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Introduction

There are two fundamental reasons why one should be committed to freedom of speech. First, freedom of speech is essential for the maintenance of democracy and effective participation in it. Citizens cannot participate effectively in a democracy unless they have a sound understanding of political and social issues and problems. So, open debate about political and governmental affairs is essential.

Secondly, freedom of speech is crucial to the pursuit of truth. Society will more effectively ascertain accurate facts and valuable opinions in an atmosphere of free and uninhibited discussion, criticism and debate.

It is also well accepted, however, that freedom of speech should, in certain circumstances, be limited. So, as the law around freedom of speech has developed, a number of reasonable limits have been identified. Freedom of speech may be limited, for example, in the interests of national security, public order, for the proper enforcement of the law, public health and public morality.

Further, free expression may be restricted to protect the rights or reputation of others, for reasons of privacy, and for the protection of fair trial. In each of these instances, the political and social value of freedom of speech must be weighed in the balance against other competing and compelling public interests.

There are no general rules that enable us to adjudicate these competing claims. Decisions as to balance will always be influenced by the specific circumstances in which the competing public interests arise.

What we can say, however, is that political speech should be relatively immune from restriction because it constitutes democratic dialogue between society’s citizens and between the government and the governed. It is speech that underpins the effectiveness of constitutional democracy. So, a special place should be reserved for expression that is of public or political concern. Limits to it should be kept to a minimum.

The position is different, however, for speech that has only a tenuous connection to democratic discussion. Racially hateful or discriminatory speech is speech of that kind. This is because racial hatred is, fundamentally, an attack on a tolerant society and the right of everyone to equal respect and concern. Limits to it may far more easily be justified.

It is considerations like these that should govern our contemporary discussion about the balance that should be struck between freedom of expression, on the one hand, and the provisions of the Racial Discrimination Act 1975 (Cth) (RDA) on the other.

Student activities

1. Explain in your own words why plain speech is essential in a modern democracy.
2. Do you think there should be limitations on free speech? Discuss.
3. Do you think it is ever acceptable to express racial hatred or racial discrimination? Give your reasons.

The S.18C debate

In a considered speech auspiced by the Australian Human Rights Commission, the former Chief Justice of New South Wales, Jim Spigelman, made two significant observations about the current debate in Australia with respect to freedom of speech and its relationship to S.18 of the RDA. He observed that the debate should not be confined to a consideration of the rights and wrongs of the Andrew Bolt case. Its terms must, necessarily, be deeper and wider than that. At the same time, however, serious consideration needs to be given to whether, in Australia, the giving of offence or insult should be the subject of a legal sanction. In Spigelman’s view, there should be no right ‘not to be offended’. This requires further explanation.

Andrew Bolt is a controversial commentator in Melbourne’s Herald-Sun newspaper. In 2011 he wrote two articles about a number of well-known Indigenous people in Australia. In essence, he criticised these people on the grounds that they were not really indigenous people because they weren’t black; and because he believed that they had taken advantage of their claimed aboriginality to advance their careers unmeritoriously.
The named indigenous people sued him alleging that he had breached the terms of S.18C of the RDA by ‘offending, insulting, humiliating or intimidating’ them. Justice Bromberg of the Federal Court of Australia upheld the case and imposed a penalty on Andrew Bolt which required him to correct the articles and issue an apology.

In extensive political and media commentary concerning the Andrew Bolt case, two matters became tangled however. The first was the content of Justice Bromberg’s judgment in the case. The second was the desirability or undesirability of the anti-discrimination provisions of the RDA that the judge had to apply, that is ss.18C and 18D. It's important to untangle them.

Justice Bromberg was required to interpret and apply the provisions of the RDA as written. His judgment is worth examining closely. The judge found that the following imputations were contained in the articles that Bolt wrote.

• The applicants were not genuinely Aboriginal.

• Fair skin colour is sufficient to demonstrate that a person is not sufficiently Aboriginal.

• The applicants, who had fair skin, had chosen falsely to identify as Aboriginal.

• They had used their assumed aboriginal identity to advance their careers or political ambitions.

• They had deprived other people who were genuinely Aboriginal of opportunities to which they may otherwise have been entitled.

In the case of the applicants, the judge found that every one of these imputations was incorrect. The question then was whether the imputations were reasonably likely to ‘offend, insult, humiliate or intimidate’ a person.

Having heard the evidence provided by the applicants, he concluded that a reasonable person in their position was likely to be injured in some or all of the ways specified. Further, the harms concerned had been inflicted by virtue of the applicants’ race. For these reasons, the judge concluded that a case of racially discriminatory conduct had been made out.

The next question was whether Bolt could claim an exemption on the grounds that his articles constituted fair comment on a matter of public interest. To qualify for the exemption, under S.18D of the RDA he had to demonstrate that he had acted ‘reasonably and in good faith’. Justice Bromberg determined that he had not.

This was because the articles in question:

• had contained multiple and serious errors of fact

• had distorted the truth

• were founded on inadequate and careless research

• had been written in a manner heedless of their racially prejudicial character

In these circumstances Bolt could not be regarded as having behaved either reasonably or in good faith. The exemption could not be claimed.

Several commentators have suggested that in drawing these conclusions, Justice Bromberg had placed too great an emphasis on the style of language used. The argument has been that it should be open to newspaper columnists to express their views forcefully and provocatively as the means of making their point. There is considerable merit in this.

Just because an article is written in inflammatory or derisory tone should not, in and of itself, be sufficient to demonstrate an absence of reasonableness or good faith. Journalists and their editors should be free to determine the manner in which their editorial opinions should be expressed. Judges should not be looking over their shoulders to determine whether the form of an argument, as opposed to its content, is in all the circumstances appropriate.

Nevertheless, the judge was at pains to point out that nothing in his extensive reasons placed any restriction on future discussion of an individual or group’s identification as members of a particular race. The problem with Bolt’s opinion pieces was not that. It was that Bolt had been mistaken with the facts, careless in his research and consequently had distorted the truth.

### Student activities

4 Explain what occurred in the Andrew Bolt case.

5 In the Bolt case the judge found that all the imputations in the Bolt article were incorrect. Do you think the applicants would have been injured and the injury was specifically because of the race of the applicants? Discuss.

6 Do you agree that Bolt had not acted reasonably or in good faith? Discuss.
Reforming S.18C of the Racial Discrimination Act

The second, significant issue is whether the RDA itself requires reform in the interests of maintaining freedom of speech. Two matters are particularly relevant here. The first is whether it should be unlawful, in the terms of the RDA, to ‘offend, insult, humiliate or intimidate’ a person because of their race.

In my view, this formulation constitutes too great an incursion on free expression. It does so because in a free and democratic society we ought to be able to accommodate speech that ‘offends and insults’, even on racial and religious grounds. We may disagree with, and be concerned by, such speech but the solution is to combat it in the marketplace of ideas rather than to prohibit it.

However, the situation is different with respect to speech that humiliates and/or intimidates. Even more so with speech that vilifies or incites hatred. Here, the measure of the hurt, the gravity of the discrimination and potential social disruption are plainly sufficient reasons to justify a legal limitation.

Ever since the Andrew Bolt case, the RDA’s limits on freedom of speech have been the subject of lively debate. The Attorney-General, George Brandis, has promised to wind back the RDA’s limits on freedom of speech. This position, however, met intense opposition from an array of ethnic and religious organisations whose members have, from time to time, suffered vilification. They want the RDA’s restrictions on racially prejudiced speech retained.

Perhaps the best place to begin an evaluation of the competing views is to examine the terms of the RDA itself. The most relevant provision is S.18C. This provides that it is unlawful for a person to do an act if it is reasonably likely to ‘offend, insult, humiliate or intimidate’ another person and the act is done because of the person’s race. The provision appears in a part of the RDA headed ‘racial vilification.’

It can be seen immediately, however, that the terms of the section relate only very loosely to the idea of racial vilification. Vilification carries with it a sense of extreme abuse and even hatred of its object. Vilification can provoke hostile and even violent responses. The words of S.18C do not convey this meaning.

Unlike several states and the ACT, the Commonwealth does not have a specific law that makes racial hatred or vilification unlawful. There was an attempt to introduce such a law in the Commonwealth Parliament in 1995 as a companion provision to SS.18C and 18D but the bill was defeated by a coalition of conservative parties in the Senate.

So, I think that as the first step in overcoming the present disagreement the Federal Government should consider outlawing hate speech. S.18C of the RDA is inadequate because it makes no direct reference to hate speech. It concerns less injurious forms of expression. Further, as a matter of principle, it seems reasonable to impose a limit on racially hateful speech given its propensity to incite or provoke vengeful and violent responses.

Community organisations that have opposed any change to the RDA sometimes misconceive this proposal. As the joint ethnic group’s public statement said ‘we view with growing concern that the Federal Government has plans to remove or water down protections against racial vilification that presently extend to Australians of all backgrounds.’

We should maintain such protections, but the RDA does not contain them. If real protection against racial hatred is desired, then racial hatred, serious ridicule and serious contempt should be named and made subject to civil law sanction.

If this were done, the intensity of public opposition to proposed changes to S.18C of the RDA may recede. Then one could look more dispassionately at the terms of the RDA’s limits on freedom of speech and determine whether and to what extent they might give way to the desirability of protecting free public and political communication.

In that pursuit, however, some advocates of untrammeled free speech go too far. These advocates argue that S.18C should be eliminated altogether. But that would mean that prejudicial speech that insulted, offended, humiliated or intimidated members of a racial or ethnic group would be regarded as permissible.

Here, the Racial Discrimination Commissioner, Tim Soutphommasane has a point. As he argues, to remove any sanction for speech of this character would send a signal that racism is acceptable. We should not do that. However, the question of what might best be discarded and what should be kept remains.

S.18C limits four different kinds of speech. The first is speech that vilifies a person on racial grounds. Intimidatory behaviour is threatening behaviour. It is behaviour that is calculated to place an individual or group in fear.

However much one might value freedom of expression, to allow racially threatening behaviour to pass without a civil penalty does not seem desirable. People of different racial and ethnic backgrounds should be allowed to take their place in society without others inducing in them a real fear of being injured or silenced.

Secondly, there is speech that humiliates. Speech of this kind is an attack on a person’s self esteem and belief. And it is an attack on a ground that the person cannot change. To say, for example, that a person is
black and therefore something less than human is to cut a person’s sense of self to the quick. The injury here is psychological but no less severe for that. Racial humiliation also requires civil penalty.

Next there is speech that insults. Insult is aggravated by its connection to race. However undesirable such invective may be, room needs to be made in the political realm for language that is impetuous or callous. Not to provide that space would substantially constrain the manner in which people habitually speak and relate. One might not like insult but it should be tolerated in the interests of free expression.

Finally the RDA restrains speech that offends. The problem is that it is very difficult to predict when offence will be taken. The definition of offence is so wide and the circumstances in which it may be inflicted are so numerous that those wishing to put their views strongly on matters that bear on race enter upon very uncertain legal territory. This unpredictability may produce a silencing effect that impinges too invasively upon open communication.

**Student activities**

7. Do you think the words ‘offends and insults’ should be removed from S.18C of the RDA? Explain.

8. What is racial vilification? Do you think there should be a federal law that more strongly makes racial vilification unlawful? Explain.

9. Investigate the meaning of civil penalty. How does it differ from a criminal sanction? Discuss whether you think a civil penalty would be appropriate in the situation of intimidating behaviour based on race?

10. Explain the meaning of the word ‘invective’. Do you think it is appropriate in the sense that it is used? Explain.

If the terms of S.18C are to be amended, consistent with the views of Justice Spigelman, it should retain restrictions on speech that humiliates and intimidates but abandon limits on speech that insults or offends. In this context, I note the words of the Chief Justice of the High Court in *Bropho v HREOC*, (2004) 135 FCR 105, 124:

“The lower registers of the preceding definitions [in 18C] and in particular those of ‘offence’ and ‘insult’ seem a long way removed from the mischief to which Article 4 of the Convention on the Elimination of Racial Discrimination is directed. They also seem a long way from some of the evils to which Part IIA of the RDA is directed as described in the Second Reading Speech.”

**Freedom of speech and its limits**

Late in 2013, the UN treaty committee responsible for monitoring national compliance with the UN Convention on the Elimination of Racial Discrimination (CERD) issued what is called a general comment. The comment dealt with freedom of speech and the legitimate limits that may be placed upon it in the interests of protecting individuals from serious forms of racial discrimination. It makes a good starting point for looking with fresh eyes at the present fractious debate on the same subject in Australia.

Echoing the Convention, the committee makes it clear that freedom of expression may be limited in only two circumstances. These are to respect the rights or reputations of others, or for the protection of national security or public order. A restriction on these grounds may not, however, endanger the right to freedom of speech. Freedom of expression is primary and must not be overwhelmed by limits imposed upon it.

The committee argues that freedom of expression and one’s entitlement to be free from damaging racial discrimination, are complementary. This is because racial vilification is calculated to damage the right of those vilified to freely express their opinions and beliefs. The right and restriction are best seen, therefore, as mutually supportive rather than oppositional.

Because freedom of speech is primary, the committee observes that restrictions upon it must be the minimum necessary to ensure that racially hateful expression does not diminish either the equality of others before the law or their enjoyment of other fundamental rights. Restrictions on free speech, therefore, should attack only serious incursions on other’s rights. Less serious instances of racial prejudice should be addressed by persuasion and education not by law.

The kind of expression that the law should sanction is speech that rejects the core values of human dignity and equality and instead seeks to denigrate and degrade the standing of individuals and groups of an identifiable race in the wider community’s estimation.

The UN committee sets down the kind of speech that should be restricted by law. It comprises incitement to hatred, contempt and discrimination against members of a group on the grounds of their race, colour or ethnic origin. This embraces much more than just racial hatred and threats of physical harm.

At the same time, the UN committee is also clear that racial insult, offence or slight does not qualify for legal restriction. It will qualify only if prejudicial speech amounts to hatred, serious contempt or serious
discrimination.

I think the Committee’s analysis is correct. On this basis, it seems appropriate to exclude the words ‘insult’ and ‘offend’ from the prohibitions contained in S.18C of the RDA. In contrast, humiliation demonstrates serious contempt for others and for that reason should remain the subject of sanction. The statutory retention of a limit on speech that intimidates is also clearly justifiable. So, the words ‘humiliation’ and ‘intimidation’ should stay.

Conclusion

To return to the themes with which I began, the UN committee is clear that limits to free speech must be necessary and proportionate. Consequently, the more important that the kind of speech is the less likely it is that a restriction will be regarded as legitimate. By way of example, the committee observes that speech that relates to political or academic communication concerning matters of public interest should be given substantially free rein. Speech advocating the protection of human rights should not be subject to criminal or civil sanction. Expressions of opinion about contested historical facts should not be penalised.

But speech that vilifies others on the ground of their race has no such justification. It contributes nothing to democratic deliberation. It injures and harms people on the ground of a characteristic that they cannot change. To render it unlawful, therefore, is plainly legitimate.

Student activities

11 Do you agree that S.18C of the RDA ‘should retain restrictions on speech that humiliates and intimidates but abandon limits on speech that insults or offends’? Discuss.
12 Do you agree with the comment ‘Less serious instances of racial prejudice should be addressed by persuasion and education not by law’? Discuss.
13 Which type of speech do you think should not be penalised?
14 Do you agree with the conclusion of this article? Explain.
FITTING THE PUNISHMENT TO THE CRIME: DO HARSH SENTENCES WORK?

Dr Karen Gelb, Sir Zelman Cowen Centre, Victoria University

This article will challenge your ideas about what works in sentencing. While many people believe that harsh sentencing is more effective at stopping offenders from reoffending, the evidence is different. Harsh sentencing, such as long terms in prison, can actually increase someone’s chance of reoffending. While the media claim that communities are tired of ‘soft on crime’ judges, research shows that people are not as punitive as we are led to believe.

What do we mean when we ask ‘what works’?

One of the major aims of any criminal justice system is to enhance the safety of the community by reducing reoffending – we say that the system has been effective if reoffending rates decline. However, definitions of effectiveness vary, so that measuring whether a system has been ‘effective’ is a difficult task.

Effectiveness is often defined in absolute terms: Has the criminal justice system successfully prevented further offending? In other words, the system has been proven effective only if offenders do not go on to commit any further crimes.

But there are other ways to measure effectiveness. Public safety may also be improved if the nature of subsequent offending changes, becoming less frequent or less serious than previously.

If we wish to take an even more nuanced approach, effectiveness may be defined in broader terms, referencing the offender’s social, economic and health status. That is, if an offender is better integrated into social networks, is employed and has stable accommodation, and is faring better with physical and mental health, we can say that the system has been effective.

Does imprisonment work?

Intuitively, people believe that imprisonment is effective at reducing crime. Offenders are punished, they are kept off the streets and they will be deterred from future offending. Prison is an expensive response to crime: across Australia, the cost of prisons in 2014-15 was 2.9 billion dollars, and it costs more than $100,000 per year ($301 per day) to keep one person in prison (SCRGSP 2016). But does it actually work?

There are several aspects to this question. Imprisonment is an effective punishment: the impact of loss of liberty cannot be overstated. But does imprisonment deter? Does it protect the community by incapacitating offenders, or keeping them off the streets?

There are two types of deterrence. General deterrence is the message sent to the general population that doing something illegal will result in being caught and being punished. It targets all potential offenders. Specific deterrence is the result of a sanction that has been imposed on a specific offender. It is the effect of previous punishment on an individual offender’s future behaviour.

Student activities

1. Describe two ways of defining the effectiveness of the criminal justice system.
2. Why do you think alternatives to imprisonment may be better for the offender and society as a whole?
3. Provide three examples of general deterrence that you have seen in the community. Hint: Think broadly – don’t limit yourself to criminal justice.

Research shows that the threat of imprisonment does provide a small general deterrent on the population as a whole. However, increasing the severity of the penalty, such as the length of the imprisonment term, does not increase deterrence. In order for deterrence to work, criminals have to consider the consequences of their crimes and decide if the benefits outweigh the costs. Criminals rarely make rational decisions about whether to commit a crime. For example, crimes committed on the spur of the moment, or under the influence of drugs or alcohol are not thought through carefully in advance. So increasing the severity of penalties will not increase
the deterrent effect of punishment. On the other hand, the certainty of being caught and punished can have a small deterrent effect. This is the principle that underpins speed cameras in Australia, for example. If we know a camera is in the area, we know we will be caught if we speed.

The research on specific deterrence, or the deterrent effect of sanctions on individual offenders who have experienced them, shows that imprisonment has, at best, no impact on reoffending and often actually increases the risk of reoffending. Offenders who serve time in prison are more likely to reoffend than those who serve some form of sentence in the community (Killias, Villettaz and Zoder 2006). Prison is ‘criminogenic’ – it provides a learning environment for crime, it reinforces criminal identity and severs social ties that might prevent offending, such as school, work and family (Ritchie 2011).

Prison may be effective at reducing further offending by incapacitating specific offenders who have a high risk of reoffending. But for some offence types, this approach does not work. Drug crimes are particularly difficult to prevent by imprisoning offenders. As these crimes have their own market economies, when one drug dealer or buyer is taken off the streets, there are many more available to take his place.

The research evidence is supported by Australian data that show high rates of return to prison. For adults who were released from prison during 2012-13, 44.3 per cent returned to prison within two years, while 51.1 per cent had returned to corrective services (including both prison and community corrections) (SCRGSP 2016, Table C.4). Among prisoners in 2016, 56 per cent have been in prison previously (Australian Bureau of Statistics 2016, Table 1). Clearly, prison is not an effective tool for preventing reoffending.

Despite the evidence that prison often fails to rehabilitate people and can actually increase the risk of reoffending, we continue to lock up ever-increasing numbers of people. Figure 1 shows that the imprisonment rate has steadily increased over the past decade, although it has increased more rapidly since 2013. During this time, the prison population has increased from 25,797 in 2006 to 38,845 in 2016.

**Definitions**

**Criminogenic** – causing or likely to cause criminal behaviour.

**Incapacitation** – preventing an individual offender from committing further crimes by removing him or her from society.

**Recidivism** – the tendency of a convicted criminal to reoffend.

So if prisons do not always work to prevent further offending, and as they have significant financial and social costs, is there a better way?

**Do community sentences work?**

Australian data show that offenders on community orders are less likely to return to community corrections or to corrective services (prison or community corrections) than those who have been in prison: of those offenders who were released during 2012-13, 13.4 per cent had returned to community corrections within two years, and 21.5 per cent had returned to corrective services (SCRGSP 2016). Compared with prisons, community orders cost far less: the cost per day for Australian offenders on community orders was only $23 in 2014-15 (SCRGSP 2016).

The research evidence supports the finding that community sentences are more effective than prison at reducing reoffending, even when taking into account the offender’s personal and offending characteristics.

Studies in numerous countries have found that reoffending rates are lower following community
sentences than after a term of imprisonment. These studies use sophisticated statistical techniques to ensure that offenders are matched on key characteristics that could affect their chances of reoffending, so that the two groups differ only on the type of sentence that they receive. These methodologically strong studies have shown that reoffending rates are significantly lower following a community sentence than after a sentence of imprisonment.

While some studies have found little difference in reoffending following prison versus community sentences (Killias, Villettaz and Zoder 2006), there are no studies showing that imprisonment produces greater reductions in reoffending. The accepted conclusion from this evidence is that community sentences are more effective in reducing reoffending.

**Does rehabilitation lead to better outcomes?**

A large body of research has proven that treatment is more effective than punishment in reducing reoffending. It is now widely accepted that punishment alone will not significantly reduce reoffending. The evidence has consistently shown that the most effective approaches to reducing reoffending are those that adopt a risk-need-responsivity approach to rehabilitation, using cognitive-behavioural programs and including a drug treatment component.

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**Student activities**

7. Why do you think community services are more effective than imprisonment as a form of punishment?

8. Do you think rehabilitation programs help to reduce reoffending? Explain.

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**A risk-need-responsivity approach to rehabilitation**

Effective rehabilitation programs are based on the offender’s individual risk of reoffending. High-risk offenders are more likely to stop reoffending with more intensive treatment and rehabilitation, while low-risk offenders do best with minimal intervention, but provide assistance such as life skills programs (Petersilia 2007). Programs are more effective if they address offenders’ ‘criminogenic needs’ – factors that increase their chance of offending, such as having anti-social attitudes, poor self-control or being addicted to drugs. Finally, programs need to take into account offenders’ learning styles and individual characteristics (Andrews et al. 1990).

**Cognitive-behavioural therapy**

Broadly, cognitive-behavioural therapy assumes that offenders’ cognitive deficits, problems in the way offenders think, are learned and so may be changed. This type of treatment helps offenders to understand their motives and to develop new ways of controlling their behaviour, such as through learning appropriate interpersonal problem-solving techniques (Lipsey and Cullen 2007).

Offenders who participate in a cognitive-behavioural program have been shown to be about half as likely to reoffend as those who do not, and it has been shown to be effective with particularly serious offenders, such as sex offenders (MacKenzie 2000) and violent offenders (Vennard, Sugg and Hedderman 1997).

**Drug treatment**

There is a clear relationship in the literature between drug use and criminal involvement, so addressing drug dependency represents a critical issue for criminal justice (and health) intervention.

Drug treatment is especially effective in reducing offending for men and for younger offenders. Some programs are designed to treat the immediate addiction, but others, such as those teaching relapse prevention techniques, are concerned with developing longer-term coping strategies. Both types of treatment have been found to be effective for reducing both drug and alcohol dependency (Vennard, Sugg and Hedderman 1997).

**Treatment programs that don’t ‘work’**

In contrast to these effective approaches, programs that attempt to scare offenders away from offending, or focus on structure and discipline, have been shown to be ineffective in reducing reoffending. Programs that simply increase control and surveillance in the community are also ineffective. In some instances, moreover, these harsher, more punitive approaches have actually been shown to increase rates of reoffending (Lipsey and Cullen 2007).
But don’t people demand tough-on-crime policies?

Belief that the public supports punitive criminal justice policies is driven by the results of opinion polls that show that people typically believe the courts are too lenient. But these opinion polls use a very simplistic question: whether sentencing is ‘too tough, about right or too lenient’. In contrast, research has repeatedly shown that public opinion on crime and justice, and on sentencing in particular, is more nuanced and complex than these surveys show.

Researchers now differentiate between mass public opinion and informed public judgment – between top-of-the-head opinion and the kind of reflective judgment that develops once people engage with an issue and consider it from a variety of perspectives.

Since the 1980s researchers have gone beyond the single question opinion poll to include questions that clarify and explain the apparent harshness of public attitudes. In particular, researchers have given respondents more detailed case studies and have provided contextual information (such as the cost of imprisonment or re-offending rates) to help respondents frame their answers.

Doob and Roberts (1983) were the first to demonstrate the powerful effect of providing more information on respondents’ attitudes. Of respondents who received a brief description of a manslaughter case (akin to the type of information provided in media accounts), 80 per cent rated the sentence as too lenient, while only 7 per cent rated the sentence as about right. In comparison, of those who received a more detailed description with information on the circumstances of the offence and on offender characteristics such as the person’s family background and criminal history, only 15 per cent rated the sentence as too lenient and 30 per cent said it was about right. Fully 45 per cent of this group described the sentence as too harsh. Doob and Roberts concluded that, were the public to form opinions from court-based information instead of through the lens of the mass media, there would be fewer calls for harsher sentences.

Large-scale surveys of public opinion about crime and punishment in the United States, United Kingdom, Canada, Australia and New Zealand have all shown that the public has very little accurate knowledge about crime and the criminal justice system: people underestimate the severity of sentencing and over-estimate the seriousness of offending.

Studies of this kind have provided strong evidence that dissatisfaction with sentencing is due largely to people’s misperceptions about crime and justice: people who have the least accurate perceptions of the nature and prevalence of crime are also those who have the most negative view of sentencing (Gelb 2011a).

Both the Tasmanian Jury Sentencing Study (Warner et al. 2011) and a second study in Victoria (Warner et al. 2016) show how people’s attitudes toward sentencing change when they have more detailed information. In both studies, the preferred sentences of actual jurors were compared with the sentences that the judge imposed in the case that each juror heard. In both studies, the researchers showed that the majority of jurors believed that the judge had imposed an appropriate sentence in the case. In fact, over half of the jurors preferred more lenient sentences than were actually imposed by the judge. The researchers conclude that the views of judges and jurors are much more closely aligned than surveys of mass public opinion suggest.

Work undertaken by the Victorian Sentencing Advisory Council also shows that people are willing to accept alternatives to prison, once they are told about the costs of imprisonment and are given information about relevant criminal justice issues. When asked about how to address prison overcrowding – either to build more prisons or to increase the use of alternatives to prison – fully 75 per cent of respondents preferred increasing the use of alternatives. The vast majority of people in the survey also agreed with keeping mentally ill offenders, young offenders, and drug-addicted offenders out of prison and diverting them into treatment instead (Gelb 2011b).

The research on public opinion about sentencing therefore shows that people do not immediately demand tough responses to crime. When provided with relevant information, their judgment is better informed, and their responses become far more nuanced and less punitive.

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Student activities

9. What is a risk-need-responsivity approach?
10. How do you think this type of approach could help to reduce recidivism?
11. What is cognitive-behavioural therapy? How do you think this type of therapy could help offenders not to reoffend?
12. Why do you think drug and alcohol treatments are likely to be effective?
13. Which types of programs do think are likely to be ineffective in reducing recidivism? Explain.
**Student activities**

14. How have questions put in opinion polls changed since the 1980s?

15. In what way has giving more information about cases changed opinions of people responding to an opinion poll?

16. Why do you think the opinion of jurors about an appropriate sentence in a case they have just heard more accurately reflect the sentence given by the judge?

**Conclusion**

The evidence is clear that harsh sentences— and prison in particular— can exacerbate the problems that cause offending. Instead, sentences that aim to address the underlying causes of crime, such as poverty, poor education, mental illness or drug abuse, are known to be more effective at preventing offending. But these are complex problems that require complex, and often long-term, solutions. Addressing social disadvantage requires long-term investment, beyond the few years of an election cycle. It is no wonder that politicians are loathe to risk their political futures by tackling the underlying causes of crime.

But there is another way. Justice reinvestment has emerged as an approach that is ‘smart on crime’, instead of simply tough on crime. Justice reinvestment reallocates taxpayer money away from prisons and invests it back into disorganised and disadvantaged communities as a way of tackling the underlying causes of crime. The evidence shows that this sort of strategic investment in local early intervention, prevention and diversion is effective at reducing crime and strengthening local communities.

While harsh responses to crime do not work, we know that smart responses do.

**Student activities**

17. If the evidence shows that harsh sentences such as long prison terms don’t reduce reoffending, why do courts still sentence people to long periods in prison?

18. If harsh sentencing doesn’t make communities safer, why do people still want criminals locked away for longer and longer terms?

19. Should courts take into account community attitudes when they sentence criminals? If so, how should judges and magistrates find out about community attitudes?

20. What role do the media play in people’s perceptions of crime and justice?

21. What role should revenge play in sentencing criminals?

**Recommended websites**


Australian Institute of Criminology: http://www.aic.gov.au


**References:**


Systematic Reviews, Oslo.


Notes

(1) The imprisonment rate represents the number of people in prison per 100,000 adults in the population. This is a better measure than simply the number of people in prison, as the rate takes into account changes in the base population.

Further reading:


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