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To Name and Shame or Not

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The justice system includes laws, procedures and specialised agencies that focus solely on juvenile offenders. Since at least early last century there has been recognition that criminal justice should proceed with caution and restraint in dealing with the lives of juveniles. In particular, the view has been that 'get tough' solutions have the potential to wreck young lives and at the same time increase rather than reduce levels of youthful offending. One protective law in regards to juveniles restricts their public identification. Yet recent 'get tough' moves have resulted in changes to the *Children (Criminal Proceedings) Act 1987 (NSW)* (the CCPA) where s 11(4)(b)-(c) removed the prohibition on public naming of youthful offenders in 2001.¹

Such moves are not restricted to New South Wales as similar shifts to publicly name juvenile offenders have been proposed in Queensland in order to permit identification in the media of those aged 14 years and over if they are convicted of serious crimes. This proposed policy also recommends that habitual offenders – those charged with three or more minor offences – should likewise be named.² Such procedures are already in place in the Northern Territory where the names and photos of young people can appear in the media and only the Supreme Court can suppress the release of names in special cases.³

In this article the issue of naming and shaming young people will be addressed by first examining a high profile sexual assault case in New South Wales where two of the offenders were not adults at the time of the offence and where there has been a recent application to the Court of Criminal Appeal to overturn the suppression order. This case has already garnered considerable public and media attention and a book was recently published on the matter.⁴ The focus on this case is important because the judgment handed down late last year preserves the anonymity of those who were underage and thereby extends this cloak to the older family members involved in the crimes.⁵

The article then canvasses arguments for the protection of certain categories of offenders, and explores the international laws that offer protection for juveniles. Some research evidence will be provided that naming and shaming offenders can lead to degradation and stigmatisation and even vigilante action. Finally, an alternative approach, known as restorative justice and reintegrative shaming, will be briefly presented because this approach demonstrates that young offenders can be sheltered while at the same time giving the community protection and satisfying the need to publicly recognise criminal harms.

Suppression order case in NSW

This case involves a series of rape offences occurring in mid-2002 in Sydney against female victims (L, H, T and C) who were aged from 13 to 17 years. The perpetrators are four brothers plus an adult friend (RS), who resided together without parental supervision. Two of the brothers (S and A) were adults aged 23 and 21 years, and the other two (M and R) were aged 16 and 17 years at that time. According to court documents, on Saturday 13 July 2002, two of the victims were in the city and missed their last train home. Three of the brothers picked up the girls in their car and took them back to their house, and along the way they picked up another brother. A home video of this night was recorded, showing all six people 'hanging out'. No sexual activity occurred, and the victims were taken to the train station the next morning.

Two weeks later the female victims received a phone call from the brothers and were asked to 'hang out' again. Three of the brothers, plus their male friend, picked them up at the train station and went back to the house where R was waiting. According to the victims, one of them was bit by S and taken to a bedroom and raped by him with further threats of violence. During the offence, this victim asked R for help, but he refused. S then told R to take the other female victim to another bedroom, at which time R took her mobile phone and left the bedroom. She was subsequently raped by M and threatened with violence. The two females experienced a number of rapes by the five offenders and were then driven to Campsie where they were told not to tell anyone. However, the victims did call for help and were immediately given medical treatment. On 29 July 2002 a search warrant was granted for the Ashfield home and by the end of the next month all five males involved had been arrested. They were charged with eleven counts, which included aggravated sexual intercourse, aggravated sexual assault and aggravated kidnapping.

Three of the offenders were represented by counsel, while the other two were not, and a separate trial was granted for the two unrepresented offenders. During the trial, the offenders gave an alibi involving another brother, but this was rejected, and none of the offenders made a successful case of consensual sexual intercourse. It is alleged that all four brothers claimed their innocence and showed little shame or remorse. The young men also claimed they had a dysfunctional family in Pakistan in which they saw a lot of violence and abuse on a regular basis.

In October 2003 R, M and RS were found guilty of all charges, and the following month S and A were also found guilty. Sentencing began on 20 February 2004 and concluded in March that year. The offenders were ranked by culpability: S and M had used knives on the victims; RS and A committed one offence each; and R claimed he did not commit any rapes, but was guilty of not preventing them and holding one of the victims down during the assault. Therefore, the sentencing was different for each offender. S was sentenced to 22 years imprisonment with a non-parole period of 16.5 years, and becomes eligible for parole in early 2019. M was sentenced to 22 years imprisonment with a non-parole period of 13 years, and becomes eligible for parole in mid-2015. A was sentenced to 16 years imprisonment with a non-parole period of 12 years, and becomes eligible for parole in mid-2014. Lastly, R was sentenced to 10 years imprisonment with a non-parole period of 5 years, and becomes eligible for parole on 31 July 2007. (On 14 April 2004, RS died in tragic circumstances.)

Two other rape cases also involved these same offenders. On 14 June 2002, T went with two friends to the home of the offenders and became intoxicated. Upon returning to the main room from the bathroom, A took her to a bedroom and raped her, and then she was raped by S and another man. Shortly after the incident, T and her friends were driven back to the train station by A. Another rape occurred on 14 July 2002 when C was picked up by S, A, M and RS and taken to the young men's home. At that time, M had consensual sexual intercourse with her, but then she was raped by S and sexually assaulted by RS. The victim was then driven home by A and M. The offenders were found guilty and the sentences were added onto their previous ones. S has now been sentenced to 28 years and will be eligible for parole on 12 August 2024. A is now serving 19 years and is eligible for parole on 31 July 2016. M was sentenced to an additional 12 months imprisonment but his non-parole period was not extended due to the sentence he is already serving.⁶

The details above are complex but have been included to reveal the difficulties in apportioning culpability for offences where there are multiple victims, offences and offenders. They also reveal the dilemma of granting anonymity to multiple offenders when some are juveniles and others are not. The above details, extracted from the trials and judgments, further demonstrate the horrendous and aggravated nature of these crimes. However, it should be remembered that many young people offend in groups – for example a gang rape by a group of mature adults may be a very different kind of offence to a gang rape committed by a group of young people especially where they are related. Finally, the horror of this sustained series of procurements and sexual assaults does need to be placed into context. Although juveniles comprise 12.5 per cent of the population, data from South Australia (police arrests) and New South Wales (Children's Court appearances) for the year 2000 indicate that sexual assault offences comprise around one per cent of all offences committed by young persons. Therefore the overall level of such offending by juveniles is low and each case should be carefully considered in light of the circumstances.⁷

Background to protective laws for juveniles

Much of contemporary criminal justice systems are based on the classical approach as promulgated by Cesare Beccaria in the late 1700s, who attempted to restructure justice processes so that they were both fair and effective. Beccaria 'objected especially to the capricious and purely personal justice the judges were dispensing and to the severe and barbaric punishments of the time.'⁸ He wanted punishment to be public, swift, certain and proportionate, among other things, and his essay *On Crimes and Punishments* became the foundation for the French Code of 1791. But his views have resonance today where there is often public opposition to what appears to be lenient punishment for one offence and penalties that are too severe for a similar offence. The French Code treated everyone exactly alike, since only the act, not the intent, was considered in determining the punishment. The problem was that the Code was too rigid and failed to allow for discretion so that later revisions permitted judges to consider 'factors such as age, mental condition, and extenuating circumstances'.⁹

Following in this classical approach 'adults and juveniles

were treated the same: deterrence was the main object' up until the early 1800s, although even prior to this time some commentators suggest that there were instances of leniency and care provisions for children.¹⁰ Laws were overhauled in 1849 with the introduction of an 'Act to provide for the care and education of infants who may be convicted of felony or misdemeanour' (13 Vict No 21). A more significant legislative change was the introduction in 1850 of an 'Act for the more speedy trial and punishment of juvenile offenders' (14 Vict No 2). The legislation 'also allowed for different and lesser penalties to be applied to juveniles convicted of larceny than were applied to adults for the same crimes, and began the process of development of children's courts in Australia.'¹¹ Thus, by the end of the 1800s there had been a shift from punishment to treatment and a clear acknowledgement that youthfulness should be taken into account.¹²

In New South Wales the *Neglected Children and Juvenile Offenders Act 1905* established a separate Children's Court which was based on the notion of *parens patriae* which came to refer to the responsibility of the juvenile courts and the state to act in the best interests of the child. In this way 'a separate Children's Court and separate penal system can be seen as a humanitarian advance on former methods of dealing with young people.'¹³ In many Australian states (Victoria, South Australia, Tasmania, Western Australia and the Northern Territory) 'Children's Courts are now open to the public [and] all states restrict media identification of the child offender but allow such identification with permission.'¹⁴ At least, that was the universal situation until recent changes in some states and territories, as noted above.

The age at which a juvenile offender can be treated as an adult in the criminal justice system varies from state to state, but 'the Australian Law Reform Commission (ALRC) and Human Rights and Equal Opportunity Commission (HREOC) have recommended that all Australian jurisdictions set the minimum age of criminal responsibility at 10 years and the age of adult responsibility at 18 years.'¹⁵ There is a prevailing view 'that a child aged seven or under cannot be guilty of a crime'.¹⁶ This is due to the idea that children are morally different from adults, because they do not have the same judgment skills, self-control and ability to know right from wrong. It is also argued that adolescents take more risks, pay less attention to negative consequences, are impulsive and look at short-term outcomes not a long-term perspective, as well as experiencing greater peer pressure which can make their offences qualitatively different from those of adults. The concept of young children being incapable of wrongdoing is known as *doli incapax*. In order to rebut this idea 'the prosecution must prove beyond a reasonable doubt that the child knew that his or her act was wrong as distinct from an act of "mere naughtiness or childish mischief".'¹⁷

There are also international provisions that help to protect the interests of those who are not yet adults. Australia is signatory to the United Nations Convention on the Rights of the Child (CROC) in which Article 3.1 states that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' This Convention 'deals more specifically with juvenile justice issues in Articles 37 and 40, which cover a range of matters relating to the rights of young people accused of an offence, and their trial, sentencing, and punishment.'¹⁸ Regard should be had as

well to the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) which 'Australia helped to develop'.¹⁹

The CROC recognises 'that children require special protection because of their particular vulnerability and stage of maturation (for example, prohibitions on sexual or economic exploitation, or special requirements before the law, such as sentencing dispositions aimed at social integration).'²⁰ Under Article 40.1 there is special mention of reintegration and allowing a child to again become a constructive member of society. Another right children have under the CROC is the right to privacy. This cannot be enforced under Australian law at present, but HREOC could investigate if there were breaches of this international convention. Indeed the existence of the UN Standard Minimum Rules for the Administration of Justice means that across all Australian jurisdictions there are severe restrictions on 'the publication of any information which would allow the identification of youths found guilty of a criminal offence in the juvenile jurisdiction.'²¹

Juvenile shaming and the media

There is no juvenile crime wave, yet this is constantly exaggerated by politicians, community leaders and the media. There is a perception that juvenile crime is 'out of control', but this is largely drawn from high-profile media coverage which tends to focus on the most predatory and sensationalised cases, and because the offenders are juveniles this tends to make the crimes seem even more shocking. Although there has been 'an enormous increase in media coverage and publicity in juvenile cases in the last decade, this coverage still tends to report outlandish cases.'²² According to a survey by the Australian Institute of Criminology, the community generally supports (by two-thirds) a rehabilitative approach to juveniles. In this regard, 'journalists should be educated and persuaded to cover the broader debates and theories underlying the administration of criminal justice, and to move away from purely sensational news reporting. A more informed public would hopefully influence politicians to move away from a law and order strategy against juvenile offending to a strategy with hallmarks of diversion, protection and rehabilitation.'²³

A consequence of broad media coverage of the offending of young people is that individuals may be labelled as criminal which in turn may transform them into identifying with that label. Public labelling can lead to stigmatisation and a community may know these individuals solely by their negative tags. While it is important to condemn deviant behaviour, any labelling should be attached to the behaviours rather than the person who committed them in order to prevent a self-fulfilling prophecy to live up to such labels. Clearly labelling theory most directly applies to juvenile offenders 'given the general view that young people and children are more impressionable than older people, and therefore more likely to respond to any labelling that might occur.'²⁴ In regards to public naming and shaming, having a suppression order on the release of juvenile names can minimise the harmful impacts of labelling.²⁵

While people in the community believe that knowing the sexual offenders in their area can better protect them, notification of offenders does not guarantee victim protection and may even give a false sense of security. Community notification also rests upon the idea of the predatory stranger but rape is more often a domestic crime rather than one committed by

those unknown to the victims. For example, in Australia in 1994 there was an 80:20 ratio of known versus stranger rapes, yet the media misrepresents this fact. Another negative aspect of naming and shaming offenders is that it may lead to harassment and vigilantism, which can harm fair trials and further punish offenders after they have completed their sentence. It can also discourage sex offenders from seeking treatment because of fear of reprisals and vigilante actions.²⁶

A more positive form of shaming is that which is called reintegrative because it does focus on the deed rather than the person. It also takes place in a supportive conferencing or mediation environment in which victims, offenders and interested parties can play a role. Under this restorative justice approach, the offender becomes an 'active player required to understand the consequences of their actions, accepting responsibility and taking action to repair the harm caused by the crime.'²⁷ The core claims of reintegrative shaming theory are: '(1) that tolerance of crime makes things worse; (2) that stigmatisation, or disrespectful, out-casting shaming of crime makes things worse; and (3) that reintegrative shaming, or disapproval of the act within a continuum of respect for the offender and terminated by rituals of forgiveness, prevents crime.'²⁸ With restorative justice, everyone involved with the crime comes together to resolve the consequences of the offence, usually in family group conferences, and there are high satisfaction rates by victims, offenders and members of relevant communities. Offenders must take responsibility for their actions and face their victims in order make amends.

Reintegrative shaming rests upon the idea that 'it is not the shame of police or judges or newspapers that is most able to get through to us; it is the shame in the eyes of those we respect and trust' that has the greatest impact.²⁹ However, there are many who believe that this form of justice cannot be used in sexual assault cases because of the intimate nature of the crimes. Yet a recent study by Kathy Daly that compares 400 court and conference outcomes for both youthful victims and offenders in South Australia over a six year time-frame found that 'contrary to the concerns raised by critics of conferencing, from a victim's advocacy perspective, the conference process may be less victimising than the court process and its penalty regime may produce more effective outcomes.'³⁰



Conclusion

Historically what affected changing attitudes towards children (such as the establishment of special legislation, different punishments and the advent of the Children's Court) were twofold: the rise of positivist criminology (looking for the causes of crime) and the availability and analysis of criminal statistics (being able to see the patterns of offending) – both of these meant that there was a more scientific approach taken to dealing with juveniles. We would argue that almost 200 years later, there should still be a focus on the evidence-based approach to deal with juvenile crime. Contemporary research would recommend a community-based approach to reducing youth crime such as 'communities-that-care' and other crime prevention type programs rather than a harsher 'name them and shame them' perspective.³¹

The law offers protection for those who are considered worthy of such care, like juveniles and the mentally ill. Often there is tension between justice versus welfare approaches for juveniles, and in more recent times there are moves to what has been called therapeutic as well as administrative/actuarial justice. The justice model takes a focus on the deeds of the young offender and treats them therefore as an adult would be processed; whereas the welfare approach focuses more on the needs of the young offender. However, while we are considering whether to name juveniles, especially in what are described as horrendous cases of sexual assault, it should be noted that there are only two jurisdictions in Australia (NSW being one) where there are specific treatment programs for juvenile sex offenders. This is a significant gap because age is recognised on the one hand where punishment is concerned, but it seems to be ignored on the other when treatment options are being developed.³²

Based on our examination here, there are three reasons to maintain the cloak of anonymity for juveniles: (1) naming does not offer greater community protection (indeed there is the potential for vigilante action); (2) it may interfere with rehabilitation prospects; and (3) this kind of naming is stigmatising rather than reintegrative. It is also imperative to keep in mind that many young offenders only offend once in their lifetimes and thus negative media attention can have long-term consequences for their education and employment as well as impacting on their extended families. As has been shown, there are alternatives to publicly naming and shaming and these more reintegrative forms of justice can assist reconciliation and repair harms for victims, while achieving a restoration of public faith through conferences and other forms of mediation.

Finally, as High Court Justice Michael Kirby has observed, the criminal law is becoming more complex and this makes it more difficult to achieve justice within and between cases.³³ By the same token the criminal law has also become more global with human rights elements underpinning what is happening in local laws in Australian jurisdictions and this makes it more likely to achieve justice. The case of naming juveniles is a clear example of how international human rights protections have the potential to exert a calmativ effect on current moves to remove good laws that offer protections for youthful offenders.³⁴

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Reflect and debate:

What is your view on providing special protections for young offenders?

In your experience, how are juvenile offenders and offending portrayed in the media?

Do you support calls for the laws governing name suppression to be overturned?