

## Information and punitiveness: trial reconstruction in Ireland<sup>a</sup>

Keywords: attitudes to punishment; punitiveness; sentencing; deliberative poll

Article type: Research paper

### Structured abstract

*Purpose of this paper:* to report results from a rape trial reconstruction in Ireland

*Design/methodology/approach:* A studio audience of 100 members of the Irish public were selected to attend a TV programme by the Republic of Ireland's national broadcasting organisation (RTÉ). This involved the examination of the sentencing of a rape case. The audience's sentencing preferences were measured at the outset, when they had been given only summary information about the case, and later, when full details had been disclosed.

*Findings:* Previous research examining changes in public attitudes to crime and punishment has shown that deliberation, including the provision of new information and discussion with others and experts, tends to decrease public punitiveness and increase public leniency towards sentencing. An experiment in Ireland, however, showed that providing information does not invariably and necessarily moderate punitive attitudes. This article presents the results, and offers some explanations for the anomalous outcome.

*Research limitations:* The pre/post design, in which the audience served as their own controls, is a weak one, and participants may have responded to what they took to be the agenda of the producers.

- Due to the quality of the sample, the results may not be generalizable to the broader Irish population.

*Practical implications:*

- Policy makers should recognise that the public is not uniformly punitive for all crimes. There is good research evidence to show that the apparent public appetite for tough punishment is illusory, and is a function of the way that polls measure public attitudes to punishment.
- However the 'information hypothesis' is too often stated in overly simple terms, that fuller and more accurate information about specific cases *necessarily* moderates public punitiveness.
- The experiment presented here serves as a counter-example, showing that a sample of the public failed to moderate their views when given fuller information about a rape case involving serious violence and a vulnerable victim.
- Sentencers and those responsible for sentencing policy would benefit from a fuller understanding of the sorts of cases which illicit strong punitive responses from the public, and the reasons for this response.
- However any such understanding should not simply translate into responsiveness to the public's punitive sentiments – where these exist.

*What is original/value of paper:* There have been limited research studies which reports factors which may increase punitiveness through the provision of information and deliberation.

## **Background**

Past studies have shown that in many developed industrialised countries, the public consistently believes sentencing practice to be too lenient. At the same time, they tend to be poorly informed about the realities of sentencing practice, and to underestimate the severity of court sentences (Roberts 1992; Roberts and Stalans 1997; Cullen et al. 2000; Roberts and Hough, 2002, 2005; Kury et al. 2002;). A consistent finding is that the least

well-informed are the most punitive, holding negative views about the criminal justice system (Hough and Roberts 1998; Mattison and Mirrlees-Black 2000).

Experimental studies designed to unpick the relationships between knowledge and punitivity have suggested that less punitive attitudes are uncovered when methodologies are used that allow the provision of information and deliberation (Doob and Roberts 1998; Chapman, Mirrlees-Black and Brown 2002; Indermaur and Hough 2002; Hough and Park 2002; Luskin, Fishkin and Jowell 2002; Hutton 2005; Keijser, Koppen and Elffers 2007; Warner and Davis 2012).

A set of experiments conducted by Doob and Roberts (1988) for the Canadian Sentencing Commission in the early 1980s are probably the earliest and most cited tests of the 'information hypothesis'. The studies involved random allocation of survey respondents to varying conditions in which they were given varying media reports of real sentencing decisions or detailed information from the court hearing of the same cases. Respondents who read newspaper accounts were significantly more punitive in their sentencing and also more likely to disapprove of the judge's decision than those who were given detailed court-based information. The essential finding – that the provision of information attenuates punitiveness and moderates criticism of sentencers – has subsequently been replicated in a range of other jurisdictions (see for example de Keijser et al. (2007) in the Netherlands and Warner and Davis (2012) in Australia<sup>b</sup>, ).

Further evidence in support of the hypothesis comes from a large-scale deliberative poll<sup>c</sup> conducted in 1994, which demonstrated that participants became less punitive on various issues relating to crime and punishment (Luskin et al. 2002). More importantly, this attitudinal change was not simply a short-term phenomenon but endured over a period of many months (Hough and Park 2002). Chapman, Mirrlees-Black, and Brown (2002) explored different means of presenting information to the public. Simple facts about crime

and the criminal justice system in three formats – booklets, seminars and videos – were all found to be effective – to varying degrees – in moderating punitive attitudes.

Lastly, in Scotland Hutton (2005) reported the results of a survey that – in keeping with earlier work – found that when asked general questions about the performance of criminal justice agencies, people tended to express punitive views; but in response to individual cases, they were less punitive and expressed more satisfaction with sentencing. If there is a significant body of research in support of the ‘information hypothesis’, Hutton usefully reminds us that punitive attitudes coexist with more tolerant ones, and that punitive attitudes expressed, for example in response to news reports, are no less real than those that emerge after deliberation. Whatever the sources of these attitudes, they are often strongly and sincerely felt.

### **The Irish experiment: methods**

The experiment reported here was carried out by RTÉ – The Republic of Ireland’s national broadcasting organisation - which provides public service broadcasting. The programme was developed in late 2006 and early 2007, following intense criticism of the sentencing of various criminal cases, including rapes. The producers of RTÉ’s flagship current affairs programme *Prime Time* proposed a programme examining whether judges were in fact out of touch. They were interested in a version of deliberative polling, and asked one of us (MH) to provide academic advice. The programme was screened in April 2007<sup>d</sup>, and subsequently won an award.

A studio audience of 100 members of the public were selected to attend the event. This involved the examination of the sentencing of three quite recent court cases– two involving homicide and one rape. The audience’s sentencing preferences were measured at the outset, when they had been given only summary information about the case, and later, when full details had been disclosed. Only the rape case represented a fair test of the

information hypothesis. It included a detailed re-enactment of key parts of the trial. Much less time was devoted to the homicide cases, in which the presenter simply read out to the audience further details about the case to the audience. Thus this paper presents findings only for the rape case.

The programme was shot entirely in a television studio, with an auditorium layout with seating for the audience and a stage for re-enactment. In the rape case, the presenter read out about the bare facts of the case – as would be reported in the media – as follows:

This was the brutal rape of a young woman walking home in the early hours after an evening spent with friends. She became quite nervous when a man got up from where he had been sitting on a wall and began to follow her, then passed her and went out of sight. But he suddenly jumped out at her and held what he said was a knife to her throat. He grabbed her mobile phone and beat her with it and his fist till she bled. He beat her so badly that she still carries the marks. He forced her up the lane, onto her hands and knees pushed his fingers into her and made her perform oral sex on him. And so she was left in the lane having been threatened with death, raped and her mobile phone stolen.

The audience were then invited to ‘sentence’ the offender (using a questionnaire referred to as the ‘pre-poll’). Once the audience had made their ‘preliminary sentence’ and their questionnaires had been collected, there was a re-enactment of key parts of the court proceedings, based on transcripts, which included statements by the victim, the defendant and a police sergeant, and the summing up and sentencing by the judge. The cast were professional actors, but acted without props or costumes. First, the ‘police sergeant’ gave an edited (but faithful) version of the original transcript of the police evidence setting out the facts of the case, which detailed the precise nature of the offence, including vaginal penetration, oral sex, assault causing injury and robbery. This was followed by evidence from the ‘victim’, in which she read out the victim impact statement that the real victim had prepared for the hearing. This convincingly established that she had been seriously traumatised by the event. It also made reference to strong religious beliefs, and the fact that

the young woman had been contemplating taking holy orders before the crime. Next, the 'defendant' was cross-examined by his defence counsel. This established that:

- he was of previous good character, and was from a 'good family'
- he said that he felt great remorse and apologised profusely
- he had had a troubled childhood, suffering sexual abuse, and was subject to considerable bullying at school
- he was currently under medical treatment for depression and was also being treated for alcohol addiction.

The re-enactment thus provided the audience with much more information than was given by the presenter at the outset (or than would be contained in typical newspaper reports). It included details about the offence, the victim and the offender, including on the one hand graphic accounts of a violent sexual crime and on the other, extensive potentially mitigating circumstances. To our knowledge this experiment is the only test of the 'information hypothesis' that has attempted to reconstruct key elements of the court proceedings using actors.

The 'judge' then gave his summing up, but before he moved to pass sentence, participants were asked to complete a 'post-poll' questionnaire in which they once again were asked 'pass sentence', it being made clear to them that they were free to revise in the light of the extra information that had been presented to them. Separate to the case study exercise, participants were also asked to answer other attitudinal questions on crime and punishment in both the pre- and post-polls.

RTÉ used a market research company - TNS mrbi – to assemble the sample of 104 participants who had agreed to attend RTÉ's recording studio for a full day for the experiment. The group did not appear to be grossly unrepresentative of the general public in terms of demographics. The survey company was able to benchmark the sample's

attitudes to punishment against those of a nationally representative sample that had been interviewed on attitudes to punishment a year earlier, before the experiment. Both the experimental and the national samples were asked how concerned they were about crime, and whether they thought crime was rising. Although the national poll found considerable concern (85% of the sample saying 'concerned') 99% of the studio audience expressed concern. Similarly the studio audience was more likely to think that crime was rising (90% against 69%)<sup>e</sup>. Both differences were statistically significant and this raises the possibility that the studio audience is atypical of the wider population.

The reason likely lies in the fact that the experiment required considerable commitment from participants – a full day in a studio, which would most attract those who are interested in, and concerned about, crime and criminal justice matters.. Whether the skewed nature of the studio sample vitiates the experiment is open to question. There are plausible reasons for thinking that the attitudes of people who are especially concerned about crime may be insulated from the effects of deliberation and information – a point to which we shall return.

## **Results and discussion**

This section first compares the sentences 'passed' by the experimental sample in the pre- and post-polls. We shall focus on the gross attitudinal change comparing pre- and post-polls. Ideally, we would have liked to have analysed individual-level data, which would have enabled us to investigate individual changes as well as net effects for the whole sample, but we do not have the necessary micro data.

The studio audience first 'passed sentence' after the presenter had outlined in a few sentences the nature of the case. The audience then watched the re-enactment of the hearing, up to, but excluding the passing of sentence; and at this point they again selected a

sentence. The table summarises responses in both the pre- and post-polls. In both cases, nobody selected any sentence other than imprisonment.

<i>Sentence length (years)</i>	<i>4 ≤ (%)</i>	<i>5-7 (%)</i>	<i>8-11 (%)</i>	<i>12 ≥ (%)</i>	<i>Life (%)</i>	<i>Total (n)</i>
Pre-poll	9	20	30	4	38	102
Post-poll	10	18	31	7	33	99

**Note:** The table does not add up to 100 per cent due to rounding

The table shows that there was very little change in preferences for determinate sentences of under 12 years. Almost identical proportions opted for sentences of four or less years, of sentences between five and seven years, and of sentences between eight and eleven years. However proportions opting for life sentences fell by five percentage points, and those voting for long determinant sentences grew by three percentage points<sup>f</sup>. Although we do not have the individual level data to permit statistical tests, changes of this size would not achieve statistical significance. The pre- and post-polls showed no overall change in the median score on the length of imprisonment<sup>g</sup>, which was ten years in each case.

Once respondents had ‘passed sentence’ in the second poll, the actual sentence was revealed, with the ‘judge’ speaking from the transcript of the original judge’s sentencing comments:

So balancing the factors as best I can, on the rape counts I sentence him to six years imprisonment and on the robbery count to three years all to date from today as he took proactive steps to bring in his plea at the first available opportunity and never occupied a trial date which is consistent with his attitude of remorse. On that count I suspend on condition the final 18 months of that sentence. I also direct that he be given credit for 30 days in respect of time spent in custody on remand. I direct that he undergo a period of post release supervision for three years, and I am required by statute to warn him that he



faces further periods of imprisonment if he disobeys any of the terms of the post release supervision.

This means that the offender would serve four and a half years of the longest concurrent sentence of six year (automatically serving the shorter three year sentence), after which he would be released on licence for three years. This is broadly equivalent to a sentence of around nine years in England and Wales and to six years in Scotland<sup>h</sup>.

In both the pre-and post-poll around a fifth of the audience chose a sentence that was broadly at this level of severity (between five and seven years). Assuming that those opting for a lighter sentence would readily tolerate the slightly heavier sentence that was actually passed, the table shows that both before and after the re-enactment a minimum of around three in ten of the audience would find the sentence acceptable.

However, after the actual sentence had been revealed, the audience was actually asked for their assessment of the sentence. One per cent thought it “much too tough”; 3% said “a bit too tough”; 14% said “about right”; 26% said it was a bit too lenient; and the remaining 56% thought it “much too lenient”. A measure of acceptability can be derived from summing the three groups who found the sentence “a bit too tough”, “a bit too lenient” and “about right”. This suggests that a large minority (43%) would be broadly tolerant of the sentence actually passed.

Whether this degree of correspondence between public preferences and court practice is acceptable is a matter of judgement. Whatever the case, the results of the experiment offer little support for the information hypothesis. The overall tenor of preferences remained largely unchanged, with no evidence of convergence around the sentence actually passed. The only suggestion of an effect can be found in the five percentage point fall in the net number of respondents who opted for a life sentence – and it is unlikely that this change would reach statistical significance in a sample of 104. Certainly there was no evidence that

the re-enactment had increased confidence in the competence of the judiciary in the way that the information hypothesis implies: the proportion of the audience who felt that judges “do a poor or very poor job” moved from 28% to 54% - result that will have been statistically significant.

Why did the additional information presented in the course of the trial re-enactment fail to moderate punitive responses? The case certainly was not short on mitigating factors that were initially hidden from the audience: no previous convictions, the expression of remorse, the defendant’s early history of being sexually abused and bullied, and his history of depression. There seemed to be plenty of information to ‘individualise’ the case from the ‘general’, upon which punitive opinions might be based (Hutton 2005).

We can offer three types of explanation for the finding. The first two concern problems relating to the internal and external validity of the experiment, respectively. The third is that the experiment offers real – if tentative – evidence about the sort of cases in which information and deliberation fail to moderate punitive attitudes.

### *Internal validity*

The internal validity of the experiment is concerned with the extent to which it accurately managed an experimental manipulation and accurately measured change in the sampled population that can be attributed to the manipulation. The experiment is open to criticism at three levels:

1. The pre/post design, in which the audience served as their own controls, is a weak one, and participants may have responded to what they took to be the agenda of the producers. In an ideal world it would be preferable to have separate experimental and control groups, with the latter exposed to some irrelevant experience to match the court re-enactment. It is, of course, totally unrealistic to

expect a television production company to underwrite this degree of methodological sophistication (and cost).

2. In the nature of an event of this sort, filmed for television, only limited information was given about sentencing options and release provisions. Although there was scope for questions and comments from the audience, there was certainly not much time or scope for deliberation. So the event fell short of the format of a 'deliberative' poll. However, the experiment clearly did succeed in presenting a great deal of texture and detail on the case where respondents were provided with details from court proceedings.

3. Whilst the re-enactment was skilfully performed by trained actors it is possible that their performance may have sensitised the audience to extraneous and irrelevant factors. Our own judgement about the performances is that the 'defendant' was rather unlikeable, and his evidence not very compelling. And perhaps more important, the 'judge' lacked much authority in his delivery. Leaving aside the substance of 'his' judgement, his performance lacked any gravitas. Of course, it may indeed have been the case that in real life the defendant was unlikeable and the judge lacked charisma, but none of those involved in the experiment were in a position to know this. Obviously this is a risk inherent in the re-enactment approach, and one that is hard to assess or quantify objectively – but as is clear from the rating of judicial competence in the pre- and post-poll, *something* happened to erode the sample's confidence, and this may have been to do with the performances of the actors as much as the sentence process that they were portraying.

### *External validity*

The external validity of the experiment may also be open to question. That is, the experiment may have accurately characterised the effects (or in this case, lack of effects) of

the experimental manipulation on the target group, but these results may not be generalizable to the broader Irish population. The first reason for thinking this is that there was intense concern about sentencing at the time of the experiment. Whilst the producers of any current affairs programme would obviously want programmes to be topical, the Prime Time team at RTÉ in this case certainly could not have anticipated that another rape case would hit the headlines immediately before the event, and that the sentence for this case would be heavily criticised. Most of the audience will have been exposed to the media uproar about the case, and this will probably have promoted a sense that sentencing – and especially sentencing of rape cases – was in crisis. Arguably, the results might have been different had the programme been made immediately before, rather than after, the new case hit the headlines.

Second, as we discussed in the methods section, when benchmarked against a national sample, the audience emerged as more concerned about crime. They may have been a self-selected audience for whom crime and justice were big issues. Few would argue that the information hypothesis is universal in its application: that any social group – provided with information and the time to think – might change their opinions. There are good reasons for thinking that people with strongly held attitudes may be especially resistant to change. Crudely, the argument would be that prejudiced people are by definition unprepared to modify their views in the face of new information (and indeed there is a large literature on the dynamics of right-wing authoritarian attitudes). We obviously cannot say to what extent the audience could be characterised in these terms, but their response to the re-enactment may not have been typical of the wider Irish population.

#### *A real effect? Limits to the impact of information and deliberation*

Another possibility is that information and explanation moderates punitivity only for some types of criminal cases (Warner and Davis 2012). Where cases involve vulnerable victims or where high levels of violence are used, many people simply want very tough sentences. We suspect that the victim's character (religious belief, vulnerability) and subsequent

traumatisation may have proved particularly salient for the audience. While the re-enactment presented a number of mitigating factors for the defendant, the victim impact statement may have fully offset these. It should be said, however, that there are plenty of tests of the information hypothesis where added information has moderated attitudes in very serious cases.

This points to the obvious possibility that information does not always and necessarily make people less punitive: it depends on the nature of the information. People tend to think stereotypically about crime, imagining the worst case to be the norm. Thus in most cases fuller information serves to challenge the stereotype, and moderates punitive responses. However, when people are confronted with crimes that are consistent with their stereotypes, the 'information effect' is no longer to be found.

Whilst this conclusion must be regarded as tentative, it is perfectly compatible with previous research on the topic, which has typically focused on less serious offences, such as burglary (Hough and Roberts, 1998, 1999; Chapman, Mirrlees-Black and Brawn 2002 Hutton 2005;). It is significant that the 1994 deliberative poll demonstrated that although exposure to information reduced punitiveness in various aspects of crime and punishment, there was no reduction in support for the death penalty, or for making a life sentence actually mean life (Luskin et al. 2002: 469).

## **Conclusions**

The experiment reported here has problems of both internal and external validity but our tentative interpretation of its results is the simple one that when people are confronted with grave crimes – as distinct from the vast majority of cases passing through the criminal process – they favour punitive sentences – or at least sentences that are more punitive than the norm in their jurisdiction. This conclusion is unlikely to hold across all cultures and

across different justice systems, of course, but it may accurately characterise western industrialised democracies. The explanation for the limits to the moderating effects of information and deliberation are probably to be found in the way in which many people hold stereotypes of crime and of offenders that match not the norm but the worst case. When they are given information that prompts them to adjust or abandon the stereotype, their views on punishment may in that case change. However, where they are asked about crimes which are indeed very serious, their responses remain punitive in the face of additional information.

This conclusion is commonsensical, but worth reporting, nevertheless, as the 'information hypothesis' is too often stated in overly simple terms, that suggest that beneath the surface, there is no real public demand for tough punishment. This position may be tenable for the majority of cases that come up for sentencing, but we suspect that it is unlikely to hold where victims are vulnerable, where serious and gratuitous violence is used, or where there is a sexual motive.

This paper has been written some seven years after the experiment was actually mounted, and nearly never saw the light of day. There are several reasons for this. As we have discussed, there were weaknesses in the experimental design, and especially in sampling, offering challenges to the validity of its conclusions. The programme producers had to make inevitable trades between methodological purity and practicability. This reduced the priority that we gave to the reporting of the results in an academic journal. Nevertheless, relative to most academic experiments, this was a well-resourced project whose results deserve to be recorded in a less ephemeral medium than a current affairs programme. Its implications for sentencing practice are to be found in the way that it qualifies the findings of previous research suggesting that information about cases tends to moderate public punitivity.

## **Endnotes**

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a We would like to thank Paul Loughlin, who produced the programme for Prime Time, RTÉ, for agreement to use the data from the experiment reported here.

b This research was an especially robust test of the information hypothesis, in that it canvassed the opinions of jurors about the sentences of cases that they had served on, and were thus especially well informed about case details.

c. In 1994 in Manchester, James Fishkin in collaboration with the National Centre for Social Research and Channel 4 Television conducted the world's first deliberative poll on crime. Deliberative polls are designed to identify the attitudes and policy preferences that the general population would hold if they had the time and energy to inform themselves properly about the issues. For more details about the origin, rationale and methodology of deliberative polling, see Luskin, Fishkin and Jowell (2002) and Fishkin, Luskin and Jowell (2000).

d. <http://www.rte.ie/presspack/2007/03/15/prime-time-the-big-picture/> Last accessed on 2 December 2014.

e. The wording of the two questions was: To what extent are you concerned or not about crime and public order maintenance in our society? How do you think the level of crime in the country as a whole has changed over the past two years?

f. It is possible that the five who changed from 'life' in the pre-poll opted for 12+ years in the post-poll, but in the absence of individual level analysis we cannot be sure of this.

g. In calculating the median sentence length, we assumed that life sentences should be treated as being equivalent to at least 12 years.

h. The two jurisdictions have different arrangements for early release. A lay person's reading of the Sentencing Council's guidelines for this offence in England and Wales would suggest that a nine-year sentence would fall at the top end of the range of possible sentences for a remorseful defendant of good character pleading guilty to an offence of this sort at an early stage and expressing remorse.

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