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The impact of crime outcomes on public opinions on sentencing: in particular regards to recent "One Punch" legislation

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The Impact of Crime Outcomes on Public Opinions on Sentencing: In Particular Regards to
Recent "One Punch" Legislation

Teneke Kuek

A report submitted in Partial Fulfillment of the requirements for the Award of Bachelor of Arts
(Psychology) Honours, Faculty of Computing, Health and Science,

Edith Cowan University.

Submitted (October, 2010)



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Abstract

Australia has recently experienced a punitive swing in sentencing policies and legislation. Consequently, politicians have responded favourably to popular demands for harsher sentencing. A comprehensive review of the current literature has been undertaken to understand why the community has adopted such a punitive position. It has been suggested that the media have hypersensitised the public into believing that crime is much more prevalent than it actually is, resulting in the individual fearing becoming a victim of crime. The public then chooses to elect politicians who appear to be concerned with their safety and the associated legislation. Expectancy/value theory contends that people's behaviour is motivated by what they expect to occur and the values which they hold. Public opinion also affects the way in which the goals of sentencing including retribution, rehabilitation, deterrence and incapacitation or protection of the community, are prioritised. Retribution is generally the most favoured principle in sentencing and therefore pro-retributive policies tend to be more supported, both in the media and by the public. This literature review will discuss how public opinion has the ability to influence sentencing policy and legislation. The influence media has on how crime and sentencing are perceived will also be examined and the principles underlying sentencing were investigated. Relevant theories that explain individuals' behaviour and what affects their values and opinions will also be discussed. Gender-specific disparities were investigated with respect to the type of sentencing goal people choose, to distinguish whether different genders prioritise the various goals of sentencing. Other issues discussed include factors influencing sentencing for offenders such as mitigating and aggravating factors, culpability, intentionality and foreseeability. This review of the literature aims to present an insight into how the opinions of individuals in society affect the manner in which sentencing is conducted.

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Crime and sentencing are two of the most publicised areas of the Australian judicial system (Warner, Davis, Walter, Bradfield, & Vermey, 2009). There have been calls by the public for increased punitiveness. Politicians, bowing to popular opinion, have responded with increased sentence terms and additional criminal laws (Warner et al., 2009). Academics have suggested two contributing factors to this shift toward punitiveness by the general public. Firstly, the public has been misled to believe that there has been a marked increase in the volume of crime (Beale, 2006). Belief in the rise in crime has sparked new fears about victimization, leaving many feeling powerless and resulting in a "tough on crime" approach (Sotirovic, 2001). Braithwaite (1999) believes these fears about crime become particularly prevalent when the economy experiences significant instability, such as during the global financial crisis of 2009. The other factor is public dissatisfaction with criminal justice, which has been linked to the belief that the system is too lenient on offenders (Indermaur & Roberts, 2005). Understanding what affects an individual's opinion and the values on topics such as crime and sentencing is of high priority in the area of psychology. This literature review will examine the various underlying factors in sentencing practices in the western world and Australia, including the pervasive influence of the media on community and how public opinion has the ability to change policy and legislation. The competing principles of sentencing and the influence of a respondent or judge's gender on sentencing outcomes will also be discussed. All these elements are symbiotic in determining how the community sentences those who break the laws society has established. It is important to acknowledge how these individual elements can influence sentencing legislation and process.

Public Opinion on Sentencing

Democracies are based on the premise that the general public should help determine what laws are enforced and which values and principles should be upheld by society (Latham, 2009). It is expected that a democracy will consider the views of everyone in society, including the wide variation in opinion (Latham, 2009). There are various factors that affect an individual's opinion on crime and the appropriateness of sentencing policies and legislation, including attitudes toward the gravity of a particular crime, culpability or responsibility of an offender, and the punitiveness of the sentence issued (Walker, Collins, & Wilson, 1987). Roberts (2008) commented that the influence of public opinion on sentencing has become widely acknowledged and accepted within the community. Public opinion therefore has the ability to effect changes in policy and legislation (Beale, 2006). Warner, Davis, Walter, Bradfield & Vermey, (2009) suggested that this ability to effect change is what drives the public's confidence in the criminal justice system. Politicians support policies that the majority of the public agrees with, and are then voted into positions of power, where they have the ability to influence change (Beale, 2009). Politicians, who attempt to change their stance once in power do not tend to be re-elected (Beale, 2009). Acknowledging the public's opinion is important because it strengthens the relationship between the judicial process and the community values it is supposed to reflect (Roberts, Crutcher & Verbrugge, 2007). The relationship between public opinion and sentencing is easily explained using value/expectancy theory (Weiner, 2010). The individual values their safety, which acts as a motive to support politicians that they believe will best serve in fulfilling that value. This becomes an issue when the public's opinion on sentencing becomes distorted and does not accurately reflect what is actually occurring in the community.

The public's "get tough on crime" mentality has had considerable impact at bringing around policy change in Australia in recent years (Casey & Mohr, 2005). A prime example being the new 'assault causing death' legislation (Criminal Code Act Compilation Act 1913 WA). Numerous studies have examined public opinion and its relationship with sentencing and commented on the importance of acknowledging that public opinion is dynamic and complex in nature. Public opinion can be influenced by long-term or immediate attitudinal changes (Casey & Mohr, 2005).

Warner et al. (2009) utilised jurors as participants in their research that investigated how people sentenced based on crime type using real cases. Warner et al. (2009) stated that it improved the accuracy of the study because the offender was regarded as a "real person" and the participants had detailed knowledge of the offence compared to many other public opinion studies which only present the participant with a written case (Warner et al., 2009). Another benefit of utilising jurors as participants in the study is that they are randomly selected members of society and therefore exhibit disparate attitudes and values (Warner et al., 2009). Their study was conducted in Tasmania and was divided into two stages. The first stage was conducted after the individuals heard the case, but before a sentence was handed down. The participants were asked to provide the offender with the sentence which they felt would be appropriate for the crime that was committed (Warner et al., 2009). The results of this stage demonstrated that in general, the sentence issued by jurors was slightly less severe than the one that the judge subsequently handed down. However, when the results were divided into to crime types the severity changed. Jurors were more severe on sentencing compared to the judge when the crime involved a sexual offence and less severe when the crime was property or violence related (Warner et al., 2009). Understanding how people view specific crimes and what influences their

opinions is critical. It can assist us in developing legislation and policy that combat influencing factors and can maintain the principles of law and a fair and just system.

In the second part of the study, the jurors were requested to read a booklet containing information on crime and sentencing (Warner et al., 2009). The jurors were then asked to comment on how appropriate they believed the sentence issued by the judge was. Ninety percent of jurors believed the sentence to be appropriate (Warner et al., 2009). When the responses from the second questionnaire were divided into crime type, it was revealed seventy-six percent believed that the sentences given for violent crimes were too lenient (Warner et al., 2009). This could be due to the fact that the public feels the rate of violence in society is increasing (Indermaur, 1996). Significantly, Indermaur (1996) stated there had been a substantial decrease in violent crime since the nineteenth century. This conclusion is drawn from police statistics and victimisation surveys. A victimisation survey is a conducted using a reasonably small group of the general population and is aimed at minimising the issue of underreporting because police and courts are not involved (Warner et al., 2009). While the police statistics show an increasing amount of violence it is possible this is more likely due to increased conviction rates and increased reporting of crimes. The victimization surveys provide a more accurate representation and show no such increase (Indermaur, 1996). Casey and Mohr (2005) believe it to be more of an increase in the perception of crime rather than the actual occurrence of it. Opinions are founded on a range of intrinsic and extrinsic factors (Casey & Mohr, 2005). Intrinsic factors are those which are specific to the individual, such as their morals and values and their prior knowledge (Casey & Mohr, 2005). Extrinsic factors are external factors (Casey & Mohr, 2005). For example, the information they are exposed to and the format it is presented to them in. Public opinion can be explained using Expectancy/Value Theory, which states people's opinions are

dictated by the motive behind them, the expectancy or outcome they hope to achieve and the personal value of worth (Weiner, 2010). For example, an individual's support for new punitive sentencing legislation may be based on their desire to reduce crime rates (motive), their belief that the new legislation will reduce crime rates (expectancy) and their belief that they will be more safe from danger and the importance they put in their own personal safety (value). Many studies have applied theories such as Expectancy/Value theory to their findings on public opinion and attitudes and their relationship with sentencing legislation and process.

A Canadian study investigated the attitudes toward sentencing on two public-opinion surveys (Roberts, Crutcher, & Verbrugge, 2007). Particular attention was paid to sentence severity, the purpose of sentencing and mandatory sentencing laws (Roberts, Crutcher, & Verbrugge, 2007). Interestingly, the study revealed that the majority of respondents supported mandatory sentencing, which is consistent with Australian research (Roberts, Crutcher, & Verbrugge, 2007). Attribution theory could be used to explain this finding. For example, respondents supported mandatory sentencing because they felt it would discourage violent crime (expectancy) and therefore limit their chances of being a victim of crime (motive) and help ensure their safety (value). Restorative justice was the most supported method of sentencing, where the offender attempts reparations to the victim (Roberts, Crutcher, & Verbrugge, 2007). This method of sentencing was more popular than traditional purposes of deterrence and protection of the community, or incapacitation (Roberts, Crutcher, & Verbrugge, 2007). Another relevant finding was that there was strong support for judicial discretion in sentencing, which means that people believe that cases should be dealt with on a case-by-case basis (Roberts, Crutcher & Verbrugge, 2007). The survey measured the sentencing purposes that Canadians felt to be important and eighty-four percent believed offenders acknowledging and taking

responsibility for their crime to be important (Roberts, Crutcher, & Verbrugge, 2007).

Additionally, 66 percent believed it important that offenders make reparation for the harm they had caused (Roberts, Crutcher, & Verbrugge, 2007).

Roberts, Crutcher and Verbrugge (2007) also used the December 2005 shooting in Toronto as an example of how social events can become catalysts for a more punitive turn in sentencing (Roberts, Crutcher, & Verbrugge, 2007). A firearm was used to kill a teenager and the public responded by directing their outrage toward sentencing policy of firearm offences (Roberts, Crutcher, & Verbrugge, 2007). This event took place during a federal election, which actually lead the parties to compete for the most punitive policies (Roberts, Crutcher, & Verbrugge, 2007). The victorious liberal party enacted new mandatory sentencing legislation (Roberts, Crutcher, & Verbrugge, 2007).

Roberts and Indermaur (2007) argued that public attitudes toward sentencing are flawed because they are based on incomplete information. Roberts and Indermaur (2007) found that knowledge of the criminal justice system had the strongest inverse relationship to punitiveness. The more the individual knew about the criminal justice system, the less punitive they were in their choices on policy and sentencing (Roberts & Indermaur, 2007). Roberts and Indermaur (2007) contended that there should be more Australian research into understanding the relationship between public opinion and policy. Bagaric (2005) stated that sentencing was an intellectually social field and that uneducated public observations are a problem for the formation of solid and well thought out sentencing law and policy. A simplistic view would be to ignore public opinion and only base sentencing policy on the word of experts. However, this would lead to social unrest and a sharp decrease in public confidence in the government and criminal justice system (Casey & Mohr, 2005). But what influences a person's opinion to a

certain viewpoint? Many academics have postulated that the media may be a leading cause of altering an individual's opinion, through the use of sensationalised media reports on the increasing crime rate and an overrepresentation of violent crimes in the news coverage (Beale, 2005).

Media Influences on Individual's Opinions

Media has the ability to influence a person's attitudes, to a certain extent, by what it chooses to portray to the target audience (Beale, 2006). For most, media is the only way they observe the criminal justice system since the average person does not have access to crime statistics (Casey & Mohr, 2005). The programs and news that are most likely to attract attention are the ones that are focused on by all forms of media, including newspapers and television. Increasing audience or reader numbers translates into larger profits due to larger amounts of sponsored advertising (Beale, 2006). Stories of crime and violence tend to attract a higher proportion of the general public and are utilised as a cost-effective method of catching peoples' attention (Beale, 2006). Extraordinary or random violent acts are sensationalised and described in an exaggerated and detailed fashion (Haghighi & Sorensen, 1996). Violent crimes that occur in areas that are considered safe, such as schools or shopping centres, are reported far more frequently than other events (Dimovski, Asimacopoulos, & Andrew, 1998, p.11). This increases the fear of crime because the public believe they are under siege (Dimovski, Asimacopoulos, & Andrew, 1998, p.11). Sprott and Doob (1997) contended that the feeling of unsafe surroundings has lead to the punitive turn in sentencing.

Conditioning by means of the media, otherwise known as *media priming* makes the viewer or readers believe that the occurrence of violent crime is far more frequent than it actually is (Paletz, 2002). The mechanism involved in media priming is termed *framing* in which the

media implies the crime is a result of individual decisions rather than societal conditions, and that more punitive criminal policies should be enforced to combat this deviance (Beale, 2006). Media *framing* ensures that any politician requires a defensive stance on crime and sentencing to be voted into power (Beale, 2006). Priming is based around cognitive accessibility theory that states that individuals will subconsciously take shortcuts to minimise effort when making a judgement (Zimring & Hawkins, 1995). This tends to be the most accessible information available at the time, which in most cases is the media (Zimring & Hawkins, 1995).

Beale (2006) postulates that fear of being a victim of crime, sensitised through consistent advertisement of violent crime in the media, drives the community to more punitive attitudes on crime and sentencing. The increasing amount of violent crime shown or read by a person could also increase their anxiety levels about being a victim, despite decreasing crime rates in Australia (Beale, 2006). Beale (2006) notes that many academics blame the media for the fear of crime and believe the increasingly punitive environment is due to this response to fear. Fear of crime theory states that individuals possessing high levels of fear choose excessive solutions to crime-related problems. This leads their political preferences to sway on the more punitive side, rather than a preventative approach (Sotirovic, 2001). It is important to note that a person's level of susceptibility to media persuasion is highly variable (Chiricos et al., 1997). This means that while one person may watch a news report on "increasing" amounts of violence in their city and be very concerned, another may watch the same report and be completely unaffected. A person's opinion on crime and sentencing can affect the manner in which they support particular goals or principles of sentencing. For example, an individual with a high level of fear of crime is more likely to support protection of the community as a sentencing principle.

Principles of Sentencing

Sentencing has two underlying aims: to protect society by reducing the amount of crime that is inflicted on it, and to implement measures that are cost-effective for economic reasons (Bagaric, 2006). The sentencing of offenders is based around the 'proportionality thesis' which states that the sentence imposed should be representative of the suffering that was caused to the victim (Bagaric, 2006). Some argue that some crimes are 'victimless', however, in these cases the victim is society (Bagaric, 2006). There are four goals which sentencing is aimed at achieving: rehabilitation, retribution, deterrence and protection of the community (Bagaric, 2005).

Retributive theory has dominated sentencing principles in Western society for past two decades (Bagaric & Amarasekara, 2000). Retribution contends that laws are created to maintain equality and order in society and by being part of that society, individuals agree to abide by the law (Bradley, 2004). By breaking the law, that individual is at an unfair advantage, compared to everyone else who is restrained by the law (Bradley, 2005). The resulting deprivation of liberty is in order to balance out their prior advantage and is the central focus of punishment (Bradley, 2005). By maintaining this balance, equality within society is restored and the community must acknowledge that crime can have negative repercussions, such as imprisonment (Bradley, 2005). Bagaric (2005) conducted a study in Switzerland on the effect that punishing someone has on an individual, when there are no personal benefits to be gained. The study found that the dorsal striatum, the area of the brain associated with enjoyment or satisfaction, was activated when a person handed down a penalty on the wrongdoer (Bagaric, 2005). Bagaric (2005) concluded that humans gain satisfaction by punishing others for their wrongdoing. An issue with retribution is it is often misunderstood as being about revenge. The differing retributive theories also have

significant variation in the manner in which they describe the offender (Bagaric & Amarasekara, 2000). Emotional and impulsive opinions are formed in the public. Society then places pressure on politicians to make changes in sentencing legislation which can lead to extreme and poorly thought out policy (Bagaric, 2005). For example, a person who takes another person's life should spend a significant proportion of their life imprisoned, to equal out the wrongdoing. This may sound logical, however, when poorly thought out sentencing legislation is put into place, many people who do not fit into this category completely, may be placed in it. For example, as a person who killed another by accident, rather than one who intentionally murdered another person.

Deterrence can be divided into two forms: specific deterrence and general deterrence. Specific deterrence aims to discourage the offender from committing future offences by providing them with an adequate punishment (Bagaric & Amarasekara, 2000). General deterrence is directed at society rather than the individual. It contends that if you punish individuals who break the law harshly, other law-abiding citizens will be further discouraged from committing criminal acts (Bagaric & Amarasekara, 2000). The limitation of this form of deterrence is that it is heavily dependent on the sentences of cases being publicised (McGuire, 2005). While the media often advertises the crimes and the cases, there is little attention into the specifics of the sentence given to the offender. It can also be argued that there is no reason to deter people who are not committing criminal acts because they have already chosen to be law abiding citizens (McGuire, 2005). The main issue with deterrence is that there is a body of literature that suggests that there is no sound link between higher penalties and a reduction in crime and that many people do not consider the consequences of the crime before they commit it (Bagaric & Amarasekara, 2000). The moral question of whether it is ethical to give one

individual a harsher sentence for the sake of deterring others is also raised (McGuire, 2005). Deterrence in a more practical sense has been found to have some success. It has been found that increased policing actually leads to a decrease in charges (Bagaric, 2000). This is most likely a better form of deterrence as it is clearer to the general public. Davies and Raymond (2000) found that deterrence only appears to work on two types of offender: white-collar criminals and drug dealers.

Rehabilitation has been a controversial topic in the last few decades with the slogan 'nothing works' strengthening its decline during the last century (Bagaric & Amarasekara, 2000). However, in the last ten years rehabilitation has made a return through the growing body of literature supporting its effectiveness (Bagaric & Amarasekara, 2000). One program that has been particularly popular is the cognitive-behavioural programs conducted within prisons (Howells & Day, 1999). These programs target the criminogenic needs of the offender, otherwise known as the risk factors for offending (Bagaric & Amarasekara, 2000). These needs could be anti-social attitudes or anti-social personality, a drug or alcohol problem or problems with education or employment (Andrews, Bonta, & Wormith, 2006). Therapy helps the offender to feel more positive emotions and develop better decision making skills (King, 2000). There is a slight increase in effectiveness when these programs occur in community corrections, rather than in prison (Dolinko, 1997). Treatment programs have been found to be between 25-30 percent effective at reducing recidivism rates in offenders (Gendreau & Goggin, 1996). Nicholson (2008) notes that is strange that rehabilitation is not valued more highly by the courts, as it has the best ability to achieve the goal of protecting the community, through treating the underlying problem. One of the reasons for rehabilitation's limited popularity is that some people choose to believe that it is offering help for those who have done wrong rather than punishing them for their

wrongdoing (Nicholson, 2008). Treatment can also be viewed from an alternative perspective, as it can sometimes be more severe than a prison sentence (Bagaric, 2000). For example, someone could be in treatment for years, whereas their prison sentence may have only been a few months in duration.

Protection for the community is based around keeping the more dangerous members away from the rest of society (Nicholson, 2008). While imprisoning an offender may sound safe in theory, research has shown that imprisonment is often a short-term option with negative long-term effects (Davies & Raymond, 2000). Prison has also been found to put undue stress on an individual, such as fear of victimisation, boredom and lack of social support (King, 2000). This becomes an issue because stress has been linked to violent offending (King, 2000). There is also the issue of 'toxic mix', whereby an offender's negative behaviours and criminal skills are enhanced because of the introduction to others with a variety of criminal skills (Bagaric, 2000). Prison is intended to be a last resort by judges but, due to social pressures, its utilisation has become more prevalent (Nicholson, 2008). How individuals feel about sentencing could be affected by their gender (Applegate, Cullen, & Fisher, 2002).

Respondent's Gender Effects

A study was conducted in Perth, Western Australia, to determine whether the demographics of the participant had an effect on the way the participant sentenced the offender, in a hypothetical offence (Indermaur, 1987). The study was conducted using a survey on violent crime. The researchers concluded that gender was the only significant variable to affect the response accuracy and knowledge (Indermaur, 1987). Females in the study tended to believe that violent crime occurred far more often than it actually did and are therefore they opted for harsher sentences (Indermaur, 1987). This supports the argument that harsher penalties are the result of

fear of crime, because females believe it is occurring so frequently and are therefore more likely to become a victim. Another study conducted in 1992 on the sentencing of juveniles also found that gender, along with age and ethnicity, affected the level of punitiveness in sentencing (Schwartz et al., 1992). Applegate, Cullen, and Fisher (2002) examined whether there was a gender difference in the attitudes towards crime. The research found that there was a definite difference in the way crime was viewed, but more specifically on the way the participant felt the offender should be punished (Applegate, Cullen, & Fisher, 2002). The study found that females opted for sentences that had a rehabilitative focus and men had a more retributive focus toward sentencing (Applegate, Cullen, & Fisher, 2002).

Baron and Hartnagel (1996) found different results in their study. Their study examined juvenile offenders and sentencing outcomes, similarly to Schwartz et al. (1992) study. However, the results showed no significant difference between the responses of the two genders (Baron & Hartnagel, 1996). It could be argued that there was no significant difference found in the Baron and Hartnagel (1996) study, due to the differences in between this study and the Applegate, Cullen and Fisher (2002) study and the Indermaur (1987) study. For example, Indermaur's (1987) research sampled only Western Australian participants. Baron and Hartnagel's (1996) study consisted solely of participants from Canada. The difference in conclusions could potentially be due to different populations. There is also the aspect of the nature of the crime. Indermaur (1987) only examined violent crime, but Baron and Hartnagel's (1996) covered a broad range of crimes. The majority of the literature supported the argument of a gender difference in the way in which crime is viewed and the goals of sentencing. By understanding how gender can affect the individual view's crime, we can better understand sentencing. For example, a person with a jury made up of females may be more inclined to find an offender

guilty due to their fear of crime, than a jury consisting mostly of men. There are many other aspects that influence the sentencing process, such as mitigating and aggravating factors, culpability, intentionality and foreseeability.

Factors Considered During Sentencing

The Australian criminal justice system considers multiple, different factors when determining the sentence that should be handed down to the offender (Lovegrove, 2004). The seriousness of the offence that is committed is a critical factor in sentencing. The principle of substantive justice contends that individuals who commit the same crime, in similar circumstances, should receive the same punishment type and severity (Ferdinand & McDermott, 2002). This is due to the fact that the crime is deemed to be of equal gravity. Stylianous (2003) stated that one key aspect of how the public appears to view seriousness is the offenders reasoning for committing the crime. For example, did they do it because they felt they had no other choice or just for entertainment? Mustard (2001) contended that seriousness was judged on not only the offender's motivation in committing the crime, but their actions, intentions and the level to which the behaviour was seen to violate the societal norms. A review relevant literature determined that the consequences of the crime were the most important aspect in determining the seriousness of the crime (Stylianous, 2003).

There are also two opposing factors in sentencing: mitigating factors and aggravating factors (Lovegrove, 2004). Mitigating factors are any feature of the offender's character, past or a circumstance of the crime that have the potential to lessen the sentence given to the offender (Lovegrove, 2004). For example, having no prior history of offending or a having good character reference from another person are likely to be mitigating factors. Alternatively aggravating factors can negatively affect the severity of an individual's sentence (Lovegrove, 2004).

Examples of aggravating factors include; failed treatment programs and numerous prior criminal offences as both of these can indicate an unwillingness to change.

Criminal culpability and intentionality are other considerations that are taken into account when determining a person's sentence. Culpability is used to define the amount of responsibility a person should bear, as a result of their criminal action (Horder, 1993). Any criminal offence can be divided into three broad categories, and there are varying degrees of severity in each category (Horder, 1993). These categories include actions which are intentional, those which are knowingly committed and those committed recklessly (Horder, 1993). The term *mens rea* is often used to describe when the offender has guilty knowledge and roughly translates to 'guilty mind' in English (Horder, 1993). In the Criminal code (1913) it states that ignorance of the law cannot be used as an excuse for committing any crime. Researchers have applied defensive attribution theory to cases in which the offender's actions have led to a negative consequence (Herzog, 2008). The offender lowers the amount of responsibility they feel towards the outcome by using excuses to justify their actions (Herzog, 2008), such as rationalising an assault on another person because they were provoked and therefore the assault was the victim's fault. Intentionality refers to the offender's thoughts when or just prior to engaging in the criminal behaviour (Corrado, 1992). An example of this would be if an offender went out one night in search of a particular person, found him and punched him in the face. By going out in search of the victim and seeking to find and hurt this person, the offender shows intention in his crime. It is required by law that intent is provided for the crime (*actus reus*) as stated in the Criminal Code Act Compilation Act 1913 (WA). Intention cannot be counted as just mere thoughts, it can however be taken into account when the offender takes actions to begin committing the offence. The Criminal Code Act 1913 states "When a person, intending to commit an offence, begins to

put his intention into execution by doing an act that is more than merely preparatory to the commission of the offence but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence” (Criminal Code Act 1913). An individual can intentionally commit an act and a criminal offence (i.e., assault) can be a bi-product of that action (Sullivan, 1992).

In criminal law the question of foreseeability is a difficult one. It refers to the perceived likelihood of the outcome occurring (Sullivan, 1992). For example, if a person speeds through a red traffic light in their car, it is reasonably foreseeable that they could crash into another car that is going through the intersection. According to the defensive processing approach, by denying the extent to which an event is foreseeable, they are able to reduce their sense of culpability (Mark, Boburka, Eyssell, Cohen, & Mellor, 2003). This is where hindsight bias comes into the equation. Hindsight bias is used to describe how in retrospect, people tend to overestimate the extent to which the event was foreseeable (Pezzo & Beckstead, 2008). When the outcome of an event is unfavourable, an individual may experience reverse hindsight bias (Pezzo & Beckstead, 2008). But what constitutes reasonable foreseeability? For example, an outcome may be foreseeable, but highly unlikely. Is it reasonable for an individual to have considered the outcome a probable result of their actions and how probable or likely was this outcome was to occur?

An interesting piece of legislation introduced in August 2008, is that of ‘Unlawful assault causing death’, which has been colloquially referred to as the ‘One punch’ legislation (Criminal Code Act 1913). In s.V, 281 it reads “(1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for ten years. (2) A person is criminally responsible under subsection (1) even if

the person does not intend or foresee the death of the other person and even if the death is not reasonably foreseeable.” By creating this law, the legislation directly goes against two of the founding principles on which the law is based (reasonable foreseeability and intentionality). It begs the question of who has the right to change years of policy and legislation development, by deciding to eliminate two factors which have always been seen to be vital in the creation of law and policy. The Law Society of WA commented on the legislation just prior to it being passed and stated that they believed it to be a “knee-jerk” reaction to a few tragic cases and they think it was badly thought out (ABC, 2008). The law reform commission was also consulted on the legal amendment prior to its creation and they decided they would not support it. So without the support of the two major legal bodies, the legislation was passed. It raises the question of whether this new law was deemed to be bad policy, but followed through to gain public support by the politicians involved.

Conclusion

This literature review has examined the various influences and mechanisms affecting the manner in which crime is perceived by society. Significantly, the media have increasingly sensationalised crime to the point at which people believe they are likely to become a victim (Beale, 2006). Individuals can be greatly affected by the media, due to the fact it is for many people the only source of information they have on sentencing policy and legislation. Cognitive accessibility theory contends that people take mental shortcuts by using the most easily accessible information to form opinions about subjects (Zimring & Hawkins, 1995). This can also lead to the development of ‘fear of crime’ in a person, which can influence the way in which they vote. Politicians promising more punitive sentencing policies are more likely to be elected than those seen to be ‘soft on crime’. This literature review has discussed the goals that

sentencing has set out to achieve through punishment, including retribution, rehabilitation, deterrence and protection of the community (imprisonment) and detailed the criticisms expressed by researchers. This review has discussed how the individual factors in each case have the ability to affect the sentence an offender receives, such as how aggravating factors can impact the severity of the sentence and where mitigating factors have the ability to lessen the sentence's severity. A judge also takes in account the intention behind the action, the foreseeability and the extent the offender can be held criminally culpable or responsible for their actions. It is important for society to understand the relationship public opinion has with the criminal justice system and to study that relationship in order to prevent poor sentencing policy.

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The Difference in Public Opinion on Criminal Sentencing and Aims, based on the Outcome
of the Crime: In Particular Regards to Recent “One Punch” Legislation

Teneke Kuek

Abstract

Academics have been intrigued by the relationship between public opinion and sentencing policy and legislation. The opinions of the majority of the public can have a substantial impact on the way in which legislation is created. Attribution theory contends that behaviour is the by-product of a person's motives, expectancy and values. It has been argued that the attitudes that form a person's opinion are heavily affected by the media. This is the only source many people have to access information about crime and sentencing legislation and policy. Sensationalised articles on violent crime can then produce a 'fear of crime' response in individuals, which leads them to support more punitive sentencing policies and the politicians who support them, to help ensure their safety. Sentencing goals are also affected by a person's attitudes and opinions. The four primary goals of sentencing include: retribution, deterrence (general and specific), rehabilitation, and retribution. Research has argued that a gender difference may also be present in how people choose to view crime and which sentencing goals they prioritise. Other factors such as intention, foreseeability and outcome also affect the sentence that is handed down to an offender. The current study examined the responses to two scenarios with alternate outcomes. Both scenarios involved the offender punching the victim once and the victim falling to the ground. In one scenario the victim's head hits the ground, he is knocked unconscious and later dies as a result of the injury. In the second scenario the victim received a couple of stitches, but is otherwise fine. This is in reference to the new law 'Unlawful assault causing Death' that was passed in WA in 2008. This study investigated two research questions. Firstly, would people sentence an offender more severely based on the outcome of their criminal act? Secondly, would female and male respondents view the crime differently and therefore feel the offender should be sentenced differently? Both parametric and non-parametric analyses were conducted on the results, as normality could not be assumed for all the questions. The results indicated that the aspects of the each case were viewed significantly differently in comparison to one another. Analysis of the responses revealed prison terms given to the offender in the 'death' condition were significantly greater than those given to the offender in the 'no death' condition. Surprisingly, analysis of the sentencing goals indicated that those in the 'death' condition favoured a rehabilitative approach to the sentence given, whereas those in the 'no death' condition favoured a retributive approach. Therefore, it can be concluded that the current study supports the contention that there is a significant difference in the manner in which a crime is viewed and responded to, based on the crime's outcome. The study did not however, find a significant difference in the manner in which each of the genders viewed or responded to the crime.

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Supervisors: Deirdre Drake and Catherine Ferguson

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The Difference in Public Opinion on Criminal Sentencing and Aims, based on the Outcome of the Crime: In Particular Regards to Recent “One Punch” Legislation

Introduction

Crime is one of the most reported and discussed topics in our society (Warner et al., 2009). The majority of people in the community have strong opinions on aspects of crime and sentencing legislation (Warner et al., 2009). To many, this can be viewed favourably because it allows the area to be reflective on society’s democratic opinions and values (Latham, 2009). However, this can also create problems when the community’s views on crime and sentencing are shaped by misconceptions and incorrect statistics (Roberts, Crutcher & Verbrugge, 2007). This study will outline the various ways in which a person’s opinion is shaped and will examine the media’s role in this shaping process, including relevant theory on how an individual’s opinions are influenced. The principles of sentencing and legal considerations will also be presented, including the legal considerations that are present during the sentencing process. These issues will be presented in the context of recent legislation that has been passed in Western Australia. The ‘Unlawful assault causing death’ or, as it is more popularly known, the ‘one punch’ legislation, appeared to be highly supported in the community. However, the single difference between this charge and a ‘common assault’ charge is the outcome. Two scenarios were utilised with differing outcomes, one in which the victim is injured and the other where the victim dies. This was to examine how the public’s perception of a crime differs based on its outcome.

Principles of Sentencing

There are two aims for sentencing policy and legislation: to ensure the safety of society by reducing the amount of crime that occurs within it and to implement crime-reductive methods that are cost-effective in nature (Bagaric, 2006). The 'proportionality thesis' is the rule that all sentences handed down must abide by (Bagaric, 2006). The thesis states the sentence an offender receives must be equivalent to suffering or discomfort felt by the offender's victim (Bagaric, 2006). Individuals often mistake this to mean that some crimes are exempt from this rule as they are victimless. However, it is society that is the victim in this case (Bagaric, 2006). There are four goals that sentencing aims to achieve, including retribution, rehabilitation, deterrence and protection of the community (Bagaric, 2006).

Retribution is centred on the notion that being part of the society means the individual must conform to the laws of that society, which are created to maintain equality and order. By breaking those laws, the offender has an unfair advantage compared to those who have chosen to obey it (Bradley, 2004). According to retributive theory, the offender must suffer deprivation (often in the form of freedom) so that the balance of equality can be restored (Bradley, 2004). By maintaining this balance, every individual in society is made aware that crime has negative repercussions (Bradley, 2005). A 2005 study investigated the effect of punishing a wrongdoing person, without any beneficial personal gains (Bagaric, 2005). The results suggested that the dorsal striatum, the area of the brain associated with satisfaction, was activated whilst the punisher was handing down the sentence to the wrongdoer (Bagaric, 2005). The author concluded that people enjoy punishing others for their wrongdoings, even when it does not directly benefit the individual (Bagaric, 2005). Retribution as a sentencing goal is often mistaken for revenge. Revenge is more emotional and impulsive in nature and therefore can lead to poor

choices in policy and sentencing (Bagaric, 2005). Additionally, retributive theory has yet to explain the relationship between crime and punishment without considering consequentiality (Bagaric & Amarasekara, 2000).

The second goal of sentencing is deterrence, which consists of two types: specific and general. Specific deterrence is centred on discouraging offenders from committing future crimes (Bagaric & Amarasekara, 2000). This is accomplished by handing down a punishment that is severe enough to deter them from committing future criminal acts (Bagaric & Amarasekara, 2000). General deterrence is aimed at the community as a whole, rather than just the one individual who committed a crime (Bagaric & Amarasekara, 2000). The theory behind general deterrence is that if a harsh penalty is handed to one offender, other people will be deterred from offending, as they wish to avoid that punishment (Bagaric & Amarasekara, 2000). This goal of sentencing has many limitations. It relies heavily on the criminal case and sentence being publicised, so that people are aware of the severity of the sentence (McGuire, 2005). However, this is rarely the case, as only particularly violent cases tend to be publicised (McGuire, 2005). There has also been little evidence to suggest that higher penalties lead to a reduction in criminal activities and people do not always consider the consequences before engaging in a criminal act (Bagaric & Amarasekara, 2000). The moral question of whether deterrence as a goal, goes against the proportionality thesis can also be raised, as the punishment is more severe than is deserved for by the crime (McGuire, 2005). An alternative goal of sentencing is rehabilitation. Whilst deterrence aims at stopping offending through higher penalties, rehabilitation has a substantially different approach (Bagaric & Amarasekara, 2000).

Rehabilitation is aimed at reducing and eliminating the underlying problems that are believed to be causing the offending behaviour (King, 2000). This can include antisocial

attitudes, antisocial personality, or problems with drug and alcohol abuse (Andrews, Bonta & Wormith, 2006). Overall, the therapeutic treatment programs have been found to be between 10 - 36 percent effective at reducing reoffending rates (Howells & Day, 1999). Rehabilitation is not highly valued in sentencing, despite it being one of the best methods of protecting the community, through lowering the rate of reoffending (Nicholson, 2008). A possible reason for its limited popularity is that some people believe that by rehabilitating the offender, we are helping and rewarding them, not punishing them for their crime (Nicholson, 2008). Alternatively, rehabilitation can often be harsher than imprisonment, as the length of treatment is generally longer than a prison sentence (Bagaric, 2000). The final goal of sentencing is the protection of the community.

Protection of the community is achieved through removing the offender from society, by means of imprisonment (Nicholson, 2008). It is theorised that by doing this the most dangerous members of society cannot endanger the safety of law-abiding ones (Nicholson, 2008). The issue is that imprisonment is highly effective in the short-term, but can have numerous negative long-term effects (Davies & Raymond, 2000). Prison can place undue stress on offender, which can have negative effects on their mental health (King, 2000). Placing numerous offenders together can also lead to the refining and enhancing the individual's criminal skills (Bagaric, 2000). Imprisonment is intended to be used as a last resort within sentencing, however, due to social pressures it is becoming an increasingly more prevalent option (Nicholson, 2008). Public support for imprisonment may be due to the individual concerns of people in society. According the expectancy/value theory, behaviour is the result of an individuals desire to have their values fulfilled (Weiner, 2010). Therefore, if an individual's personal safety is of high value to them and they believe all offenders jeopardise that safety, they then may choose to support policies

and legislation which supports imprisonment and protection of the community, over the other sentencing goals. How a person prioritises the goals of sentencing and their opinions on the sentencing process can also be affected by other factors, such as a individual's gender (Applegate, Cullen, & Fisher, 2002)

Effects of Respondent's Gender

Gender differences are present in many areas and the criminal justice system appears to be no exception. Indermaur (1987) investigated the effects of a participant's demographic information on the way the participant viewed crime and sentencing. A study was conducted in Perth, Western Australia, similarly to the present study and utilised a survey on violent crime. The results showed that gender was the only significant variable to affect the individual's response to the hypothetical crime (Indermaur, 1987). More specifically, women were found to believe violent crime occurred more frequently and therefore they tended to sentence more severely than their male counterparts (Indermaur, 1987). It is possible that this is the result of fear of crime, because females believe crime is much more frequent than men do (Applegate, Cullen, & Fisher, 2002). Schwartz, Guo and Kerbs (1992) also studied a range of demographic factors of participants and the effect that they had on sentencing attitudes and the level of punitiveness toward juvenile offenders. The study found that gender, age and ethnicity were all significant factors in determining sentencing attitudes. The authors also concluded that the level of perceived crime was positively related to punitiveness (Schwartz, Guo & Kerbs, 1992). Applegate, Cullen, and Fisher (2002) investigated gender differences in the attitudes towards crime. The results suggested that there was significant disparity in responses between the ways in which the crime was viewed, especially the way participants felt the offender should be punished, based on the respondent's gender (Applegate, Cullen, & Fisher, 2002). The study

found that females opted for sentences that had a rehabilitative focus and men had a more retributive focus toward sentencing (Applegate, Cullen, & Fisher, 2002).

Baron and Hartnagel (1996) found opposing results in their study. Their study examined juvenile offenders and sentencing outcomes, similarly to Schwartz, Guo and Kerbs' (1992) study. However, the results showed no significant difference in the responses of the two genders (Baron & Hartnagel, 1996). It could be argued that there was no difference found due to the differences between the two studies. For example, Indermaur's (1987) research sampled only Western Australian participants. Baron and Hartnagel's (1996) study contained Canadian participants. The difference in conclusions could therefore be due to different populations. There is also the aspect of the nature of the crime. Indermaur (1987) only examined violent crime, but Baron and Hartnagel's (1996) covered a broad range of crimes. Overall, the majority of the literature has found a gender difference is the way crime is viewed and which goals of sentencing are favoured. There are also factors or circumstances which affect every criminal case and which make it hard to generalise between cases.

Factors Considered During Sentencing

The sentencing goals affect the type of sentence an individual receives, however, there are factors which affect the severity of an offender's sentence (Lovegrove, 2004). The overarching principle in sentencing is that of substantive justice (Ferdinand & McDermott, 2002). This principle contends that people who commit the same crime, with similar circumstances surrounding it, should receive the same punishment type and severity, as they are deemed to be of equal gravity (Ferdinand & McDermott, 2002). The reason for the offender's actions can greatly affect the manner in which the case is viewed (Stylianous, 2003). One offender may have committed a crime for personal gain, where as the other may have done it to

feed his family. Therefore, the circumstances surrounding the case are different. Mustard (2001) also contended that circumstances surrounding the crime play a large role in determining the sentence an offender receives. It was postulated that juries determined the seriousness of a crime on the offender's motivation behind it, the intention possessed by the offender when committing the crime and the level to which the behaviour violated social norms (Mustard, 2001). Stylianous (2003) conducted a literature review of research in the area of sentencing. The results demonstrated that the outcome of the crime was deemed to be the most important aspect in determining the seriousness of an offence (Stylianous, 2003). Individual factors that effect how a person is sentence can be divided into two types, aggravating, and mitigating factors (Lovegrove, 2004). Aggravating factors are individual factors which have the ability to increase the sentence given to an offender, such as prior offences and failed treatment programs (Lovegrove, 2004). Mitigating factors have the ability to do the opposite to a person's sentence, to decrease the severity (Lovegrove, 2004). An example of a mitigating factor is a good character reference about the offender from a previous employer.

Culpability and intentionality of the offender is an aspect that is taken into consideration during sentencing. Culpability refers to how legally responsible an individual is for the crime they committed (Horder, 1993). Mens rea is the legal term often used when discussing culpability and is a Latin term meaning 'guilty mind' (Horder, 1993). Mens rea is used in law to describe whether the defendant had a 'guilty mind' or 'guilty knowledge' when the act was committed (Horder, 1993). For instance, whether the person deliberately intended to drive over the victim in their car, or did they not see the victim standing in the road ahead of them. This does not mean that the offender can claim that they were not aware that their actions were considered to be breaking the law. The Criminal Code Act (1913) states that ignorance of the law

can not be used as an excuse for any crime that is committed. Herzog (2008) applied defensive attribution theory to offenders, stating that many offenders utilise excuses to minimise the responsibility they feel for a crime that results in a negative outcome. Intentionality refers to the intention the offender possessed when committing the unlawful act (Corrado, 1992). For example, did the offender go out looking to fight the victim or was he already out, when the victim started a fight with him? Another Latin term, *actus reus*, is used to describe the issue that the individual must have the intention for the act to be considered as criminal (Sullivan, 1992). Recklessness is often regarded as having no intention. However, in criminal law, being reckless and committing an unlawful act as a bi-product is still regarded as having intention, as it is reasonably foreseeable that by acting recklessly the outcome could have occurred (Sullivan, 1992).

The final aspect is foreseeability, which explains how reasonable it is to consider the outcome occurring as a result of the action (Sullivan, 1992). An assault case is a perfect example. The offender punches the victim and the victim falls down as a result of the punch. He sustains a cut on the back of his head as a result. In this case it is highly foreseeable that the punch would cause injury to the victim. Mark, Boburka, Eysell, Cohen, and Mellor (2003) believe that many people utilise defensive processing approach when addressing the issue of foreseeability. The offender will try to deny how easily foreseeable the action was in an attempt to dissolve their level of culpability or responsibility (Mark et al., 2003). 'Hindsight Bias' is often used when discussing foreseeability and is experienced when the individual feels guilt toward the event (Pezzo & Beckstead, 2008). Hindsight bias works in the opposite way to the defensive processing approach and refers to an individual's overestimating how likely an event was to occur, when looking at it in retrospect (Pezzo & Beckstead, 2008). This is most likely to occur

when an unpleasant event results from the action or event (Pezzo & Beckstead, 2008). The problem lies with determining what constitutes reasonable foreseeability. As one highly perceptive person may have thought the outcome was very easily foreseen, compare to another person, who did not even consider the outcome to have occurred.

New legislation was added into the criminal code of Western Australia in 2008, which included features that distinguished it from the rest of the code (Criminal Code Act 1913). Section V, 281 was devoted to Unlawful assault causing death. It stated “(1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for ten years. (2) A person is criminally responsible under sub-section (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.” This is unique in the fact that two founding factors, intentionality and foreseeability are completely excluded from the offence. Therefore an offence which occurred without intention can see an offender serving 10 years in prison. It is interesting to note how all these factors or considerations affect the sentence an individual is given. Even more interesting is the reasons why the legislation is passed and what influences the politicians to support such legislation.

Public Opinion on Sentencing

Acknowledging the public's opinion is an important aspect in maintaining a judicial system that reflects the values and morals of the society around it (Roberts, Crutcher & Verbrugge, 2007). It is this ability of effect change in the system that is tied in with public's confidence level in the criminal justice system (Warner et al., 2009). There has been an array of literature on the topic of public opinion. The substantial influence the public opinion has on sentencing has been commented on at length and is acknowledged, at least within the academic

community (Roberts, 2008). Politicians are used by the community to effect change and in return receive public support. To be voted into a position of power the politician must stand, or at least appear to stand for the beliefs and values in which a significant amount of the population agree with (Beale, 2009). Once that position has been attained they must continue to argue for legislation and policy which reflects those same views, to be re-elected (Beale, 2009). This can be applied to the method in which public opinion affects policy. The problem this poses is that when community opinions sway on the punitive side, the legislation that is argued for becomes equally as punitive. These punitive movements can take form in the way of slow long-term shifts or more immediate short-lived attitudes (Casey & Mohr, 2005).

Warner et al. (2009) conducted an experiment aimed at determining whether an increase in information about the criminal justice system would change the way in which the participants viewed sentencing. In the first stage the participants heard a case and then answered a questionnaire on the type and severity of sentencing they believed the offender should receive (Warner et al., 2009). The participant's sentences in this stage were less severe than that of the judge. During the second stage the participants read a booklet on crime and sentencing information (Warner et al., 2009). They were then informed of the sentence handed down by the judge and ninety percent of jurors believed it to be appropriate. However, when the results were examined by crime types the conclusions differed (Warner et al., 2009). Seventy-six percent of the participants believed the sentences given to offenders who had been charged with violent crime offences were too lenient (Warner et al., 2009). Many authors believe that it is violent crime that fuels the growing concerns the public has about crime in society. The vast majority of people in society believe that crime is on the increase, despite studies on the area finding no increase (Indermaur, 1996). Roberts and Indermaur (2007) concluded that punitiveness had a

strong relationship with criminal justice system knowledge. Individuals with more (correct) knowledge on the criminal justice system and sentencing process were less punitive when it came to crime and sentencing (Roberts & Indermaur, 2007). Beale (2006) believes the media may have a significant impact on influences people's opinions on crime and sentencing.

Media Influences on Individual's Opinions

Media has the ability to influence a person's attitudes and opinions by choosing what information is exposed to it's audience and how it is exposed to them (Beale, 2006). The media is for many people, the only source of information concerning crime and policy (Casey & Mohr, 2005). The media's primary concern is their profits, not the accuracy of the information (Beale, 2006). Unfortunately, articles and programs on crime and violence appear to attract the largest audience numbers (Beale, 2006). Events that are out of the ordinary or randomly violent are sensationalised in a manner which makes the viewer/reader believe that they are an everyday occurrence (Haghighi & Sorensen, 1996). The by-product of this is a fear of crime within the community (Dimovski, Asimacopoulos & Andrew, 1998, p.11). Sprott and Doob (1997) believe that it is this fear of crime that has lead to the punitive turn in sentencing policy in recent years. Fear of crime theory postulates that individuals who have high levels of fear, choose more extreme or punitive solutions to the problem (Sotirovic, 2001).

The term given to describe the way in which the media makes the reader/viewer believe the occurrence of crime is higher is *media priming* (Paletz, 2002). The mechanism involved in priming is *framing* (Beale, 2006). This is the method in which the media chooses to portray the information. Such as suggesting that crime is socially determined, rather than individually determined. This then positions the reader to believe crime is due to living in a bad society and that laws need to be more punitive in order to combat this deviance (Beale, 2006). Media

priming is based on cognitive accessibility theory that states people will subconsciously take mental shortcuts in order to minimise the effort and time required to make a judgement (Zimring & Hawkins, 1995). The most accessible information available is usually the one utilised and is often the information presented by the media (Zimring & Hawkins, 1995). Some authors have contended that constantly feeling as if the person is likely to be a victim of crime has led to a general fear of crime from individuals in society (Beale, 2006). This is despite falling crime rates (Beale, 2006). Academics have postulated that there exists a relationship between the 'fear of crime' and a punitive turn in sentencing legislation and policy (Beale, 2006). Fear of crime theory states that people who possess a high level of fear choose dramatic solutions to crime related problems. This in turn affects their political preferences and leads to a punitive approach over the more preventative options (Sotirovic, 2001).

The area of criminal sentencing and policy is very complex. This area is affected by many external factors such as the media and public opinion. The media sensationalises crime to the point where people believe unusually violent acts are occurring everyday. This is thought to provoke a fear response in the public. Politicians come to the rescue by offering more punitive sentencing policies to 'fight' crime. These politicians get voted into power on this basis and laws and policies become more punitive as a result. However there are also many internal factors of each individual case that goes through the criminal justice system. Factors such as the deemed severity of the case, the outcome, the mitigating and aggravating factors, the culpability and intentionality of the offender, and the foreseeability of the crime. The gender of the individuals in the jury can also affect the manner in which an offender is sentenced. The current research is aimed at examining how people sentence an offender and view the crime committed, based on the outcome of the crime. This is in particular reference to the 2008 legislation that has been

passed in Western Australia (Unlawful assault causing death). The research questions to be answered by the study were:

- 1) Do people sentence an offender more severely based on the outcome of the crime?
- 2) Do female and male respondents view crime differently and therefore sentence the offender differently?

It was proposed that the more serious outcome (death) will be viewed more harshly and therefore sentenced more severely. The two scenarios were identical, differing only in the outcome. It was also proposed that females will be more supportive of community based and therapeutic based options and less severe in the imprisonment terms given.

Method

Design

The study involved a 2 x 2 between subjects experimental design. There were two experimental groups, each presented with one of the two versions of the scenario. The aim of this design was to distinguish whether there was a difference in the way people perceived the seriousness of an offence, the severity of the sentence they believed the offender should receive and the sentencing aims. One independent variable in the study was the outcome of the offence. In one version of the scenario the victim is killed and in the second version he only receives minor injuries as a result of the incident. Gender effects, the second independent variable, was also examined in the study to determine if a participant's gender affected the way they chose to sentence. How the individual perceived the offence was measured using a series of questions, in which participant responded using a likert-type-scale, containing five points. These questions asked respondents to rate the seriousness of the crime, the intention involved in the case, the foreseeability of the outcome and the seriousness of the outcome. This was then followed by

questions regarding the aims of sentencing (rehabilitation, retribution, deterrence and protection of the community). There was a small number of qualitative response questions asking for any additional comments the participant may have had, such as the reasoning behind the responses they gave. The final page was a basic demographic sheet, so that the data could be analysed in terms of how well it could be generalized to the population at large. This included questions regarding the person's individual characteristics, such as age, gender and occupation.

Participants

A total of 119 people participated in the study. Four of these were excluded due to missing data, which left 115 in the sample group. Participants completed a demographics sheet as part of the survey. The participant group consisted of 55 males (47.8%) and 60 females (52.2%). The participants were given six age categories. The 18-25 age group consisted of 38 (33.0%) of participants, 26-35 years contained 32 (27.8%) people, 36-45 years had 25 (21.7%) individuals within it, 46-55 years contained 10 (8.7%) of the participants, 56-65 years consisted of 10 (8.7%) of the participants and the last group with a age range of 66 years and above contained no participants. In the question regarding the highest level of education achieved, there were five categories. The first consisted of 3 (2.6%) individuals in the sample and was for individuals who had completed year 10 in High school. The second group was for people who were completing or had completed year 12 in their High School education and consisted of 11 people or 9.6% of the sample. 15 or 13.0% had or were currently obtaining a TAFE diploma and 5 or 4.3% were in the process of completing or had completed a skilled trade. The final group consisted of 81 people or 70.4% of the sample and was made up individual already possessing or in the process of obtaining a university degree. The list of occupations provided for participants to choose from was obtained from the Australian Bureau of Statistics. Of the sample 7 (6.1%)

stated their occupation as falling into the community and personal service worker category. Administration and clerical was the occupation of 9 (7.8%) of people in the sample. There was 10 (8.7%) of the sample in the manager category and 47 (40.9%) in the professional occupation category. Salesperson consisted of 3 (2.5%) of the sample and tradesperson or technician was the occupation of 2 (1.7%) of the participants. There was one labourer (0.9%) and 24 (20.9) students. Four (3.5%) of participants were retired and 8 (7.0%) defined that their occupation did not fit into any of these categories. When the participant was asked if they were employed by any branch of the criminal justice system 112 (94.1%) responded no and 3 (2.6%) responded yes. The participants were also asked about which ethnic group they classified themselves as being part of. None of the sample identified themselves as indigenous Australians. However, 93 (78.2%) classified themselves as being non-indigenous Australians. Another 22 (19.1%) classified themselves as not falling into either category.

Materials

The first page of the online survey was an information letter (Appendix A). A consent letter was not needed as the responses were anonymous and prior to starting the survey participants were told that by completing the survey, their consent was assumed. The Questionnaire (Appendix B, Appendix C) was presented in an online format, using the Qualtrics website. The information letter explained what the data was being used for and that respondents' participation in the survey was completely voluntary and anonymous, and that by completing the survey they were giving their consent to take part. Implied consent by engaging in participation is outlined in the National Statement on Ethical Conduct in Human Research, s, 2.3.6, (National Health and Medical Research Council, 2007). Contact numbers for counseling services were provided on the information sheet, in case participants felt any distress whilst participating in the

questionnaire or post-completion. The information sheet provided the participant with the contact details of the primary researcher, a colleague, the supervisors on the project and an independent party. This allowed the participant access to as many sources as possible, should they have any questions regarding the research. The first scenario described an altercation between two males. This resulted in a punch being thrown, in which one of the men received brain damage and subsequently died (Appendix B). The second scenario was identical to the first in all aspects except the outcome, where the victim is left with a few stitches as a result of the fight (Appendix C).

Identical questions followed on after both scenarios. The scenarios were short and quite basic, in an effort to limit the amount of confounding variables that can arise from too many details being presented (Appendix B, Appendix C). There was no time-limit in which the participant needed to complete the survey. Once the questionnaire was completed the results went into a file on the Qualtrics website. The data was then be uploaded into PASW 18.0 for analysis.

Procedure

Before any of the research began, ethics approval was gained from the Edith Cowan University Computing, Health and Science Faculty Ethics Committee. The questionnaire was created using the Qualtrics software, which allowed online access to all the participants. By clicking on the web-link the participant was directed straight to the questionnaire (Appendix B, Appendix C). This web-link was distributed through social contacts and by means of the snowballing effect. Once on the site, the participant was asked to read the scenarios and complete questions and the demographic sheet (Appendix D). The first page of the questionnaire was the information sheet (Appendix A). After three months of the survey's being available

online, the link was shut down. The quantitative questions were then statistically analysed and the qualitative questions were examined for frequently used terms and themes.

Results

Assumption Testing

The data was analysed using the statistical computer program PASW 18.0. Prior to any analysis being carried out, assumption testing was conducted by screening and graphing the data as recommended by Field (2007). The testing revealed the data was not normally distributed for all questions. The responses for the first four questions (seriousness of the offence, importance of intention, importance of foreseeability and seriousness of outcome) were all found to not be normally distributed according to the Shapiro-Wilks test of normality. The questions regarding sentencing goals (importance of rehabilitation, deterrence, protection of the community and retribution) also indicted that normality assumptions had been violated. All the results were found to be both deviated for kurtosis and partially negatively skewed. If the data are found to fall between the acceptable levels of negative one and positive one, parametric tests may still be used (Allen & Bennett, 2008). There are two requirements for the data to be analysed using a parametric test, despite the Shapiro-Wilks test indicating normality was violated. There must be a minimum of forty participants and the groups sizes must be relatively equal (Tabachnick & Fidell, 2007). Two of the four initial questions were in this category, including the importance of intention in the case and the importance of foreseeability. These responses were analysed using independent *t*-tests. The Mann-Whitney U test is recommended for results that do not meet the acceptable levels of normality (Allen & Bennett, 2008). Therefore, numerous questions including

the seriousness of the offence, the seriousness of the outcome and all four of the sentencing goals questions were analysed using the Mann-Whitney U test.

T-test and Mann-Whitney U test Results for Case Scenarios

Independent t-tests were conducted on the two questions that did not violate normality. Both were found to not be significant on the Levene's test and therefore for both questions homogeneity of variance was assumed. The *t*-tests compared the 'death' condition group ($n = 65$) to the 'no death' condition ($n = 54$). The first *t*-test was conducted on the importance of intention question. There was no significant difference found between the 'death' group ($M = 3.69, SD = 1.13$) when compared to the 'no death' group ($M = 3.57, SD = 1.44$), $t(117) = .50, p > .05$, two-tailed, $d = 0.62$. However, there was a significant difference between the 'death' group ($M = 3.43, SD = 1.22$) and the 'no death' group ($M = 4.74, SD = 1.97$), in the foreseeability of the offence question, $t(117) = 4.426, p < .05, d = 0.00$. The Mann-Whitney U was used to analyse the other six likert-scale questions. The hypothesis test summary produced by PASW revealed that only two of the six other questions were found to be statistically significant, between the two conditions. The two statistically significant questions were in regards to the seriousness of the offence (0.00) and the question regarding the seriousness of the outcome to the victim (0.00). The four questions regarding the sentencing goals were all found not to have a significant difference between the 'death' and 'no death' condition.

Results for Ranked Data

The next section of the results analysed the rankings of intention, foreseeability and outcome in the order of their importance in the case/scenario presented to them. This was analysed using cross tabs to determine how many participants place each aspect in each ranking.

A Kruskal-Wallis analysis found that there was no significant difference between the priority the aspects were placed in across the two conditions ('death' and 'no death'). Table 2 displays the results from the Kruskal-Wallis analysis.

Table 2

Ranked Data for Case Aspects

	Highest priority	2 nd Highest priority	3 rd Highest priority
Death condition (n = 65)	Outcome (n = 29)	Intention (n = 27)	Foreseeability (n = 9)
No death condition (n = 54)	Outcome (n = 30)	Intention (n = 19)	Foreseeability (n = 5)

A similar analysis was performed on the rankings of the goals of sentencing. A Kruskal-Wallis test was performed to determine whether there was any significant difference between the two conditions. The analysis determined that both the rehabilitation question (.000, $p < .05$) and the retribution question (.043, $p < .05$) were significantly different between the two conditions. Community protection and general and specific deterrence were found to have no significant difference. Table 3 displays the results produced from the Kruskal-Wallis analysis.

Table 3

Ranked Data for Sentencing Goals

	Highest priority	2 nd Highest priority	3 rd Highest priority
Death condition	Rehabilitation	Community Protection	Deterrence
(n = 65)	(n = 35)	(n = 14)	(n = 10)
No Death condition	Community Protection	Rehabilitation /Deterrence	Retribution
(n = 54)	(n = 19)	(n = 13)	(n = 9)

Gender Comparisons

The last part of quantitative analysis was the Mann-Whitney U test performed on all the rankings participants gave to case aspects and sentencing goals. This was to determine whether there was a significant difference in the way the participants responded according to their gender. There was no significant difference found between any of the aspects of sentencing (seriousness, intention, foreseeability and outcome) or any of the goals of sentencing (general and specific deterrence, community protection, rehabilitation and retribution) by gender.

Themes in Qualitative Questions

The questions seeking qualitative answers were analysed for common themes or responses (Liamputtong & Ezzy, 2005). The first qualitative question, to which 103 participants responded, asked "If you believe that imprisonment is a suitable punishment, how long do you think the offender should receive?" Thirty-two responses in the 'death' condition included

recommending the offender receive between 5-10 years imprisonment. Six of these participants justified their response by recommending the maximum penalty on the basis the victim had died. Three responses included comments about the offender should receive a reduced sentence if he completed rehabilitation or community service. One person commented that a prison term would not benefit the individual, but would be aimed more at comforting the family of the victim. In the 'no death' scenario, the responses were less punitive. Eighteen participants recommended between no jail time and a few months imprisonment, another eleven participant's responses varied between a 3-6 year prison terms. Seven responses stated that the length of the sentence would depend on the offender's prior criminal history and therefore the likelihood of this occurring again.

The second qualitative question asked "Describe how you think this case should be dealt with by the Criminal Justice System?" There were several themes found in the 53 responses in death scenario. Thirty participants felt that the crime was very serious and that Andrew was a violent person that was a threat to the community and/or needed to be punished in the form of imprisonment. Of those responses, four expressed the fact the violence needs to be deterred in society. Six responses contained the words "Murder" or "Manslaughter". Five of responses put emphasis on the words that were muttered by James to Andrew, which could affect the level of provocation and therefore the sentence severity. Twelve respondents said that his sentence should reflect the surrounding circumstances (e.g, prior history, provocation etc). The 'no death' scenario responses were less punitive in nature. Themes included Andrew paying compensation (three respondents), fines (three respondents) and participating in some kind of community corrections (seven respondents). Thirteen responses mentioned counselling or rehabilitation in

their answer. In this scenario, similarly to the 'death' scenario, there were also five participants that bought up the importance of knowing exactly what was muttered.

The final qualitative question was "Are there any additional comments you wish to make about this case?" There were a few common themes in the Death condition. Two respondents said they needed more information about the offender and his criminal history. One respondent recommended the offender should be made to take part in raising awareness aggressive and criminal behaviour. Three people commented that they believed imprisonment was found to be ineffective and therefore should not be used. The 'no death' condition responses were significantly more varied in nature. One response said that they had considered the possibility that Andrew could have died and therefore sentenced more harshly. Another respondent put emphasise on the fact that an accident (such as tripping on a shoelace) could have the same outcome. One participant focused on the fact that James was young and this behaviour was occurring more frequently in younger males. Similarly to the previous question, three participants put emphasise on what was muttered before the punch occurred.

Discussion

The purpose of this study was to investigate how the outcome of a crime would affect how the participants felt the case should have been dealt with in the criminal justice system. It was hypothesized that there would be a significant difference in the responses, depending on the outcome of the crime and the gender characteristics. This was shown to true for certain aspects of the case. Foreseeability, offence seriousness and outcome were all found to be significantly different between the two conditions, 'death' or 'no death'. Foreseeability in the 'no death' scenario was given a higher importance rating, compared to the 'death' scenario. This may be

due to the fact the outcome where the victim receiving stitches seems more plausible and therefore more foreseeable than the outcome of 'death'. If the participant read both of the scenarios, there may not have been such a difference in the findings. The difference between the seriousness of outcome responses could be attributed to the fact that loss of life occurred in one scenario. The results of this question and the qualitative responses, confirms the hypothesis that an offender would be dealt with more severely based on the outcome of the crime. This is concurrent with Mustard's (2001) findings that people make judgments on severity based on to what degree the societal norms are violated by the actions. In this case, death is a more severe violation of the norm.

Unexpectedly, intention responses were not significantly different between the two scenarios. It was thought that intention's importance rating would be higher in the no death condition, due to the fact the offender probably intended to hurt the victim. Unlike the death condition, when the offender killed the victim, when harm was more likely the intention. It is possible that the participants viewed this as a question of the offender's intention to hit the victim, rather than the intention to commit the resulting outcome. This could account for the lack of difference in the responses for this question. There was no difference found in the priority of the case aspects which could indicate that the two scenarios were viewed the same in terms of which aspects should be considered most important in the case.

Two of the sentencing goal questions were found to be significantly different between the two conditions, including retribution and rehabilitation. Interestingly, the participants in the 'no death' condition placed a higher rating on retribution than the death condition participants. This could be due to the fact they believed it was easier and more moral to equalise the damage of a few stitches than it was to put a weighting on a person's life. Fear of crime theory contends that

individuals with a high level of fear will choose more punitive options to crime related problems (Sotirovic, 2001). While initially this may appear to be contradictory to the results found in this research, it could be explained in terms of people's perception of the likelihood of this occurring to them and therefore themselves becoming a victim to the crime. The likelihood of being punched and receiving stitches as a result of the incident seems more likely than dying.

The death condition rated the importance of rehabilitation significantly higher than the no death condition. This was an unexpected finding. The qualitative responses indicated that many participants associated the offender in the 'death' condition as being a violent person. This could be the reason for these findings. Nicholson (2008) states that rehabilitation is limited in popularity due to the fact many people perceive it as rewarding the offender for their crime by helping them. The results of the study contradict Nicholson's (2008) contention that retribution is of limited popularity. This may be due to the outcome of the offence being unlikely; the offender can draw a small amount of sympathy from the respondent, which might encourage them to opt for rehabilitation over the other sentencing goals.

The aim of the current study was to answer two questions. Firstly, will people sentence an offender more severely based on the outcome of their crime? The responses revealed that people did respond more punitively to the 'death' condition. The imprisonment period suggested in the 'death' condition was much higher, in terms of years. Therefore the answer to the question is affirmative and the hypothesis that there would be a difference based on the disparate outcome is supported. The second question asked 'will female and male respondents view the crime differently and therefore sentence the offender differently?' This study was found to have no gender disparity and therefore the hypothesis that there would be a gender difference is rejected. A review of the literature suggested that there was likely to be a gender difference found in the

responses of the participants. However, no such difference was found in the current study of 115 participants. This could be due to the crime type or the population surveyed. Indermaur (1987) found a significant gender difference in the investigation on the public opinion of violent crime. This was using participants from the Western Australian population, like the current study. It is possible that less of a gender difference exists in the current social environment than 23 years ago when the Indermaur (1987) study was conducted. The Baron and Harnagel (1996) study that was conducted almost a decade later found no gender difference. The lack of significant gender disparity could also be due to the fact the death condition provided a morally conflicting decision for most people. On one hand, the offender did commit an act of violence by throwing a punch at the victim. However, the offender only hit the victim once and it is unlikely that he intended to kill him. A less morally conflicting case may have produced a larger effect in the results. A possible limitation could be the proportion of individuals that had tertiary level education and worked in professional positions. These people may be more aware of their thinking processes and biases and therefore responded in a 'politically correct' manner. Another limitation of the study was the fact that participants did not have two scenarios to compare against each other. A larger effect may have been evident if they were exposed to both conditions and therefore had an opportunity to consider the two alternative outcomes. Future research should examine whether a gender disparity is present in amongst differing crime types. Another aspect that could be investigated is the level of harm that is caused. Whether a difference exists between two assault scenarios, one resulting in the victim with little to no injuries and the other in which the victim is seriously injured. While a difference was found between the two scenarios, in terms of the way they were viewed and the sentences deemed appropriate for them, there are still numerous other

avenues in this topic that could be examined. Further research would assist in developing a clearer picture on the topic of discussion.

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Appendix A

Dear Participant,

We are currently completing a research project as part of our Honours degree in Psychology at Edith Cowan University. Our projects look at public opinion in regards to crime and sentencing. These studies have been approved by the Faculty of Computing, Health and Science Ethics Committee.

Participation will involve reading brief scenarios involving a crime and completing a short questionnaire. The questionnaire is designed to collect your opinion, and there are no right or wrong answers. You will also be asked to complete a demographics sheet so that we may understand the characteristics of respondents, such as age and gender. However all information is anonymous and we will not be able to identify you in any way. The whole study should take about 10-15 minutes to complete.

Participation in this study is completely voluntary, and you are free to withdraw at any time. By returning the questionnaire you are giving your consent to participate in this research. We anticipate that this study will not distress you in any way, however if at any point you feel uncomfortable with the survey please do not proceed. If a particular question makes you uncomfortable, but you are happy to answer the others, leave the question and continue on to the next one. We have included contact details of free healthcare services below if you feel that you need to talk to someone about any distress that occurs as a result of participation.

Lifeline – Ph: (08) 131 114

Crisis Care – Ph: (08) 9223 1111

If you have any further questions regarding this study please do not hesitate to contact us, our supervisors or Dr Justine Dandy, who is a person not involved in the research:

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Thank you for your time and consideration.

Appendix B

Two young men were walking down a street and passed three others walking in the opposite direction. James muttered something and Andrew from the other group reacted by throwing a punch at James. James fell to the ground unconscious. He was taken to hospital, but died as a result of the brain damage that occurred when his head hit the ground.

Taking into consideration the circumstances please rate (by circling a number) the following:

1. *The **seriousness** of the offence*

Not serious 1. 2. 3. 4. 5. Very serious

2. *The **importance** of the aspect of **intention** in this offence*

Unimportant 1. 2. 3. 4. 5. Very important

3. *The **importance** of the aspect of **foreseeability** in this offence? (E.g- how likely was the offender to see the outcome as a likely possibility of his actions?)*

Unimportant 1. 2. 3. 4. 5. Very important

4. *The **seriousness** of the **outcome** of this offence is? (E.g- victim's injuries)*

Not serious 1. 2. 3. 4. 5. Very serious

5. *Please rank the three variables in order of importance to you in terms of sentencing. (One being the most important, three being the least important variable).*

- Intention _____
- Foreseeability _____

• Outcome _____

6. Describe how you think this case should be dealt with in the Criminal Justice System?

7. If you believe imprisonment is a suitable punishment, for how long do you think the offender should be imprisoned (The maximum sentence is ten years)? _____ years

8. How important do you believe the following are in terms of punishment in this case?

Rehabilitation- Aims to prevent further offending by teaching pro-social behaviours, through therapy and education.

Unimportant 1. 2. 3. 4. 5. Very important

Deterrence- Aimed at discouraging criminal behaviours by presenting a negative consequence to criminal activity. E.G- fines, or imprisonment

Unimportant 1. 2. 3. 4. 5. Very important

Protection of the Community- Aimed at protecting the community from its more dangerous members

Unimportant 1. 2. 3. 4. 5. Very important

Retribution- Aimed at making the offender pay, or make up for their wrongdoing, otherwise known as getting their 'just deserts'

Unimportant 1. 2. 3. 4. 5. Very important

9. Please rank the goals of punishment in terms of their importance. (1=the most, 4=least).

Rehabilitation

General and specific deterrence

Community protection

Retribution

10. Are there any additional comments you wish to make about this case?

Appendix C

Two males were walking down a street and passed three other males walking in the opposite direction. James muttered something and Andrew from the other group reacted by throwing a punch at James. James fell to the ground unconscious. He was taken to hospital. He suffered a mild concussion and had fourteen stitches on the back of his head due to the gash which was received as a result of the fall.

Taking into consideration the circumstances please rate (by circling a number) the following:

1. *The **seriousness** of the offence*
Not serious 1. 2. 3. 4. 5. Very serious
2. *The **importance of the aspect of intention** in this offence*
Unimportant 1. 2. 3. 4. 5. Very important
3. *The **importance of the aspect of foreseeability** in this offence? (E.g- how likely was the offender to see the outcome as a likely possibility of his actions?)*
Unimportant 1. 2. 3. 4. 5. Very important
4. *The **seriousness of the outcome** of this offence is? (E.g- victims injures)*
Not serious 1. 2. 3. 4. 5. Very serious
5. *Please rank the three variables in order of importance to you in terms of sentencing. (One being the most important, three being the least important variable).*

● **Intention** _____

● **Foreseeability** _____

● **Outcome** _____

6. *Describe how you think this case should be dealt with in the Criminal Justice System?*

7. If you believe imprisonment is a suitable punishment, for how long do you think the offender should be imprisoned?(The maximum sentence is ten years)_____years

8. How important do you believe the following are in terms of punishment in this case?

Rehabilitation- Aims to prevent further offending by teaching pro-social behaviours, through therapy and education.

Unimportant 1. 2. 3. 4. 5. Very important

Deterrence- Aimed at discouraging criminal behaviours by presenting a negative consequence to criminal activity. E.G- fines, or imprisonment

Unimportant 1. 2. 3. 4. 5. Very important

Protection of the Community- Aimed at protecting the community from its more dangerous members

Unimportant 1. 2. 3. 4. 5. Very important

Retribution- Aimed at making the offender pay, or make up for their wrongdoing, otherwise known as getting their 'just deserts'

Unimportant 1. 2. 3. 4. 5. Very important

9. Please rank the goals of punishment in terms of their importance. (1=the most, 4=least).

Rehabilitation

General and specific deterrence

Community protection

Retribution

10. Are there any additional comments you wish to make about this case?

Appendix D

Thank you for the time you have taken to complete this questionnaire. To assist us in understanding the nature of the data, we request a few personal details. Details and responses to the survey are anonymous, so please do not write your name on any of the sheets we have provided.

1. Please select the age category to which you apply:

- 18-25 26-35 36-45 46-55 56-65 66+

2. Please select the your gender:

- Male Female

3. Which of the following answer/s applies to you?

- I have completed/completing my high school certificate (year 10 level).
 I have completed/completing my high school certificate (year 12 level).
 I have completed/completing a tafe diploma.
 I have completed/completing a skilled trade.
 I have completed/completing a university degree.

4. Which of the following best describes your current occupation?

- Community and Personal service worker
 Machinery Operators and Drivers
 Administration and Clerical
 Manager
 Professional

- Salesperson
- Tradesperson or Technician
- Labourer
- Student
- Unemployed
- Retired
- Other (Please state) _____

5. Are you currently employed by any branch of the criminal justice system?

- Yes No

6. Do you know someone who has a mental illness?

- Yes No

7. What is the postcode of the suburb you live in? _____

Or the Country if you live outside Australia _____

8. If you have moved in the past 12 months, what was the postcode or country that you lived in prior to that? _____

9. Which ethnic background do you classify yourself as being a part of?

- Australian

Indigenous Australian or Torres Strait Islander

Other (Please specify) _____

Thank you for your participation and time you spent on this survey. It is greatly appreciated.

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