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Judicial Time Lords: Media Direction vs. Judicial Independence

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Abstract

News stories and their headlines first collated and analysed by Schulz (2008; 2010) have clearly identified a significant continuing Discourse of Time, which is being used to analyze the work of courts and judges and influence policy decisions. This paper suggests that time discourse is a very powerful influencer in public perception transmission and suggests ways in which authorities can identify and modify responses direct to community. A corpus of sentencing remarks randomly sourced in Australia from various Criminal Courts websites since 2008 indicates judicial officers appear unaware of the need to reframe discursive presentations for community. Sentences appear offender focussed rather than driven by the need for community reassurance. This article provides a multi-disciplinary approach using communication theory and legal perspectives. This unique collaboration in to Time and its challenges for authorities reliant on public confidence (and funding) provides evidence that the Discourse of Time and its construction is used as a major evaluative measure of them. Sentencing presentations thus may be considered in light of these findings.

Key Words: Judicial Independence; Communication Theory; Discourse of Time; Sentencing.

Introduction

This article identifies how “time” is used as a particularly powerful tool in the media and political discourse about the work of courts. Previous research of media stories and their headlines in South Australia by Schulz (2010) has been reviewed and demonstrates that a *discourse of time* is used by the media, in a way that courts must fail, to establish a *discourse of disrespect* for the judiciary and *discourse of direction* to influence their work. This *discourse of time* is most obvious in the discussion and endless debates about “how much time” has been taken from a convicted offender as a sentence seems to cast judicial officers as modern “time lords” made famous in the BBC *Doctor Who* TV series where the

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protagonist holds sway over time and space. The significance of time in the work of courts has extended beyond criminal law sentencing. Time has been the major topic in recent public media debate in Australia about the Family Law Amendment (Shared Parental Responsibility) Act, 2006 (herein after known as the Act).

For example, Jackman (2010) suggested that the family law field has a time problem where equal time is a key note of feuding parties: “In mediation and counselling rooms they say equal time has become the new sticking point because angry parents now see it as their right...” (p. 20). Jackman further suggests the change in the Act came about as the result of the active political lobbying of non custodial parents, mainly fathers, who “besieged politicians and backbenchers” to demand changes to formulae calculating child support payments and care arrangements. In addition, the then Australian government instituted an inquiry, which will be ... “asking the committee to investigate what factors ...in deciding the respective time each parent should spend with their children post separation” (Jackman, 2010, p. 20). Time is precious and we media consumers are constantly reminded of it.

Time as a concept has been the subject of many theorists, philosophers and linguistic analyses. Indeed time is so significant to political protagonists they often use it as a tool for gathering impetus about a number of issues as in the example above where time with family becomes politicised and used to garner votes in defined constituencies. Shenhav (2005, p. 315) has detailed what he calls “concise narratives” which are “temporal ranges” in political statements or speeches which “shed light” on political discourse constructions surrounding the founding of Israel as a nation. In addition, he has found that the number of references which are made by individual ministers which details the past and present or distant future, highlights “timelines” as very significant and is “widened by the level of publicity of the forum” (2005, p. 317) in political discussions. Such political discussion takes place daily in our newspapers and uses time frames as a significant tool in evaluation. This reflects in the work of Schokkenbroek (1999, p. 59) which considers the “evaluative aspect of stories as they affect temporal organisation of events in narrative”.

In considering headlines as a key structure {see for example van Dijk (1998 cited in Hullse, 2000, p. 4) on semantic macrostructures} that leads readers into narrative. It is interesting to note that they too, recapitulate events in the order, which they happen as in this example identified by Schulz (2010). This clearly outlines the encapsulated narrative “*the man is a killer, he went to court, he was found guilty of killing by driving, but was allowed to walk free from the court (with a suspended sentence)*”. This is a clear example of Schokkenbroek (1999) and her concept of the underlying *event structure* and then the narrated event sequence as the *discourse structure*. In addition, this allows further news to be examined and rated on the evaluative notion of the temporal range set out for the reader that how this story may unfold in further extrapolations of it.

Time as a major focus of news is an integral part of media practice which highlights the importance of this metaphor so that “vivid language and its ambivalence invites us to search out what is dimly apprehended” (O’Shaughnessy, 2004, p. 70). Metaphors engage with the viewers, readers or listeners who then apply their own responses based on a range of sympathies and feelings. Time is precious, and we have come to expect a safe and long life. This has been cut short in the daily dramas of living that are played out in courts this is easily focussed around the loss of time.

The notion of quality time has been highlighted by others as a really important political as well as family matter and is the subject of debates surrounding the care of children,

parental responsibilities and guilt (Torre 2007; Wingard 2007) and the notion of an overwhelmed over informed society full of risk adds to this confusion (Beck 1992; Gitlin 2001). Time is of the essence and is a much vaunted precious “possession” which is an abstract concept that is at risk itself of being “stolen” by a number of institutions with heavy demands on individual’s work and knowledge, and their commitment to family and community.

The work life balance is also the subject of in depth research in trying to find solutions for modern society’s view of being harried, overworked and time poor (See for example the University of South Australia Centre for Work and Life Balance, which focuses on this significant area³). However, there has not been significant research on the use of notions and metaphors of time in discussing justice, courts, crime and punishment. Schulz (2008; 2010, p. 99) demonstrated that headlines in Australian and international media used a significant focus on time as a *discourse of disrespect* against the judiciary which formed a pattern leading to the *discourse of direction*. She identified that it was used as a type of yardstick or “tariff” for measuring the work of courts. Sentencing discourses are the most prevalent views for this type of debate (for instance see Gelb on public opinion and sentencing 2006 and Tomaino 1997 on public opinion input into sentences) and is often heavily promoted via media headlines as a political tool. O’ Shaughnessy (2004) has remarked that politicians will link and use any symbolic tool in order to garner public attention and sentencing and its subsequent debates within what Schulz terms the *discourses of disapproval and disrespect* and appear frequently to direct public thinking about the topic. Time is used as a form of evaluation of criminal justice to resonate with a society that reports being *short of time, time poor, out of time* and *pressed for time* as disclosed by researchers who have found that *quality time* is a major focus of attention (Hochschild, 1997).

Time pressures have now become the focus of political debates within communities as they seek to control how society should behave and react as part of their own *Risk Society* input (Beck, 1992). Such debates are sourced out of many surveys conducted by magazines and political parties all seeking to tap into the pulse of community and public opinion. This is then translated into stories highlighting the plight of “super mums” and “dads who don’t help around the house” which lead to stress on the modern family. Collective experiences of people’s daily lives repeated in newspapers and public affairs television augmented by authoritative groups such as the Institute for Family Studies in Australia or elsewhere and other scholars surveying and sombrely telling the community that the new *flexibilisation* of the work place has led to people feeling more and more pressure is noted. *Quality time* is the catchword of the age.

These relate to issues where there is little time for children and quality time being lessened by modern work practices (Breedveld, 1998). Just as time is elevated in importance to people’s lives, it is no surprise that time is also used as a significant factor in the evaluation of justice through the daily stories about crime and punishment. Risk avoidance is a daily discussion in Australia. Avoiding and controlling crime and criminals is a national obsession along with the drama of sport in Australia.

The media in modern democracies often shout and display headlines that yet another offender has been set free, escaped justice or needs to spend more time in prison as the community is “demanding more and tougher penalties”. To make their point the media

³ <http://www.unisa.edu.au/hawkeinstitute/cwl/default.asp>

simplify the complexities of sentencing by using time as the yardstick to measure the justice system. This reductionism allows an eye for an eye yardstick by which any sentence for a crime where the victim died will be inadequate in a jurisdiction without a death penalty. This approach enables TV news to deliver information from the news anchor's desk with strident headlines behind the news reader's head such as "*Killer Walks Free*", "*Community Outrage at Lenient Sentence*". All these areas of an unrelenting critique and discourse of disrespect was identified by Schulz in her research on the language which swirls around courts and judicial officers setting them apart as the "new offenders" and "other" within the justice system in Australia and elsewhere (2010, p. 55). The term walks free has become code in media practice to infer that someone has been given a suspended sentence but is misunderstood by the community as inferring that someone has had their offence dismissed in some way.

Potter (2005) asks, "What makes a description difficult to undermine? [H]ow are these factual descriptions put together in ways that allow them to perform particular actions?" This is done (according to some theorists) by construction of a set of discourses that rally a community into believing that judges are to be questioned and to be taken to task. An example appeared on December 1st 2008 when the daily Adelaide *Advertiser* proclaimed "...Judges are finally getting the message" next to bold headlines proclaiming that unprecedented lengthier gaol terms are becoming the norm for "Killer drivers". The *Advertiser* has regularly campaigned for all drivers convicted of causing death by dangerous driving should be imprisoned for long terms, by using comparisons of the time served in prison as the only relevant balance against the time lost in the shortened life of the victim. It appears to have won its case in the court of public opinion. Later in the same day, the Attorney General of the State trumpeted "even tougher new laws" in relation to speeding and drink driving were already in the pipeline.

The daily and relentless reporting of crime and justice in Australia and modern international "24 hourly news cycle" democracies, fed by the convenience of stories from police media units, is such that media agenda setting around the rule of law is virtually beyond doubt (see for instance: Roberts & Hough 2005; Rottman *et al* 2003; Schulz 2008; 2010).

Within politicised discourses, a specialist strand of "risk" logic has developed, in recent years, which makes very clear the degree to which mediated justice outcomes have become over-focused on sentencing. As Gelb (2006) indicates that public opinion is clearly focussed on this area and suggests that the public feel that they are entitled to have a say in how justice should be administered. While judges' sentences are constrained by statute and consistency with earlier sentencing decisions, in accordance with the rule of law – often commenting upon such provisions in their sentencing remarks – in the public view, almost entirely dependent upon media reporting of trial outcomes, the judge's sentence is an exercise of very real power. The public are not informed of the constraints and are encouraged to the view that public opinion should influence the result. This is a path to replace the rule of law with mob rule.

What sentencing does in a repertoire of punishment reduced to limited-period of incarceration and prescribed financial penalty, is to reduce the convicted individual's capacity to progress, socially and economically – for a quantifiable proportion of their life span. What criminals have long called "doing time" has become an unacknowledged part of the social quantification of justice: a judgment over how much "time" or loss of it has been meted out in sentencing, at the heart of media attacks on court decisions.

Sentencing as dispensation of punishment understood within this *discourse of time* has taken the public imagination; it has become a populist yardstick to measure the work of the courts and their responses to public concerns. Time is precious in a modern economy, where working hours and trading hours are regulated, and measures of throughput and productivity are central to success. The concept that *time is money* and waiting time is misspent (Lakoff & Johnson 2003, Hüllse 2000) is widespread, so that certain people to be taken out of society, and so out of productive labour, for a measured period of time, is considered to be a fitting punishment. Life itself is now seen as a manageable project⁴ in modern society: as a sort of stocks and shares portfolio, where life investments “mature” alongside the “responsibilised” self. Time as a prized entity then becomes a marker of profit and loss. As the rest of the community struggles about their daily business, using a prized commodity to measure out their success or failure, both the incarcerated criminal and the fined individual lose forward momentum. Indeed, if they do not “lose time” in these ways – as for instance when the media report criminals undertaking university degrees within prisons, or salvaging businesses despite massive court fines and payouts; then once again the community is represented as “outraged”. Above all, if a judge does not recognize the importance of this concept of “time as time-out”, then criticism ensues.

Sentencing as management of time is similarly brought into sharp focus when victims’ families are interviewed, post sentencing, on the steps of the court house. Most often reported after a murder conviction, a drunk-driving offence or a child negligence case, are comments, which equate to a typical example such as “X years is just not long enough...” – a direct measurement of a prison sentence against a full life, lost. Further comments frequently include how a victim’s family feel that they themselves “have been given a life sentence,” forced to undergo the lost “progression” consequences of the physical, psychological, social and economic outcomes of the loss of a family member. There is often speculation that a convicted individual may well go on to participate in society, and even to do reasonably well, post release – while their beloved relative is denied further participation, or contribution to family progress. From this perspective, the “time as time out” discourse reads sentencing as disproportionate to community loss – as not an equivalent forfeit of a “life time”.

To this extent, Judges have been asked by media and society not just to deliver an equitable administration of the law, but also to detect and reflect within their deliberations values that are current today. In a world which is often constituted through discourses of *risk* and *fear*, this *discourse of time* heralds a clear and present measure of “a lifetime” and its value in society. Communities clearly want offenders to be denied that time, in ways, which do indeed reduce life progress.

That demand cannot be met by the prison system. Sentencing is not based on a retributive eye for an eye, or time for time measure. It involves taking into account many factors including the need to ensure adequate punishment and deterrence of the offender and others, but also importantly the need for rehabilitation, admission of guilt and attrition, payment of compensation and the past and future prospects of the offender and victims, to name a few.⁵ The effect that jail has can also be controversial. The same media, which produce headlines demanding harsher penalties and longer sentences, are equally liable to produce narratives of harsh and even lawless prison systems; deaths in

⁴ See for example the growth of “life coaches” as a separate career, which encourages people to manage their time and life in such a way to achieve their goals and personal success.

⁵ For a list of factors see s. 10 of the *Criminal Law (Sentencing) Act 1988* (SA) available at Austlii.edu.au

custody; high rates of recidivism; violence and substance abuse, as the lessons of incarceration. These feed back into law and order debates: partly an exacerbation of “risk” from “freed” offenders which feeds the whole law and order debate; partly a suggestion that violence within the prison system is in itself part of the punishment. In the meantime, real measurement of criminal acts against justice outcomes is rarely attempted, outside the closed studies of academic criminology. Both the closing of the prison gate, and the intense privacy according personal financial status, make ongoing demands for an equalised outcome of “life time spent” impossible. In fact, it is this very impossibility, which makes the discourse powerful: which gives it urgency – and which renders it political.

With the collapse of the Soviet Union, which stood as a proxy for left wing ideology (a status of doubtful merit for a totalitarian construct) the old certainties of left, and right wing, politics in the context of an ongoing “cold war” in the West has collapsed. Political party ideologies have fallen away in a society that enjoys relative peace and low crime rates, revealing the pursuit of power as their remnant *raison d'être*. It is convenient to replace these old certainties with an ongoing source of “unmeetable” community demand, operating from within the personalised yet universal field of family, around a ‘law and order’ paradigm. Therefore, it is that sentencing issues are now being framed by governments and media world wide as a measure of their own “commitment” to “security” – a curious promissory campaign in light of the foundation of neo-liberal campaigns on de-regulation and removal of government control and interference from individual responsibility and rights. Whatever the ideological formation, it plays across a field in which judicial officers: positioned as one day too conservative (“remote” and “out of touch”) and the next day too liberal (“gone soft”) are resented for their independence, are to be controlled through a variety of new sentencing guidelines, grids and pressure outside proper legal processes.

None of these debates is new. Judges have been speaking on such topics for many years, airing special concerns at key moments. Lord Kilmuir exhorted the judicial community to remain silent in the face of community criticism in July 1955 (cited in Griffith 1997, p. 42), as a tactic for continuing to be seen as dignified and *independent*, maintaining a judge’s “reputation for wisdom and impartiality” as indisputable within the general community. Given the depth of media critique that has developed since, the tactic has not succeeded. Courts are under unrelenting media pressure. Continuing attacks on the judiciary for such issues as leniency of sentencing; court outcomes deemed by the media to be “below community standards”; continued calls for tougher penalties, all deny opportunities for the wisdom of judges to be tempered with mercy – or perhaps in more contemporary terms, for an accused’s “life issues” to be considered in mitigation.

Critics such as Tomaino (1997) have even called on the criminal justice community to consider taking the notion of public opinion itself into account as part of the sentencing process. A process to do this might deflect those claims made based on “public opinion” in media reporting, when there is in fact an absence of any real indication of community expression of concern. However, it is unlikely to solve a situation where the media and political discourse is intended to influence public opinion rather than to reflect it.

Within this context, Schulz (2008) has reviewed media stories and headlines from major newspapers in Australia and particularly South Australia in her earlier study of a six month snapshot period to provide an analysis of how this discourse construction of the importance of time can and does affect public perceptions of the justice system. Further headlines and stories also were collected and submitted for a discourse analysis to

determine and confirm the consistency of the concept that justice systems everywhere and their central personnel the Judiciary are constantly being pilloried through the *Discourse of Disrespect*, and *Direction* as outlined in earlier work by Schulz (2010).

These media items contained episodic lexis related to time such as *years, weeks, days* or *sentence* when related to the justice system. In other cases, words such as *delay* or even the mention of a day such as *Tuesday* indicated time was a major element and so were chosen for analysis.

Metaphors of Time

One indicative metaphor enacting and controlling this increasing sense of pressure towards absolutist elimination of elements of disorder lies in the notion of *time* – most particularly in its application to time as a component valued within a community itself losing access to self-directed use of time, hard-won across over a century of industrial action, which has been cut away within a few decades of “workplace reform”. Sentencing for serious crimes within the modern justice system is primarily by imprisonment, which casts offenders into a category of “other” outcasts from our law abiding righteousness and removes from offenders their control of time, space, and the access to income, which regulates both. In a society whose accepted standards of leisure time, mobility and home ownership, and security of income are being eroded rather than improved, “time” is the most immediately measurable element of sentencing and has become a prime code for assessing the severity of the crime-punishment ratio. The term *time* is interchangeable with the notion of sentencing, as a type of checking mechanism for how the community views “retributive punishment”. In a society beset by fears of downward social mobility, marginalisation and even complete elimination from an ordered society, (see Bauman 2000), sentencing to time in jail becomes a scale upon which to measure one’s own distance from the chaos and exile of social failure.

“*Nemer fears life in prison*” a headline which headlined on page one with the publication of Nemer’s own letter to the Adelaide South Australia daily newspaper *The Advertiser* (11/12/03) shows that “doing” time in prison is so fearful that Nemer sees his own life at risk as a result.⁶ Prison, coded within both the news and entertainment media as a space of chaos, populated by dangerous monsters is outside the “progressing” time of lives and careers moving forward into increasing security. Allocations of prison “time” considered inadequate when measured against the breaches caused to victim’s lives occasion – at least for the media – “public outcry”. In other words, the metaphor of time suspended for time lost must be seen to be equal in strict horological terms – no matter the sense the justice system may have of what amounts to a significant period of incarceration or deprivation of full citizen rights.

Headlines endlessly rehearse calls for an equitable allocation of time deprivation. On 21/9/04, it is “*Just eight hours jail*” – “*Sex offence magistrate walks free on bail,*” in which a magistrate charged with a sexual offence was presented at a court where he was given bail pending the trial. This headline clearly was directing reader attention to this importance of time within justice (and implicitly calling for punishment before the judicial process was completed). “*Only two years in jail*” was a headline under the bolder heading of “*Tribal Justice*” (*Bulletin* 28/9/2004) which clearly shows that time, as a type of tariff, is of the

⁶ This relates to an offender who was found guilty of shooting a firearm and causing harm while a newsagent was delivering newspapers during early morning rounds in a suburban street causing a deal of public discussion and distress over the incident when his first appearance resulted in a fine and suspended sentence.

essence in justice being seen to be done in reporting by news outlets. In *The Advertiser* (31/7/03), a ruling is said to have "...resulted in convicted shooter Paul Nemer escaping time in jail". There "time" slips against the key elements of the familiar phrase: "escape jail", suggesting that so slight is his "time" that he has really avoided jail altogether.

Nor is the civic resentment of reduced "free" time for ordinary citizens in contemporary work conditions allowed to remain inert in the "time" discourses surrounding sentencing. "Prison not meant to be holiday"⁷ is a common media refrain, building on the fears that exclusion from today's long hours of work may be "the holiday" that many no longer can access. For advocates of "longer time" sentencing, duration should be seen to equal intensified deprivation.

Time, itself seen as precious to communities and individuals alike (Lakoff & Johnson 2003, p. 7) must be scrupulously assessed, to optimise the punishments of those sentenced. It must be weighed against the "time" lost to victims, whether time with family members or progress towards financial security. Above all, it must be rendered as "negative" time: long in duration, to mark the equal deprivation, which must be accorded to those convicted.

An example of this occurred in New South Wales Australia when newspaper headlines detailed the granting of privileges to serial killer Ivan Milat, serving time in a prison for eight murders on back packers visiting Australia. Media headlines demanded their removal, citing victims' families being outraged at him being allowed to have a television and toaster in his cell (and apparently having a good relaxing time). This resulted in the Premier of NSW Morris Iemma calling for these privileges to be removed from his cell.⁸ This story reinforced the negative stereotype of prisoners and used this to justify negative time. This groups with Milat, and the many in prison for property offences who will be released and for whom time should be used to remediate or improve their future with educational qualifications or employable skills, health or fitness improvement drug and alcohol rehabilitation, relationship counselling, psychological assessment and treatment and other remediation to reduce the risk they will pose to the community, when they re-enter it.

It is thus around the notion of "time" as an equalised deprivation of social progress that the social shift towards an Old Testament retributive "justice" is brought to oppose – and even actively resent – more modern concepts of penitential reformation. In addition, since the parole system, where prisoners may be released before the end of their sentence under supervision, is founded on the notion of reform, it too is under populist media attack: regarded as a form of "cheating on time equity" which then occasions regular media panic. For a society, which appears no longer to believe in remediation, any release is problematic – but "early" release amounts to a miscarriage of "justice".

A Sweep of Data: Collocations and conflict

A sample of more than 250 headlines was collated and studied over five years from 2006–2011 with a bundle of 120 in the last two years. Each of these headlines was sourced from national newspapers, international online news and TV headlines viewed during this time. Each of these was placed in a folder and sorted into specific categories. Each of the headlines and stories related to sentences delivered by courts and particularly sentences that

⁷ *The Advertiser* 12/12/03

⁸ (Source: AAP news agency June 21st 2006)

were creating and engendering news coverage were considered and placed in the file for analysis.

Collocations of words of one or two removed from the time episodes listed in the headlines (*weeks, days, years, sentences etc*) suggest a range of emotions for the readers and construct a very powerful discourse of *dissatisfaction*.

The most obvious connection for lexical choice is what Matheson reflecting the insights of Halliday suggests (2005, p. 20) has called the “word choice combinations” and what Fairclough (2001, p. 237) calls the “company words keep” and indicates a lexical choice of headlines and choosing to avoid an alternative. This choice contains a powerful amalgamation and highlights the notion of community concern over time even more clearly. Some examples include the following:

- angry
- ticking
- brutal
- action
- judge
- lesbian murderers

The verbs collocated, although few, are very indicative of the possible mindset of the authors of headline selections. Some examples include:

- Cut
- learn
- defend
- delay
- faces
- throwing (indicating a part of the offence)
- killing
- smashing
- impose
- cremated
- earn
- ticking (another metaphor for time)
- call
- and jailed

Not only do the metaphors of time clearly matter but also they are placed often within a *conflict or battle mode* suggesting that society is in conflict with the justice system or those in decision making situations. This is indicative of van Dijk’s (1993; 1998) notion of discourse constructions within news that place difficult or challenging groups as set apart in news discourses and not connected to the same values or behaviours of the general populace. Conflict and battle mode are clear examples of media selection practices and reveal what McCombs and Shaw (2004) suggests are media agenda setting.

Second Sweep of Data: Agents tell the community what is wrong and who is to blame

The second sweep of headlines clearly describes agents or agencies related to the problem being reported and most often describe victims and their plight as waiting,

disappointed, or dissatisfied. They are often *angry* or concerned at *delays* in waiting for justice to be done. Victims are described in terms to evoke sympathy. They are *children, young, three dead sons, and mothers, fathers or families*. Perpetrators on the other hand are clearly defined: *lesbian, murderers, abusive magistrates or fathers drug dealers, drug users, bikies, or hoons*. Clearly the battle lines are drawn here and indicate what the reader is meant to think in what Teo (2000) has also called the “semantic macrostructures” that point the way to place these perpetrators at the margin as “other”. This conflict sets an agenda that clearly outlines what needs to happen in order before the community is reported to be satisfied.

Moreover, indeed this occurred on December 5 2008 when headlines suggested the Byrne family were “satisfied” with the jail term given for a murderer found guilty the month before. It is worth considering the lyrics by Gilbert and Sullivan from the *Mikado* as relevant as when they were written more than (100+years ago). “*My object all sublime I shall achieve in time —To let the punishment fit the crime —The punishment fit the crime;*” It is the object to ensure via media commentary that the punishment is fitting to the crime by standards set by the media and victims.

Third Sweep of Data: Lacunae within headlines

It is interesting to note that the term punishment or penalty is missing in all of the media headlines and the stories viewed for this study. Terms used instead of punishment or penalty include *impose, serve* showing time indicated and *maximum terms* (time indicated) found in the body of the stories describing the sentence handed down by the judiciary.

Lacuna theory holds that what is missing can be significant, as outlined by Dellinger (1995, para 60) as “specific property of the text as a means of communication in both form and content” and may be intentional or unintentional. This sweep of headlines and stories show the media do not regard the result as amounting to a sufficient (or any) penalty or punishment in terms of their discourse of time as the measure of balance of the punishment to the harm to the victim.

In these lacunae rich headlines the following terms suggest a sentence is not long enough and time does not fit crime and imply other meanings to the readers:

- *Escapes* [not jailed for crime when guilty pleas presented to court]
- *Walks free* [not jailed]
- *Suspended* [sentence given but person not jailed]
- *Family anger at* [short] *sentence*
- *Judge’s warning on overcrowding: less jail time* [soft on prisoners]
- *Only two years jail: tribal justice* [Aboriginal people are treated differently]
- *Seven Years in jail for six young lives* [implies the comparative time arithmetic that each life was quantified as ‘worth’ only just more than one year’s jail time]

Here the lives and criminal consequences are measured, as worth a certain amount of time in this media language construction and offenders should have a penalty that takes concomitant time away from them. One headline from the *Advertiser* (12/04/08) suggests readily what we all know and Lakoff and Johnson (2003, p. 7) reflect that “time is money” and “... which do you value: Quality time with family and friends is something money can’t buy”.

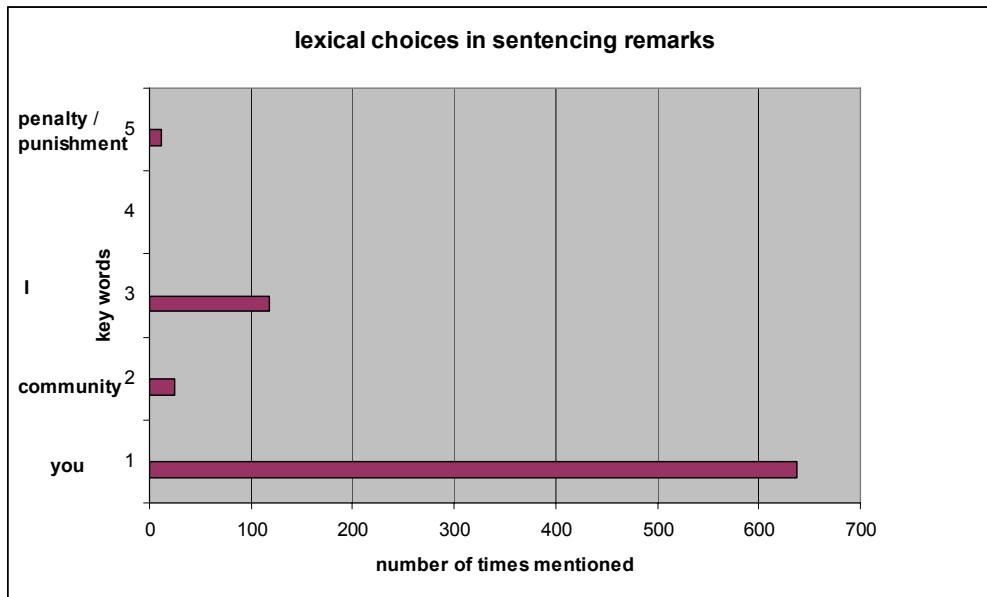
Dellinger (1995) suggests that understanding and relating to another culture can be identified only through texts and language and that identifying what is implicit via lacunae

can assist in making cross cultural evaluation and decisions. In fact, the modern culture of valuing time and the ability to show care and attention and “spend it with significant others” in a time squeezed society identified by Southerton (2003:21) shows how time occupies even daily family thoughts. Such thoughts are then displayed tacitly in the discourse of time headlines which imply that certain classes of crime deserve another version of *time squeeze* and therefore be denied access to actual time with *significant others* themselves. The media are putting time in both pans of the scales of justice in a way that is designed to show that the judges have failed us, the greater community. It is as though the news headlines are dictating to the judiciary what should take place in a tacit *discourse of direction*.

A brief review of sentencing remarks and major lexical choices revealed

Eight downloaded sentencing remarks were subjected to a discourse analysis and a first content analysis was undertaken to determine the most used and least used lexical items. While this may be considered a small representative sample in the first instance, twenty other sentences from a variety of courts websites were also scanned to inform the research as being representative of a general sentence framework. Other sentencing remarks and documents are earmarked for further analysis and if this first finding is correct there is a probability that this will need significant research to aid judicial officers in future thinking on the approach to sentencing remarks in lieu of these initial findings.

The chart inserted below clearly indicates that the sentences delivered are focussed on the individual offender and features most often the term (lexical choice) “you” (meaning the offender) and does not include the community in general other than if they are related to the community from which the offender emanates (often located within ethnic minorities).



For example not one sentencing remark studied begins with words such as “The Community” but often with the offenders name in the first sentence as if the community has been marginalised in this discourse. It is worth noting that most stories that complain about judicial sentencing suggest that the community or victim has a perception of being “ignored” and that the judicial officer may be “out of touch” with community standards.

Perhaps the construction of this discourse surrounding courts is itself being created by what is missing or lacunae in discourse constructions.

Another interesting lexical item is the word “I” most often collocated with auxiliary verbs such as “have” and “was” and often in the passive voice. This indicated judges and magistrates as passive receivers of information.

Such collocations need much further investigation as they appear to show a judicial officer as seeing themselves and the offenders as the only major protagonists in this context: the community as marginalised and “othered” within courts by courts “habitus” or chosen values culture and language (see Bourdieu 2003, p. 102 on habitus and hierarchies of respect). This short analysis of sentencing remarks made freely available via courts websites show that judicial officers while serving community do not directly address them but focus significantly on the offender alone and appears by this form of discourse to “other” the community. Judicial education may now consider the use of discourse analysis as another information and communication tool in assisting judicial officers to be more responsive to communities and deliver judgments and sentences reflecting new approaches to research to protect justice and the rule of law in society.

Conclusion

Changing the focus of sentencing remarks to reflect the value that time has within society and determined as penalty or *time out* can greatly redirect the attention from the lacunae evident here in the chart: *penalty* or *punishment*.

Sentencing involves as many variants as life itself. Young people, males especially, experience a period of “storm and urges”⁹ which with the grace of good fortune and careful parenting passes without adverse incident for most, but for some results in them killing or maiming their best friends or strangers in road accidents and fights. The culpability of their conduct often does not correlate with the consequences. Some people have an atrocious upbringing of deprivation and abuse that leaves them with deep internal pain and lack of empathy for others. Some mask their pain with drugs and embark on a career of selfish exploitation of others, returning the abuse they have suffered in the ways their life has taught them. Some of these can be rehabilitated with care and time. A very few have pathologies that make them an enduring danger to society from which they must be separated by long term incarceration. Some crimes are borne of anger, desperation, and some by greed. There are other reasons and motives for crimes. Fixing an appropriate penalty cannot be assessed by expressing the consequence and the penalty each in terms of time and comparing them. The media does this, not to convey information, nor for rational commentary, but rather using the metaphor of time to oversimplify in a way to justify criticism of penalties, even where no fair basis of criticism exists. This forms the basis of a discourse of disrespect and direction to undermine the independence of the judiciary and ultimately to control them in the ways already identified by Schulz (2010).

Time is of the essence, Tempus fugit, Time and tide wait for no man, the chorus of time bound phrases is constant and significant to our society, a society that is overwhelmed, busy and has to cope with an unrelenting amount of information and direction. This information is directed to us on how to cope, and how to live, and this includes ‘what to think’. The judiciary need to be aware of how ‘time’ as a yardstick is now a significant agenda setting item in news discourse and is being used to criticise sentencing and to

⁹ Sturm und Drang, the German literary movement exemplified by the early period of Goethe’s work.

direct how they should do this important judicial function. Serving judges have some of the means to counter this discourse but existing common law processes tend to lead them into a focus on the defendant, which can leave discussion of community and victim concerns to one side.

Sentencing remarks should always address the impact of the offence on the victim and discuss how *the community is best served* in the sentencing process. These concerns may be not be mentioned or sometimes overlooked if the prosecution compromises the factual basis of sentencing under pressures of workload and leave the main appeal to the judge's discretion to the defendant's counsel. There may be a need to give victims a greater role in the prosecution decisions to compromise the factual basis of sentencing and generally in the trial and sentencing process (as occurs in civil code systems). Another alternative is victim offender conferencing as part of the sentencing process, which can help to deal with victim anger and to better inform the judge (Cannon 2008). Where a sentence of imprisonment to serve is imposed the basis of its calculation in accordance with previous cases should be made clear as well as the cost to the community of keeping a defendant in custody and the collateral implications of institutionalisation from long terms of imprisonment. Judges need to speak to the community and the victims in their sentencing remarks, as well as the defendant and the appeal courts who wait for their error

Sentencing is a complicated jurisprudence, as it substitutes the judicial arm of the State to sanction State force against the defendant instead of permitting direct retribution and revenge. Judges need to become aware of the discourse implications of their sentencing remarks to make explicit the conflicting considerations in sentencing and to prevent their remarks being hijacked to serve media agendas. This does not require legislative change but awareness by the judiciary of these issues and adoption of sentencing processes and their remarks to ensure that community and victim interests are properly reflected and clearly expressed in their State sanctioned paternalistic processes.

The remaining step will be to make these better-constructed processes and remarks more generally available to the broad community. This can be done by careful preparation and planning of discourse materials prior to their public presentation and direct address to community via the internet and other modern media. It is no longer sufficient, or safe, to rely on traditional media to translate or deliver the information to the public, because they no longer just deliver an accurate record of events, rather court reports are now infotainment which is simplified by the use of the discourse of time to create a discourse of disrespect and control over the judicial process.

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