
Judicial Reasoning and the ‘Just World Delusion’: Using the Psychology of Justice to Evaluate Legal Judgments

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Abstract

Melvin Lerner is a pioneering social psychologist who has devoted his academic life to studying the origins and nature of our passionate attachment to the idea of justice. He coined the phrase ‘Just World Delusion’ to refer to our need to believe that the world is a just place where people not only ‘get what they deserve’ but where, depending on their behaviour and their attributes, they also appear to deserve the actual fate that life has given them.

Our intuitive and deeply embedded human desire to see the world as just (and therefore as secure, controllable and morally balanced) is so strong that if we observe an injustice that we are unable easily to remedy, we can be led to eliminate the threat to our ‘deluded belief’ by reconstruing apparently unjust events so that they appear to be ‘just’. Lerner explains that when people are unable to cope with these events by employing rational tactics, they often resort unconsciously to three ‘non-rational’ strategies that allow them to reinterpret the ‘injustice’ so that it seems to disappear. These commonly observed tactics, which allow people to believe that the person concerned has in some way deserved their fate, include reinterpreting either the outcome or cause of an event – or even reconstructing the character of the victim.

This paper argues that Lerner’s research can provide us with a powerful three-part analytical tool that can assist us not only to construct more convincing arguments in legal cases, but can also help us to evaluate legal judgments and identify the occasions where the strategies born of the Just World Delusion may have unconsciously been used by advocates or judges. It uses three case studies to illustrate the operation of the Just World Delusion and contains an Appendix that can be used by judges and commentators to evaluate and de-construct the legal reasoning that has been used to justify a decision.

1. THE ‘JUST WORLD DELUSION’

Melvin Lerner is a pioneering social psychologist who has devoted his academic life to studying the origins and nature of our passionate attachment to the idea of justice. He coined the phrase ‘Just World Delusion’ to refer to our need to believe that the world is a just place where people not only ‘get what they deserve’ but where, depending on their behaviour and their attributes, they also appear to deserve the actual fate that life has given them.¹ Our intuitive and deeply embedded human desire to see the world as just (and therefore as secure, controllable and morally balanced) is so strong that if we observe an injustice that we are unable easily to remedy, we can be led to eliminate the threat to our ‘deluded belief’ by reconstruing apparently unjust events so that they

¹ Lerner M, *The Belief in a Just World: A Fundamental Delusion* (Plenum Press, 1980) p 11.

appear to be 'just'.² Lerner explains that when people are unable to cope with these events by employing rational tactics (like assisting the victim of past injustices or taking active steps to prevent the occurrence of future injustices) they often resort unconsciously to three 'non-rational' strategies that allow them to 'reinterpret the "injustice" so that in fact, it disappears'.³ These commonly observed tactics, which allow people to believe that the person concerned has in some way deserved their fate, include:

- reinterpreting the *outcome* of an event;
- reinterpreting the '*cause*' of an event; and
- reinterpreting the *character* of the person concerned.⁴

The first of these non-rational tactics involves reinterpreting the consequences of an event so that the outcome no longer appears to give rise to an injustice. For example, research has shown that people who become paraplegics after an accident or those who must endure lengthy and painful treatment for cancer tend to find and focus on a compensating benefit or reward (such as 'getting in touch with their spiritual side' or rediscovering a strong faith in religion), which allows them to achieve 'a perspective that define[s] their fate as a valuable or desirable consequence.'⁵ By characterising the outcome as a good thing, these victims can embrace the event as something positive and can find the strength to face their future with their illusions about the world intact. The event is no longer an unjust and undeserved tragedy, but a good thing to be celebrated. The scales of justice are balanced: no pain without gain.

In the second kind of case we are tempted to reinterpret the 'cause' of an event so that the unjust outcome appears to be deserved. A classic example of this method of avoiding the conclusion that the world is an unfair and unjust place is the familiar phenomenon of victim blaming.⁶ To avoid having to accept that they themselves might be the subject of a violent and random attack, like rape for example, people find reasons why a victim of such an assault might have 'brought it on herself' by going out late at night and wearing skimpy clothing.⁷ Once this manoeuvre is complete, the victims of this delusion can continue to feel that they are in control of their own fate and can allow themselves to believe that they will be able to avoid being the 'cause' of any bad events in their own lives.

² Lerner, *The Belief in a Just World*, n 1, p 12.

³ Lerner, *The Belief in a Just World*, n 1, p 20.

⁴ Lerner, *The Belief in a Just World*, n 1, p 20-21, original emphasis.

⁵ Lerner, *The Belief in a Just World*, n 1, pp 162-163. See also Melvin Lerner 'The Justice Motive in Human Relations: Some Thoughts on What We Know and Need to Know about Justice' in Lerner M and Lerner S (eds), *The Justice Motive in Social Behavior* (Plenum Press, 1981) 11, p 21.

⁶ Lerner, *The Belief in a Just World*, n 1, pp 52-53.

⁷ Lerner, *The Belief in a Just World*, n 1, pp 109-111; and Montada L, 'Doing Justice to the Justice Motive' in Ross M & Miller DT (eds), *The Justice Motive in Everyday Life* (Cambridge University Press, 2002) 41, p 57. Another example is the belief that the suffering in a person's present life has been caused by evil deeds in a past life.

The third tactic is to reinterpret the character of the person concerned in the events so that we can continue to believe that only good things will happen to good people, and more importantly, that bad things will happen only to bad people. So, for example, it seems that people who suffer an apparently unjust fate actually alter their view of their own moral worth so that they appear to have deserved the awful things that have occurred in their lives.⁸ Each of these strategies has the same outcome – they allow us to continue to face the future and to avoid being overwhelmed by the thought that no matter what we do, we are the helpless playthings of a malign, uncaring Fate. However, as Charles Batson points out, the Just World Delusion is a 'two edged sword' that can lead us either 'to redress injustice or to perpetuate it'.⁹ The Just World strategies can lead us to re-interpret the facts so that people appear to shift out of the upsetting category of 'innocent victims of an unjust fate' into the more comforting category of people 'who had it coming'. We do this by a process of reasoning based on a faulty premise:

Only the bad will have to suffer.
This person has suffered.
Therefore, this person must have been bad.

This un-stated syllogism forms in our unconscious minds and gives us the comfort we need, but perversely, it can then prevent us from giving comfort to those who have suffered.¹⁰ So, while the strategies born from the Just World Delusion may have positive psychological effects on those in its grip, they can also have a negative effect on the way that those people treat others and lead them unconsciously to perpetuate the very kind of injustice against others that they fear so much for themselves.

Lerner accounts for this paradox by arguing that human beings 'walk around with two remarkably different senses of justice' – the 'normative' sense, which informs the thoughtful, reasoned, familiar and conscious discourse of justice observed in our courtrooms, and the 'intuitive' sense of justice, which is the emotional, immediately compelling and almost 'primitive' urge to judgment that forms deep within our unconscious mind and which compels us to act in sometimes perverse ways.¹¹ Each of

⁸ Lerner, *The Belief in a Just World*, n 1, p 21 and Lerner 'The Justice Motive in Human Relations', n 5, p 13.

⁹ Batson D, 'Justice Motivation and Moral Motivation' in Ross M & Miller DT (eds), *The Justice Motive in Everyday Life* (Cambridge University Press, 2002) 91, p 92.

¹⁰ For a recent non-legal example of the delusion at work, see my discussion of an article by Germaine Greer on the death of the 'Crocodile Hunter' Steve Irwin, who died after being stung in by a stingray in Queensland in September 2006: Davis J, 'Sentencing and the Psychology of Justice' (2007) 32 *Alternative Law Journal* 144. Greer demonstrated her mastery of the three techniques: she gave us ample evidence that Irwin was a bad *character*, she hinted that he had *caused* his own fate, and, by suggesting that his death had saved the animal world from further torture at Irwin's hands, she also planted the idea that the *outcome* of Irwin's encounter with the stingray was a good one. He was a bad man who deserved to suffer and who was not allowed to get away with his crimes.

¹¹ Lerner M, 'Normative and Intuitive Senses of Justice' (2001) 1 *International Society for Justice Research Newsletter*, <<http://www.isjr.org/Newsletter-Issue1-01.html>> downloaded 11/1/08; and 'Pursuing the Justice Motive' in Ross M & Miller DT (eds), *The Justice Motive in Everyday Life* (Cambridge University Press, 2002) 10, p 21.

these two different senses of justice has a different source, and we respond differently when they are challenged. The intuitive sense of justice emerges deep within our psyche as a 'personal contract' when, as children, we learn how to delay personal gratification in the present in exchange for longer term benefits; to do this we must cling to the belief that the future will give us those good things that we have earned.¹² If we work hard now, we will be rewarded later. Batson explains that 'this contract is non-negotiable' and when the intuitive sense of justice is offended the foundations of our world collapse and we descend into 'an abyss of helplessness and depression'.¹³ By contrast, the normative sense of justice is taught, not by our experience of the world, but by our immersion in a culture; it is learned from our parents, teachers and other moral educators.¹⁴ Lerner and Batson explain that this normative sense of justice is more accessible to cognitive awareness and rational analysis, and, although we learn that these powerful norms of justice should not be ignored, a breach of this 'social contract' does not 'shake the foundations of our reality'.¹⁵ As a result, our responses to threats to our intuitive sense of justice are much less easily controlled than our responses to breaches of our normative sense of justice.

This paper attempts to show that there are times when the decision making processes of our judges can be overtaken by the intuitive – to the detriment of the normative or morally informed method of judgement that the community expects. It argues that although the process of arriving at a decision may well feel like an inscrutable, intuitive, even unconscious process, the construction of the written judgment which accompanies and justifies that decision must be tamed by the conscious mind and must conform to the normative patterns of reasoning that mark out the legal method. Consequently, it concludes with an Appendix that will assist judges and commentators to evaluate and de-construct the legal reasoning that has been used to justify a decision and to identify the occasions when the intuitive, but deluded, sense of justice may have sabotaged the duty to conform to the normative sense of justice.

2. THE JUST WORLD DELUSION AND THE LAW

The success of the Just World strategies depends in part upon our ability to identify apparent differences between cases and our willingness to infuse those distinctions with moral significance. These are familiar techniques for those who are trained in the law. To master the legal method and to persuade others within the justice system of the correctness of their case, lawyers must be able to distinguish cases on the facts and construct convincing arguments based on the significance of those facts. Lawyers and judges use their imagination and their skills in selecting evidence and interpreting facts to argue by analogy, to avoid the operation of an unhelpful precedent or to attract the operation of a more favourable one, and above all, to comply with the requirement of

¹² Lerner, *The Belief in a Just World*, n 1, pp 14-19 and Lerner 'The Justice Motive in Human Relations', n 5, pp 22-25.

¹³ Lerner, n12; and Batson, 'Justice Motivation and Moral Motivation' n 9, p 92.

¹⁴ Lerner, n 11.

¹⁵ Batson, 'Justice Motivation and Moral Motivation' n 9, p 94.

distributive justice, which demands that we treat like cases alike and different cases differently. Successful advocates require not only a knowledge of the law, but equally importantly, a minute and thorough mastery of the facts of a case and an ability to weave those facts into a compelling narrative.¹⁶

A key task for the lawyer – it's an overarching concern in dramatic art – is to fit actions together in a convincing whole. There's a story to tell the jury: evidence has to be selectively turned into a believable plot.¹⁷

This suggests that those skilled in the legal method are also well placed to use the Just World tactics – or something very like them – to bolster the persuasiveness of their arguments. The fact that one can often sense the outcome of a case from a judge's recital of the facts (and well before the analysis of the law begins) has often been remarked upon.¹⁸ The criminal law, and sentencing law in particular, presents advocates with a perfect stage upon which to show off their mastery of the art of persuasion and to build an appreciation of the psychology of justice into those strategies of persuasion. This suggestion is strengthened by the observation that the crucial issues in a criminal case require an assessment of the same three matters that Lerner's research has identified, ie: a finding as to the *causes* of a crime, an assessment of the harmful *consequences* that flow from it, and an appraisal of the *character* of the people involved. An analysis of the reasoning behind a sentencing decision is particularly appropriate to the theme of this conference – given the traditional characterisation of sentencing as 'an art, not a science'¹⁹ and so the next section of the paper contains three sentencing case studies that illustrate how Lerner's insights into the psychology of justice can assist the construction and de-construction of the legal reasoning found in this area of the law. The first gives an example of the advocate's art; the second two major case studies focus on cases where the advocate's art may have influenced the reasoning in the sentencing judge's decision.

An Example of the Delusion at Work: Just Living in Wayne's World

An illustration of the success with which advocates can exploit the Just World Delusion can be found in a recent case that was widely reported in the Australian media in

¹⁶ Curthoys J and Kendall C, *Advocacy* (LexisNexis Butterworths, 2006) pp 19-20. See also Richard Edney, 'Literary Concepts And The Plea In Mitigation' (2004) 9 *Deakin Law Review* 185.

¹⁷ Curthoys J and Kendall C, *Advocacy*, n 16, p 21, quoting Sam Schrager, *The Trial Lawyer's Art* (Temple University Press, 1999) p 29.

¹⁸ For a recent example, see the comment in Luntz et al, *Torts: Cases and Commentary*, 6th ed, (LexisNexis Butterworths, 2009), p 678 on the contrasting stories told in the different judgments in the High Court case of *Kuru v New South Wales* (2008) 246 ALR 260. See also the earlier decision *New South Wales v Kuru* [2007] NSWCA 141, (2007) Aust Torts Reports 81-893.

¹⁹ See, for example the comment by Crisp J in *Wise* [1965] Tas SR 196 at 200. For a discussion of the case law and debate over the 'instinctive synthesis' as opposed to the 'two-stage method' of sentencing, see Edney R and Bagaric M, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007), Chapter 2: 'Plucking figures from the air: instinctive synthesis' pp 15-42. I discuss (and reject) the idea that sentencing is either a subset of art or of science in Davis J, 'The Science of Sentencing: Measurement Theory and von Hirsch's New Scales of Justice' in Tata C and Hutton N, eds, *Sentencing and Society: International Perspectives* (Ashgate, 2002) 329.

October 2008,²⁰ when the well-known Australian Rules footballer Wayne Carey 'walked free' from a court in Miami after his American lawyer, Richard Sharpstein, negotiated a plea deal to a charge that carried a maximum penalty of 15 years. As a result, Carey did not have to serve any jail time and no official record of a criminal conviction now stains his character or prevents him from returning to the USA. Sharpstein's public comments on the case can be read as an attempt to persuade us that Carey did not deserve a severe punishment for what he did in a Miami hotel in 2007, where, according to reports, he 'glassed' his girlfriend and violently assaulted two police officers. Sharpstein, who had earlier promised to 'fight it hard and tough' and match his client's success on the football field with equal success in court, incorporated all three of the 'Just World' strategies into his game plan as he tried to convince the public that his client was not a real criminal who deserved punishment, but was instead a victim who had been overtaken by events beyond his control.

His first and most successful play created doubt about the real *cause* of the events. The police had been called after Carey had publicly struck his girlfriend Kate Neilson in the face with a wine glass in a hotel restaurant. News reports by Ian Munro of *The Age* cited a hotel security supervisor's statement lodged with the court, which tells us that Carey allegedly swore at the officers, calling them 'a pack of dogs' and 'scrawny little cops' and telling them 'I will beat all of your asses'. He pleaded guilty to elbowing one police officer in the face and kicking another in the mouth. To divert us from Carey's anger and aggression, Sharpstein focused attention on Kate Neilson. She had dropped the charges against Carey, and, in a tale all too familiar to lawyers and police who deal with 'domestics', she wrote a letter reportedly claiming that 'they had a lot to drink' and that 'she was as much at fault for this incident as Wayne'. We are left, guided by our own unconscious attachment to the idea of justice, to draw our own conclusions: if *Kate* somehow caused her own glassing – and if the real 'cause' of the events was actually *alcohol*, it would be unfair to hold Carey fully responsible for his actions. Furthermore, Sharpstein said that Carey 'had not realised the officers were genuine police when they entered his room' and explained he had 'reacted as anyone would' to the invasion of his privacy. The unstated message, delivered directly to our unconscious, repeatedly suggests that Carey was not an active cause of the events, but was swept up by forces beyond his control. So, we should not blame him; instead we should blame alcohol, we should blame Kate, and we should blame the police. If he was only one of four 'causes' of this event, why should he have to pay the full price?

The second strategy focused on Carey's *character*. Before an audience can be convinced that a lenient decision is just, they first have to feel sympathy for the

²⁰ See: 'Carey targeted over hero status: lawyer' *Sydney Morning Herald*, October 15, 2008 <<http://news.smh.com.au/world/carey-targeted-over-hero-status-lawyer-20081015-50sk.html>>; Munro I, 'Carey avoids jail over US police assault' *The Age*, October 15, 2008 <<http://www.theage.com.au/world/carey-avoids-jail-over-us-police-assault-20081015-50t2.html>>; Hellard P, 'Wayne Carey avoids jail in Miami' *Herald Sun* October 16, 2008 <<http://www.news.com.au/heraldsun/story/0,21985,24503518-661,00.html>>. Copies on file with the author.

offender, so the next step in the campaign diverted attention away from Carey's pre-existing reputation for violence and victimising women. As an American judge writing about advocacy has explained, it is important for lawyers to make the audience care about their clients by casting them in one of four roles:²¹

- Make the character skilled at what he/she does;
- Make the character a victim of undeserved tragedy;
- Put the character in jeopardy;
- Make the character a good person.

Sharpstein did well. He portrayed Carey as 'a national hero' who was not so much a victimiser as one of the victimised. Not only was he a victim of his own celebrity, but in this particular case, he was a victim of police and prosecutors who had blown the events 'way out of all proportion'. The lawyer reportedly said that Carey had been targeted by US authorities and was quoted as saying: 'As a matter of fact, there is more attention being paid to it because Mr Carey is a national hero in Australia than would have been if he was the average citizen on the street in Miami.' He was relieved that 'cooler heads prevailed' once they 'saw what it was'.

Having diverted our attention from Carey's past misconduct, Sharpstein then went on to minimise Carey's culpability for the offences. He pointed out that Carey had 'meant no harm' and reminded us that Carey had not realised that 'the officers were genuine police'. Viewed in such a light, this was a story of an innocent victim (a hero in fact) who simply (but, as it turned out, mistakenly) thought he was acting justifiably in self defence. Other news reports suggested that Carey 'did not mean to make contact' with his girlfriend's face when he glassed her. (Apparently all he had intended to do was to throw a glass of wine over her.) The conclusion we were expected to draw from these narratives is that Carey was not a bad man who deserved a severe punishment. Rather, he was an unlucky man who never intended to hurt anyone, he was a man who had been treated unfairly and, as his lawyer reminded us, he was a very remorseful man who was sorry about what happened to him and the others that day. He was a victim of events and a victim of the police and a victim of his own fame. A lenient sentence would therefore be just because a hero like Carey should not have to suffer any more.

The final play in Sharpstein's gamebook was to minimise the *outcome* of the event. He planted the suggestion that no real harm had been done by Carey's acts that night, despite the violence that he inflicted both on the police officers and his girlfriend. Her willing and supportive presence in court proved that her injuries had healed and that their relationship had not been damaged by the assaults. This completed the illusion that justice itself required Carey's immediate release. If she could forgive him, so could we. Each of these three strategies tapped directly into our powerful need to believe that the world is just and together they were aimed at convincing us that this lenient sentence would make up for all the unfairness that this lawyer's client had suffered. He was a

²¹ Fine RA, *The 'How-to-Win' Trial Manual* cited in Curthoys J and Kendall C, n 16, p 39.

good man, who had done no real harm and who was himself a victim of events that were the result of many different causes.²²

The reasoning used by Carey's lawyer to convince us that his client did not deserve a severe sentence reverses the syllogism that we use to convince ourselves that a victim of misfortune may have deserved their fate, but critically, each is based on the same premise, each can be detected by the use of the same three tactics, and each may lead to perverse outcomes that offend the normative sense of justice.

Premise: bad people should suffer and good people should not suffer.

Version 1 (responding to victims)

Fact: this person has suffered.

Therefore:

This person must have been bad.

Version 2 (sentencing)

Fact: this good person has suffered.

Therefore:

This person does not deserve any more suffering.

The remainder of this paper considers whether these tactics, which so often feature in the arguments made by lawyers to the judge, have any legitimate place in a judge's reasoning. It will use Lerner's insights into the three strategies that we use to maintain our belief in a just world to examine two well-known cases where sentencing judges attempted to justify decisions that secured the immediate release of offenders convicted of serious crimes. In each case, the judges themselves recognised that the sentences were extreme, exceptional or extraordinary and in both cases the decisions were overturned on appeal. The first case, *R v Clotworthy*,²³ where the New Zealand Court of Appeal upheld the Solicitor-General's appeal in a stabbing case, is well known to the restorative justice movement.²⁴ The second is a well-publicised Australian case, *DPP v Whiteside and Dieber*,²⁵ where the Victorian Court of Criminal Appeal allowed the DPP's appeal in a case where two offenders were convicted of the manslaughter of an innocent homosexual man whom they had fatally beaten because they (wrongly) suspected him of rape.

I argue that Lerner's theory can provide us with a useful analytical tool that reveals the interpretive strategies and one-sided narrative techniques that judges may unconsciously adopt when they want to persuade the public that an unusually lenient sentence is just. My analysis contrasts the stories told by the sentencing judges with the accounts given by the Appeal Court judges and shows that these fact-focused strategies come at a cost.

²² Carey faces similar charges early this year in Melbourne. We are left to wonder if the US tactics will work again in sports loving Victoria where Carey's record is better known.

²³ (1998) 15 CRNZ 651, [1998] NZCA 114/98.

²⁴ See: Braithwaite J, 'Restorative Justice: Assessing the Optimistic and Pessimistic Accounts' (1999) 25 *Crime and Justice* 1, pp 87-88; Bowen H and Thompson T, 'Restorative Justice and the New Zealand Court of Appeal's Decision in the *Clotworthy* Case' (1999) 3 *Journal of South Pacific Law*, Article 4, <http://www.Vanuatu.usp.ac.fj/journal_splaw/articles/Bowen1.htm> viewed 19 April 2005; Morris A and Young W 'Reforming Criminal Justice: The Potential of Restorative Justice' in Strang H and Braithwaite J (eds), *Restorative Justice: Philosophy to Practice* (Ashgate, 2000) 11, pp 12-13 (see also in the same volume: Sir Anthony Mason 'Restorative Justice: Courts and Civil Society' 1; and Charles Barton 'Empowerment and Retribution in Criminal Justice' 55).

²⁵ [2000] 1 VR 331, (2000) 114 A Crim R 234, [2000] VSCA 142.

Judges who selectively re-interpret the facts to create an illusion that justice demands the immediate release of an offender can be tempted to abandon their proper judicial role, to slip unconsciously into a task better suited to an advocate, and worse, to avoid engaging with the deeper issues of principle that may be raised in these controversial cases.

3. CASE STUDY: *R v Clotworthy*²⁶

The offender in this case was convicted of one count of wounding with intent to cause grievous bodily harm and one count of assaulting a police officer with intent to obstruct him in the course of his duty. After referring the case to community conferencing between the primary victim and the offender, the sentencing judge 'extended' the principles of sentencing 'to their extreme' by imposing a two-year prison sentence suspended for two years and ordering \$15,000 reparation and 200 hours community service.²⁷ This sentence was designed to keep the offender out of prison and in employment so that he could help his victim to obtain plastic surgery. The challenge in such a case is normally to identify the issue of principle that justifies departing from the ordinary sentencing path, which, the Court of Appeal pointed out would normally start at a point between five to six years.²⁸ However, the sentencing judge, by resorting to all three of the Just World strategies, allowed himself to avoid accepting that challenge.

Clotworthy: the Cause

My research shows that judges who adopt this technique tend to present a version of the events that minimises the causal role of the offender's culpable choices and instead casts blame on some other external 'cause'.²⁹ By intimating that offenders were the helpless victims of fate, or suggesting that they were controlled by an overwhelming external force (like drugs, alcohol, the gambling industry, etc)³⁰ or insinuating that the crimes were actually caused by someone else (like the victim, the offender's family, or some third party),³¹ the judges divert attention away from the offender's true motives. In cases where there is no suitable external cause to blame, judges may suggest that the

²⁶ See n 23.

²⁷ See Comments on Passing Sentence, Thorburn J, 24 April 1998, District Court Auckland T.971545 at 10.

²⁸ (1998) 15 CRNZ 651 at 660.

²⁹ Davis, 'Sentencing and the Psychology of Justice' n 10.

³⁰ See, for example: *R v Yu* [2001] VSC 55, where the gambling industry was blamed in a case of manslaughter by criminal negligence where a mother left her child for two and a half hours alone in a car at the height of the Australian summer while she played the pokies in a hotel; and *R v Sette* [2000] NSWSC 648, where the offender's traditional and strict Italian family was blamed in a case where a 33 year old relinquishing mother was convicted of manslaughter for abducting the child that she had been 'forced' by her family to give up for adoption, stabbing him and then hiding his body in a dam. The offender in *Sette* had offered no explanation of the events and had expressed no remorse about them to the court, however, the sentencing judge who imposed a wholly suspended two year sentence, noted as part of the justification at [45], that her family had 'realised *their* error' (my emphasis).

³¹ See my discussion of these techniques used in a number of Western Australian cases in Davis J, 'Domestic Violence and Sexual Abuse: Should the Courts Abandon the Welfare Approach to Sentencing?' (1998) 27 *Western Australia Law Review* 227.

events were caused by 'fate'³² or were 'inexplicable'. In *Clotworthy*, the sentencing judge emphasised that the cause remained a mystery: suggesting (at 2-3) that the conduct was 'utterly bizarre, defying explanation, understanding or any intelligent appreciation'; noting that 'for no apparently understandable let alone justifiable reason, the prisoner attacked the victim'; and concluding that:

He is utterly unable to articulate a remotely connected series of reasons to explain his behaviour. He appears now in the cold light of day and after long and I expect, arduous periods of inward self assessment, to be as mystified as anybody about his behaviour.

The mystery was subsequently solved by the New Zealand Court of Appeal, which reduced the reparation order to \$5,000 and increased the sentence to three years, unsuspended.³³ Tipping J pointed out that Clotworthy's apparent 'inability to recall' the cause of the events was 'strange' in the light of the fact that he was 'carrying a substantial hunting knife in a public place' and had used it to inflict 'extreme and near fatal violence for the purposes of an attempted street robbery.'³⁴ The Appeal Court explained in detail the events leading up to the crimes and showed how Clotworthy's blameworthy motives and criminal intentions led to his conduct that night. The facts, laid out in the second paragraph of the decision (at 653), showed that: Clotworthy had sworn at the victim, chased him along the road, grabbed him about the neck, put him into a headlock, produced the knife, held it to the victim's throat and demanded money. When the victim did not comply he slashed him in the face and stabbed him repeatedly in the stomach and chest. Following this attack he also struggled with bystanders who attempted to help and then kicked and headbutted two police officers who attempted to arrest him. By contrast, the sentencing judge's tactics hid those reasons from view, created the illusion that Clotworthy was not fully to blame for his crimes and took the first step towards convincing the audience that, unlike other offenders convicted of similar crimes, this offender did not deserve to be imprisoned.

Clotworthy: the Character of the Offender

The re-interpretation of the cause of Clotworthy's crimes was strongly linked to the re-interpretation of his character, and so, as the sentencing judge continued the story about a good man who made an uncharacteristic and mystifying error, Clotworthy was sympathetically described (at 4) as an 'ordinary young New Zealander who is kicking off in life – from scratch', and (at 2) as a man with 'a life partner' and 'two very young children'. His Honour took pains (at 7) to contrast the character of this 'good citizen' with the 'overwhelming preponderance' of cases, committed by 'people of horrible prior history', who were 'evil for the malice' they displayed, and who 'demonstrated an entrenched trait of lawlessness'. In fact, his Honour had earlier pointed out (at 2) that Clotworthy himself had a prior conviction for assault, but for reasons unstated, said it had no 'significant relevance'. Two very different characterisations of those convicted of repeated offences of violence were presented in this case and one can easily imagine

³² See the second case study of *Whiteside and Dieber*, below.

³³ (1998) 15 CRNZ 651.

³⁴ (1998) 15 CRNZ 651 at 660.

from the vigorously pejorative description of the archetypal repeat offenders exactly how the judge could have described Clotworthy's character, had he decided to jail him. The characterisation of the offender as a good person continues to transform the narrative from the ordinary story about a criminal who deserves punishment into a very different tale that exploits our powerful belief that the world is just. Once the offender is portrayed as a good person, the Just World Delusion takes over and does the rest of the work: if the good do not deserve to suffer and only the bad should be made to suffer, then surely this good man should not be jailed?

One of the real difficulties for judges who unconsciously use the Just World strategies is that a conviction establishes certain incontrovertible facts, not only about what the offender did, but also about their intentions and state of mind – and it is possible to use those facts to make primary inferences about the offender's character. The Court of Appeal in *Clotworthy* simply explained in detail all of the facts about the crimes that the sentencing remarks had left out and, without express comment, allowed those facts to define the character of the man. But a judge who portrays the offender as fitting into the category of 'a good person who does not deserve punishment' faces another difficulty because the fact of conviction itself places the offender into the category of 'a person who *does* deserve punishment' and the job of shifting them out of it is arguably inconsistent with the judicial role and subversive of the premise underlying the criminal justice system, namely, that criminals should be punished for their crimes. As Gleeson CJ and Hayne J have pointed out:³⁵

At the very root of the criminal system lies the recognition by society that some conduct is to be classified as criminal and that those who are held responsible for such conduct are to be prosecuted and, in appropriate cases, punished for it.

In *Clotworthy*, the offender would clearly have suffered some punishment under both the first sentence imposed by the sentencing judge and as a result of the second, more severe sentence imposed by the Court of Appeal, but the point is that the general strategy of portraying the offender as verging on the blameless creates problems when the sentence is designed to avoid imprisoning offenders convicted of serious crimes.³⁶ Of course, the fact of conviction does not necessarily prove that an offender is a 'bad character', however, the deeper difficulty is that judges are not simply sentencing the offenders for their characters, but for their crimes, which remain – by definition – bad. And this is why they will sometimes adopt the third tactic to reinforce the first two.

Clotworthy: the Consequences

In the rare cases where judges try to justify the immediate release of offenders convicted of serious crimes they must overcome a final hurdle constituted by the nature of the crimes and their consequences. In these cases the judges tend either to minimise

³⁵ *Carroll* (2000) 213 CLR 635 at 644 [23].

³⁶ There are cases where this characterisation of an offender does carry more weight: for example, it is commonly found in cases where one partner in a devoted marriage or similar close loving relationship has yielded to requests by their partner to put an end to their suffering by performing a mercy killing (see, eg, *Maxwell* [2003] VSC 278).

or hide the harmful results of the crimes, or to refocus attention onto some other 'consequence' that leads once more to the conclusion that the offender deserves to be released.³⁷ Both strategies were used to great effect in *Clotworthy*. The first step was to gloss over the effects of the crime by referring (at 4) only to an 'embarrassing scar' and a 'saddening onset of serious epilepsy' that had an 'immeasurable effect' on the victim's peace of mind. This description can be contrasted with the much more detailed account of the effects of the six stab wounds to the victim's face and chest given by Tipping J in the Court of Appeal (at 654):

[H]e underwent emergency surgery to repair a collapsed lung and diaphragm. He required blood transfusions and spent 2 days in intensive care. He was in hospital for 6 days. One of the stab wounds was life threatening, being only six centimetres from Mr C's heart. Mr C has been left with permanent scarring. The most notable scar is ... 27cm long across his back [and] was the result of emergency surgery. What is more, the attack brought about a recurrence of Mr C's grand mal epilepsy ... with seizures lasting as long as 8 hours and requiring hospitalisation. He can no longer legally drive a vehicle.

The second step was to divert attention away from the effects on the real victim and focus instead on a different set of consequences, by contrasting the harm done by the normally expected sentence of imprisonment with the consequences flowing from the lenient sentence. So, the sentencing judge insinuated that the usual sentence would spread the circle of harmful consequences even further by tripling the number of innocent victims, pointing out (at 9) that imprisonment would:

- 'wreak havoc' on the offender's 'small' and 'fragile' *family*;³⁸
- hurt the *victim* (who needed money for plastic surgery); and
- harm the *community* who would have to fund the cost of jailing the offender to the tune of 'somewhere between \$40-\$90,000 per year'.³⁹

Before concluding (at 9-10) that no good would be achieved by imprisoning the offender, his Honour referred (at 5) to the fact that the victim did not see any benefit in a 'festering agenda of vengeance ... in his heart', noted (at 7) that the victim and offender 'had intimate and personal communications' that facilitated a 'healing of attitudes' and comforted us with the thought that the 'community at large' would not have any 'sense of betrayal' if one day Clotworthy and his victim could 'one mused, greet each other in the street' with 'mutual acceptance if they meet again'. By pointing to new victims and identifying other harms, this technique created a smokescreen

³⁷ So, for example, in the case of *Hodder* (1995) 15 WAR 264, discussed in the article cited in n 31 above, Malcolm CJ, who supported the immediate release of the offender, minimised the consequences of Hodder's crimes (of violently attacking his wife and orally and anally raping her) by suggesting (at 280) that the fact that Mrs Hodder had forgiven her husband within three days showed that the harm done by his attacks was 'apparently not great'.

³⁸ It should be pointed out that imposing the fully reparative solution desired by the victim (who wanted \$25,000) could also have 'wreaked havoc' on the family – and in fact the sentencing judge himself could not justify going so far and reduced the sum to \$15,000.

³⁹ Both the first and the third points could be made in every case where an offender with a family is imprisoned; what needed to be explained was why this case out of all of these other cases, warranted special treatment. The third point is arguably not relevant to a sentencing judge's decision as it is the kind of policy matter better decided by the legislature.

distracting our attention away from the hard facts of the crime and its immediate effects; and by using highly emotive language to tell a new story about these events that goes far beyond the crime and its consequences, this strategy completed the illusion that justice required the immediate release of the offender.

Clotworthy: Critique

The real criticism of the use of these techniques in *Clotworthy* is not simply that they obscured the truth about these crimes, their causes and their consequences,⁴⁰ or that the decision disregarded the importance of consistency, deterrence and public confidence in the effectiveness of the criminal justice system, as the Court of Appeal pointed out.⁴¹ The more troubling problem lies in the fact that, by using the Just World strategies to create an illusion of justice, the judge avoided the opportunity to tackle the real issue of principle head on and explain exactly why a restorative approach should be fully incorporated into criminal sentencing and extended to serious cases like this one. By selectively re-telling the story and twisting the facts so that the case seemed to fit within the usual sentencing paradigm, the judge sabotaged his own decision and made it possible for the Appeal Court judges to resolve the case simply by correcting the facts and re-telling the story. As a consequence they were not forced to consider the real issue of restorative justice in any depth, and the case remains a frustrating ambiguity, hailed by some as a step forward but condemned by others as a failure.⁴²

In fact, the real potential of restorative principles to effect a paradigm change in serious cases could have been revealed *only* if the judge, having first acknowledged and described the full seriousness of the facts in this case, had then presented a principled argument that took those harsh facts into account and justified following the restorative path. For example, the judge could have explained how the sentence, which incorporated a substantial measure of reparation to the victim, could not only satisfy the punitive goals of the criminal justice system by imposing an appropriately heavy burden on the offender, but could, at the same time, also create benefits for the victim – benefits that a purely retributive system that casts the victim only in the role of a witness, cannot provide.⁴³ But because the sentencing judge used the fact-focused Just World tactics to avoid the deeper principle and to create the illusion that the facts themselves dictated a lenient sentence, *Clotworthy* represents a lost opportunity to fully test restorative justice's power to transform the criminal justice system.

⁴⁰ The sentencing remarks do not canvass in any detail the second count involving the police officer. They note (at 2) that the second count was 'the more important' but one wonders how the judge would have coped with the case if the second matter had also been dealt with via a community conference and the victimised police officer had not been as forgiving as the primary victim and wanted the offender to be imprisoned as a punishment for his crime against him.

⁴¹ See pp 657, 660.

⁴² See references above, n 24.

⁴³ See von Hirsch A, et al (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, (Hart, Oxford, 2003); Zedner L, 'Reparation and Retribution: Are They Reconcilable?' (1994) 57 *Modern Law Review* 228; Strang H & Braithwaite J (eds), *Restorative Justice: Philosophy to Practice*, (Aldershot, Ashgate, 2000); and Crawford A and Goodey J (eds), *Integrating a Victim Perspective within Criminal Justice*, (Ashgate, Aldershot, 2000).

4. CASE STUDY: *Whiteside and Dieber*⁴⁴

The two offenders in this case that dominated the headlines in Victoria in 2000 pleaded guilty to manslaughter (unlawful and dangerous act). They had chased and attacked two other men under the mistaken belief that they had committed a rape, beating one so severely that he died. The events in the Fitzroy Gardens and the subsequent events in court provided fertile conditions for the Just World Delusion to flourish. This was partly because the story tapped into so many primal fears (the events began with the lies of a woman who falsely cried rape); partly because of the fact that the victims, as long-standing and devoted homosexual partners, were the most unlikely men to have raped a woman that night; and also because the victims, as gay men out strolling in a public park, were so afraid of being bashed that they panicked and ran for their own safety, thereby 'confirming' in their attackers' minds that they were the 'rapists'. This devastating irony added to a compelling and increasing sense of injustice as members of the public, who had already been shocked by the tragically undeserved fate of the two victims, were shocked for a second time when the judge decided to free the two offenders, sentencing them to three years imprisonment suspended except for time served.⁴⁵ Their release led to public outrage, petitions and media campaigns⁴⁶ and within one month and four days, the Victorian Court of Criminal Appeal (CCA) had heard the appeal,⁴⁷ increased the sentences to six years imprisonment with a non-parole period of four years, and returned the offenders to prison.

⁴⁴ [2000] 1 VR 331, (2000) 114 A Crim R 234, [2000] VSCA 142.

⁴⁵ [2000] VSC 260.

⁴⁶ *The Age* and the *Herald-Sun* published many articles and editorials on the case, from the time of the offence on 28 April 2000 until re-sentencing on 4 August 2000. Copies on file with the author.

⁴⁷ *DPP v Whiteside and Dieber* [2000] 1 VR 331.

Whiteside and Dieber: the Cause

In this case, the judge found a number of alternative 'causes' of the crime and he told a dramatic tale that began, as so many classic justice stories do, with a woman.⁴⁸ This woman, who was introduced in the second paragraph of the case, was perfectly cast as a contrast to the offenders, who appear as two clean cut young men from good families.⁴⁹ She was a woman 'with her own problems', 'difficulties' and 'prior convictions' who, the evidence revealed (at [4]), had started the day by ingesting two cones of cannabis and who had then spent the afternoon (carrying a packet of amphetamines in her purse) drinking heavily on a pub crawl with her boyfriend. They fought, she was left drunk and distraught in the park, where she met the offenders and 'falsely cried rape'. The judge observed to the offenders: 'How unfortunate it was that your paths crossed hers'⁵⁰ insinuating not only that the offenders were the 'victims' that night, but also suggesting that their 'misfortune' had its roots in her conduct, and not in their own. The causative role of the woman's 'killing lie' was a flawed, but powerful, defence theme that strongly influenced both the media and the judge – but it was an argument that the woman herself was able to see through:

In one fiery exchange [with a defence barrister] she agreed that she had lied but rejected his suggestion that she might feel partly responsible for the death of an innocent man. "Yes (I lied)," she said. "It didn't give them the right to do what they did."⁵¹

His Honour was careful to note (at [3]) that 'it would be quite wrong to blame her for what followed. I do not.' Nevertheless he noted that her lie 'was the first step in this unfolding tragedy'⁵² and then went further to identify how many other factors contributed to the fate of these young men who 'truly and reasonably':

[B]elieved a woman had been raped ... who then, in a rush of emotion, believing you had found the perpetrators, severely but briefly assaulted the victim. Finally, there is the rare and perverse confluence of events which channelled you towards this tragedy: the false cry of rape, your decent belief in its truth, and the socially-induced fear of the victims for which we all share blame. You are, of course, responsible for your own actions. No-one suggests otherwise: 'Men at some time are masters of their fates; The fault, dear Brutus, is not in our stars, But in ourselves...' But you and the victims were under a malevolent star that Anzac night.⁵³

So, although the judge could not legally blame these other factors, he made much of them in the story that he told, repeatedly drawing attention to the lying woman, the

⁴⁸ Adam, defending himself in Genesis 3:12 for eating from the tree of knowledge of good and evil, blamed Eve: 'The woman whom thou gavest to be with me, she gave me of the tree, and I did eat.'

⁴⁹ Media reporting in 'A killing lie in Fitzroy Gardens' *The Age* (Melbourne), 24 June 2000, News Extra p 3 characterised the woman as a 'former topless barmaid whose business cards say that she provided "adult entertainment".'

⁵⁰ [2000] VSC 260, Cummins J at [4].

⁵¹ 'A killing lie in Fitzroy Gardens' n 49. The woman was convicted of making a false report to police and received a two-month intensive corrections order.

⁵² The events were described as a tragic or a tragedy eight times in the sentencing comments.

⁵³ Sentencing comments [2000] VSC 260 at [29].

malevolent star, the perverse confluence of events, the unplanned upsurge of emotion that afflicted them, the cruel facts, and even society itself – that must 'all share blame'. This dramatic story, told in a theatrical and emotive style and sprinkled with Shakespeare,⁵⁴ created both the illusion that the offenders themselves were 'victims of misfortune'⁵⁵ and an atmosphere suggesting that they should be freed.

The Victorian Court of Criminal Appeal, in a significant contrast, told a very different story that began, not with two good young men who went out and met a bad woman, but with two innocent men who went out for a walk one evening and met two criminals.⁵⁶ This account placed the true victims at the heart of the story and rejected the idea that the crime was a 'foreordained tragedy of errors for which no-one need take full responsibility' or a 'natural conclusion of a chain of events in which the respondents had, with praiseworthy motive, become caught up.'⁵⁷ The judges emphasised instead the causal role of the vicious motives of these strong, belligerent and angry young men, who disinhibited by alcohol and fuelled by inner rage, spoke their intentions ('I'm going to fucking kill you'),⁵⁸ hunted down a physically disabled older man and then beat him into unconsciousness. They dispersed the smokescreen of external 'causes' created by the sentencing judge and made it clear that the cause lay solely within the offenders themselves: in their intentions which were criminal; in their motives which were vicious and vengeful; in their beliefs about their victims which were baseless and unreasonable; in their decisions which were deliberate and purposeful; in their desires which were to take the law into their own hands and punish; and in their own choices which were culpable and deserving of greater punishment.

Whiteside and Dieber: the Character of the Offenders

The story told by the sentencing judge not only contrasted the good characters of the two middle class offenders with the bad character of the drug abusing lower class woman who lied, it also equated the good characters of the two offenders with those of the two innocent victims, adding strength to the idea that all four men were victims who did not deserve any more suffering. The judgment repeatedly suggested that the

⁵⁴ Sandra Petersson suggests that judges most often quote poetry as a rhetorical device for one of three common purposes: (a) to comment on the parties or facts; (b) to divert from the legal analysis; or (c) to introduce the judgment: 'Poetic Justices and the Legalities of Love' (2000) 31 *Victoria University at Wellington Law Review* 103.

⁵⁵ This was one of the three characterisations rejected by Brooking JA in *Whiteside and Dieber* (2000) 1 VR 331, at 342 [38]. It was also later roundly criticised by Gummow and Callinan JJ in the unsuccessful application for leave to appeal to the High Court in the transcript of *Dieber v DPP* M89/2000 (22 June 2001).

⁵⁶ See the judgment of Winneke P (2000) 1 VR 331 at 331-332, which after detailing the charges and history of the case, begins the narrative in the third paragraph by identifying the deceased and going on to explain how he was killed.

⁵⁷ *Whiteside and Dieber* (2000) 1 VR 331, Brooking JA at 342 [38]; see also Winneke P at 336 [19] denying that it was 'an unfolding tragedy in which the respondents became inevitably entangled.'

⁵⁸ A quote not used in the sentencing comments, but mentioned several times in the Appeal decision.

offenders and the victims were all good, decent men,⁵⁹ who made a series of 'reasonable' 'mistakes'⁶⁰ that compounded the woman's original lie into a shared tragedy. The offenders were characterised as responsible, loyal, genuine, solicitous and trusting men of excellent character who, seeking to protect the 'violated' and find 'the violators'⁶¹ made an understandable error that led to an 'unexpected, unintended and unlikely death'. They were: non-aggressive, non-violent, excelling at study and sport, innocent of burdens, capable, hard-working men of integrity and considerable potential. The judge emphasised that they were not vigilantes but men from decent, honourable, hard-working families that engendered and nurtured plain, good values into their sons – prompting a friend of the victims to say:

“People felt it was irrelevant whether they came from good or bad families, or from the east or the western suburbs,” Ms Cameron said. “If they were such nice characters, then they wouldn't have bashed someone so severely that he died.”⁶²

This point was taken up by the Victorian CCA who, like the judges in the NZ Court of Appeal in *Clotworthy*, also based their characterisation of the offenders on inferences and descriptions taken directly from the sworn testimony of eye-witnesses, and who rejected much of the sentencing judge's characterisation. Justice Brooking was struck by the fact that a huge amount of unsworn and untested material had been put before the sentencing judge by people who had not witnessed the events but who nevertheless purported to describe not only the events of the night, but also the motives and characters of the offenders.⁶³ His Honour emphasised the fact that the offenders themselves had not given sworn evidence, and went on to summarise the issue of character (at 342), by identifying the 'danger' that the 'uncommonly voluminous' quantity of untested, self-serving and second-hand material put before the judge had forced the 'stark and intractable circumstances of the crime and its effects' to 'recede too much from view.' So, even though it was accepted that the offenders had previously been men of good character, the CCA concluded that on the day of the offences they had shown themselves to be palpably aggressive, enraged and unreasonable men who deliberately perpetrated two violent vigilante attacks, despite having been told by others in the park that the victims were gay.⁶⁴ These strong young men, who mercilessly hunted down and bashed their disabled victim with fists, feet and elbows as he lay

⁵⁹ 'Decent' appears nine times in the comments: *three* times to describe the true victims, *six* times to describe the offenders and their families. This repetition reinforces the idea that the four men were good people and contrasts them with the bad woman, whose conduct made victims of them all. The offenders' characters are described as 'good' or 'excellent' nine times.

⁶⁰ 'Reasonable' or 'reasonably' is used *twice* to describe the 'mistakes' made by the victims, and *four* times to describe the 'mistakes' or 'errors' made by the offenders, see especially paragraph [8].

⁶¹ The terms 'violators' (used to describe the imaginary rapists) and 'the violated' (used to describe the 'rape victim') were used six times in the sentencing comments.

⁶² 'Petition seeks tougher penalty for killers' *The Age* (Melbourne), 29 July 2000, p 3.

⁶³ *Whiteside and Dieber* (2000) 1 VR 331, Brooking JA at 341-2. His Honour explained that many lengthy reports were submitted, five character witnesses were called for each offender and 60 written references were given to the judge.

⁶⁴ The CCA highlighted quotes from others who had been present in the park that night who had met the woman and the victims, which cast doubt on the reasonableness of the offender's beliefs, and which had been omitted by the sentencing judge: see eg, Winneke P at 334-335 [13-14].

trapped and screaming for help, and who later pretended that they were acting in self-defence, were not 'quiet, very peaceable young men' who acted out of 'misguided chivalry', but savage vengeful men whose motives came from much darker parts of their characters.⁶⁵

Whiteside and Dieber: the Consequences

The sentencing judge dealt with the consequences of the crime in much the same way as he had dealt with the cause of the crime and the character of the offenders; first, by limiting his coverage of this issue to just two paragraphs out of forty-one, and then by counter-balancing the negative features they contained with a far greater number of paragraphs detailing positive features about the offenders.⁶⁶ Although his Honour did recognise (at [18]) the severely traumatising effects on the surviving victim (who had lost his life partner and who was experiencing 'excruciating suffering' and the most 'severe grief reaction' that his counsellor had ever seen), the crime itself was dismissed (at [10]) as a 'brief but severe assault' leading to unconsciousness, and its effects on the deceased victim were cloaked behind technical jargon taken from official autopsy reports. So, the sentencing comments referred (at [16]) to medical reports of 'subarachnoid haemorrhage' and 'traumatic left vertebral artery dissection' again causing the 'stark and intractable' facts to 'recede from view' as Brooking JA pointed out in the Court of Appeal.⁶⁷

By contrast, the CCA gave much greater attention to the effects of the crime, supplementing the autopsy reports describing 'injuries to the head, neck, chest, right and left arms ... the head, including the bridge of the nose, two black eyes, and bruising all over the left ear'⁶⁸ with extensive quotations from eye-witness accounts that explained in vigorous, clear and very affecting ordinary language exactly what the offenders did to create those effects:

Just punching the crap out of him. He was using fists and elbows ... he was not stopping. It was outrage; he was a bloody animal, savage.⁶⁹

The account given by the CCA re-balanced the narrative and brought the harsh facts back into view, not only by revealing many matters about the conduct and its effects

⁶⁵ See Winneke P at 336 [19] and Brooking JA at 341 [33].

⁶⁶ This is unexceptional in decisions that follow directly after a lengthy trial where many of the facts have been established in evidence, however, as Winneke P explained in the first paragraph of his judgment, in this case the offenders were initially presented on a charge of murder, but immediately before the plea, the Crown was given leave to file over a further presentment alleging charges of manslaughter. The offenders were convicted on their pleas of guilty, but did not give any evidence about the events of the night or their own states of mind and sobriety during the lengthy pleas in mitigation which were described by Brooking JA at [35-37]. His Honour concluded at [36]:

It is striking that so much effort should be directed into putting before the judge evidence of background and character and self-serving secondhand descriptions via psychologists of the events of the night, but not a word from the respondents themselves'

⁶⁷ See Brooking JA at 341-2.

⁶⁸ Winneke P at 334 [11].

⁶⁹ Winneke P at 334 [10].

that the sentencing judge had omitted,⁷⁰ but also by giving a name to the deceased victim, Keith, and a voice to his grieving partner. They allowed the surviving, bereaved victim’s own description to tell the story of his fear of the unrelenting chase, of the repeated angry threats, kicks and blows that he both sustained in one attack and observed in another, and of the length of the attacks and their effects on himself and his partner.⁷¹ Their subsequent decision was interpreted by the surviving victim as putting the story right and placing a proper value on the life that was taken:

“I want to thank the people of Victoria who stood up to be counted on this case, that there was some recognition that my Keitho was a valuable member of the community,” Mr Campbell said. “I feel that the appeal judges have recognised that.”⁷²

Whiteside and Dieber: Critique

To minimise the time that the offenders had to spend in jail, his Honour used all three of the Just World strategies to construct a version of the events that made the lenient sentence appear to follow ‘inexorably’ from the facts.⁷³ However, the story was described by two judges in the High Court of Australia as ‘nonsense’ and ‘perverse’⁷⁴ and the sentence that this story supported was held by the CCA to be manifestly inadequate, erroneous and ‘altogether too lenient’. This failure of judgement was not like the error in *Clotworthy* – there was no deeper issue of principle at stake – and the CCA swiftly and easily corrected the error. By contrast to *Clotworthy*, however, the real cost of the decision in *Whiteside and Dieber* was that both the sentence and the story that it was based upon were perceived by the public (and by the bereaved survivor) as a failure to stand up for the true value of the life of the victim who was killed. In minimising and obscuring the harm done by the crime and the culpability of the offenders, the judge was also led to minimise the value of the life that they had taken away and to obscure the significance of the rights that they had violated.

5. CONCLUSION

Batson has warned that the three ‘non-rational’ interpretive techniques that we use to convince ourselves that the world is just can lead us to perpetuate injustice.⁷⁵ These case studies have shown that Lerner’s research helps to identify the injustices that can occur

⁷⁰ For example the threat made by one of the offenders to the victim: “I’m going to fucking kill you” was omitted in the sentencing comments, but was quoted five times by the CCA and this threat and other threats to kill were also referred to in four other places. See also n 64, above. Brooking JA at 341 [35], also mentioned the 44 pages of medical reports about the effects on Whiteside alone, including details of his broken thumb. It is unclear from the judgment whether the fracture occurred as a result of the attack.

⁷¹ Winneke P at 333 [8]; Brooking JA at 339 [25-26].

⁷² ‘Sentence reflects a life was taken: gay partner’ *The Age* (Melbourne), 5 August 2000, p 1.

⁷³ [2000] VSC 260 at [32].

⁷⁴ See Callinan J, n 55, who described the sentencing judge’s characterisation of the crime as an ‘inevitable consequence’ of an ‘unfolding tragedy’ as ‘perverse’ and Gummow J who described the finding as ‘just nonsense’ and rejected the submission made by counsel for Whiteside and Dieber that it was only a ‘question of literary style’ rather than a matter of substance.

⁷⁵ See n 9 above.

when judges use similar techniques to convince us that their sentences are just. The accumulated effect of the Just World strategies creates a compelling illusion that the judge is morally obliged to desist from punishing the offender, but, because these unconscious strategies are based on a premise that may lead to perverse reasoning, they are apt to produce perverse outcomes. Furthermore, by selectively re-interpreting the facts into a story where the crime becomes the result of some external '*cause*' beyond the offender's control, where the offender becomes a good *character* who is really a blameless victim, and where the crime's harmful *consequences* are minimised or hidden from view, the judges pay a heavy price and the risk of injustice is high.

The first risk is that the judges can slip into an exercise that is inconsistent with their judicial duty. By unconsciously presenting a one-sided account favouring the offenders, the judges risk transforming themselves into advocates and abandoning their judicial task, which requires them to present an even-handed decision that weighs all of the relevant matters in the balance. The second risk is that judges can be forced into a position where their judgment casts doubt on the principles upon which the criminal justice system is based and where their reasoning is inconsistent with the fact of conviction. These strategies also carry other costs. In minimising the harm done by the crime, the judges must also minimise the value of the rights of the real victims that the criminal law is supposed to uphold and protect. In hiding the culpable choices made by the offenders, the judges virtually deny the facts established by the evidence. And in suggesting that an offender's conduct approaches the morally blameless and that criminal punishment creates more harm than it is worth, the judges undermine not only their own role but also the role of the legislature and the standing of the justice system that they are obliged to respect. Two of the most serious risks are that the use of these tactics will distort the sentencing process by ignoring the principle of proportionality and jeopardise the principled development of criminal sentencing law by leading the judge to re-interpret the facts instead of focusing on the deeper issues. The final danger arises because these strategies are used only in selected cases. This offends against our sense of distributive justice and means that judges can be led to ignore one of the most important demands of justice itself, which requires us to consistently treat like cases alike.⁷⁶

The image of the scales of justice offers the best guidance to the method that sentencing judges should adopt to ensure that their decisions are not contaminated by the Just World Delusion. This image has traditionally been interpreted as requiring not only that the punishment should fit the crime, but also as requiring that every judicial decision should be made after an analysis and recognition of both the strengths and weaknesses of a case, and that in every sentencing case, both the aggravating and the mitigating factors relevant to the decision have been recognised and weighed. Melvin Lerner has made it clear that the ultimate goal of the Just World view is not necessarily to *be just*, but to *see the world as just* and he warned us that this desire can lead us into perverse strategies that deny justice to others. For judges in our criminal courts the ultimate goal

⁷⁶ See Mason J in *Low* (1984) 154 CLR 606 at 610-611.

is not only to *do justice* but to *be seen to do justice* and this paper has suggested that judges can protect themselves from unconsciously falling prey to the Just World Delusion by consciously ensuring that they place all the facts – both favourable and unfavourable – openly into the scales and making sure that they present a balanced account that squarely addresses any issues of principle that may be raised in these controversial and challenging cases.

APPENDIX A: A 'Just World' Sentencing Checklist

The evidence from these case studies shows that Lerner's research can assist us to identify the occasions when the 'Just World' tactics may have been used and to recognise the tell-tale methods that support them. This checklist of issues can be used to ensure that sentencing judgments can be controlled not by the instinctive, powerful and unconscious belief in a Just World that is embedded deeply within the unconscious minds of all human beings, but by the normative traditions of the culture of rational legal argument that marks out the law as a moral force.⁷⁷

STEP ONE: Check the sentencing range

- Is the head sentence outside the expected range in the light of the objective facts of the case?
- Is the sentence described as: extraordinary, unusual, extremely rare, or exceptional because of any particular feature, eg a suspended sentence, or a very limited time in prison in serious cases?

One of the first signs that a judgment may need to be examined for evidence of the Just World Delusion occurs when the judges themselves describe their decisions as rare, extraordinary or exceptional in some way. So, for example, the sentence imposed in *Clotworthy* was described by the sentencing judge as extending the principles of sentencing 'to their extreme', as 'extraordinary' and as outside the 'orthodox path to sentencing'.⁷⁸ The circumstances leading to the sentence in *Whiteside and Dieber* were described by the judge as 'rare'.⁷⁹ Another warning sign appears when the head sentence lies outside the expected range when assessed in the light of the objective facts of the case (as the Court of Appeal held occurred in *Clotworthy*) or where a suspended term or an extremely short term of actual imprisonment is imposed in a serious case (as occurred in *Whiteside and Dieber*). If either of these two threshold tests is satisfied, then the judgment's style, narrative techniques and structure should be tested for signs of the three Just World strategies.

STEP TWO: Apply the Just World Analysis

⁷⁷ There is a more disturbing possibility – which is that the entire criminal justice enterprise may be based upon a deluded view that justice can be done in our courts.

⁷⁸ See *R v Clotworthy*, (24 April 1998) District Court Auckland T.971545 at 5, 8 and 10.

⁷⁹ See [2000] VSC 260 at [29].

2.1 The 'Cause'

The signs that a judgment may have been affected by the first strategy can be revealed by asking the following questions:

- Does the judgment:
 - a) obscure or minimise the causal role of the offender's conduct, or
 - b) fail to identify and explain the offender's motives and culpable choices?
- Does the judgment tend to suggest:
 - c) that other forces (eg, alcohol, drugs, gambling, a surge of emotion, etc) may have caused the events, or
 - d) that other persons were 'really' to blame?
- Does the judgment:
 - e) indicate that there was no 'real' cause; or
 - f) suggest that the events were 'inexplicable' or 'fated' in some way?
- Does the judgment seek to:
 - g) cast blame on the victim; or
 - h) suggest that the offender is in some way an innocent victim?

It is important to bear in mind that the mere fact that other causative factors have been mentioned by a sentencing judge does not mean that the decision is wrong, and in fact there will often be occasions when these other causal factors need to be highlighted and explained. However, if the coverage of these factors is unbalanced and tends to overshadow or minimise the causal role of the offender's actions, this may suggest that there is a problem. The real issue is not whether other causal factors have been identified, but whether the judgment is balanced in its coverage of those factors.

2.2 The Character of the Offenders

The signs that a judgment may have been affected by the second strategy can be revealed by asking the following questions:

- Does the judgment fully describe the offender's character as revealed in both:
 - a) their criminal conduct (as proved or admitted), and
 - b) in their past history?
- Does the judgment rely on self-serving statements given by the offenders to third parties (like counsellors or psychiatrists) that have not been tested in evidence?
- Does the judgment ignore or minimise relevant matters that have been proved in evidence?

A judgment should offer a rounded picture of an offender's character that recognises both the positive and the negative qualities as proved in evidence. Given that most offenders are unlikely to be wholly good or wholly evil, a judgment may mislead if it emphasises only one aspect of an offender's character. Again, the issue is whether the coverage is balanced and even handed. In both cases discussed in this paper, the sentencing judges' coverage of the issue of character was weighted very heavily

towards identifying and elaborating upon the offender's positive characteristics, by contrast with the weighting on display in the decisions handed down by the Courts of Appeal. In the construction and coverage of the question of character, just as in the construction and justification of the actual sentence, proportionality is the key. A disproportionate focus on only one aspect of an offender's character may lead to a disproportionate sentence.

2.3 The Criminal Conduct and its Consequences

The signs that a judgment may have been affected by the third strategy can be revealed by asking the following questions:

- Have the actual consequences of the criminal conduct been adequately recognised, described in appropriate detail and explained in easily understood language – or have they been hidden from view, minimised, or cloaked behind technical jargon?
- Does the judgment adequately recognise the worth of the actual victims, the importance of their rights that were violated, and the true value of their losses?
- Does the judgment emphasise the immediate and direct consequences of the crime or does it give more attention to exploring the consequences of the proposed sentence on other parties or on the costs to the community in general?
- Does the judge suggest that the expected sentence would 'not do any good' in this particular case or contrast the cost of the proposed unusual sentence with the cost of the more usual sentence?
- Does the judge effectively question any of the premises underlying the criminal justice system?

The task of persuading an audience that an unusually lenient sentence is justified is made easier if the judgment has been carefully constructed to explain and to reflect the full consequences of the crime.

2.4 The Narrative Strategy and Structure

As a final check, the judgment should be assessed for any of the following stylistic signs, which may also confirm that the judge has slipped into a tone or style of writing more suited to an advocate than a judge:

- Does the judgment address both the positive and the negative features in the case in an even handed way?
- Have the facts been selectively organised into a one-sided narrative that hides or minimises any of the facts established in evidence?⁸⁰
- Does the judgment adopt rhetorical devices, use a theatrical or dramatic style better suited to an advocate (or quote Shakespeare)?

⁸⁰ See the references to the art of advocacy in n 16 above.

- Does the judgment allocate space evenly between the positive features of the case and the negative features or does the allocation appear to favour one side only?

In both of the case studies, the judges adopted theatrical language and a stylised narrative technique that marked their decisions out as aiming for an emotional or affective response in the audience. This feature not only diverted attention away from the legal analysis,⁸¹ but ultimately detracted from the authority of the decisions.⁸² The case studies also revealed strong imbalance between the number of paragraphs allocated to describing the effects of the crime and those that described other positive features, eg the prior good character of the offenders in *Whiteside and Dieber*.⁸³

STEP THREE: Identify the Issue

The Just World strategies may be masking a deeper issue of principle that should be addressed in the sentencing comments.⁸⁴ However, the fact that a judge has employed the Just World strategies does not necessarily prove that the actual sentence is itself unjust, nor does it disprove the judge's view that the case is a special one where an unusual or exceptional approach is warranted. It may simply mean that the judgment needs to be better balanced in its content and structure or that the reasons why the case presents as a special case need to be better substantiated and explained. The decision will be stronger if it is based on a full and even-handed assessment of the facts and where the true basis of principle for departing from a more usual or expected course has been made out. If both of these matters are dealt with effectively, then the case will be more useful as a guide to future decisions and will be much less likely to be overturned on appeal. And if it is overturned on appeal, a case that has identified the relevant principle and provided a set of arguments that support it, will have made a valuable contribution to the development of sentencing law, regardless of the outcome.

⁸¹ See n 16 and n 54. The dramatic nature of the art of advocacy is often emphasised in texts on the subject and the use of courtroom scenes in drama, which began in ancient Greece and continues to current times, is further evidence of the strong links between drama and advocacy.

⁸² See, for example the CCA decision in *Whiteside and Dieber* and the comments made by Gummow and Callinan JJ, above n 55.

⁸³ See text at n 66.

⁸⁴ The case studies in this paper have focused on examples where the sentences were held on appeal to be excessively lenient, and the Just World strategies assist in this analysis, however, it may be more difficult to detect their use in cases where the sentence is excessively harsh – perhaps because the criminal justice system is premised on the view that offenders are 'bad people' who do deserve punishment. Further research is needed to see whether the Just World analysis can help to identify this second kind of cases.