

“Soft on Crime, Not Doing the Time”: The Media, Law and Order and the Criminal Justice System

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I begin this paper with a very Australian media parable about a man called I will call X. This story illustrates my theme of how the media can manipulate, or at least attempt to manipulate public opinion on crime and criminal justice matters.¹ I then move to a discussion on the courts and the media, and finally some suggestions on what can be done to alleviate the current problems.

The tale begins simply enough, with a report in our local Queensland (Australia) newspaper, the Murdoch owned *Courier Mail*, on May 28 2007 that a local radio announcer X had been violently attacked “bashed” overnight in Brisbane’s CBD. His injuries were said to be a broken nose, cracked cheekbone, and fractured skull. Although released from intensive care, he remained in hospital. A message from his radio station asked for privacy during his recuperation. All that was known at that stage therefore was that he had sustained head injuries in some sort of altercation.

The next day, May 29, the *Courier Mail* reported an interview with X where he said “I have no recollection of it, and I just want to know why?”. The report stated that he had been found in the street by a passerby and taken to hospital where he was heavily sedated. He is also reported to have said “I love this city and I’ve always felt safe, yet from what I have heard today about the number of incidents, it’s not good. From now on, when I go out I will think more about where and what I am doing and have my wits about me”. And further in the story: “I don’t want to talk about what sort of people they are, but I just want to know what was going through their head. I am just lucky it’s not more serious. I was feeling sorry for myself early this morning and then you realise you didn’t lose your life and how lucky you are”. Brisbane’s Lord Mayor was reported as saying that the attack on X was a “horrifying situation”, but that safety in the city had improved in recent years. It is relevant at this point to note that the *Courier Mail* had been leading a campaign to have the defence of accident reviewed, after several high profile cases where accused persons have been acquitted by a jury of homicide charges after killing people in street attacks, and relying on the accident defence in that the deaths were not foreseeable, given the nature of the attack.

On May 30, the incident was front page news, with the sensational headline: “BIG MOUTH” – Radio star says he was a victim of random violence in the city – but was his brutal bashing personal?” The story opens with security camera footage, and then states “These are the images that undermine a media personality’s claim that it’s not safe to walk Brisbane’s streets”. And also “And they indicate that X was not the victim of a random street attack”. The story then said that a man had admitted punching X after he had allegedly made unwanted advances to girl, had followed her

¹ I acknowledge that I have had the benefit of reading the excellent paper by Professor Sara Sun Beale on this topic (also in this plenary session).

and some friends to their car, and had made a derogatory comment. The story repeated that X claimed to have no memory of the incident, (hardly surprising in that he had received head injuries). The story reported that after being informed of the security footage, X withdrew his criminal complaint and said that he did not wish to take the matter further. The relevant part of this article was the headline that X allegedly had a “big mouth”, having made a claim that it was not safe to walk Brisbane’s streets; yet he had consistently stated that he had no recollection of the incident, and merely said that after he had heard of other incidents “it’s not good” and that he would keep his wits about him in future. In the reported interview the day before, he does not state that it was random attack, only that he was attacked and didn’t know how it had happened. In this story X was reported to have withdrawn his complaint because “I haven’t got the energy. I was almost killed two nights ago, and all I want it to get my life back on track. I can’t remember anything of the night. I did nothing illegal and I did nothing wrong”.

Also on 30 May, X, who was by now clearly established to have been the victim of a street attack of some sort, possibly provoked by his behaviour toward a girl, but nonetheless an attack, was accused by the *Gold Coast Bulletin* of “tarnishing the reputation of Brisbane’s city centre after withdrawing a bashing complaint”; having had another person admit the day before to having hit him, allegedly after X had made comments to a girl at a nightclub. This story was based on a statement by the owner of a nightclub where X had been drinking before the attack, that he was annoyed that X’s claims “had painted a poor image of a normally safe city”.

At this point, the media was clearly running the story, reporting it in a way which in effect blamed X for the attack, and for tarnishing the city’s reputation by talking about it, despite the fact that he had said that he didn’t recall what had happened, and in fact said very little about the city being unsafe, such comments being made in relation to other incidents, which were in fact correct. And when it became obvious that the attack came after X’s own actions, this somehow made him also to blame, because it was “personal” and not a “random” attack, despite the fact that X didn’t seem to know the person who hit him, and that there was no suggestion that X had struck the other person first. In fact the night club owner was quoted in the *Courier Mail* as saying that “it is frustrating and disappointing that we had had a *media barrage* [my emphasis] that has painted a picture of Brisbane where you’re taking your life into your hands walking down the street to catch a cab”. In other words, in this version, he was blaming the media, not X for the adverse publicity, which may have kept patrons away from the nightclub.

Also in that edition of the *Courier Mail* on 30 May was a story entitled “Video Killed the Radio Star, showing images from the security camera inside the nightclub; the message again being that X was to blame. The story stated “here are the images that undermine a media personality’s claim that it’s not safe to walk Brisbane’s streets”.

However where this story becomes particularly interesting is the response by the readers to the story on the online edition of the newspaper. Rather than endorsing the version of the story taken by the *Courier Mail*, the readers in fact rejected that construct. The story on 30 May attracted 83 comments, some which pointed out that it is in a nightclub’s interests to attract “celebrities” to their premises. Another pointed out that,

If a woman was raped after following some men up the street, only misogynists would infer she was “asking for it”... the interpretation that his behaviour caused the assault is a disgrace.

And this one,

What a poorly written article! It is basically saying that it is OK to bash someone if they hit on a girl. Interesting how society is so accepting of violence these days....

In response to the claim by the victim that he couldn't recall the incident, the following comment was typical: “Of course he can't remember what happened, he was knocked cold”.

A number of readers were critical of the newspaper's coverage of the issue; for example the following three comments:

It's disappointing, but not surprising that [the] Courier Mail is willing to stoop to 'Today Tonight' [tabloid current affairs TV program] levels of investigative journalism.

Cant beleive that an article is making out that someone deserves this and some of the comments on here supporting that [sic]. We [are] sure headed down the gutter as a society if we are saying that is acceptable to do this to someone for chatting up a girl.

Oh, so he tried to chat up someone's girlfriend. I guess that makes beating him senseless and leaving him lying on the ground perfectly acceptable.

And the following from the family of a victim of crime:

If you think this is great reporting you need your head read. The article makes out that X deserved this. If we as a society are now saying that it's acceptable to do this to someone for chatting up a girl then we are really in the gutter. We lost a family member ... punched and kicked to his death for an alleged “smart arse comment” his killer can't even recall what was said. His killer is now a free man due to the ridiculous accident defence that the judge instructed the jury on. It is never OK to punch and kick someone for a comment, idle glance or any other action other than self defence. What the hell is happening here. X did not deserve this and should reconsider his options.

In fact, of the 83 comments on the reports of 30 May, 48 were supportive of the victim, and /or in favour of the perpetrator being charged; and 14 thought that the victim deserved what he got (ie, were more or less in agreement with the slant of the story which was published).

Another story in the entertainment pages of the same edition of the paper had a similar response, with various pieces of advice offered, for example,

Of course it out of order for someone to cop it for being chheky [sic] to someone elses' chick, but since time immemorial [sic] this has happened.

And the following;

It is not ok to punch someone unless you were yourself in imminent danger of being assaulted [sic] yourself.

By 31 May, under a heading of "Please Explain X", X was being advised by the *Courier Mail* that he was under pressure from his employers to apologise for bringing Brisbane's reputation into disrepute (presumably for having his head introduced to the pavement and bleeding onto the ground).

By now, the reader's comments were overwhelmingly in favour of X (21/23), such as this comment:

The [named radio station] bosses have really outdone themselves now! They have pushed X into apologising for being BASHED!

So because X was wildly (?) inappropriate, it's OK to beat him within an inch of his life and leave him for dead. Well that's a great message to send out. Come to Brisbane, it's ok to beat people up if they provoke you in any way, shape or form.

By 31 May, the CM published some comments in a daily feature of the printed paper called *Talking Point*, again critical of the stance taken by the newspaper:

The headline "Big Mouth" appeared to condone the bashing of a young man apparently for remarks made on a night out. ... The person who couldn't just walk away in this instance should be severely punished for bashing X. We shouldn't tolerate this increasing lack of control.

However, despite the increasing number of critical comments on the coverage by the newspaper, the *Courier Mail* editorial of 31 May repeated the story that it was the victim's fault:

Radio personality X's neglect to tell the whole truth as to the circumstances leading up to his assault in Brisbane's inner city is more than unfortunate.. Mr X's obfuscation has diverted attention from both the seriousness of the assault and the fact that unruly drunken behaviour remains a problem around city nightspots.

This comment conveniently ignored the fact that the victim received head injuries in the incident, that it was uncontroverted that he did not recall what had happened; and further that his public comments on the incident were limited.

By Friday 1 June, X had made an on air apology at his radio station, and said that he was sorry if he had upset anyone in this process, if there is anyone he had upset, and noted that some of his statements had been taken out of context.

On Saturday 2 June, the *Courier Mail* reported that a victims' group had urged the victim of the assault to re-file his complaint to the police, and that the perpetrator had to be made responsible for the violent assault.

The next day, the *Courier Mail's* sibling paper, the Murdoch owned *Sunday Mail* was taking a different slant on the issue, noting that despite X's alleged unwanted advances towards the woman at the nightclub,

That is not a justification for a vicious assault and nor should his embarrassment deny justice being served on his attacker. After all, one punch can kill.²

In a strange twist, *The Sunday Mail* also reported on 3 June that the man who had contacted police in regard to the attack had previously been questioned in relation to another matter. The *Courier Mail* has been silent since then. The police investigations remain closed at the request of the victim, X.

So what can be learned from this sorry saga?

I have argued elsewhere that the media necessarily has to be selective in the stories that they report, for reasons of space and also reader/viewer interest,³ and that it is impossible for a television or radio news story to report anything but the barest facts.⁴ Despite their duty to be balanced and fair in reporting crime, it is almost inevitable that crime is reported on a very selective basis, with the more sensational or contentious stories much more likely to be reported.⁵ On the face of it, this is not alarming.

Crime and deviance is an ongoing fascination for the media,⁶ and it can be argued that the same is the case for the public in general. However Beale argues that the news media are not just mirroring events in society, but that media content is shaped by economic and marketing considerations which override what would have, in the past, been journalistic criteria for newsworthiness.⁷ Although this statement is made in the context of the media in the United States, I would argue that it applies almost equally

² The last sentence is a reference to a campaign launched in response to the two recent cases involving street fights, where the accused were acquitted using the defence of accident.

³ Geraldine Mackenzie, *How Judges Sentence*, The Federation Press, Annandale, 2005, 150.

⁴ See generally, Peter Grabosky and Paul Wilson, *Journalism and Justice: How Crime is Reported*, Pluto Press, Sydney, 1989, chapter 2; and also discussion of the limitations of media reporting of court hearings by Adams J in *R v Jurisic* (1998) 45 NSWLR 209, 255.

⁵ Andrew Ashworth and Michael Hough, 'Sentencing and the Climate of Opinion' (1996) *Criminal Law Review* 776, 779; Keith Soothill and Chris Grover, 'The Public Portrayal of Rape Sentencing: What the Public Learns of Rape Sentencing from Newspapers' (1998) *Criminal Law Review* 455; Peter Grabosky and Paul Wilson, *Journalism and Justice: How Crime is Reported*, Pluto Press, Sydney, 1989, chapter 2.

⁶ Janet Chan, 'Systematically Distorted Communication? Criminological Knowledge, Media Representation and Public Policy' (1995) 28 *The Australian and New Zealand Journal of Criminology* 23. See also discussion in Mark Israel, 'Telling Stories of Crime in South Australia' (1998) 31 *The Australian and New Zealand Journal of Criminology* 213; and generally Peter Grabosky and Paul Wilson, *Journalism and Justice: How Crime is Reported*, Pluto Press, Sydney, 1989 (particularly the relationship between the police and the media).

⁷ Sara Sun Beale, 'The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness' (2006) 48(2) *William and Mary Law Review* 397, 401.

to Australia. In the case I have discussed above, the media were not simply mirroring events, they were taking the lead by slanting the story in a particular way, despite feedback from the public which indicated that they were at odds with community opinion on the matter.

But as the media is the main source of information about the criminal justice system, there is a clear duty to be fair and balanced in the reporting.⁸ The media are not obliged to report the story in context, which can also lead to misunderstandings about issues such as sentencing, as well as fear of perceived risk of victimisation.⁹ The media has a pervasive influence on public opinion, and it has been asserted by some commentators that public policy is largely driven by the media, instead of social science research.¹⁰

My study of Queensland judges and sentencing¹¹ revealed a deep distrust by judges of media reporting of crime and justice issues. Some of the judges in that study drew an explicit link between public opinion and the media's reporting of stories.

Public opinion is driven by media opinion.

Public opinion is dangerous particularly where the local newspaper is "redneck" and intolerant, which is the case here.

The media is an enormous influence in the sentencing process. The media is responsible for the huge incarceration rate in recent times.

The media does play a role in shaping public opinion about sentences that have been imposed or should be imposed. As a judge you can't allow yourself to be influenced by the popular press.

However many of the judges interviewed felt that the role of the media in commentating on sentencing could be, and often was, a positive one. It was seen by some judges as a valuable method of passing information on sentencing to the general public, and performing an educative function. This is analogous to the description by

⁸ See discussion in Canadian Sentencing Commission, 'Sentencing Reform: A Canadian Approach' (Canadian Government Publishing Centre, 1987), 95; Victorian Sentencing Committee, 'Sentencing: Report of the Victorian Sentencing Committee' (Attorney-General's Department, Victoria, 1988), 609-610.

⁹ Andrew Ashworth and Michael Hough, 'Sentencing and the Climate of Opinion' (1996) *Criminal Law Review* 776, 779.

¹⁰ Kathleen Daly, 'Celebrated Crime Cases and the Public's Imagination: From Bad Press to Bad Policy?' (1995) 28 *The Australian and New Zealand Journal of Criminology* 6, 6; see also discussion in Sara Sun Beale, 'The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness' (2006) 48(2) *William and Mary Law Review* 397.

¹¹ Geraldine Mackenzie, *How Judges Sentence*, The Federation Press, Annandale, 2005; Geraldine Mackenzie, 'The Art of Balancing: Queensland Judges and the Sentencing Process' (2003) 28 *Alternative Law Journal* 288. Some of the judicial comments and discussion from the book are repeated here; in addition I have used in this paper a number of comments which do not appear in the book.

Grabosky and Wilson of the crime news as a morality play; reflecting and reinforcing the prejudices of society.¹²

The media was seen in a positive light by a minority of judges in the study, particularly where that particular judge had made positive efforts to co-operate and liaise with the media, for example this judge who saw the media as part of the checks and balances in the system:

It is good to have judges' sentences being scrutinised. If we are being watched, we will be more careful.

See also this comment by one judge regarding how media commentary is perceived by the public in general:

It is hard to put your finger on what role the media have. I often question the extent to which the public believes what they hear on the electronic media or read in the papers. I suspect that the average person thinks that what they hear or read is fairly unreliable. However because of human nature, perhaps we tend to believe what we have sympathy with. Perhaps people who are better educated and more knowledgeable about the issues would be more sceptical, and the general public would be more inclined to believe what they read.

And further:

The press sets up a hornet's nest with respect to particular offences, and judges must apply their own appreciation of how serious offences are. Judges should guard against the hysteria; it is something judges need to be aware of and guard against. Judges should impose a sentence which is appropriate and should have the courage to do that.

Some judges saw the media as a valuable, and often only, method of passing on information to the public about particular cases, or sentencing in general. Some of the judges spoke of their efforts in keeping the media properly informed about cases before them, which resulted in better public awareness and understanding of the sentencing process.

If I have a case that is high profile, I will ensure that the media have timely access to the transcripts of the sentence or judgments. Often the cases can't be simplified, but we can as judges go to trouble to express concepts in ways that can be understood and expressed in a newspaper article. It is also possible to refer the media to parts of judgments which are useful and may give a summary of the case. I don't go out of my way to court the media, but there is no point in making their job difficult. In keeping the media fully informed there are spin offs in increased public awareness and understanding of the system, and thereby assisting in making public opinion better informed.

¹² Peter Grabosky and Paul Wilson, *Journalism and Justice: How Crime is Reported*, Pluto Press, Sydney, 1989, 14.

It ensures that you stay careful, and sometimes if you want to send a message, you can do so through the media, but it is hit and miss. They tend not to pick up the bits that matter. If, for example, you want to point out that the accused has done some things that might turn him around, or you may wish to give credit to some community organisation which has assisted, the media will never support that. They just want to report the circumstances which they think are relevant.

The media has a central role in reflecting the courts to the public and the public to the courts. The media is the mediator between the courts and the public; it is important that the judge and the community realise that the media may for example be conducting a campaign, perhaps helping them to sell more newspapers. For example, if you go to a victim's relative, say someone who has been raped, of course they would say that the person should be punished in retribution for the wrong. This is why the state punishes on behalf of individual victims.

Sometimes in a controversial case or one that I want a message to get through, and there are press in the court, I will make remarks which I intend to be quoted and it is appropriate that they be quoted. Normally however I am very careful in what I say.

Many judges therefore saw the media as playing, or potentially playing, a positive role in the sentencing process, as a channel for information between the courts and the community. This role is a critical one in terms of building and maintaining public confidence in the court system, and is perhaps a key to community satisfaction and the return to public confidence in the sentencing system.¹³

Quality of reporting by the media

As has been indicated in some comments discussed thus far, the perceived poor quality of reporting came in for substantial criticism from many of the judges in this study. There was a feeling that reporting was selective and sometimes biased. Many of the judges specifically commented on this aspect.

The press has been very poor in conveying the story of what goes on in court; they often tell half the story which makes it appear that the person has been inadequately punished. They are not giving the proper reason for the sentence. The media puts a lot of pressure on judges to increase the penalties. The pressure comes from the press and victims' groups. You feel it more when you are sitting in provincial cities where you become more a part of the community.

With politicians, the media and sometimes academics, there is a focus on the prosecution facts, but sentencing is more complex than that. The judge has the overall responsibility; however each party before the court focuses on themselves; for example the victim, the prosecution and the defence. The sentence reflects the interests of all of these, however it is unfair when the

¹³ See also discussion by Adams J in *R v Jurisic* (1998) 45 NSWLR 209, 255.

media reflects only the prosecution view of what is going on before the court. Sometimes the offence is the inevitable consequence of a life of deprivation. The media focuses on the nature of the crime and what happens to the victim. An appreciation is lacking of an understanding of why the person did it. All of these things have a profound effect on the sentence. The public seems to think that sentencing is a one sided exercise, but in fact the sentencing judge juggles all of the interests.

The media often does not give a fair report of a sentence and as a result the public is not properly informed. I would hope judges do not sentence on the basis of comments in the Sunday papers! ...It is essential that the courts are open to the public and subject to public scrutiny. One difficulty is that media reports are often not accurate. Sensational reporting can influence public opinion unfairly. The power of the media needs to be exercised responsibly: it is open to abuse.

The media, in order to get a story will often ask the victim or their relatives, or the relatives of the offender for comment. These comments are usually emotional, and of course one sided in nature, and will make good news. ...The media is deceptive, misleading and sensationalist. They have to sell papers. I wouldn't expect the media to print the whole of the process, and I suppose if they did it would be too boring anyway. We are unlikely to get fair reporting unless the whole of the sentencing process was published.

Newspapers are playing an enormous role in public opinion which is very negative. The aim seems to be to "get the profession" and is out of perspective. The ways that the newspapers operate don't express public recognition of the strength of the system. They do a huge amount of damage.

The media catchcry is read by politicians and prompts them into action. The difficulty is that the media have a lot to answer for and are sensationalist. How many stories do they report on rehabilitation? It is a fallacy that bad news sells newspapers. The newspapers are attempting to sell newspapers by turning crime into entertainment. There are far more good people being rehabilitated and these are not being reported. Until the media gets the view that we have to empty the jails, we won't get anywhere.

The media have a huge role to play in the sentence. The *Courier Mail*¹⁴ seems to be devoting huge space to court reporting. That newspaper has done a huge disservice to sentencing over the last ten years. They demean the legal process in the public eye to no good reason. They tend to sneer at things they don't understand in Queensland and are very negative.

The public is only told what is going on in the courts through the media. The media is irresponsible about reporting cases. Classic cases are dangerous driving, where the court looks at the consequences rather than the act. If you ask the relatives of someone who is a victim about the penalties, they will say

¹⁴ *The Courier Mail* is the only major Queensland newspaper.

they are far too light, whereas if you ask the relatives of someone who is in court as an offender, they will say they are far too heavy.

The quality of reporting is very poor. I try to make sure that they report it right. It is a question of what you say in court as a judge, and if they don't report this correctly, I get them (the media) into court and haul them over the coals. The media are trying to reduce what happens in court to simplistic terms. What can often take half a day in court will end up as a few lines.

The media is irresponsible in their reporting of sentencing.

It was also acknowledged by some of the judges that there were sometimes valid reasons why not all cases were published, and that the issue was a complex one:

I wouldn't expect the media to print the whole of the process, and I suppose if they did it would be too boring anyway. We are unlikely to get fair reporting unless the whole of the sentencing process was published.

People tend to only hear about the cases which are unusually lenient, but this is often for a specific reason; for example the plea in mitigation may be particularly effective, or there are facts which the public don't know about. People get the idea of the normal pattern of sentencing from exceptional cases, but they don't have the full facts, for example maybe the offender pleaded guilty to a lesser offence.

If the media turned up more often to court then the public might be better informed. It's difficult however for reporters to take in everything that is in court and report accurately on what goes on.

These comments demonstrate the judges' views that crime was often unfairly and negatively reported, leading to an unbalanced view on the part of the public in relation to the criminal justice system. This underlines the importance of balanced reporting on the part of the media to avoid perceptions by the public in general that the courts are "soft on crime".

Media campaigns

Further to claims of inaccurate and unfair reporting, some judges characterised what the media were doing as an orchestrated campaign.

There seems to be a general campaign of denigration in the media, which seems to go right across the board. There is an insidious campaign to diminish the role of the courts in society. This potentially has disastrous consequences.

Sentencing is a very troubled area; you have only got to read the various commentaries in the media to see the discrepancies between what goes on in court and what is perceived to happen. The media are probably to blame. There appears to be a thinly concealed philosophy of payback. Having resort to victims fresh after the sentencing to ask whether they are satisfied is really

mischievous. A sentencing judge is not even pretending to satisfy the victim, however this appears to be expected.

The *Courier Mail* in perhaps a subtle way is saying that public opinion demands people be given denunciatory sentences. But is this public opinion? People I speak to say that offences which happened 30 years ago are water under the bridge. Some people think that it is almost outrageous. You only need one or two people to write a letter to the press and that is said to be public opinion. Usually they have a vested interest in the subject anyway

The courts and the media

The way that the media deals with matters in court is part of a “feel good” society and the need to have a win win situation. Law isn’t like this and sentencing isn’t like this either. Everyone feels they have to come out of court from a sentence feeling good, but life is not like that.

The past twenty-five years has seen a significant increase in the public scrutiny of the courts and criminal justice issues. While the reasons for this are speculative, a major cause would have to be the proliferation of electronic media and the opportunity to broadcast information widely about sensational criminal cases; crime sells. The television court reporter becomes the commentator, giving information on complex cases in a fifteen second news grab. The victim’s family is led sobbing from the court. The defence team is shown striding away. It is clear who is being cast as the archetypes of good and evil.

Newspapers and the print media can and do give in-depth coverage to crime, devoting extra column space to the more sensational cases. Pictures of grieving relatives accompany the commentary. The message is clear. The victim and/or their family have suffered terribly and will always suffer, the criminal will get off lightly to be housed at taxpayer’s expense for an all too brief period of time, and then will be let out to do it all again. The cliches are numerous and regularly found in the popular press.

Out of fairness to the media however, it should be added that public education is not the sole or main aim of crime reporting, and it is too simplistic to lay at their feet the only blame for public perceptions of crime; however, as noted by the Canadian Sentencing Commission, if the reporting of sentencing matters was more balanced and thorough, the public might have a better and more accurate understanding of the sentencing process.¹⁵

There are no winners and losers in the criminal justice system. Having the perpetrator of a crime put behind bars does not bring back a deceased victim. It does not restore the injuries, take away the nightmares or remove the psychological damage. It might make the victims and their families temporarily feel better if they perceive that “justice has been done” but if their expectations for a lengthy sentence are not

¹⁵ Canadian Sentencing Commission, 'Sentencing Reform: A Canadian Approach' (Canadian Government Publishing Centre, 1987), 98.

fulfilled, it may only bring frustration, anger and resentment. As one of the judges said:

We as judges see the pain inflicted on the person before the court. The public tends to be unsympathetic toward people before the court. There is a concept that people who are sympathetic toward criminals are “bleeding hearts”. The sentence to be fair involves taking those things into account. But inevitably there is criticism. It is hard to get media coverage of the circumstances of the accused. The public does not want to know. The public is hard, and I feel this is particularly so in Queensland where people seem to be less compassionate. It seems to be a very patronising and judgmental society. There are so many criticisms of the process in Queensland, and there is a bad perception of judges. I don’t understand why the public is so hard toward accused. Perhaps it is human nature.

Many of the judges in this study perceived a lack of public confidence in the criminal justice system.¹⁶ The pressure being put on the courts by the media and the calls for public opinion to be taken into account can also be seen as a symptom of this problem. Justice Kirby however comments that judges can and do adapt to changing times, and are willing to respond sympathetically to changing perceptions of justice.¹⁷ Underlying the responses by the judges in this study was the view held by many of them that they were in touch with community values, and thus qualified to express these values in their sentencing decisions. What was also evident from many of the interviews was a sincere desire and commitment to assimilate these views in their sentencing decisions (wherever appropriate). The issues of exactly how public opinion, community values or community expectations should be taken into account in sentencing, and more problematically, how these views should be ascertained, remains to be determined.

The conservatism of the community witnessed over the past 20 years, and the increasing emphasis on law and order and fear of crime,¹⁸ has undoubtedly had a significant influence on how the community perceives the sentencing system. Research in the United States has also noted a relationship between conservative religious views and public perceptions of crime and punitiveness,¹⁹ and there has been a connection drawn between neo-conservative policies and the influence of law and order.²⁰

With constant criticism of the courts in the media, both in terms of public accountability and the perceived lack of sensitivity of the court to victims, it is important that the courts do whatever is possible to communicate the reasons for a

¹⁶ Cf also *R v Jurisic* (1998) 45 NSWLR 209, 246, (Adams J); and Stephen Parker, 'Courts and the Public' (Australian Institute of Judicial Administration Incorporated, 1998), 162.

¹⁷ Justice Michael Kirby, 'Judicial Stress' (1995) 13 *Australian Bar Review* 101, 110. See also *R v Jurisic* (ibid), 220 (Spigelman CJ).

¹⁸ John Irwin, James Austin and Chris Baird, 'Fanning the Flames of Fear' (1998) 44 *Crime and Delinquency* 32; Russell Hogg and David Brown, *Rethinking Law and Order*, Pluto Press, Annandale, 1998, chapter 2.

¹⁹ See Theodore Curry, 'Conservative Protestantism and the Perceived Wrongfulness of Crimes: A Research Note' (1996) 34 *Criminology* 453.

²⁰ Russell Hogg and David Brown, *Rethinking Law and Order*, Pluto Press, Annandale, 1998, 121.

particular decision. If the courts do not and cannot communicate what they do effectively to the community at large, the misunderstanding of what occurs in the courts will only increase, with corresponding potential for an increase in confusion and resentment. Effective communication is one of the keys to overcoming this.

This need for better communication has been stated on many occasions, but perhaps none so eloquently as by Sir John Barry in his lecture “The Courts and Criminal Punishments” in 1969,²¹ recently quoted by the High Court in *Pearce v The Queen*.²²

[The criminal law] must be administered publicly in such a fashion that its activities can be understood by ordinary citizens and regarded by them as conforming with the community’s generally accepted standards of what is fair and just. Thus it is a fundamental requirement of a sound legal system that it should reflect and correspond with the sensible ideas about right and wrong of the society it controls, and this requirement has an important influence on the way in which the judges discharge the function of imposing punishments upon persons convicted of crime.²³

²¹ Sir John Barry was a distinguished judge and legal scholar, and was the founder of the Department of Criminology at the University of Melbourne in 1951. See discussion of his work in Justice Michael Kirby, ‘John Barry on Sentencing: A Contemporary Appraisal’ (1979) 12 *The Australian and New Zealand Journal of Criminology* 195.

²² (1998) 194 CLR 610.

²³ *Ibid*, 622-623 (McHugh, Hayne and Callinan JJ).