Coward punchers: shamed and deterred by 'one punch' laws?

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ABSTRACT

If the aim of the criminal justice system is to achieve and maintain crime reduction, then it is imperative that the objects of the law and punishments enforced by the legal system do not undermine this purpose. This critical essay will analyse Section 25A and Section 25B of the *Crimes Act 1900* (NSW), colloquially known as the 'one punch' legislation, through the foci of social control theory, reintegrative shaming theory, and labelling theory. The analysis considers the political and media discourse that accompanied the introduction of this legislation and how this may be understood through criminological theory. It has been more than ten years since the first 'one punch' laws were passed in Australia, led by Western Australia. While this essay focuses specifically on the New South Wales legislation, which was passed in 2014, the length of time since the introduction of these laws presents opportunities for a retrospective on whether enacting 'one punch legislation' is an effective alternative to utilising existing manslaughter laws.

Keywords: Crimes Act, One Punch, Manslaughter, Legislation

INTRODUCTION

This critical essay considers Section 25A and Section 25B of the *Crimes Act 1900* (NSW), with respect to social control theory, reintegrative shaming theory, and labelling theory. Sections 25A and 25B of the *Crimes Act 1900* (NSW) are colloquially referred to as the 'one punch' legislation. First, this essay outlines Sections 25A and 25B of the *Crimes Act 1900* (NSW), and the historical context that led to the establishment of mandatory sentencing for 'one punch' assaults. The legislation is then analysed through the foci of social control theory, reintegrative shaming theory, and labelling theory. We conclude that the very public and rapid passing of the legislation, concomitant to the political and media discourse that occurred contextually, was as much a political and public statement as it was a legal one to create social control.

A major means by which the criminal justice system strives to achieve social control is through establishing and enforcing legislation. In the context of this essay, social control theory will be considered with the definition formulated by Akers (1973), as social conformity to the desired standard of behaviour through the formation of a punishment that reduces deviance and encourages conformity.

The enactment and implementation of any legislated criminal law may arguably be considered a form of social control by government. However, the combination of Section 25A and Section 25B of the *Crimes Act 1900* (NSW) is highly prescriptive in the type of offence it seeks to control by operation of Section 25A, and the removal of judicial discretion by mandatory sentencing indicates a definitive level of social control by the legislature under Section 25B.

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THE ‘ONE PUNCH’ LEGISLATION

There are two key sections within the *Crimes Act 1900* (NSW) relevant to mandatory sentencing for ‘one punch’ assaults: Section 25A and Section 25B. Section 25A creates the offence of assault causing death, and Section 25B relates specifically to assault causing death when the defendant is intoxicated, and dictates the mandatory minimum sentence for this offence. Section 25A of the *Crimes Act 1900* (NSW) defines the *actus reus* or physical element of assault causing death as the act of assaulting someone, without lawful exemption, by hitting the victim with an object or any body part, causing death, regardless of whether the death was caused directly by the assault or indirectly by subsequently hitting the ground or an object, and even if the death was not reasonably foreseeable.

The *mens rea* or mental fault element for assault causing death is intention to commit assault (Anderson, 2016). Intention may be defined as per Brennan J, *He Kaw Teh v R* (1985)157 CLR 523 who, at 211- 213 referred to intention as, “…a decision implies a desire or wish to do such an act or to bring about such a result…Intent, in another form, connotes knowledge.” While the onus of proof of intention rests with the prosecution, the scope of intention is determined by the court. When the defendant has a cognitive impairment, or was intoxicated but the intoxication was not self-induced, the Section 25A mental fault thresholds are not met. If intoxication was self-induced, there is a mandatory minimum penalty for this offence. The minimum sentence for assault causing death when the defendant is intoxicated (self-induced) is imprisonment for eight years, with no opportunity for parole for at least eight years, as per the *Crimes Act 1900* (NSW).

The ‘one punch’ legislation and mandatory minimum sentencing for assault causing death while intoxicated were introduced as a response to the cultural phenomenon of alcohol-induced violence that was brought to the public’s attention in 2014/2015 (Schreiber et al., 2016), particularly following the cases of *R v Loveridge* [2014] NSWCCA 120 and *R v McNeil* (No. 4) [2015] NSWSC 1198. In the case of *R v Loveridge*, the defendant randomly targeted alcohol-related assaults towards five victims. One of the victims, Thomas Kelly, was taken to hospital with life-threatening brain injuries, and was later taken off life support and pronounced deceased on 9 July 2012, two days after the incident. The defendant plead guilty to four counts of assault and one count of manslaughter and was originally given a sentence of seven years and two months imprisonment with a non-parole period of five years and two months. The Crown appealed against the Judge’s original sentence on several grounds. Notably, the Crown felt that his Honour’s sentence did not adequately reflect the importance of general deterrence in the sentencing of alcohol-related assaults. Moreover, the appeal echoed the Australian public’s response to the original sentence as too lenient (Flynn, Halsey & Lee, 2016). The appeal was successful, and the original sentence was substituted with a new sentence of 13 years and eight months imprisonment with a non-parole period of ten years and two months.

In a similar case, *R v McNeil* (No. 4) [2015] NSWSC 1198, the defendant Shaun McNeil randomly targeted a one-punch attack on Daniel Christie while McNeil was intoxicated, resulting in Christie hitting his head on the pavement and ultimately leading to fatal head injuries. Daniel Christie’s life support was turned off 11 days after the attack, on 11 January 2014. The defendant also assaulted Daniel Christie’s brother Peter, and another young person, JF. As a result, McNeil was sentenced to ten years imprisonment with a non-parole period of seven years and six months. One-punch attacks such as these became noticeably frequent in Australian society (Schreiber et al., 2016) and received extensive media coverage (Flynn et al.,

2016). As a result, the Australian public advocated for mandatory minimum sentencing to be introduced for this offence as a strategy of general deterrence (Flynn et al., 2016). Quilter notes that the "one punch" legislation was announced on 21 January 2014. Just over one week later, on 30 January 2014, without any known public consultation, the Premier read the relevant bill for the second time in parliament and the bills were passed by both houses without substantial amendment and a day after they were introduced. The *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* received Royal assent and commenced operation on 31 January 2014 (Quilter, 2014). This legislation coincided with the introduction of the 'lockout' restrictions limited to the Kings Cross and CBD precincts of Sydney. Statistical analysis from BOSCAR indicates that overall assaults declined in the 'lockout' target areas during the relevant periods of the lockout and rose in the 'non-lockout' Sydney Star Casino area by approximately two assaults per month during the same period (Menendez et al 2020).

Notwithstanding the public outrage generated by the incidence of 'one punch' attacks and the legislation created in response, it has been little utilised since being passed into law. One punch attacks in NSW where the victim survives are usually dealt with under the law of grievous bodily harm (*R v Jerome Saffey* [2019] NSWDC137) or may be dealt with under manslaughter or s.18(1) murder elements (*Grogan v R* [2016] NSW CCA168). The requirements of Section 25A and Section 25B are so specific that the factual scenario must fit precisely to be confident a charge may be accurately prosecuted.

MANDATORY SENTENCING

Mandatory minimum sentencing is debatably a controversial strategy to be adopted by the Australian criminal justice system. While it appeals to the punitive 'tough on crime' position of the public (Frost, 2006) and may act as a general deterrent for alcohol-fuelled violence (Schreiber et al., 2016), mandatory minimum sentences do not allow for any judicial discretion to be applied in sentencing considerations (Cassel & Luna, 2011). As Gray (2017) points out, many countries have increased their adoption of mandatory sentencing to promote punishments that are 'tough on crime', align with the perspectives of the public, and reduce arbitrary sentencing by bypassing judicial discretion. However, such a strategy can actually encourage greater arbitrariness in sentencing by undermining the traditional judicial process of delivering a sentence that is proportional and based upon the unique circumstances of a case (Gray, 2017). Because of this 'one size fits all' approach, contextual factors are not considered in sentencing decisions, the sentence is not individualised to the defendant, and the sentence delivered may be disproportionate or inappropriate (Cassel & Luna, 2011). The NSW Supreme Court acknowledged this as early as 17 December 2014 before the new legislation passed in the decision of *R v Field* [2014] NSWSC 1797, "It is no longer appropriate for this Court to regard one punch or single punch cases of manslaughter as constituting a single class of offence since the objective seriousness of each case may vary widely. It is essential that the particular case under consideration is the focus". It may be argued that mandatory minimum sentencing for alcohol-fuelled assaults can be inappropriate in some circumstances, particularly due to its implications for reintegration and restorative justice. Due to the complex and controversial nature of adopting a mandatory sentencing strategy, and the discourse that surrounded it contextually, it is important to assess the legislation and the milieu in which it was enacted through criminological perspectives.

THEORETICAL APPROACHES

Braithwaite's theory of reintegrative shaming proposes that social control can be achieved by shaming the offence performed by a defendant (Braithwaite, 1989). An integral feature of reintegrative shaming is that while it exhibits social disapproval for the offence, it does not cast shame upon the defendant. Rather, the defendant is shown forgiveness by society such that they may be reintegrated into their community, in line with a restorative justice approach (Braithwaite, 1989). Braithwaite provides extensive support for his position that shame acts as a deterrent. He references a study conducted by Schwartz and Orleans (1967), which found support for the notion that social control is successful not because of the penalties of an offence, but rather the moral reasoning that underlies the punishment. He contends that this is the result of the importance placed on the opinion of others and maintaining one's positive reputation (Braithewaite, 1989 citing Schwartz & Orleans, 1967). Fitch et al. (2018) have conducted one of the few longitudinal studies on reintegrative shaming theory, albeit in the context of non-predatory offending, nationally in the US. They found, "Overall, peer shame acknowledgement at age 18–21 was a significant predictor of no non-predatory offending at ages 21–27" (p. 361). In the Canberra Reintegrative Shaming Experiments (RISE), Tyler, Sherman, Strang and Woods (2000) found that, "diversionary conferencing resulted in a significant decrease in the reoffending rates of violent offenders. Diversionary conferencing reduced reoffending by approximately 38 crimes per 100 offenders per year." The study noted that serious violent offences were excluded from the experiment (Youth.gov.au, unknown, p. 1). Braithwaite (1989) also notes that it is important to differentiate reintegrative shaming from stigmatisation or disintegrative shaming. The latter involves shaming the individual, and ultimately leads to the individual's ostracism from society.

Arguably, the establishment of and support for mandatory minimum sentencing for alcohol-induced assault causing death represents the Australian public's condemnation and criminal justice system shaming of 'one-punch' assaults. Thus, mandatory sentencing can act as a strong general and specific deterrent. But it can be equally contended that these laws being enacted alongside the political and public discourse that surrounded them contextually may have instead resulted in unproductive, disintegrative shaming. This may be symbolised by the change in the discourse of 'one-punch' assaults, as politicians and the media alike replaced the colloquially termed 'king hit' with 'coward's punch' to alter how these assaults were viewed by the public, aligning them with cowardice rather than dominance (Schreiber et al., 2016). This is exemplified in retired boxer Danny Green's online "Stop the Coward's Punch" campaign (Green, n.d.). When considered in isolation this may be viewed as a positive societal shift, but an issue arises when one considers the unintended negative consequences that can occur as a result of labelling the offender.

Labelling theory is a criminological theory that proposes that defendants who are labelled by their community have an increased likelihood of reoffending (Braithwaite, 1989). From the perspective of labelling theory, punishments that result in negative labels being ascribed to defendants will be counterproductive in achieving crime reduction. Being labelled as deviant has damaging implications for individuals, as they may take on the identity that the label represents, ultimately 'creating' deviance rather than abolishing it. Thus, the label ultimately becomes a 'self-fulfilling prophecy', resulting in heightened recidivism among these defendants (Braithwaite, 1989). Labelling damages the reputation of individuals in their society and results in feelings of judgement, isolation, and separation from the community, damaging a defendant's community connections, self-esteem, and regard for society (Braithwaite, 1989). More recent studies have established that in youth, labelling reduces the likelihood of self-

evaluation (Kroska et al., 2017, p. 86). In this way, while punitive measures can have positive implications for general deterrence in the short-term, they may ultimately undermine social reintegration and restorative justice. Furthermore, when labelling occurs alongside a mandatory sentence that lacks consideration for individual circumstances such as age, the number of previous offences and likely response to rehabilitation, it has the potential to impede the ability of offenders to be positively reintegrated into their society. This is exacerbated by the challenges offenders already face when attempting to re-join their community after a period of imprisonment. As it is young men who are most likely to commit alcohol-fuelled assaults (Donnelly, 2018), greater consideration should be made as to how offenders will be able to re-engage with society after they have been punished for their offence.

It is important to consider the purpose of punishment. Reitan (1996) contests that the chief justification of punishment is its role in reintegrating defendants into their society. This is contextualised by reintegration theory. From a reintegrative perspective, it can be argued that the labelling that ensued following the extension of Section 25A to include Section 25B of the *Crimes Act 1900* (NSW), in conjunction with the political and public discourse surrounding the crimes, may have been counterproductive in reintegrating individuals into their society, and thus not adequate in achieving the key purpose of punishment. The labels ascribed to 'coward's punch' defendants could have significant negative implications through encouraging social rejection and disintegration, which, as discussed by Braithwaite (1989), begets further crime. It is essential that general deterrence is achieved through the punishments that are introduced in Australian society, but it cannot be at the expense of restorative justice and specific deterrence.

CONCLUSION

The mandatory sentencing laws and the renaming of the 'one punch' offence in the vernacular from 'king hit' to 'coward punch' may have had unintended negative consequences on the Australian criminal justice system's reintegrative goals. Mandatory sentencing does not enable an individualised approach to justice, resulting in depersonalised outcomes that impede social reintegration. Given the specific elements of the s.25A offence and s.25B mandatory sentencing requirements, the NSW Director of Public Prosecutions would need to have a significant degree of confidence in the prospect of conviction to anchor a whole case solely on these sections. As only a small number of cases have been prosecuted on the facts under this very prescribed area of law, an argument may be made that the very public and rapid passing of the legislation has been as much a political and public statement as a legal one to create social control. This is echoed by the political and media discourse that occurred contextually, and when examined under labelling theory, concerns are raised as to whether the 'coward punch' label serves to reinforce a negative stereotype and disincentivise rehabilitation.

While it is challenging to assess the efficacy of the 'one punch' legislation as a general deterrent when it was introduced concurrently with the 'lockout restrictions' in the Kings Cross and CBD precincts of Sydney, further evaluation is needed to determine the true implications of the mandatory sentencing and vernacular changes that occurred ten years ago. It is essential that Australia does not see another cultural increase in 'one punch' assaults, and it is also important that previous defendants are successfully rehabilitated and reintegrated into society to reduce the risk of recidivism.

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