⁹ 'Cop it sweet' is a common colloquial term used which basically means to 'take your punishment like a man.' The officers from the now defunct Street Crimes Unit, which stopped and searched 27,601 people in New York City in 1997 and 1998, most of them from minority backgrounds for just 4647 arrests.

¹⁰ Bratton W, 'Turnaround: How America's Top Cop Reversed the Crime Epidemic?' *Heritage Lecture* No. 573, Washington DC 1998 at p 229. See also note 8 for offences against good order.

consequences of zero tolerance policing in terms of their civil rights and civil liberties being violated when the police exercise unchecked discretion.¹¹ Amnesty International has reported that police brutality and unjustified use of force is a widespread problem embedded in the New York City police culture.¹²

There is a wealth of empirical evidence to support the argument that police misconduct and abuse of power have increased as a direct result of zero tolerance policing.¹³ The level of police misconduct and abuse of power is invariably higher in neighbourhoods where large numbers of ethnic and racial minorities reside. In Australian jurisdictions the policing of Indigenous communities will be the focus of this type of policing strategy; the history and process of criminalisation in these communities establishes this.¹⁴ Increasingly, it is evident that zero tolerance policing has resulted in more distrust and spatial separation between the police and the communities in which they serve. Further, given the fact that there are other equally effective policing strategies that can be used in the fight against street crime, the enforcement of zero tolerance policing must be questioned.

Overpolicing, as a result of zero tolerance policing tactics have further alienated a disproportionate number of ethnic and racial minorities in New York City and indigenous communities in Australian jurisdictions. Critically, it is the indiscriminate strict enforcement of zero tolerance policing policies that has significantly contributed to a decreasing trust between the police and many people in these communities. This level of distrust between the public and the police is the direct result and unintended negative outcome of zero tolerance policing.

Recent use of the police sniffer dogs in Byron Bay will inevitably affect the middle class business also who live and frequent the streets there. Perhaps there is a long-term plan in Byron Bay to reduce the number of backpacker's accommodation and move the powerless working class out of the area. As a consequence of this, Byron Bay will eventually be developed to look similar to 'Yuppie Noosa Heads'

¹¹ There was an increase of 75% in police complaints for abusive conduct over a four year period in New York City. *Crime & Delinquency*, (1999) 45 (2) April at p 175.

¹² Note 11 at p 176. Amnesty International Report 51/36 June 1996.

¹³ Note 11.

¹⁴ Cunneen C. Dr. Associate Professor at the University of Sydney has done extensive, much admired and widely recognised work in the policing of Aboriginal people and the process of criminalisation. For further readings on the subject matter there is an excellent article written by him entitled 'Enforcing Genocide? Aboriginal Young People and the Police' in White R & Alder C (eds), *The Police and Young People in Australia*, Cambridge University Press, Cambridge, 1993, p 128.

Queensland. One high-ranking police officer, Supt. Barry Audsley commented that the use of the sniffer dogs is likely to become a regular feature of drug policing on the North Coast.¹⁵ Zero tolerance policing on the North Coast may extend to the suburban streets as the officer noted, "the sniffer dogs can be used anywhere it is a safe environment to work".¹⁶

More test cases will be coming before the courts in the North Coast region as people challenge the validity and possible illegality of sniffer dog searches. A Lismore barrister has claimed that people searched by police after being singled out by a drug detection dog, but found to have no drugs on them may be entitled to civil damages.¹⁷ The police in South Australia have dropped many charges when they have been challenged because they are unsure of the legality of the searches.¹⁸ Empirical research is currently being conducted on the North Coast region to see the impact of the sniffer dogs searches in the policing of public order.

Is zero tolerance policing the best solution against street crime?

The question may be asked whether zero tolerance policing is the most viable crime fighting strategy available to the police services? If there is an ascendant theory among American Criminologists it is that no single factor, cause, policy or strategy has produced the drop in crime rates.¹⁹ Crime in all jurisdictions including urban and rural Australia should always be viewed in the context of the prevailing micro and macro-structural variables in a society. The fact that crime statistics are indicative of a sharp decline in the crime rate during the period of zero tolerance policing should be treated with some degree of suspicion.²⁰

¹⁵ *The Northern Rivers Echo*, 3 May 2001. See s.28F of the *Crimes Legislation Amendment (Police and Public Safety Act 1998 No 38)* which gives more power to the police to give reasonable directions in public places.

¹⁶ Note 15.

¹⁷ *The Northern Rivers Echo* 10 May 2001 p 1.

¹⁸ Note 17.

¹⁹ Green, note 4, p 178.

²⁰ There is always a certain degree of concern about the pressures that local commanders feel to show that the crime rate is continually being reduced. As a result of this, there is the possibility that crime statistics may sometimes be falsified or manipulated. Quite frankly, the crime rate always seems to skyrocket just before any State or Federal election in Australia when the populist law and order sentiment is sweeping the country by advocates of tougher punitive measures in the process of criminological mythology.

There never seems to be a clear-cut consensus among the experts when there is a rapid downward trend in the crime rates in America. Ordinarily, there are always two competing theories on the ethnology of crime in America. One is the liberal belief that economic inequality and racial injustice are prime contributing factors and the other is the conservative view that blames the erosion of social values.²¹ Logic dictates that the small benefits yielded by zero tolerance policing must be weighed up against the cost to the people who live in that society. In the case of Australian jurisdictions it is the indigenous people who are already poor and marginalised that suffer the most in the process of criminalisation because of their lack of economic social and political power.

One undisputed fact in Australia is that the level of poverty in many communities is increasing as the socioeconomic gap between rich and poor widens. Zero tolerance policing does not alleviate the burden of being poor and marginalised but only adds more misery to a people who see little hope out of their socioeconomic condition. Furthermore, the fact is that zero tolerance policing is not operational in a spatial vacuum separate from the elements of demographic variables in the process of Aboriginal criminalisation.²² Many experts have long held the view that demographic factors are significant contributors to crime rates.²³ People are conscious of the argument that the police have to sometimes carry out their duties in very difficult circumstances, in the policing of urban and rural crime in Australia.

Adequate empirical evidence is available that there are equally effective ways of community policing methods that yield similar crime rate reduction results as zero tolerance policing. Law enforcement can be carried out in ways that are effective, but a careful balance must always be drawn to protect individual freedoms, rights and liberties. Tougher law and order measures for dealing with petty public order offences under existing legislation in Australia have never yielded results without political alienation in Aboriginal and other ethnic communities.²⁴ The notion that a racially and ethnically mixed population leads to social disharmony and criminality is alive in the

²¹ Note 19, p 178.

²² Note 14, p 128.

²³ Note 19, p 178.

²⁴ Chan J, 'Policing Youth in Ethnic Communities: Is Community Policing the Answer' in White R & Alder C (eds), *The Police and Young People In Australia*, Cambridge University Press, Cambridge, 1993, p 175.

popular imagination.²⁵ Stereotypes of 'ethnic' criminality are fuelled by the mass media.²⁶

Australian jurisdictions do not need zero tolerance policing

In the past several years there has been strong support for zero tolerance policing in Australia. However, the author would again reiterate the argument that zero tolerance policing is not appropriate in the Australian policing context. The Australian Prime Minister, the Honourable John Howard had indicated that state authorities should at least examine some aspects of zero tolerance policing.²⁷ He submitted quite strongly, "one of the things you have got to remember is the success that has been achieved in a city like New York with zero tolerance policing approach to law enforcement is very instructive".²⁸ Zero tolerance policing gives politicians a certain degree of political ammunition in the fight against crime, however, a 'get tough' approach has never been the answer to the nation's crime problem.

Law and order has long been a favoured catch cry of politicians and the media.²⁹ Russell Hogg and David Brown have referred to 'law and order common sense' as being based on popular and often recycled perceptions about the nature of crime.³⁰ Common elements within the law and order sphere include: the perception that crime rates are higher than they have ever been; tougher penalties and increased police powers are required; the criminal justice system is soft on crime; and the victims of crime should be entitled to exact revenge on offenders.³¹ There have been inherent contradictions in criminal justice policy in various Australian jurisdictions in the 1990s particularly where young people are involved.

²⁵ Bird G, 'The Times They are a' Changing: Policing Multicultural Australia' in Moir P and Eijkman H, (eds) *Policing Australia Old Issues New Perspective's*, The Macmillan Company of Australia Pty Ltd, South Melbourne, 1992, p 353.

²⁶ Note 25.

²⁷ *Sydney Morning Herald*, 17 September 1998. The Honourable Prime Minister, John Howard, at the launch of the Coalition's crime policy in the marginal Perth seat of Cowan took the populist line on crime by urging state authorities to be tougher on offenders and he urged them to adopt or at least look at aspects of zero tolerance policing used in New York.

²⁸ Note 27.

²⁹ Hogg R and Brown D, *Rethinking Law and Order*, Pluto Press, Sydney, 1998, p 18.

³⁰ Note 29.

³¹ Note 29, p 21.

The Young Offenders Act 1997 (NSW) implemented a system of restorative justice measures for dealing with juvenile offenders.³² It is an example of a well considered rational progression in juvenile justice, seeking to divert young offenders from the criminal justice system in recognition of the fact that most young people who offend will not reoffend.³³ On the other hand, there have been measures such as *The Children Parental and Responsibility Act 1997* (NSW) to increase police powers which is the government reaction to popular law and order sentiment against young people in the form of zero tolerance policing.³⁴ People in Byron Bay, Ballina, Nimbin, Lismore and surrounding areas are seeing the use of police powers derived from existing legislation in NSW in the form of zero tolerance policing of public order.³⁵

Zero tolerance policing has moved beyond the policing of public order offences on the street level and into the public school system. Increased police involvement in schools and pressure to adopt a zero tolerance approach to drug use and property offences places schools in a predicament, where the objective of schooling in providing education is compromised by the need to enforce law and order demands of governments and the wider community.³⁶ Australian courts have held that schools have a high duty of care towards students and negligent failure to alert them of their legal rights while taking on a law enforcement role poses a potential conflict of interest.³⁷ This trend in policing in NSW is based on the premise of political and legislative 'moral panic' to give people in the community the notion that the police are making our streets and schools safer. More laws are enacted that give the police more powers to use them quite often in working class communities. Police intervention into the public school system is

³² Neil R, 'Teaching Law and Order: Criminal Justice and Schools in NSW', (2000) 6 (1) *AJHR*, p 255.

³³ Note 32.

³⁴ Note 32.

³⁵ See the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* No. 38.

³⁶ Note 32, p. 263.

³⁷ Note 32. In 1998 the government legislated to increase police powers and section 11c of the *Summary Offences Act 1988* (NSW) was added to make it an offence for a person to possess a knife in a public place or school without a reasonable excuse. Under s 28 a police officer has the power to search for knives or other dangerous implements if they have reasonable grounds to suspect that a person may be carrying such an implement. Under s 28A(1)(d) the police have the power to search lockers at school and any bag or personal effect in the locker. Under s 28A(2)(d) a student may, where reasonable possibly to do so, nominate an adult who is on the school premises to be present during the search. Naturally it is an offence to fail to comply with the search under s 28A(7).

an approach of a zero tolerance criminal justice policy and criminalisation of the school environment.

Another undisputed fact is that the criminogenic conditions in Australia are invariably different from many American jurisdictions. Therefore, it is critical that these fundamental conditions be examined because they are central to the issues of zero tolerance policing in Australia. Fundamentally, for example, one such crucial difference is that at its peak in 1992 New York's homicide rate was fifteen times higher than Australia.³⁸ Secondly, the demographic and economic circumstances also differ quite significantly.³⁹ A combination of these two factors inevitably affects the varying conditions and the policing of street crime in Australia. Even for the policing of public order offences in Australia as is the case in the United States, there are limits to the degree which there should be the strict enforcement of petty street crime.⁴⁰ Policing is a very complex undertaking and the strict enforcement of petty street crime is but one set of tools that is available for the policing of public order crime.⁴¹

Why Australia should not shift to zero tolerance style of policing?

Attempts to adopt the policing tactics similar to the New York City Police Department (NYPD) zero tolerance style of policing in Australian jurisdictions will be counterproductive. Why choose this style of zero tolerance policing in Australia when there are other equally effective policing methods that are available to the police? Obviously, the trend to experiment with zero tolerance policing methods in Australia is designed to apply more punitive measures for petty street offences. However, the fact is that the Royal Commission into Aboriginal Deaths in Custody (RCIADC) have argued strongly against the use of the criminal justice system to control minor offences by indigenous people.⁴² Further, zero tolerance policing is contrary to the recommendations of the Royal Commission which advocate the following:

³⁸Grabosky, note 6, p 2.

³⁹ Grabosky, note 6, p 3.

⁴⁰ See note 8 sections of the *Summary Offences Act 1998* (NSW) for Offences in Public Places. One can make the argument that in NSW we already have a degree of zero tolerance deeply embedded in the legislation itself. Further, the policing of these offences is already a form of zero tolerance policing in the state.

⁴¹ Grabosky, note 6, p 2.

⁴² Grabosky, note 6, p2.

- Indigenous self-determination (recommendation 188);
- Community policing (recommendation 88, 214, 215 and 220);
- Non-arrest for trivial offences (recommendation 86);
- Alternatives to arrest for juveniles (recommendation 62, 239-242);
- Diversion from police custody for public drunkenness (recommendations 79-85).⁴³

Zero tolerance policing is resource intensive and pro-active and this may increase the level of public disorder which will destroy policing based on community consent, trust and participation.⁴⁴ Similar to the situation in New York City, it is the indigenous people and other ethnic minorities in Australia who mostly will suffer the consequences of this style of policing. Inevitably, it is always certain groups of people who will 'cop it sweet' if zero tolerance policing becomes an integral aspect of policing urban and rural crime in Australia.⁴⁵ Issues of policing urban and rural Australia is in the context that policing itself is inseparable from the spatial, demographic and socioeconomic conditions in particular areas like Aboriginal communities.⁴⁶ Strong arm tactics employed as a result of zero tolerance policing will further alienate some people from the police who are already treated with suspicion when policing those communities.

Heavy-handed law enforcement can destroy the legitimacy of the police, making their job difficult if not impossible.⁴⁷ Strict enforcement required in the policing of public order offences as a result of zero tolerance policing will affect other community policing efforts in many Australian jurisdictions. Mutual trust is an essential aspect of community policing universally and it is no different in Australian jurisdictions as it is in New York City. A relationship of trust between the police and the public is essential for effective law

⁴³Cunneen C DR, 'Zero Tolerance Policing: Implications for Indigenous People' (1999) 4 (3) *AILR*, p 115. These recommendations mentioned in the article are part of the report prepared by Dr. Chris Cunneen of Sydney University's Institute of Criminology in 1998 for ATSIIC. See the text of the full report at <www.atsic.gov.au/ztp/ztpintro.htm> for more details.

⁴⁴ Note 43.

⁴⁵ The term 'cop it sweet' denotes the same meaning defined in note 9.

⁴⁶ Cunneen, note 14, p 132.

⁴⁷ Grabosky, note 6, p 3.

enforcement.⁴⁸ Emerging empirical evidence point to the fact that the less respectful the police are towards suspects and citizens, generally the less people will be inclined to comply with the law.⁴⁹ As a consequence of this, zero tolerance results in a lower level of trust between the police and members of the community. Once trust is reduced as a direct or indirect consequence of zero tolerance policing, policing urban and rural street crime becomes more complex.

Factually, the current overrepresentation of indigenous Australians in the criminal justice system has been widely noted.⁵⁰ At present, the Northern Territory imprisons four times as many of its citizens than any other state.⁵¹ Policies of strict enforcement for public order offences would result in an even greater over-representation of this group, which could have political ramifications.⁵² More importantly, this could lead to more deaths in custody and further alienation of indigenous people already marginalised economically, politically and socially in their communities. The mandatory 'zero tolerance' for property offences and subsequent sentencing laws enacted in the past few years in the Northern Territory have already led to the death of an indigenous juvenile in custody. Logically, is it not true that socioeconomic poverty is the real crime for Aboriginal people in the jurisdiction of the Northern Territory?

While policing petty offences with the use of zero tolerance tactics the police will inevitably apprehend some offenders for other crimes. More specifically, on a percentage basis relative to the general population, the number of these offenders will be smaller in number than the police would like us to believe.⁵³ Zero tolerance policing will destroy community relations, which are essential for effective and efficient policing in a multicultural Australia.⁵⁴ A recent review of the implementation of the early stages of the *Young Offenders Act* which

⁴⁸ Grabosky, note 6, p3.

⁴⁹ Grabosky, note 6, p3.

⁵⁰ Grabosky, note 6, p3. Since zero tolerance policing is resource intensive, it requires either increased police numbers or the allocation of existing resources away from other areas of law enforcement. Thus, zero tolerance policing strategies are seen as invariable short term and expensive as Dr. Chris Cunneen mentions in his report to ATSIC cited at n 43.

⁵¹ Pritchard S 'Mandatory Sentencing: Rights and Wrongs' 2000/2001 *Summer Bar News* (NSW), p 17.

⁵² Grabosky, note 6, p 3.

⁵³The Redfern raid on the Aboriginal community in Sydney is a good example that illustrates this criminological fallacy.

⁵⁴Chan, note 24, p 181.

began in April 1998 and is designed to keep young people out of court and detention have raised a number of serious questions in relation to the diversion rates for young indigenous people.⁵⁵ Recently, 34 percent of the 320 children in NSW juvenile detention centres were Aboriginal, who make up less than two percent of the population.⁵⁶ Across Australia, Aborigines account for 37 per cent off all the juvenile detainees and 52 per cent of the girls in detention. Mandatory sentencing in the Northern Territory has had a severe impact upon Aboriginal women with an increase of 485 per cent in their imprisonment rate since the law was introduced.⁵⁷

When zero tolerance policing is zero

In the New South Wales policing context the term ‘zero tolerance’ should be viewed as no more than a simple catchy product name with little resemblance to its New York City cousin.⁵⁸ Simply, the question that everyone wants to know the answer to is: to what extent is the New York City experiment in zero tolerance policing miracle impacting on the policing of public order offences in NSW? Globally, there is no doubt that urban crime rates have increased and Sydney is no exception to this rising trend. In recent years, policing operations have become more focused on chasing and catching criminals with large scale, tightly scripted, high profile police operations addressing street violence and disorder more prevalent than they have been for years.⁵⁹ Cabramatta, Canterbury, Bankstown and Central Sydney are all areas that need more police resources to combat the rising crime wave in recent years.

Have any aspects of zero tolerance policing had an impact in the fight against street crime in these areas where particular spatial street conditions exists? Yes, the NSW police have readily adopted some elements of zero tolerance policing, such as tactical deployment of police using the latest crime mapping technology, high profile saturation style activities and increased level of accountability of

⁵⁵ *Sydney Morning Herald*, 11 September 2000. Senior Children’s Magistrate Mr. Roger Dive said arrest should be a last resort for the police, who have alternatives to imprisonment under *the Young Offenders Act*. These include cautions, warnings or sending juveniles to conferences where they meet their victims.

⁵⁶ Note 55.

⁵⁷ Note 51, p 18.

⁵⁸ Darcy D ‘Zero Tolerance- Not Quite the Influence on NSW Policing Scheme Some Would Have You Believe’, (1999) 10 (3) *Current Issues in Criminal Justice*, p 290.

⁵⁹ Note 58.

supervisors and managers.⁶⁰ Arguably, there has to be a reassessment of some of these policing strategies because of the different crime variables in the Australian context discussed previously. These varying crime conditions between New York City and Sydney should not be ignored because they are essential for any further attempts to adopt zero tolerance policing strategies.

Another crucial street level variable in contrast to New York City is the fact that in the early 1990s the police there were dealing with a highly criminalised heavily armed population.⁶¹ Two distinct benefits resulted from zero tolerance policing that drastically affected the incidence of gun related homicide in New York City. Firstly, the searching of suspects for minor offences allowed the police to deal with crime both preventively (detering the carrying of guns) and directly (taking guns of the streets) and locking people up subject to criminal justice controls.⁶² Such police activity in Australia would have very little impact on the rate of homicide or incidence of shootings in various Australian jurisdictions because people rarely carry concealed weapons here.⁶³

Many Australian jurisdictions including NSW have numerous people who commit public order offences that zero tolerance policing is designed to target. They include perceived teenage troublemakers, persistent beggars, the drunk and disorderly and others who commit a series of relatively minor incivilities and social disorder. Since the police have wide discretionary powers in Australia, it is always questionable as to how far should police discretion be applied in dealing with these relatively minor offences? What are the unintended consequences of broad police discretion? Central to the issues of zero tolerance policing is to what extent does police discretion become overpolicing? Don Weatherburn, Director of NSW Bureau of Crime

⁶⁰ Note 58.

⁶¹Dixon D, (Radio National Transcripts.) *The Law Report*, 'Policing Strategies, Policing on the ground', Tuesday, 25, August 1998 at p 1. As Associate Professor David Dixon, Faculty of Law UNSW indicated in the interview that the drop is quite significant and it is likely for people to say that the police themselves are responsible for it. However, he further indicated that clearly the police have certainly had some impact on the crime rate but zero tolerance policing was only one of a variety of strategies that affected the drastic drop in crime.

⁶² Note 61.

⁶³ Note 61.

Statistics questions whether or not the policing of minor offences in NSW will turn up many serious offenders.⁶⁴

Don argues that we should keep an open mind as to what might result from cracking down on offences like fare evasion, speeding or drink driving, if you make it a policy to check for outstanding warrants at the same time.⁶⁵ In Australia there is another fundamental difference with the nature of the criminal law offences compared with the ones in New York City. The sixty thousand warrants in NSW involve people with warrants out for car theft, breaking and entering, robbery and assault.⁶⁶ Some people have argued that zero tolerance policing measures for common law and statute based petty offences in Australia must be carried out in tightly controlled ways so that abuses as a result of overpolicing do not occur.⁶⁷ Hard-nosed type policing measures in some instances could generate more crime in certain jurisdictions and create resentment within the community against such activities.

Public order policing of street offences in Australia is conducted aggressively enough against drunkenness not to reduce the amount of alcohol consumption in the community but to get Aboriginal people off the streets.⁶⁸ As a society we need to critically examine the socioeconomic variables which result in the high rate of public drunkenness among the Aboriginal population in some Australian jurisdictions. Since crime in Australia is not as epidemic as it is in New York City effective policing requires a range of responses for dealing with urban and rural disorder. The policing of public order in Aboriginal communities have already been assertive enough given the wide discretionary power the police already possess.

⁶⁴ Note 61. For the record there are approximately sixty thousand people in NSW with outstanding warrants according to the NSW Bureau of Crime Statistics.

⁶⁵ Note 61. In NSW, there is an unqualified power to arrest for any reason. There are powers to stop and search in the *Crimes Act; Summary Offences Act* (1988) and the *Drug Misuse and Trafficking Act*. There is the power to demand the name and the address of every citizen and to move them on, giving the NSW Police a wide range of legal authority in the policing of public order.

⁶⁶ Note 61. NSW Bureau of Crime Statistics.

⁶⁷ Note 61. Arguably, this is the crux of the issue prevalent in this criminological policing fallacy because the level of evidence of police abuse by the NYPD at the height of the zero tolerance campaign was simply extraordinary.

⁶⁸ Note 61. Zero tolerance involves the use of the criminal law as a primary tool in dealing with disorderly behaviour of people who may be intoxicated, homeless, or mentally ill. Zero tolerance, when applied to Aboriginal communities was an abject failure. These preceding comments are extracts from Nyman; T. article 'Forget Zero Tolerance' cited in note 71 at p 61.

What are the alternatives to zero tolerance policing?

More suitable avenues for dealing with crime and disorder in Australia include working with community groups and agencies in addressing crime problems in particular communities.⁶⁹ Law enforcement in Australia should combine alternative policing measures which encompasses community policing and problem oriented policing. The success in crime rates as a result of these preceding policing methods is similar to zero tolerance policing with much less cost to the community. Dr. David Brereton summarises the pitfalls of zero tolerance policing by arguing that the aggressive language and style associated with the NYPD model carries with it the dangers of increased conflict with sections of the community ‘corner cutting’ and over zealotry on the part of the police.⁷⁰

Clearly, the one initiative that has received more exposure than it deserves is zero tolerance policing as part of the policing strategy for NSW in the future.⁷¹ Zero tolerance policing literally means that the police fully enforce the criminal law and discretion is eliminated from policing.⁷² Naturally, the shortcoming of this policing strategy means that there will be less effort on various other forms of community policing policies in jurisdictions with higher crime rates. Empirical evidence is consistent with the fact that the mandatory sentencing laws for property offences in the Northern Territory which came into effect on Tuesday 8, March 1997 effectively eliminates the focus on community policing efforts within Aboriginal communities.

Amendments to the *Sentencing Act* 1995 (NT) and the *Juvenile Justice Act*, 1993 (NT) commenced a regime of mandatory imprisonment for a range of property offences, including theft, criminal damage, unlawful entry, unlawful use of a motor vehicle, robbery and receiving stolen

⁶⁹Brereton D Dr, “Zero Tolerance and the NYPD Has it worked there and will it work here?” paper presented to *AIC Conference*; Canberra, 22-23 March 1999, p12. Dr. Brereton is the Director, Research and Prevention Queensland Criminal Justice Commission. His arguments on zero tolerance policing are his own and not those of the Queensland Criminal Justice Commission.

⁷⁰Note 69. As Dr. Brereton so eloquently states in his article that the strong crime reduction focus can have dysfunctional consequences for an organisation’s management process, for example, by putting pressure on police managers to manipulate crime data in order to make the crime figures look good. See note 16 on manipulation of crime statistics.

⁷¹Nyman T, ‘Forget Zero Tolerance’ (1999), *July Law Society Journal*, p 60.

⁷²Note 71.

property.⁷³ Clearly, the causes of crime may vary depending on the local socioeconomic conditions. The level of poverty in the Northern Territory is inseparable from the socioeconomic variables and the link to criminalisation in Aboriginal communities. Is locking an Aboriginal youth up for a year for stealing a packet of biscuits really achieving justice?⁷⁴ Some offenders are hard cases with pages of prior convictions, who need to be kept off the street. Others, however, are just kids from shocking backgrounds, reacting against problems in their lives.⁷⁵

The central principle of any sentencing system is proportionality; that the punishment reflects the relative seriousness of the crime.⁷⁶ Various criminal law offences have their origins in a system of greed including corporate crime and others in youthful rebellion. Crimes not subject to the Northern Territory's mandatory sentencing regime include obtaining credit by deception.⁷⁷ False statements of officers of corporations and false accounting are offences that do not result in mandatory imprisonment terms but stealing a packet of biscuits and a soft drink does.⁷⁸ A mandatory sentencing law and criminal justice policy aimed at the removal of judicial discretion is an unacceptable, unjust draconian law and bad public policy. Logically, it would be better criminal justice policy to focus on measures for addressing socioeconomic marginalisation, the discriminatory approach to law enforcement and the lack of adequate diversionary programs in the Northern Territory.⁷⁹

Diversionary processes under the *Young Offenders Act 1997* (NSW) should be pursued in the Northern Territory to deal with young offenders in the least restrictive way as possibly in the circumstances.⁸⁰ Section 5 of the *Northern Territory Sentencing Act* incorporates traditional sentencing practice by requiring the court to consider a number of factors in imposing a sentencing: the need for punishment, the prospect of rehabilitation, and the need for

⁷³Gibson D, (2000) 25 (3) 'Mandatory Madness: The True Story of the Northern Territory's Mandatory Sentencing Laws' *Alternative Law Journal*, p 103.

⁷⁴ Gibson, note 73, p 106.

⁷⁵ Gibson, note 73.

⁷⁶ Gibson, note 73.

⁷⁷ See s.63 *Summary Offences Act 1996*.

⁷⁸ See s. 234 *Criminal Code Act 1983* and s. 233 *Criminal Code Act 1983* for corporate offences.

⁷⁹ Note 51, p 18.

⁸⁰ Gibson, note 73, p 107. See s.34 (1) (ii) and s.7 (e) of the *Young Offenders Act 1997* (NSW).

deterrence.⁸¹ Mandatory sentencing ignores an important component of the sentencing equation which is the prospect for rehabilitation.⁸² Naturally, the prospect of a jail sentence offers limited opportunity for rehabilitation in the absence of sufficient diversionary schemes for indigenous offenders. In the case of Aboriginal offenders, arbitrariness is particularly manifested because mandatory sentencing laws prevents courts taking account of the cultural background and responsibility of offenders, and the economic and social difficulties often associated with Aboriginality.⁸³

Governments, for all their huffing and puffing, have generally respected the dividing line that separates legislative will and judicial independence; but not in the Northern Territory.⁸⁴ Mandatory sentencing in the Northern Territory targets property offences, which indigenous Australians are more likely to commit. These property offences are inseparable from the socioeconomic conditions and the history of criminalisation in underclass indigenous communities. Certainly, as Associate Professor David Dixon reiterated at a criminology conference, “In Australia property offences are serious but not on the same scale as New York City.”⁸⁵ Dr. Brereton pointed out that the NYPD model of zero tolerance differs from traditional reactive policing mainly in an organisational sense and in the use of intelligence. Traditional reactive policing is not to focus on specific goals but on responding to and managing workload demands. The NYPD model, however, does not fit comfortably into the community policing model which NSW and other modern police forces sometimes prefer.⁸⁶

A choice between zero tolerance policing and traditional methods of reactive policing is inconsistent with the thesis that the better use of police resources yield the same results as military style tactics. The

⁸¹ Gibson, note 73, p 106. In 1990, the Human Rights Committee confirmed in the case of *Van Alphen v the Netherlands* that arbitrariness must be interpreted broadly to include inappropriateness, injustice and lack of predicability. Firstly, mandatory sentencing is arbitrary because it allows no differentiation between serious and minor offending. Secondly, it allows no differentiation between those for who offending is out of character and those who display elements of recidivism. Thirdly, mandatory sentencing does not allow courts to sentence individuals according to the circumstances of the particular case and offender. See n 51 for detailed discussion.

⁸² Gibson, note 73, p 106.

⁸³ Note 51, p 17.

⁸⁴ Gibson, note 73, p 103.

⁸⁵ Dixon D, note 61.

⁸⁶ Brereton, note 69.

latter choice of zero tolerance policing was reinforced and resulted in shooting of David Gundy in Redfern.⁸⁷ Later, the disbandment of the Special Weapons Operations Squad (NSW) is the readily identifiable 'zero tolerance policing price' and the government acknowledgment that this style of policing was alien to Australian police public relations.⁸⁸

In 1996, 72 per cent of all adult court appearances for public order offences involve Aboriginal people in the Northern Territory.⁸⁹ There is no question that in recent years the Northern Territory Chief Minister has been a very strong supporter of zero tolerance policing. The likely impact if public drunkenness is recriminalised in the Northern Territory is evident when at present 90 per cent of all the people placed in police 'protective custody' for public drunkenness are indigenous people.⁹⁰ Aboriginal people already comprise 81 per cent of the people sentenced to imprisonment in the Northern Territory.⁹¹ Zero tolerance policing will clearly have a discriminatory impact, further exacerbating indigenous over-representation in the prison system.⁹²

Conclusion

The adaptation of the 'broken windows' thesis⁹³ incorporated into zero tolerance policing methods, tactics, and strategies is at the pinnacle of a doomed policing policy. Irrespective of the short-term benefits in the sharp reduction of crime rates zero tolerance policing has yielded in New York City, serious consequences resulted from this style of overpolicing. Critics have queried the claims which have been made about the effectiveness of the approach adopted by the NYPD, questioned its applicability to societies like Australia and argued that this style of policing is discriminatory, leads to police citizen conflict and is unsustainable in the long term.⁹⁴

⁸⁷ Nyman, note 71, p 60.

⁸⁸ Nyman, note 71.

⁸⁹ Note 43, p 116.

⁹⁰ Note 43, p 116.

⁹¹ Note 43, p 116.

⁹² Note 43, p116.

⁹³ See explanation of thesis at note 1.

⁹⁴ Brereton, note 69, p 1. Brereton D Dr, (Pollard, 1998, Dixon, 1998, Wadham, 1998) as cited in 'Zero Tolerance and the NYPD. Has it worked there and will it work here?'

In the process of reconciliation with indigenous peoples, Australia should not adopt zero tolerance policing as an integral part of its policing services. People should be careful not to get caught up in this policing fallacy which has a populist appeal perpetuated in the media and in some political circles.⁹⁵ As Dr. Chris Cunneen, Associate Professor, University of Sydney stated; “The experience of zero tolerance policing in New York City shows that these issues and arguments are matters of very real concern and they go to the heart of the nature of the relationship between the police and social and political communities which are subjects of policing.”⁹⁶ Before Australia starts adopting more NYPD zero tolerance policing policies, we need to thoroughly re-examine and reassess public discourse to deconstruct populist right wing notions about zero tolerance policing itself.

It is easy to see why some people get caught up in the hysteria of NYPD ‘quick fix crime miracle’ solutions or the ‘criminological policing fallacy’ the label the author prefers to attach to zero tolerance policing. Zero tolerance policing initiatives should be evaluated in terms of their long term impact on persons arrested and on society as a whole bearing in mind the short term effects on the incidence of crime in Australia.⁹⁷ Public discourse on criminal law issues in Australia must consider all of the pros and cons about zero tolerance policing because the ideals of democracy demand that we do so. Certainly, the legislators in the Northern Territory were not thinking about the outcome of the draconian mandatory sentencing laws that they were enacting and the dangers the laws pose to the fabric of democratic societies.⁹⁸ Zero tolerance policing will only lead to a further loss of cooperation in indigenous communities as the history of Aboriginal police relations has shown.

Finally, the current government in Canberra does not have the political will to use constitutional means to overturn the draconian mandatory

⁹⁵ It is guaranteed that in the upcoming Federal election to be held later this year that law and order will be on the political agenda once again. During the recent state election while campaigning in Queensland liberal opposition leader Rob Borbidge was talking about the tougher zero tolerance laws he would pass if elected to the office as premier. Now that he has retired from politics after one of the most crushing defeats in Queensland electoral history, there is an enormous amount of time for him to reflect on the get tough approach to law and order in Queensland jurisdictions.

⁹⁶ Cunneen C Dr, ‘Zero Tolerance Policing and the Experience of New York City’ (1999) 10 (3) *Current Issues in Criminal Justice*, p 312.

⁹⁷ Grabosky, note 6, p 4.

⁹⁸ See the *Sentencing Amendment Act No (2) (1996) (NT)* and the *Juvenile Justice Amendment Act No (2) (1996) (NT)*.

sentencing laws in the Northern Territory. The primary objective of policing should continue to be preventative, followed by detection and punishment.⁹⁹ The police are not an insulated, self-contained group, but members of and accountable to the society in which they serve. In summary, zero tolerance policing avoids one critical fundamental form of police accountability which is communal accountability.

The Greek Philosopher Socrates once said, “ The true champion of justice if he intends to survive even for a short time must necessarily confine himself to private life and leave politics alone.”¹⁰⁰ Socrates would have been very disappointed that ‘law and order’ politicians are thinking about enacting and amending more draconian laws for the policing of public order offences in Australia.¹⁰¹

⁹⁹ Hazlehurst K, ‘Widening the Middle Ground: The Development of Community Based Options’ in Hazlehurst K (ed), *Ivory Scales: Black Australia and the Law*, NSW University Press, Sydney, 1987, 249.

¹⁰⁰ ‘The Apology’, in Plato, *the Last Days of Socrates* at p 56.

¹⁰¹ In the past few years in NSW we have seen the introduction of *Crimes Legislation Amendment, Police and Public Safety Act* (1998), amendments to the *Crimes Act and Summary Offences Act* (1988) (otherwise known as the knife laws), as well as to the *Children Protection and Parental Responsibilities Act*, (1997), and the *Young Offenders Act* (1997). There has also been an increase in private security guards patrolling public spaces. The new search powers under s. 28 A (3) of the *Summary Offences Act*(1988) allows the police to stop and search merely because of a person’s presence in an “area of high incidence of crime” and is drawn so widely as to be arbitrary in practice. See a more detailed discussion by Campbell, S. *Law Society Journal* November 1999 at p 1.