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Pamela D. Schulz, *Courts and Judges on Trial: Analysing and
Managing the Discourses of Disapproval***

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On Courts and Communication Strategies:

Book Review of Pamela D. Schulz, *Courts and Judges on Trial: Analysing and Managing the Discourses of Disapproval*

Andrew J. Cannon

PAMELA D. SCHULZ, *COURTS AND JUDGES ON TRIAL: ANALYSING AND MANAGING THE DISCOURSES OF DISAPPROVAL*. Lit Verlag, 2010, 290 pp. \$76.00.

This book is a broad-ranging and detailed discussion of the sometimes fraught relationships between courts, politicians, and the media. The author combines her practical experience as the first public relations and information officer with the Courts Administration Authority in South Australia with in-depth research as a communications analyst. She has analyzed media and their practices both in Australia and worldwide. This has revealed much of interest about the motivations and methods of journalists, politicians, and judges, as well as implications for community confidence in the court system and the rule of law in modern democracies. Schulz concludes by offering some practical solutions to the problems she has identified.

Courts have no direct power over citizens and merely mediate executive power by validating arrest on charges, authorizing the exercise of the power of fining or imprisonment, and quantifying and collecting judgment debts. To effectively perform their work, courts depend upon the confidence of the public in the judicial process. There are very few judges, and relatively few cases, especially in the common-law system, so the overwhelming source of information for the general public about courts is the media. Yet the media selects the bizarre and sensational rather than the serious. As Schulz says, “[i]f it bleeds, it leads,” and content is selected on the basis of the “four C” principle: courts, cops, crime and conflict.¹ Schulz contends that in a western world of relative safety, the media and politicians have created a climate of fear of violent crime to prop up their own relevance. Crime is depicted as a major problem, and getting “tough on crime” is the simplistic solution. Part of this process is to make stories newsworthy by finding cases where there is discontent about the result, which is then beaten up as part of a discourse of disrespect against the judicial process as a whole. Straight reporting is demoted in importance in preference for conflict, problems, and denouement.

Schulz notes that courts have used journalists in the role of

public information officers to better supply information to the community on the courts’ own terms. However, she considers that they have not been successful in bringing the generally good work of courts to the attention of the public. To be effective, courts must have communication strategies that are proactive and interactive and provide access and feedback loops through a wide variety of pathways. In addition to a broad range of communication strategies, courts must become more directly involved with the public through community and specialist courts such as drug, mental-health, and first-nation or Nunga courts that link directly with community services.

Schulz develops her discussion through the discipline of critical discourse analysis. This is a communications study method that seeks the sometimes unstated meanings in communications by looking for patterns of words and phrases and their proximity to each other and conversely by what is systematically avoided or suppressed. She identifies a general discourse of *disapproval* of courts in the media that has developed into discourses of *disrespect*, *diminution*, and *direction*. This leaves judicial officers feeling marginalized and threatened, while politicians have joined in so that they can be seen as saviors from the problem, which is largely a media construct. Schulz identifies the use of the technique of “othering,” by which a small group is branded and demonized so that the majority can find a sense of unity in coming together with a sense of rectitude to eject them. This technique, of course, has a long unhappy history, and the marginalization of the judiciary has always been a first step in the process. In this instance, the technique has been applied first to criminals who should be locked away for longer and to judges who fail to do this.

Her interviews of politicians demonstrate a disconnection between their stated understanding of and commitment to the rule of law and the independence of the judiciary. At the same time, politicians think that the courts need “direction” from them to address changing community standards, especially in sentencing matters, which are the fodder of the press.² They acknowledge that the judicial role is not to be popular but to apply the law “without fear or favor, affection or ill will.”³

Footnotes

1. PAMELA D. SCHULZ, *COURTS ON TRIAL: ANALYSING AND MANAGING THE DISCOURSES OF DISAPPROVAL*. 4 (2010).
2. *Id.* at 46.

3. This is the usual common-law judicial oath. See, for example, Section 11 of the *Oaths Act 1936* (SA). See discussion of popularity, SCHULZ, *supra* note 1, at 112.

Although politicians acknowledge the central importance of judicial independence in interviews with the author, Schulz demonstrates that the same approach often is not reflected in public comments made to the media. While it is the work of courts to make nuanced decisions in controversial cases, when they do, this has sometimes been described as “an unelected and unaccountable judiciary usurping power” (judges are not elected in Australia or Britain).⁴ Politicians do emphasize the need for the language of law and judgments to be accessible, and from their comments the author draws the need for a media judge to enter the media arena on behalf of the judiciary.

Schulz has assessed the view of the judges through discourse analysis of interviews of selected judges from all levels of the judicial hierarchy in Australia and of their speeches. What emerges is a primary concern about independence, and parallel to this is an inevitable tension between the judges’ need to have a relationship of confidence with the community and politicians and the isolation, which is inherent in their role. They feel misrepresented and misunderstood.

Schulz uses Foucault’s approach to power to suggest that the widespread formation of a negative response is indicative of an emerging challenge to power, which she sees as a challenge by elected government to the authority and independence of the judiciary. Who leads this dance between the media and the politicians is uncertain, but at this ball the judiciary is the wallflower, and anyway, traditionally it would refuse to dance in this infotainment world of modern media. The Foucault approach relegates the great events in history to tipping points preceded by multiple strands of discourse leading inexorably to the inevitable result, and then the tipping point is exaggerated as the cause when it is largely the result.⁵ Not to be involved in the discourse is not to exist and is to risk the loss of relevance, power, and the independence so valued by the judiciary. At the same time, discourse analysis shows a judiciary that is protective of its own methods and unwilling to join public controversy. The author recognizes that a commitment to a rule of law is bound to lead to unpopular decisions. Indeed, it is the judiciary that stands between a tyranny of the majority and populist oppression as they moderate the exercise of governmental power. Schulz identifies an increasing recognition in the judiciary of the need to defend the notions of independence and the rule of law in the media and to better educate the community through civics education and similar means. But many of its members, as is typical with the marginalized “other,” feel powerless and are defensive.

Schulz concludes that in the face of headlines about a court judgment such as “THIS IS NOT JUSTICE—THIS IS A DISGRACE,” the present role of a journalist information officer, which entails ensuring accurate information is supplied to media, holding court open days, giving school tours, and

speaking at community events and the like, is not sufficient.⁶ She says a fully integrated and sustained communications strategy is required, starting with using discourse analysis to identify the misconceptions that need to be countervailed. To address these misconceptions, the author would have press judges, who do not sit so they can engage in discussion of public controversies, and communication managers, who ensure courts do react effectively to community concerns and express themselves so that they are understood. A range of other measures—such as a roadshow to showcase the sentencing process, direct access to the community through cameras in courts, and interactive websites—are recommended to make the work of courts accessible and to provide contextual information to the few cases the media choose to highlight. Judicial participation and knowledge of discourse analysis is also suggested to further ideas for better communication.

Criticism of courts is not new. For example, in 1934, the High Court of Australia granted a writ of habeas corpus⁷ to release a left-wing Czech journalist who had been detained as an illegal immigrant by order of Attorney General Robert Menzies to prevent him speaking at a conference. In response, the *Sun* newspaper railed against the judges: “If the High Court were given some real work to do the bench would not have time to argue for days on the exact length of the split in the hair, and the precise difference between Tweedledum and Tweedledee.”⁸

Times now are different. In that case, the editor and the paper were each fined for contempt,⁹ which is unlikely to happen now. And today, with the shift of the power from the nation-state toward corporate interests, some of which have a worldwide controlling interest in the media, politicians and media share a new common interest: to maintain a discourse of threat and sensation and to diminish the judiciary, whose independence puts the judiciary outside their control.

Neither can it be said that the courts have no blemish. Their independence gives them control over process and costs, and they tolerate excessive delay and overindulgent expense on sometimes irrelevant pretrial processes that have driven the cost of litigation beyond the reach of the bulk of the community. As Justice Dyson Heydon recently said in the High Court:

The presentation and adjudication of the case in the courts below do cause it to merit a place in the precedent books. The reasons for placing it there turn on the numerous examples it affords of how litigation should not be conducted or dealt with. The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other.¹⁰

4. *Id.* at 159.

5. MICHEL FOUCAULT, *THE ARCHEOLOGY OF KNOWLEDGE* (trans. Alan M. Sheridan, 1997).

6. This headline ran in the tabloid, *The Advertiser*, <http://www.adelaidenow.com.au/>, on July 30, 2003.

7. *R v Wilson; ex parte Kisch* (1934) 52 CLR 234.

8. *The King v Dunbabin; Ex Parte Williams* (1935) 53 CLR 434, 436.

9. The paper was fined 200 pounds, and the journalist 50 pounds. *Id.* at 448.

10. *Aon Risk Services v Australian Nat’l Univ.* (2009) HCA 27, 156, available at <http://www.austlii.edu.au/au/cases/cth/HCA/2009/27.html>.

Courts must accept valid criticism and be prepared to remedy properly identified problems. However, that is not Schulz's focus. Her point is that there is much damaging discourse about courts that is merely criticism for ulterior purposes not based on any merit. Media discourse reformulates rather than reflects reality as the media competes with executive government and the judiciary to represent justice and the common good. Political and media use of law-and-order rhetoric undermines public confidence in courts and the rule of law that it masquerades as discussing.

The research on which this book is based is Australian, but the author includes material from the UK, USA, Canada, India, and Europe, and the book has a broad international relevance to foster discussion in this important area. It is scholarly but readable for general interest, so the book will serve both as a text for interest as well as a course book in progressive law schools and communications faculties.



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