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DO COURTS RESPOND TO THE MEDIA IN SENTENCING OFFENDERS?

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Do courts respond to the media in sentencing offenders?

In law school, we all learned about the three theories that govern criminal justice; rehabilitation, deterrence and retribution. There was value in rehabilitation when the criminal showed genuine remorse, deterrence worked when it was necessary to set an example to other members of society, and retribution meant the wicked received their just desserts.

Whichever theory holds sway is said to say a lot about society. A morning with some talkback radio programs would convince you that deterrence and retribution should be the only considerations. Yet the same government that panders disgracefully to such forces has also introduced diversionary programs such as MERIT and circle sentencing. Government is in the business of being popular. Talk back radio and newspapers are too. However, the judiciary is in the business of delivering justice.

What is justice? I tend to think it's a bit like beauty in the eye of the beholder. Some might consider the regime of mandatory sentencing to be grotesque, others merely Rubenesque. The drug courts and magistrate referral programs are either giving people a second chance or reflective of society's soft attitude to drugs.

But the question—do courts respond to the media in sentencing offenders? I believe is too narrowly focused. It connotes some form of pressure from the media as if it is some sinister force working against the scales of justice. But there is a reason we are called reporters; we report what people do and say.

Let's change the question slightly. 'Do judges respond to political pressure'? Or better still, 'do judges respond to community pressure on sentencing' because that is what this debate is about.

What the question was, do politicians respond to media pressure? Or should I say, community pressure. The decision by the NSW Attorney-General, Bob Debus, to proceed with a recent High Court appeal against the re-sentencing of gang rapists is the first exhibit for the prosecution. Both the DPP and the Crown Advocate raised serious doubts as to the prospects of success, but after a week of outrage, including a *Sunday Telegraph* tearjerker with the victim's father, an appeal was lodged. It failed miserably, with the Crown at one point pleading with the High Court to consider its final point confidence in the administration of justice. Let's just say the High court did not require argument from the other side.

Before I explore this doubtful concept of media pressure I'm sure judges would love to be told they have bowed to the 'media pressure' I'd like to quote from my interview last year with the chief justice of NSW, James Spigelman.

I observed that it doesn't take much prompting to get the chief justice's thoughts on what he perceives to be the main cause of any loss of confidence in the administration of justice—the media's focus on sentencing and victims.

'There are frequently cases where getting the reaction of the victim's family is just a manifestation of lazy journalism. More than half the time there is an expression of dissatisfaction, particularly where a death is involved ...'

It's very hard to write a pointed piece of journalism with the kind of agonising of conflicting, incommensurable factors that a judge has to go through in a sentencing exercise.

But there is a laziness in going to the family and giving that degree of prominence when a much broader range of issues have already been raised in the judgement.'

The chief justice acknowledges the shift in sentencing principles away from rehabilitation of the offender to retribution—both in Parliament and the courts. Is it a good or bad thing?

'Oh, I think it's just reflecting the public environment. Judges are not insensitive. They might be behind the times—that's not necessarily a bad thing, that judges are more conservative than others—but it's inevitable that sort of change will have an impact.'

I wonder whether the chief justice was shooting the messenger.

The NSW Attorney-General's Department has established a victims unit. Victims' impact statements are read to courts. Victims tell of the personal experience and put emotion in justice system. Indeed, victims' organisations are very significant pressure groups that governments must listen to if they are to at least be seen to be tough on crime.

However, there seems to be some resentment in legal circles at the focus given to the victim and their point of view. Not because they don't have a right to be heard but because this comes at the expense of weighing the individual circumstances of an accused. And because they are part of a system which increasingly prefers retribution over rehabilitation.

These same victims' groups are a potent force in the election of judicial officials in the United States. But you will never hear the judiciary complaining about the comments of victims' groups. To do so would risk the unbridled wrath of talkback land. No we'll just attack the outlets that give victims a voice. And the politicians that listen to them.

Let's take another tack. There has been a swag of corporate crooks paraded through the courts in recent years. Judges such as James Wood and John Dunford were cheered from the rafters as they said those behind the collapse of HIH had betrayed public trust and should be made examples of. Were they responding to media pressure? Community pressure more like it.

There is little evidence which directly addresses the question. However, NSW judges seem to have responded to COMMUNITY concerns they are soft on crime, with an eight-year study revealing that sentences for manslaughter have increased in length by 33 per cent.

The Judicial Commission of NSW research showed the median penalty for manslaughter had risen from five years, three months in 1990–1993 to seven years, and that accusations of leniency were unfounded.

The NSW's Chief Magistrate also had his say recently on allegations that local courts are too lenient when it comes to sentencing. He pointed out police seemed to prefer running their gripes through the media rather than the courts. For example, last year there were 91 applications for leniency appeals by police to the DPP which led to 68 appeals. On the other hand, there were 10,964 appeals against the severity of magistrate decisions.

Of course judges see a subtext in any discussion about sentencing: that they are out of touch! Shortly after I was asked to speak at this conference, I was asked if I could address the stance taken by my colleague, Paul Sheahan, on the law's attitudes to rape and the conduct of sexual assault trials. 'The contempt is mutual your honour', probably goes down as the judiciary's least favourite headline of recent times. For those who haven't had a flavour of Mr Sheahan's work, here goes:

'Since the spate of gang rape trials exposed the fact the courts are treating rape victims like cannon fodder, there has been an outbreak of Brahmanism from within the legal profession—a self-appointed higher caste, with a sense that any robust criticism of the courts or, God forbid, the judiciary, from outside is, by definition, ill-informed and inappropriate.'

David Hunt, the now acting judge of the NSW Court of appeal, was given equal space to reply:

'Is there not a journalist somewhere who understands the rule of law, due process, natural justice or the right to a fair trial? Does nobody understand or appreciate that the system of criminal justice we have in this country is second to none?'

And that:

'Most thinking people would accept, as does the law, that where fairness to [the complainant and the accused] conflict, the person whose liberty is at stake should get preference.'

The tone was very much: I am dealing with idiots. The 'most thinking people' line was manna for Sheahan.

I will let you in on a secret. When my colleagues at the *Herald* discuss Paul's work we say 'that's Sheahan's take on things'. That the judiciary is so sensitive to one man's comments says everything. With a book on the way, I would suggest you start rehearsing this line and make it a mantra 'Yes we are well aware of Mr Sheahan's views.'

I mentioned to Paul that I was speaking this morning and told him I would stress that he was merely offering his own opinion. 'My opinion. Not Michael Pelly's, not *The Sydney Morning Herald's*.'

For the record, I have adopted the stance of Malcolm Brown, a *Herald* reporter for more than 30 years who once said to me: ‘If you are going to lock a bloke up, you better be pretty bloody sure you’ve got it right.’

It’s basically the same argument as Hunt’s, but with none of the thundering pomposity that so endears the bench to cartoonists.

But someone whose opinion you may be more interested in is the Chief Justice of the High Court of Australia, Murray Gleeson. ‘No one believes that judges should decide cases by responding to the roar of the crowd,’ he said in a 2004 speech titled ‘Out of Touch or Out of Reach?’. ‘At the same time, if there is any area in which the administration of justice must keep in contact with public morality it is the criminal law.’

Then the chief justice showed himself, like Spigelman, to be a realist.

‘People are far more likely to read or hear about what are regarded as aberrations. Most people never hear about most sentences, because most sentences attract no comment. When people think only of stereotypes of violent offenders, they are more likely to favour harsh retribution than when they think of individuals.’

He cited research which suggests the American public generally endorse a punitive and retributive approach to sentencing. However, as in Australia and elsewhere, the more information people are given about the circumstances of particular cases, the more they tend to modify their harshness. And they are also open to persuasion about the possibility of rehabilitation, especially for young offenders, but they require good reasons. That is exactly what is happening with circle sentencing and other diversionary programs.

Since 1998, there has been a 24 per cent drop in the number of young people in custody largely because of youth conferencing, under which offenders are forced to face their victims.

Children serving community service orders are now required to clean up the mess they or their peers made of public, private and council properties. The same young offenders often then become responsible for maintenance of the sites they vandalised.

The MERIT (Magistrates Early Referral Into Treatment) Scheme has also shown such encouraging early results in breaking the drug-crime cycle that it is now being rolled out across the state. The Drug Court has been a similar success, even if it seems more vulnerable to promises that can be broken by the curse of addiction. Then there is the ‘circle sentencing’, which allows Aboriginal elders, local magistrates and police and victims to agree on an appropriate punishment. It too has been rolled out across the state, spurred on by the almost rabid enthusiasm of the Attorney-General, Bob Debus.

These programs have been lumped under the umbrella of restorative justice because they are about restoring victims and communities as well restoring offenders. In the United States, they are called courts of hope.

Are these judges under media pressure to pass light sentences? It's a ridiculous proposition—just as saying the '*Herald* convinced me to increase the sentence by a few years'.

Before Mr Cowdery tells me my time is up, I am going to risk some more observations. You are appointed by members of the public. You are paid by the public. You are part of a public institution that will be open to public scrutiny.

The trust us line does not work anymore. And if you want to attack the media, remember you are attacking an institution whose job it is to keep public officials under scrutiny.

Don't be afraid to explain yourselves. To be media savvy is not a bad thing. The court of criminal appeal has seen the benefit of publishing judgement summaries, more accurate reporting and the High Court's press releases have become a template for some journalists.

So which judgements are most accurately reported? A difficult question, but one that might be answered by reference to some rules of journalism. We must get to the point quickly and do it in a way that will make someone read on. People don't have to read us. Or listen to us. They can move on to the next item, turn the channel or shift the dial. They might decide an issue is too complex, or they can't relate to the subject matter. If they feel remote they will turn away.

But lest I finish with advice that is not welcome, I will quote from a speech by Chief Justice Spigelman to mark the opening of last year's law term:

'The media has an understandable focus on high-profile cases and controversy. What judges do on a day-to-day basis in the normal line of cases simply is not news, nor is it ever likely to be. I do not suggest that such reporting is wrong. A mass media outlet must appeal to a broad public. There remains a task for all of us who are engaged in the administration of justice to attempt to educate the public about the actual levels of sentences imposed.'