(2001) 6 *Media & Arts Law Review* 97

THE MEDIA AND PUBLIC MISCONCEPTIONS ABOUT THE JUDICIARY

ELIZABETH HANDSLEY[1]

ABSTRACT

[97] Those with an interest in the relationship between the media and the judiciary generally agree that it needs to be improved. Debate so far has tended to focus on process, or how the two institutions go about dealing with each other. This article takes the debate into another field by looking at the *content* of media reporting on the judiciary. Based on a study of newspaper articles, it identifies a number of ways in which the media risk perpetuating public misconceptions about the judiciary. Those misconceptions are: that the purpose of judicial independence is to benefit judges; that judges represent sections of the community; that the government is the only potential source of illegitimate influence on the judiciary; and that the justice system aims to be perfect. In many instances the problem arises from the commercial pressures on the media that can lead to a tendency to sensationalism and lack of attention to cases where the system has worked well. In others, however, it is suggested that with a little more attention to the long term implications of their work media organisations and their employees can do much to improve the accuracy of the overall impressions they convey, thereby also improving their relations with the judiciary.

In recent times, populations have become more mobile and received more information, and therefore become more inclined to question traditional forms of authority.[2] We have also been seeing increased questioning of the common law 'fairy tale' that judges only find the law and do not make it.[3] [98] Now that people have a better understanding of just how much power judges have, they are far more likely to challenge judges' actions and functions. As Justice Beverley McLachlin of the Supreme Court of Canada has said: 'Judging is not what it used to be. Judges are more important now; judges are

[1] BA LLB (UNSW), LLM (Northwestern); Senior Lecturer, School of Law, Flinders University.

[2] See Bernard Lane, 'Judicial Reticence' (Paper presented to the Second Annual Symposium of the Judicial Conference of Australia, Sydney, 8–9 November 1997) <http://www.law.monash.edu.au/JCA/lane.html>; Helen Cunningham, 'The Role of the Judiciary in a Modern Democracy' (Paper presented to the Second Annual Symposium of the Judicial Conference of Australia, Sydney, 8–9 November 1997) <http://www.law.monash.edu.au/JCA/cunningham.html>.

[3] See Simon Lee, *Judging Judges* (1988) 13–19 (quoting Lord Reid); Michael Sexton and Laurence Maher, *The Legal Mystique* (1982); JAK Griffith, *The Politics of the Judiciary* (3rd ed, 1985); George Williams, 'The High Court and the Media' (1999) 1 *UTS Law Review* 136, 138–9.

more criticised.'[4] There has also been increased debate on judicial appointments,[5] coupled with heightened scrutiny of the backgrounds of existing judges.[6] These developments mean that common law judges can no longer expect to rely on a certain mystique in order to maintain their authority, but need to think about consciously and purposely earning that authority through their words and deeds.

A few judges might regret these trends, but many positively welcome the increased openness and candour with which they can pursue their roles. Some probably even enjoy participation in the increasingly vigorous public debate on aspects of judicial role and function.[7] However, if the judiciary requires public confidence in order to fulfil its functions,[8] it must pay close attention lest the debate foster a negative or erroneous perception of any aspect of the judiciary.[9] In particular, it is necessary to keep an eye on

[4] (1994) *Law Quarterly Review* 260, 260, quoted in Sir Gerard Brennan, 'The State of the Judicature' (1998) 72 *Australian Law Journal* 33, 39.

[5] For example, in the wake of debate about Callinan J's activities while at the Bar: see Chris Merritt, 'The Courts and the Media: What Reforms are Needed and Why?' (1999) 1 *UTS Law Review* 42, 46. See generally Christopher Kendall, 'Appointing Judges: Australian Judicial Reform Proposals in Light of Recent North American Experience' (1997) 9 *Bond Law Review* 175; Sir Gerard Brennan, 'The Third Branch and the Fourth Estate' (1997) 16 *Australian Bar Review* 2, 4–5; Sir Anthony Mason, 'The State of the Judicature' (1994) 68 *Australian Law Journal* 125, 131–2.

[6] See, eg, Justice Michael Kirby, *The Judges* (1983), 16–18; Griffith, above n 3, 26–9. A journalistic account of aspects of the Australian judiciary can be found in Robert Thomson, *The Judges* (1986).

[7] As Lane points out, senior judges themselves have contributed to the debunking of the 'declaratory theory' of law: Lane, above n 2. See also Justice Robert McLelland, 'In Defence of the Administration of Justice: Where is the Attorney-General?' (1999) 1 *UTS Law Review* 118, 121.

[8] See *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220; *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577; Stephen Parker, *Courts and the Public* (1998) 11, 16, 32. The cases have generally treated judicial independence as a cause of public confidence, but Justice R D Nicholson of the Federal Court puts the causal relationship the other way around: Justice R D Nicholson, 'Judicial Independence and the Conduct of Media Relations by Courts' (1993) 2 *Journal of Judicial Administration* 207, 207. Flint treats public confidence as dependent on judicial restraint: David Flint, 'The Courts and the Media: What Reforms are Needed and Why' (1999) 1 *UTS Law Review* 30, 40. I have argued elsewhere that public confidence is a 'red herring' from the point of view of determining controversies over the separation of judicial power: Elizabeth Handsley, 'Public Confidence In The Judiciary: A Red Herring For The Separation Of Judicial Power' (1998) 20 *Sydney Law Review* 183. However, that argument does not detract from the proposition that courts cannot function effectively unless they have the confidence of the public, at least in the sense of public willingness to accept judicial decisions. See also Justice Richard McGarvie, 'The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence' (1992) *Journal of Judicial Administration* 236, 267; Nicholson, above n 8, 218; Justice John Doyle, 'The Courts and the Media: What Reforms are Needed and Why' (1999) 1 *UTS Law Review* 25, 26; Brennan, above n 4, 38–42; Brennan, above n 5, 3–4; Parker, above n 8, 16 ('institutions of government in modern society depend ultimately upon public confidence and consent rather than coercion').

[9] See Nicholson, above n 8, 215; Doyle, above n 8, 27 ('public confidence in the courts rests on public understanding'), 28.

the way judicial activities and issues are reported and discussed in the public's primary source of information about those activities, the mass media.[10]

[99] The extent of debate on related matters such as the role of the Attorney-General in defending courts when attacked in the media, the appointment of court media liaison officers and the punishment of journalists for contempt of court[11] is evidence that members of both the judiciary and the media are seriously concerned about a relationship recently described as 'strained and often combatant'.[12] A central issue in the debate is the extent to which judges should be willing to speak to the press extra-judicially. One school of thought says they should hardly ever be willing to do so; another says, to quote a judge who ran into trouble as a result of writing articles for a newspaper, that '[a] judge works for the public and has a responsibility to the public and ought to be amenable to the media to explain what he [sic] is doing and why he is doing it.'[13] A complementary issue concerns the capacity and willingness of the media to report fairly and accurately on judicial activities. Limitations are both internal to the media — that is, the media's predilection for sensational copy and small bites of information[14] — and imposed by the courts in the form of (amongst other things) long judgments that are indigestible within the short time-frame imposed by media deadlines.[15] Whatever the difficulties, Campbell is no doubt correct that the judiciary

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[10] See Parker, above n 8, 6 ('there are … perceptions of the justice system, arising directly through contact with the courts or indirectly through the refraction of the media, which can and should be addressed'); Patrick Keyzer, 'What the Courts and the Media Can Do to Improve the Standard of Media Reporting of the Work of the Courts' (1999) 1 *UTS Law Review* 150, 152.

[11] See, eg, 'The Courts and the Media' (1999) 1 *UTS Law Review*; Nicholson, above n 8; Sir Daryl Dawson, 'Judges and the Media' (1987) 10 *University of New South Wales Law Journal* 17; Justice Michael Kirby, 'Judiciary, Media and Government' (1993) 3 *Journal of Judicial Administration* 63; Brennan, above n 5; Nicholson, 'The Courts, The Media and the Community' (1995) 5 *Journal of Judicial Administration* 5; Mr Justice Teague, 'The Courts, The Media and the Community — A Victorian Perspective' (1995) 5 *Journal of Judicial Administration* 22; Janet Fife-Yeomans, 'Fear and Loathing — The Courts and the Media' (1995) 5 *Journal of Judicial Administration* 39. On the Attorney's role, see especially Daryl Williams, 'The Courts and the Media: What Reforms are Needed and Why' (1999) 1 *UTS Law Review* 13; McLelland, above n 7; Brennan, above n 4, 41–2. On media liaison officers, see especially Nicholson, 'The Courts, the Media and the Community', above; Williams, above n 3, 144; Keyzer, above n 10, 156–7; Brennan, above n 4, 40; Nicholson, above n 11, 9–10. On contempt of court, see especially Dawson, above n 11, 28–30; Flint, above n 8, 32–3; Doyle, above n 8, 26; Michael Chesterman, 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, or Why Not Both?' (1999) 1 *UTS Law Review* 71.

[12] Campbell, 'Access to the Court and its Implications' (1999) 1 *UTS Law Review* 127, 127.

[13] Judge James Pickles, *The Times* (London) 6 May 1986; quoted in Dawson, above n 11, 19. See also Doyle, above n 8, 26, 27.

[14] See Williams, above n 3, 140.

[15] See ibid 145; Keyzer, above n 10, 152.

needs the media 'because it is through the media that the courts acquire their credibility and account to the wider community.'[16]

Taking the starting point of an observation that there will always be some kind of limit on the capacity of judges actively to promote understanding of their activities through the media, the contribution of this article to the debate is to point out a few ways the media can easily but (hopefully) unwittingly foster an unnecessarily negative view of the judiciary. Such views are considered undesirable not because they may cause discomfort to judges, but because they tend to distract attention from matters where there *is* need for the community to become engaged in serious debate. They also tend to prevent debate from being as well-informed (and therefore as useful) as it might be.

The matters to which attention needs to be paid have been identified on the basis of on a study of media reporting of judicial activities and issues in a few Australian newspapers in the early 1990s. That reporting has tended to be misleading on the question of the intended beneficiaries of judicial [100] independence, the non-representative nature of the judiciary, the potential sources of illegitimate influence on the judiciary and the goals of the legal system. The starting point will be to set out some of the main points most judges would like the public to understand about their role and functions. After a description of the reporting the subject of the study, detail will be provided of the misconceptions that risk being perpetuated by means of what is said and not said in the media, with suggestions for how those misconceptions can be avoided.

Little understood facts and principles relating to the judiciary

[16] Campbell, above n 12, 131. See also Parker, above n 8, 21–3; L Greenhouse, 'Telling the Court's Story: Justice and Journalism at the Supreme Court' (1996) *Yale Law Journal* 1537, 1539, quoted in Williams, above n 3, 143 and in Brennan, above n 5, 9 (courts and media 'as … partners in a mutual democratic enterprise'). On the other hand, Liz Jackson notes a degree of disagreement between the media and the judiciary as to how best to foster public confidence in the courts: Liz Jackson, 'Panel Discussion' (1999) 1 *UTS Law Review* 159, 164.

Judicial independence and judicial process

It is imperative that people should understand properly what is meant by judicial independence and why it is important. A proper understanding of the concept would generally take in most other aspects of judicial role and function, covering as it would the relationship between the judiciary and the other arms of government (including appointments, tenure and the way judicial salaries are set), the difference between judicial functions and those of the other arms and also the different relationships the various arms of government have with the electorate. People need to understand that judges are obliged to make their decisions according to the law and the evidence presented to them, and that this is achieved in part by ensuring that judges cannot be influenced in their decisions by the government of the day. In other words, people should understand the relationship between judicial independence and the separation of powers.

Judges and individual liberties

Further on the point of separation of powers, people should also understand that to preserve judicial independence in this way is to limit the power of the other branches, particularly the executive, in ways that are often salutary from the point of view of individual rights and liberties.[17] Even where there are no entrenched constitutional guarantees of individual rights and liberties, the judiciary plays an important role for example in upholding the presumption of innocence, even when public opinion, and therefore (on at least most issues) the representatives of the public, might be more inclined to make the opposite presumption.

Judges and public opinion

In this sense it is the role of the judiciary to be prepared to be unpopular from time to time, which in turn means it is imperative that judges not be accountable to the electorate in the way that members of the other branches are. That is, the electoral non-accountability of judges is not an unfortunate by-product of the system, but an

integral and essential element of the system. This is not to say that the system requires that judges should trample on the values and beliefs of the community they serve. There is a serious issue as to the place of claims that the judiciary is unrepresentative, or out of touch with public opinion on matters such as the place of women in society.[18] However it would be a major departure from the system of government we know if such claims were met by the institution of mechanisms to make judges directly accountable to the public in some way. Judges are supposed to be able to resist public opinion when the law or justice requires it,[19] and we could not expect them to do so if their fortunes depended on maintaining public approval.

Judges and public confidence

On the other hand, an important function of the legal system is to discourage self-help and encourage [101] the orderly resolution of disputes.[20] It can only fulfil this function if it has the confidence of those whom it is attempting to encourage and discourage. Therefore the media risk doing a disservice not just to judges but to the justice system if they undermine public confidence in the judiciary. The media must walk a fine line between on the one hand providing information to which we are entitled on public institutions [21] and on the other hand undermining confidence in and therefore destabilising institutions on which society depends for its well-being.[22] There may be an extent to which the misdeeds of individual judges should be overlooked in the name of maintenance of public confidence in the judiciary as an institution. It is a matter for judgment what that extent might be, and a matter for potentially endless debate whose

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[17] See McLelland, above n 7, 125.
[18] See below under the heading 'Misconception 2: Judges (should) represent sections of the community'.
[19] As Parker puts it, 'the Rule of Law, and ideas of judicial independence and procedural fairness which stem from it, require transcendence above transient public moods': see Parker, above n 8, 6.
[20] Ibid 7, 15 ('Like the drag on a fishing reel, courts and the law are there to absorb some of the strains in society'). However, this role of courts is to be distinguished from the one they play when legislatures abdicate their responsibilities to resolve major social and other issues, leaving them to the judiciary to sort out and risk exposure to criticism for judicial activism: see eg Flint, above n 8, 37; Merritt, above n 5, 44.
[21] Chief Justice John Doyle of South Australia argues that recognition of the media's obligations to the public should form the basis of judicial co-operation with them: Doyle, above 8, 28. See also Brennan, above n 5, 8–9. This assumes that the media fulfils those obligations, which may not be the case: see Margo Kingston, 'Panel Discussion' (1999) 1 *UTS Law Review* 48, 52; Simon Rice, 'Panel Discussion' (1999) 1 *UTS Law Review* 48, 55. Campbell goes so far as to call the media 'pompous and self-righteous': Campbell, above n 12, 131. For this among other reasons it can be argued that the courts need to do more to communicate directly with the community, without the intermediary of the media: see eg Alan Rose, 'Panel Discussion' (1999) 1 *UTS Law Review* 48, 50.

judgment is best to be trusted, the judiciary or the media. However, it is a fair bet that few people outside those institutions would be willing to rely on *either* of institution to strike the right balance.

In any event, people need to be aware of any information that would have a tendency to bolster public confidence in the courts. This is not to say that the media need to be public relations machines for the judiciary, but they should at least be willing to give prominence to matters such as judges' attempts at self-improvement in the form of education programs and occasions where judges show courage and integrity in the performance of their functions. The media should also at least offer judges a right of reply when they have been criticised.

The Media Study

The study which forms the basis for the development of the arguments advanced in this article was based on a computer search which yielded 247 articles on topics relating to the judiciary from three major daily newspapers, spanning a five-and-one-half year period from January 1990 to June 1995. The strongest representation is from *The Age*, a daily broadsheet published in Melbourne: 175 articles, from April 1990 to June 1995. From the *Australian Financial Review* — a national quality tabloid focussing on economic matters — the study covers 44 articles, from February 1990 to January 1995. Articles from the *Sydney Morning Herald*, a daily broadsheet published in Sydney, are comparable in number to those from the *Australian Financial Review* (42) but span a shorter time period (July 1993–June 1995).[23]

[102] The sample includes reports on government initiatives, for example, the establishment of inquiries, the announcement of policies (70 articles, including 31 on

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[22] See McLelland, above n 7, 123.

[23] The three newspapers studied were chosen for the rather prosaic reason of ease of access and searching, given that they were the three Australian newspapers accessible through NEXIS at the time the search was done. It must be no coincidence that all three are owned by the Fairfax organisation. It is tempting to think of this study as a study of 'Fairfax' newspapers rather than of 'major daily' newspapers but, in the absence of significant comparative material, I am hesitant to assume that the ownership of the newspaper makes any difference in its treatment of the judiciary. There may be grounds to expect different treatment of matters in which the ownership of one newspaper or group of newspapers has a particular stake but there is nothing obvious to suggest that the judiciary is such a matter. Still it would be interesting to see the results of a survey that covered the Murdoch stable, including and especially the tabloids, and ideally the electronic media as well.

measures taken by the Victorian government to abolish a tribunal and remove certain tribunal members), speeches by members of the judiciary (24) and politicians (5), the release of reports by various types of bodies, be they government (16), judicial (1) or other (4), milestones in judicial careers, for example, appointments and especially retirements (18), conferences of the legal profession (6) or the judiciary (3) and actual allegations of bias against an individual judge (14). Several items were on a number of judicial statements in 1992–93 that gave rise to concerns of gender bias on the bench (23).[24] There were also a number reporting on an exchange of views or other communication between a judge and a politician (13). A few articles reported on an actual judicial decision. (5)

In news items, judicial independence was rarely mentioned outside the context of alleged or anticipated government interference with the conditions of judicial service (for example, salaries, tenure). Nor was judicial bias often presented as an issue of judicial independence, or indeed a matter in which the government was expected to have any role. An exception to this was the issue of 'gender bias': here the Government's actual or potential role was often referred to, most likely because the Government itself chose to enter the fray.[25] This tends to suggest that gender bias is seen as distinct from individual bias in the sense of, for example, a judge having a personal relationship with one of the lawyers in a case.[26] In the latter type of case the Government does not seem to have sought a role, and it does not seem to have occurred to anyone to ask why not, at least not in a forum that has found its way onto the pages of these newspapers.

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[24] See Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* (1994) 1–11.

[25] Lindsay Simpson, 'Judgment Day', *The Sydney Morning Herald* (Sydney) 5 March 1994; Robyn Dixon and Margaret Cook, 'Women Facing Judicial Bias, Says Magistrate', *The Age* (Melbourne) 15 September 1993; Karen Middleton, 'Senate May Look into Attitudes of Judges', *The Age* (Melbourne) 20 May 1993; Karen Middleton and Michael Magazanik, 'Rape Remarks a Backlash Against Women: Magistrate', *The Age* (Melbourne) 14 May 1993; Karen Middleton, 'Some Judges are Women Haters, Says Cook', *The Age* (Melbourne) 13 May 1993; Peter Weiniger, Peter Gregory and Karen Middleton, 'State Accused of Responsibility in Rape Comment', *The Age* (Melbourne) 7 May 1993; Prue Innes and Karen Middleton, 'Judges Face Retraining on Sex Bias', *The Age* (Melbourne) 11 February 1993; Prue Innes, 'Law to Tackle an Attitude Problem', *The Age* (Melbourne) 11 February 1993; Karen Middleton, 'Mixed Reaction to Bid for Female-Friendly Judiciary', *The Age* (Melbourne) 11 February 1993; Michael Magazanik, 'Kennett Joins in Censure of Judge', *The Age* (Melbourne) 13 January 1993.

[26] See, eg, Margo Kingston, 'Judge Unbiased by Court Affair: Chief Justice', *The Sydney Morning Herald* (Sydney) 22 February 1995; Jennifer Cooke and Margo Kingston, 'Private Affair is a Public Concern', *The Sydney Morning Herald* (Sydney) 25 February 1995.

Opinion columns and editorials, on the other hand, frequently linked discussion of judicial independence to the Rule of Law and/or the protection of individual liberties. Less frequent was a linking of judicial independence to judicial process. There is a reasonable degree of sophistication in some commentators, in terms of the understanding they demonstrated (and communicated) about the system of government and what it seeks to achieve. For example, the former Victorian Equal Opportunities Commissioner, Moira Rayner, wrote one very scholarly and informative piece on constitutional history, linking matters such as parliamentary sovereignty and the separation of powers to the avoidance of the type of tyranny that existed in Britain prior to the Glorious Revolution.[27] Such pieces, however, were the exception rather than the rule in the overall mass of articles on the judiciary in the three newspapers in the relevant time period.

[103] **The misconceptions and how they can be avoided**

One rarely encounters evidence that a journalist has deliberately set out to mislead the public on an important matter concerning the judiciary, but nevertheless journalists do not appear typically to see it as their role to provide a balanced or accurate picture.[28] A constant complaint of judges (and no doubt others) has been of a tendency to trivialise,

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[27] Moira Rayner, 'The Inglorious Revolution Against Judicial Independence', *The Age*, 5 December 1994. See also Jon Faine, 'Our courts are no place for politics', *The Age* (Melbourne) 26 August 1994 (linking impartiality and 'proper legal procedures').

[28] Justice Michael Kirby has related at some length an illustrative tale where his comments about the state of NSW workers' compensation law were reported as a personal attack on the Premier, and his subsequent attempt to set the record straight with the Premier was reported as an 'apology': Kirby, above n 11, 67–71. Keyzer comments on 'an unfortunate tendency for newspaper articles describing cases involving judicial review of legislative or executive action to be headed "Judges Hitting Out" or "Judges Slamming Ministers"': Keyzer, above n 10, 152. The problem has also been referred to as one of the 'moral simplicity of much of our media. … If you can offer your audience certainty, if you can offer them a picture that the truth is simple, that virtue is on one side and vice is on the other, then they go away feeling much better': Rod Tiffen, 'Panel Discussion' (1999) 1 *UTS Law Review* 159, 166. See also Dawson, above n 11, 23; Nicholson, above n 8, 216; Williams, above n 11, 22; Williams, above n 3, 141. There is a particular concern relating to sentencing decisions for, as Justice Richard McGarvie has commented, 'There is no news value in giving prominence to criminal sentences which would draw community approval but only to those which would not': Justice Richard McGarvie, 'The Courts and the Future: New Stump Jump Ploughs to Cultivate Old Paddocks' (Opening Address to the Third Annual Colloquium of the Judicial Conference of Australia, Surfers' Paradise, 6–8 November 1998), <http://www.law.monash.
edu.au/JCA/McGarviePaper.html>. See also Doyle, above n 8, 29; Brennan, above n 4, 40.

sensationalise and present issues in a way that maximises their entertainment value.[29] Clearly there is a limit to how far one can expect departure from the practices that have been followed to date. On the other hand, if one recognises the immense power the media have to shape people's understandings and therefore their opinions, it is only reasonable to identify and draw attention to situations where the outcome of certain types of media activity can be undesirable. Such situations can and should be recognised as involving potential or actual misuses (not to say abuses) of the media's power. This is particularly so given the propensity of media actors and organisations to claim certain freedoms on the basis of their important role in the provision of information.[30] The provision of *inaccurate* information can justify nothing in the way of freedom for the provider. Once undesirable outcomes are identified, debate can then follow on what preventative or remedial action might be appropriate.

It is generally recognised that 'the judicial process will not headline the evening news.'[31] It is simply unrealistic to think that the media would ever take on the role of educating the public on matters such as separation of powers, the role of the judiciary in protecting individual rights and the relationship between procedure and fairness. However, it is not too much to ask that the media approach their task in a way that avoids the creation or perpetuation of misconceptions about the judiciary and its activities.

It is in this spirit that four misconceptions about the judiciary that risk being perpetuated in the Australian media, and possibly elsewhere in the world as well, are now described. Where appropriate, I also make suggestions as to measures for avoiding the misconception.

Misconception 1: Judicial independence is for judges' benefit

The first misconception that risks being perpetuated through the media is that judicial independence exists for the purpose of protecting judges themselves, rather than

[29] See, eg, Dawson, above n 11, 18.
[30] See sources cited above n 21.
[31] Williams, above n 11, 15.

individual rights and the justice system as a whole. Some judges in extra-judicial statements have been at pains to point out that that is [104] not the case, and that judicial independence exists for the public benefit.[32] However, the message does not necessarily get through. This is particularly so in a climate of economic rationalism where '[a] profession [which] defends its traditional values and practices in the public interest … is likely to be attacked as merely another vested interest resisting necessary reform. Judicial independence is typically seen as a personal security for the judges'.[33]

The most obvious way in which such a perception can be perpetuated is simply through a less than thoughtful choice of words. For example, in January 1997 the Council of Chief Justices issued a statement supporting the Beijing Statement of the Principles of the Independence of the Judiciary. The report in *The Australian* (not included in the media study, but illustrative) was headed 'Code to spell out judicial freedoms'.[34] The use of the word 'freedoms' is bound to align judicial independence with individual liberty in the reader's mind.

A more subtle means of perpetuating a perception of judicial independence as the interest of judges themselves rather than the community at large is to mention judicial independence primarily or even exclusively in connection with judicial tenure and salaries. This tendency is indeed apparent in the reports covered by the study.[35] Judicial sackings and tussles with the government over salaries appear to be considered very good copy, not least because, being matters close to the heart of many judges, they

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[32] Kirby, above n 11, 66; Brennan, above n 4, 33–4; Sir Gerard Brennan, 'Courts, Democracy and the Law' (1991) 65 *Australian Law Journal* 32, 40; Sir Gerard Brennan, 'Judicial Independence' (Paper presented at The Australian Judicial Conference Annual Symposium, Canberra, 2–3 November 1996) <http://www.law.monash.edu.au/JCA/Brennan.html>.

[33] Lane, above n 2. But compare Kirby, above n 11, 66, lamenting the media's tendency to see judicial independence as a matter of judicial self-interest following the abolition of a Victorian court, particularly considering the media are 'ever vigilant for [their] own perceived privileges'.

[34] Janet Fife-Yeomans, 'Code to spell out judicial freedoms', *The Australian* (Sydney) 31 January 1997.

[35] Heather Gallagher, 'Watching the Watchdog', *The Age* (Melbourne) 15 May 1995; Jacquelyn Hole, 'Judges Examine Retirement Rules', *The Sydney Morning Herald* (Sydney) 10 February 1994; Prue Innes, 'Prickly Issue of Judicial Salaries Arises Again', *The Age* (Melbourne) 19 March 1992; Rowley Spiers, 'Government Moves to End IRC Pay Impasse', *The Australian Financial Review* (Sydney) 3 April 1992; Rowley Spiers, 'IRC Lobbies Democrats Over Threat to Status', *The Australian Financial Review* (Sydney) 26 March 1992; Rowley Spiers, 'Judges 'Offensive' for Linking Pay, Independence', *The Australian Financial Review* (Sydney) 10 September 1991; Margaret Easterbrook, 'Lawyers Attack Government on Judges' Pay', *The Age* (Melbourne) 5 April 1991; Margo Kingston, 'Libs to Challenge

often inspire judicial comment. In fact Sir Daryl Dawson, formerly a justice of the High Court, has stated extra-judicially that a threat to judicial independence is an exception to the general rule that judges should not speak to the press.[36] It is still relatively novel to see a judge quoted in the press in an extra-judicial capacity,[37] and this no doubt adds to the attraction of such stories from the point of view of the media. However, unless such stories make the further reference to the judicial role in checking executive power and upholding the law regardless of public opinion about an individual case, uninformed readers [105] might mistakenly conclude that the goal of judicial independence is to keep judges in the manner to which they have become accustomed. Although judges are invariably so kept as a result of their independence,[38] this is not the end goal but a means to an end.

Media reports are therefore likely to create a more accurate impression if they raise the concept of judicial independence in connection not just with judges' industrial conditions, but with judges' actual judicial activities. When a judge makes a decision frustrating government policy or contrary to the desires of the public, attention should be drawn to the fact that it was judicial independence that enabled him or her to do so.[39] The unfortunate experience so far has been that judges who make such decisions are more likely to be attacked for being political than praised for being independent.[40] Such

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Tax Plan for Judges', *The Age* (Melbourne) 3 November 1990; Prue Innes, 'Chief Judge Attacks Hawke on Judges' Salary Increases', *The Age* (Melbourne) 19 July 1990.

[36] Dawson, above n 11, 18; Nicholson, above n 11, 17.

[37] See 'Judges and the Media — The Kilmuir Rules' [1986] *Public Law* 383; Dawson, above n 11, 17–18, 24; Brennan, above n 4, 36, 41. The strength of the 'rules' is such that contravention has been considered a form of judicial misbehaviour: Dawson, above n 11, 20. However, there appears to be a growing body of opinion that modern conditions necessitate a change in the rules or perhaps even their abandonment: see Nicholson, above n 11, 7–8, Cunningham, above n 2; Sir Anthony Mason, 'Judicial Independence and the Separation of Powers — Some Problems Old and New' (1990) 13 *University of New South Wales Law Journal* 173, 180–1. One particularly convincing reason given for a need to relax judicial reticence is the unwillingness of the Attorney-General to defend the judiciary against attacks: see Nicholson, above n 11, 16.

[38] At least in the sense that being so kept is a measure of a judge's actual independence, whatever one might wish to argue that person's position *should* be. A judiciary whose members are liable to removal (or in fact removed) is not independent. The same goes for reductions in salary and, arguably, any other interference with conditions of work.

[39] Here it is necessary to distinguish decisions 'frustrating government policy or contrary to the desires of the public' from events which reveal a judge to be 'out of step with community values'. The latter type of issue is a good deal more likely to involve undesirable judicial bias: see above, text accompanying nn 18–22.

[40] Key examples are the reactions to the *Tasmanian Dams* case and *Wik*. See Williams, above n 11, 21–2; Flint, above n 8, 36–41; McLelland, above n 7, 119–22; Campbell, above n 12, 134; Williams, above n 3, 140, 142; Keyzer, above n 10, 151; Brennan, above n 4, 42; Mason, above n 37, 133.

attacks do not necessarily come from journalists and editors themselves, but they can be reported in such a way as to make the media complicit. Williams notes the tendency of the press to

> turn to interested parties for clarification of a decision and, without understanding what the High Court has decided, uncritically accept such statements. This occurred after the handing down of the *Wik* case, where the decision was misrepresented, and remains largely misunderstood, in part because of the capture of journalists covering the case by interested parties.[41]

The objection might be raised that references to judicial independence as a contributing factor in a decision frustrating government policy could have the effect of bringing judicial independence into disrepute. Readers who are encouraged to associate judicial independence with decisions with which they disagree are not likely to become more enthusiastic about judicial independence as a result. To such an objection there is a two-fold answer.

First, over time one would expect most people to see both decisions with which they agreed and decisions with which they did not agree represented as a consequence of judicial independence. Hopefully this would ultimately reinforce the message that the function of the judiciary is not to make decisions with which any particular individual agrees, and encourage people to think more carefully about why they agree with some decisions and not with others.

Secondly, as noted above the necessity for judicial decisions at times to displease the public is a central feature of the legal system; if people do not already understand that, they need to have it explained to them as many times as it takes. It is hopefully not too much to expect that people can come to understand that many judicial decisions are

[41] Williams, above n 3, 142. My own view is that this dynamic is more a result of journalists' search for the contentious in preference to the informative, rather than, as Williams would have it, their lack of anyone else to explain a decision to them.

based on law which is in some sense out of the judge's hands.[42] Moreover, judicial decisions are based on fuller information and deeper reflection than underlie the views of most members of the public, or at least one would hope so. Again, people can surely come [106] to understand as much and therefore to feel curious about judicial decisions rather than rejecting them outright. The media have a potentially very important role in fostering the development of this kind of understanding and inquiry.

Misconception 2: Judges (should) represent sections of the community

The sample in the newspaper study included a number of feature articles about individual judges or groups of judges.[43] Often such articles discuss judges' backgrounds: what their parents did for a living, what school they went to and so on. Clearly such articles are potentially useful glimpses at exactly who is exercising judicial power (and who is not). Few people would be willing to assume that such matters do not shape the outlook of the judges in question, or that the outlook thus shaped never finds its way into judicial decision-making. Therefore, it is probably necessary to know these things about the decision-makers before one can understand the decisions. However, there are a few dangers with such articles.[44]

First, it is possible for them to actually present a distorted vision of the judiciary or court in question. Where numbers are small, it is a real possibility that any sample selected will be unrepresentative of the group as a whole. It would be very easy for a journalist, wittingly or unwittingly, to create an impression that all members of a court are members of a particular group by including only judges from that group in the sample featured in an article. Ideally such samples should be representative of the court in question, but failing that articles should at least include statistics for the court on any matters mentioned that relate to judges' personal lives.

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[42] This is particularly so considering the huge proportion of cases that are disposed of in Magistrates' and other lower courts: see Parker, above note 8, 9.

[43] For example, Lindsay Simpson, 'Judgment Day: The Supreme Court Fights Back', *Sydney Morning Herald*, 5 March 1994; Peter Smark, 'Low profiles, high ideals', *Sydney Morning Herald*, 12 July 1993; Ken Merrigan, 'Champion of the underdog leaps to the defence of the Parole Board', *The Age*, 5 July 1992.

[44] A further danger in addition to those discussed in the text is that judges will become irritated by 'media categorisation of [judges] according to the colour of their skin and their school': see Nicholson, above n 11, 17

Second, and probably more importantly, even discussing judges' backgrounds can exaggerate in the reader's mind the importance of such matters from the point of view of coming to terms with judges' work product. As noted above, such matters are probably relevant, at least occasionally, from the point of view of understanding a judge's decisions. People need to think about the extent to which this kind of influence is only human and therefore the best we can do, and at what point it becomes a kind of bias and therefore undesirable. But this kind of reflection needs a more focussed basis than mere knowledge of a fact about the judge's life: it needs to be based on information about the types of matter the judge is involved in and the kinds of decisions he or she has made. Such matters are not typically discussed in the type of article to which I am referring. Ultimately, the relevance of evidence about a judge's background is probably too tenuous to justify the risk of calling into question a judge's impartiality. That risk should therefore be at least addressed in some way, if only by a disclaimer that a judge's background has influenced his or her decision-making in any way that could be considered bias. Ideally this type of article should canvass the point just made, that conclusions about bias can be made only in relation to detailed information about particular decisions.

Third, on the theory that sauce for the goose is sauce for the gander, the media should make every effort to avoid the suggestion that increasing the representation of a currently unrepresented group will necessarily improve the quality of justice. As noted above, the sample in the media study included a good deal of discussion about the problem of male judges demonstrating a failure to understand the position of women. A frequent conclusion, implied or stated in the media, has been that there need to be more women on the bench. This conclusion overlooks the distinct possibility that just as male judges don't understand women, female judges won't understand men. It may be that women judges, having lived in a male-dominated world, are likely to have a better understanding of the opposite sex than do men [107] judges; in other words, sauce for the goose is not necessarily sauce for the gander.[45] If that is the theory underlying calls

[45] Cooney, 'Gender and judicial selection: should there be more women on the courts?' (1993) 19 *Melbourne University Law Review* 20; Madame Bertha Wilson, 'Will women judges really make a

for more women on the bench, it should be made explicit. To the extent that affirmative action creates an impression that one form of bias is being substituted for another, it will also give the impression of a real departure from the way the judiciary is supposed to function.

This leads to the fourth and probably most fundamental issue, which is that discussion of judges' backgrounds can obscure the very important fact that judges are not supposed to represent any group of which they are a member. Once again, it may be true that beliefs and attitudes shaped by judges' attendance at a particular type of school, or growing up in a certain type of environment, show up in their decisions. Such an influence does raise serious issues requiring serious reflection. But this is a very different matter from saying or suggesting that judicial appointments should be made with an expectation that appointees will somehow privilege the interests of their own group over others' in the same way that politicians are expected to fight for the interests of their constituencies.

There are a few reasons why it would be desirable to see a balance of, for example, women and men on the bench of any given court which have nothing to do with 'representing' one gender or another in the sense being used here. One is that if there is such a balance, observers can be confident that there is no structural gender bias in the appointment process. This in itself might be an important means of maintaining public confidence in the judiciary. Another reason is that members of one gender will not be discouraged from setting their sights on a judicial appointment if they see evidence that their gender is not likely to be a disadvantage. A third reason — and perhaps the most significant one — is that if all judges have colleagues of both genders in roughly equal numbers, there is a real likelihood that all judges will understand the position of both genders a lot better. However, none of these reasons suggests that judges are or should be *making their decisions* by reference to the interests of their gender. The media need to be careful to separate out these various lines of reasoning when discussing related issues such as judicial appointments and means of addressing gender bias in the courts.

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difference?' (1990) 28 *Osgoode Hall Law Journal* 507; Suzanne Sherry, 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986) 72 *Virginia Law Review* 543. But compare Michael Solimine and Susan Wheatley, 'Rethinking Feminist Judging' (1995) 70 *Indiana Law Journal* 891.

The legal community should also be vigilant to correct errors on occasions when the lines become blurred.

Misconception 3: The government is the only potential source of illegitimate influence on the judiciary

Another way to phrase this misconception might be that judicial independence is only about separation of powers. As noted above, in the Australian newspapers studied, judicial independence tended to be raised mainly in connection with relations between the judiciary and the government.[46] A typical article would be one where the government has made some sort of proposal or taken some action relating to the conditions of judicial office, and the judiciary (or the opposition) has objected on the ground that the proposal or action threatens judicial independence.[47] Typically readers are left to draw their own conclusions about exactly what that means. Unless they have some pre-existing understanding of governmental institutions and structures,[48] they are likely to conclude that judicial independence is [108] merely something to do with the relationship between the judiciary and the government, and more specifically to do with what the government can and can't do to the judiciary.

This picture is not inaccurate, but it is very incomplete. Sometimes, it is further rounded out with some kind of observation about the anticipated practical *result* of loss of independence, namely that judges will not be willing to act as a check on the government. The implication, rarely if ever stated, is that judges will be biased in favour of the government in order to protect their salary indexation, their jobs, or whatever. The less clearly such a message comes through, the smaller the likelihood that the reader will realise that there is more at stake than keeping the government within the confines of its legitimate power. The real fear is the introduction of *an illegitimate* influence on judicial decision-making, not just the introduction of

[46] See above, n 25 and accompanying text.
[47] Eg, Prue Innes, 'Chief Judge Attacks Hawke on Judges' Salary Increases', *The Age* (Melbourne) 19 July 1990.
[48] And unfortunately the Australian public's knowledge about such matters has been proven woefully inadequate: see Civics Expert Group, *Whereas the People: Civics and Citizenship Education* (1994); Kingston, above n 21, 51; Campbell, above n 12, 135; Keyzer, above n 10, 153. Such ignorance is nor

governmental influence on judicial decision-making. In other words, the problem is bias, and the government is only one potential source.

Another gap in the picture arises when reference is made in this context to the need to ensure that people in litigation against the government get a fair hearing. The natural fear is that a judge who is in fear for his or her job or pension might be inclined look for ways of advantaging the government in litigation; such an observation was not uncommon in the articles in the study. Few people would imply from such a reference that it is not important to ensure that *all* litigants get a fair hearing, but readers might be forgiven for implying that there is some special danger associated with the government unless the further reference is made to the general principle of judicial impartiality.[49]

In one sense there *is* a special danger. The government pays judges' salaries and funds their courts, so it does have potential means of affecting judges' lives that private companies and individuals do not. If a private entity had such influence over a judge — say if it owned the house the judge lived in — the matter would immediately be construed as an issue of bias and a recusal would be expected without further discussion.[50] But judges cannot recuse themselves on the basis that one of the parties is the government. There would be no-one left to hear claims against the government, and so much for the rule of law! But as private power becomes consolidated and former government monopolies become privatised, the distinction between the government and private enterprise becomes increasingly unhelpful, and even potentially dangerous.

For example, imagine litigation in which one party is the Australian Bankers' Association. In principle, all judges who bank with a member institution should recuse themselves. It is hard to imagine many judges being left to hear such a case.[51] Another

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restricted to Australia, however: a Hearst survey in the US found 'that half the public did not understand the legal concept of innocent until proven guilty': Nicholson, above n 8, 215.

[49] See Parker, above n 8, 15 ('The Rule of Law requires, inter alia, the impartial application of the law to the facts as found fairly in the case.').

[50] Or perhaps not, considering the Mundroola affair: see John Basten, 'Judicial Accountability: a proposal for a Judicial Commission' (1980) 52 *Australian Quarterly* 468, 471–2.

[51] It was on similar grounds that Lord Denning once felt constrained to point out that none of the parties had objected to a case about public transport fares and council rates being heard by judges who were both public transport users and ratepayers: see *Bromley London Borough Council v Greater London Council*

example would be litigation involving the owner of the only newspaper in town. Of course the hope is that all judges will be able to carry out their functions without regard for possible adverse publicity, but the same can be said of possible cuts in their salaries. We don't expect judges not to be affected by nervousness about their salaries, which is why we try to avoid the nervousness by giving judicial remuneration a measure of protection.[52] The power to punish [109] for contempt might be a similar (if rarely used) protection in relation to adverse publicity, but this only serves to underline the existence of a source of potential influence other than the government. And in any event the other party's cause for concern about the chances of a fair hearing, whether in litigation against the government or against a private monopoly, is essentially the same.

Nor is there any reason to think that influence over judges happens only as the result of the application of some form of external pressure in the form of a threat or inducement. Judges have in common with other human beings their own beliefs, preferences and values which constitute a threat of illegitimate influence *from within*. It is a difficult question to what extent such influences can be avoided. Few people these days would wish to argue that judges can perform their functions in a moral vacuum. But at the other end of spectrum, few would argue that it would be proper for a judge to determine a custody dispute involving a mother in paid employment by reference to a personal belief that a woman's place is in the home. The position of women in relation to the paid workforce is a matter on which a variety of views are held in society, and no one view should be privileged simply because a judge who happens to hold that view happens to be making a decision. Just as judges have no business representing their social class, race or gender, they have no business imposing their personal views on others.

Internal influences of the type just described may raise different issues from external, in the sense that different kinds of measures are required to avoid and correct them.

[1982] 2 WLR 62, 65. Although in that case the situation was slightly different from that in our hypothetical banking case, because the judges had interests on *both* sides of the case, Denning's comment that '[a]ny Court of Appeal would be likewise placed' is apposite. See also Brennan, above n 5, 5.

External sources of influence can be avoided with measures to protect judges. Some internal influences, such as financial interests, can be addressed with recusal from a case; others, such as a judge's views on the place of women in society, are trickier, and the proper way to deal with them (if any) is a matter of ongoing debate. However, that is not to say that either kind of influence is more important than the other, either in practice or in principle.

In short, the separation of powers is an important means of preventing governmental abuses of power, not least because an independent judiciary is able to impose the Rule of Law on any potential rogue government. However, it is important not to lose sight of the broader context of judicial decision-making which requires strict adherence to admissible evidence and the elimination of *all* illegitimate influences. Some potential sources of influence might pose more of a threat than others, but it is the illegitimacy of the influence, rather than the nature of the source, that is of concern.

Misconception 4: We can expect the justice system to be perfect

This conception has been identified partly on the basis of the media study, but also on the basis of the frequent appearance, on television news, of reports with an interview of a relative of a murder victim after the offender has been sentenced. It is only natural that people should care how others feel when they are in such a situation, but it is also very interesting that the media treat it as 'news' when the relative says the punishment is inadequate. Presumably on those occasions when a relative of the victim says the sentence was adequate, or that he or she is not really concerned with the sentence as it won't bring the victim back, that is not news. Or perhaps no relative ever makes such a comment.

However, the problem here is not in the process of deciding what is and is not newsworthy but in the perceptions that are likely to be created by the decision that

[52] See, eg, *Australian Constitution* s 72(iii). It is probably worth noting that such protections do not avoid the occasional eruption of disagreements over matters such as indexation. A good number of items in the media study were on this topic.

invariably gets made. There are two perceptions here: first, that the system exists to serve victims and their relatives, and second, that it aims to do so perfectly.

The position of victims in the criminal justice system has been the subject of extensive debate and reform in recent years.[53] However, those reforms have stopped far short of bringing into question the historical role of the criminal law as keeper of the *public* peace, rather than as vindicator of individual [110] victims.[54] I make this statement without taking any position on the desirability or otherwise of such a construction of the criminal law; it may be that further reforms are desirable or even necessary. My point for present purposes is about what the criminal law (and therefore judges in criminal cases) *are trying to* achieve, for surely that is the fairest measure against which to evaluate what they *do* achieve.

If the media interview a victim or relative after a sentencing, they are sending a clear message that his or her views on the sentence matter. On one level of course they do matter, that is, on the level of humanity and compassion. They matter because people *care* about them. However, that does not mean that from a legal point of view they matter any more than yours or mine. The crime was a crime against society, and therefore against all of us. We all have an equal stake in the sentence, and singling out the victim or a relative to comment on it, however understandable, creates the false impression that that person has a greater stake than anyone else. The media need to give some serious thought to ways in which they can avoid the perception. An obvious starting point would be to consider simply not interviewing victims or relatives any more, but this is unlikely to prove acceptable from the media's point of view.

Even from the legal system's point of view there is a significant sense in which the views of victims and relatives matter more than others': the sense in which the system aims to discourage attempts at self-help. The views of those sought to be discouraged

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[53] Eg, the use of victim impact statements in sentencing. See *Crimes Act 1900* (ACT) s 429AB; *Criminal Procedure Act 1986* (NSW) Part 6A; *Criminal Law (Sentencing) Act 1988* (SA) s 7; *Sentencing Act* 1991 (Vic) s 95A; *Sentencing Act 1995* (WA) Part 3 Div 4.

[54] Parker has made the more general point that 'at a general level … courts exist to serve the public. At the least, they are there for the public good rather than for private gain': Parker, above n 8, 14. Whether he is correct in asserting that '[m]ost people would agree' with that statement remains open to debate.

are clearly of interest here. But at the same time, as long as those people are being discouraged, the objective is being achieved. The question is, *How much* vindication is necessary to achieve that objective? Does it need to be complete, in the sense that the legal system does everything to the offender that the victim or relative would have done in the absence of the legal system? Clearly not. This is another sense in which the legal system does not look through the victim's eyes. For one thing, it acts according to law, which is general and formulated in advance of the situation that brings it into play, not *in reaction to* a specific event. For another thing, it is required to recognise the needs and humanity of the offender, as we would not necessarily expect the victim or a relative to do. It is required to act in a way that is fair to the offender, as we would not necessarily expect of the victim or a relative.

If a dissatisfied victim or relative is interviewed on a criminal sentence, there arises a serious danger that matters relevant to the true nature of criminal proceedings, such as those just outlined, will be obscured. It is as if we are being invited to conclude that the legal system has failed if a victim or a relative walks away from the court feeling less than completely satisfied.[55] The simple fact is that if victims and their relatives feel completely satisfied this is, if anything, an indication that the system has failed, in that it has not accommodated the perspective of the offender.

Reporting on criminal matters needs to keep in view the presumption of innocence and the broader perspective of which it is a part: the system has to be, and is, prepared to let the guilty go free. This can happen in a variety of ways: no suspect may ever be identified, insufficient evidence may be gathered to justify a charge, an accused may be acquitted at trial (including 'on a technicality'), or an 'inadequate' penalty may be imposed — that is, a penalty which doesn't accord with someone's view of the offender's guilt. It is simply unfair to the system to expect all offenders to be caught, convicted and sentenced to the maximum penalty that anyone thinks is justified. The statement in a Crimes Act or Criminal Code that certain behaviour is an offence is not a guarantee that everyone who ever engages in that behaviour will be punished to the

[55] On satisfaction with court performance, see Parker, above n 8, 25–6.

maximum extent possible. It is very easy for the media to create an impression otherwise.

In similar vein, the more general comment can be made that just as the legal system is not perfect, nor [111] is the judiciary. For all that is made in the media of judicial independence and related issues, it is important to avoid the impression that if only we could sort out judicial appointments, tenure and salaries there would never be a problem with the judiciary. Even the most competent and unbiased (and highest paid!) judge can and will make mistakes. Some mistakes can be learnt from and therefore avoided in future, and the media have a role in maximising the possibility of that occurring. They therefore should avoid making a 'feeding frenzy' out of any mistake that is identified, to maximise the chances of the mistake being accepted as such by the judiciary and addressed in future. It is very easy to push the judiciary further underground with unwarranted or overzealous criticism, but a well-targeted media campaign can inspire judicial self-examination and corrective action. There is no easy way to prescribe in advance how the media can ensure their activities fall into the latter category rather than the former, but hopefully a recognition of the distinction between the two will be a useful first step.

Conclusion

Both the judiciary and the media are powerful institutions that claim to be (and should be) serving the public good. If they are doing so, it is difficult to understand how there can be any conflict between them. Yet there is clearly a need for relations between the media and the judiciary to be improved. Judges are unhappy with the way the media report on their activities, and the media are unhappy with restrictions the judiciary place on both access to relevant information and the legality of certain types of reporting. Each institution needs to find means to co-exist happily with the other. One useful exercise in that process would be for each side to explain as clearly as possible its concerns with the ways in which the other operates; those explanations should be couched in terms of something other than the self-interest of the institutions giving them.

This article’s contribution to that process has been to point out a few specific ways in which media reporting on judicial activities can foster erroneous and potentially damaging impressions in the minds of readers. The public are less likely to support judicial independence if they see it as a kind of personal meal-ticket for judges, yet that is just the impression that is suggested when independence is mentioned mainly in the context of debates about the conditions of judicial appointments. The public are likely to become annoyed when judges don’t reach the decisions they would wish for, unless they understand that judges are not supposed to represent the community or any section of it. Certain types of reporting on the judiciary, however, risk inviting just the opposite conclusion unless due care is taken. The public might not be sufficiently vigilant and critical of influence exerted on judicial proceedings by non-governmental actors unless care is taken to avoid creating an impression that the government is the only potential source of illegitimate influence. Once again, such care is not always taken. Finally, a focus on the dissatisfaction individuals experience with judicial proceedings can also erode public confidence by creating the impression that litigants and their associates are something like ‘customers’ when in fact they are not. In such a dynamic, the public are given unrealistic expectations and the judicial system is set up for failure.

It should be stressed that these misconceptions are damaging not (just) from the point of view of the judiciary’s good standing in the community, but in the sense that they are likely to distract attention from matters on which the public *should* be engaged in serious debate about the desirability or otherwise of judicial activities. If the public are too busy grumbling about ‘judicial freedoms’ or the ‘unrepresentative’ nature of the judiciary, they will not be discussing where to draw the line between acceptable judicial common law method and judicial activism, or between fearlessly upholding the rule of law and being out of touch with community values. If the public are too heavily focussed on the government as a potential source of illegitimate influence on the judiciary, they are likely to miss the point entirely when some other potential source threatens to come into play. And if the public is too busy cataloguing instances where someone came away from judicial process unsatisfied, they will not be [112] examining whether the judiciary has in fact been applying the law in an unbiased way and imposing sentences that can be defended under the law.

There is no legal framework in existence which can address these difficulties. Nor is it reasonable to expect that there could be one. Any attempt to introduce the needed improvements in media-judiciary relations would need to negotiate a minefield of political and other sensitivities, with freedom of the press and judicial independence heading the list. Because both sides have such powerful means of staking a claim for autonomy, it is unrealistic to hope that any solution to the face-off can be imposed from outside. It is up to journalists, editors and publishers to find ways to incorporate into their daily practice means of avoiding the misconceptions that have been identified. For the print media, the code of journalistic ethics might be a useful repository for that commitment; for the electronic media, industry codes of practice might serve a similar function.