SCANDALIZING THE JUDGES

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[*This article examines the historical development of the law of contempt in Australia relating to abuse of judges and attacks upon their integrity and impartiality. The author criticizes the tendency of courts to misuse this action as a substitute for libel, and recommends a return to an earlier approach focussing on the actual effect of alleged scandalous remarks on the proper administration of justice.*]

Introduction

The law of contempt in Australia has recently received considerable judicial and public attention. This led in 1983 to the Australian Law Reform Commission being given a comprehensive reference on the law of contempt. An issues paper and research papers have already been issued by it.[1] The branch of the law of contempt dealing with 'Scandalizing the Judges' received particular attention in *Gallagher v. Durack*.[2] In that case a union official was found guilty of contempt for suggesting that his appeal from an earlier conviction for contempt had largely been successful because of the influence brought to bear on the judges by union members walking off the job. Murphy J. delivered a strong dissent but the other High Court judges were happy to affirm the principles relating to this area of the law laid down in a 1935 High Court decision (*R. v. Dunbabin; ex parte Williams*).[3] One might have thought that changes in the political and social climate and in the position of judges in the framework of government over a period of nearly 50 years indicated that a re-examination of the law in this area was warranted. Instead, the judges, as have so many others, were content to simply assert what they saw as the basis for the law in this area without any examination of its real foundation or of its necessity.

Thus, the High Court asserted:

> The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of Courts or Judges.[4]

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1 Australian Law Reform Commission, *Reform of Contempt Law, Issues Paper No. 4* (January 1984). See also *Research Paper No. 5, Reference on Contempt* (1984) which is a comprehensive analysis of all aspects of scandalizing.

2 (1983) 45 A.L.R. 53.

3 (1935) 53 C.L.R. 434.

4 *Ibid.*

In *R. v. Dunbabin* the High Court justified this area of law as existing 'in order that the authority of the law as administered in the courts may be established and maintained . . .'[5] Scurrilous imputations 'if permitted could not but shake the confidence of litigants and the public in the decisions of the Court and weaken the spirit of obedience to the law'.[6] No examination is made in the judgments of whether these assertions have any factual basis. Nearly all judges appear to assume that attacks on the judiciary will inevitably lead to the breakdown of law and order. Murphy J. is very much a lone voice to the contrary, putting freedom of speech ahead of judicial dignity.[7] It would be wrong to put all the blame on the judges, however, for the widespread acceptance of the need for the present law in this area. It is an ideological viewpoint widely shared in Australia and Britain that judges must be immune from criticism, particularly unreasoned, in order to preserve the role of the law in resolving peacefully society's conflicts. This view is very much part of the consciousness of most people in these societies. The problem, however, as Denniston J. of the New Zealand Supreme Court recognizes, is that one 'cannot compel public respect for the administration of justice'.[8]

Any review of the law in this area must, therefore, examine the historical origins of the legal principles. The principles themselves have been repeated numerous times and summarized by scholars.[9] Essentially, the law penalizes two types of attack on judges: '(a) scurrilous abuse of a judge as a judge, or of a court and (b) attacks upon the integrity or impartiality of a judge or court'.[10] None of the statements of the law, however, give much attention to the origin of the law or its historic rationale.

The leading historical authority to which many authors refer is the opinion of Wilmot J. in *R. v. Almon* in 1765 in a never delivered judgment. He stated that the power of the courts to punish for contempt 'stands upon the same immemorial usage as supports the whole fabric of the Common Law'; the power of 'vindicating their own authority is coeval with their first foundation and institution'.[11] One finds assertion without any supporting authority in that judgment, and unquestioning acceptance of the assertion by those who come subsequently. The exception is the large amount of historical work by Sir John Fox who argues strongly that Wilmot J. was in error in terms of the procedural aspects of the law set out in his judgment.[12]

One can trace the actual expression 'scandalizing the court' to Lord Hardwicke in 1742.[13] It is from this period in the 18th century, which saw the begin-

5 *Ibid.* 443.
6 *Ibid.* 444-5.
7 These views it seems may be shared by Samuels J. of the N.S.W. Court of Appeal. See (December 1983) 3 *Communications Law Builetin.*
8 (1913) 33 N.Z.L.R. 545, 574.
9 Arlidge, A. & Eady, D., *The Law of Contempt* (1982) 156-65; Borrie & Lowe's *Law of Contempt* (2nd ed., 1983) 226-46; Armstrong, M., Blakeney, M., Watterson, R., *Media Law in Australia* (1983) 127-32; A.L.R.C. *Research Paper No. 5, supra* n. 1. p.313
10 *Report of the Committee on Contempt of Court,* Cmnd 5794 p.68 (Phillimore Committee).
11 (1765) Wilm 243; 97 E.R. 94.
12 Fox, J.C., *The History of Contempt of Court* (1927; reprint 1972).
13 *St James Evening Post* case (1742) 2 Atk 469.; 26 E.R. 683, 684.

nings of the rise of the press, that the modern law of contempt is usually seen as coming. Contempt for speaking disrespectfully of the court on service of process is gradually extended at this time to publications wherever made that scandalized the Court.[14]

At this time as well, the law of seditious libel ceased to play a prominent role. In earlier centuries this law had been used in part to deal with attacks on the judiciary.[15] In an even earlier era the action *scandalum magnatum* was available to deal with attacks on the judiciary.[16] As the political climate changed, and the Monarch became more a figurehead, the relevance of seditious libel as an appropriate mechanism by which to control politically motivated speech whether directed at judges or other public figures declined. This change is aptly perceived by Stephen in his *History of the Criminal Law*[17]

> Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes would be pointed out with the utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority.
>
> If on the other hand the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part. He is finding fault with his servant. If others think differently they can take the other side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place, or perhaps that the arrangements of the household will be modified. To those who hold this view fully and carry it out to all its consequences there can be no such offence as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb or property but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal.

But while the political leaders may have been content to accept greater freedom of speech, the judges appear to have resisted. Judges of the 18th and 19th centuries had an elevated view of their status, and in place of seditious libel the law of scandalizing emerged as a potent weapon with which to curb criticisms of the judicial office.[18] As will be indicated below, the primary

[14] *Supra* n.10, p.314. See also Arlidge & Eady, *op. cit.* 17-19.

[15] For a detailed discussion of the law of seditious libel as it relates to attacks on judges see *Boucher v. The King* [1950] 1 D.L.R. 657, especially *per* Rand J. at 680ff, but also other judgments; on rehearing [1951] 2 D.L.R. 369, especially *per* Kellock J. at 390ff, Locke J. at 395ff. The Canadian Supreme Court decided 6 to 3 that incitement to violence or creation of public disturbance was an essential element in an action of seditious libel brought in respect of remarks against the administration of justice. This would not seem always to have been so.

[16] Russell, W., *A Treatise on Crimes and Misdemeanours* (1865; 1979 reprint) I.341. For the development of the law of libel see Plucknett, T.F.T., *A Concise History of the Common Law* (5th ed. 1956) 484ff.

[17] Stephen, J.S., *A History of the Criminal Law of England* (1883) v.II, 299-300.

[18] For general historical background see Johnson, P., *The Offshore Islanders* (1972) 240ff, especially 252. See in relation to Lord Chancellor Hardwicke, the statement by his biographer: 'The purity and the dignity of the law were to him as the breath of life, essential to the very existence of the nation, the loss of which involved inevitably the corruption and dissolution of the state . . . judicial impartiality and the fearless execution of justice remained henceforth the sheet anchor of the constitution and of the national liberties'. Yorke, P.C., *The Life and Correspondence of Earl of Hardwicke* (1913) v.II, 521. Lord Hardwicke, as already mentioned, used the phrase 'scandalizing' in 1742.

rationale given for the offence of scandalizing in cases in the 19th and 20th centuries is the need to protect public confidence in the administration of justice. This is reflected in the view of Borrie and Lowe that:

> The necessity for this branch of the law of contempt lies in the idea that without well regulated laws a civilised community cannot survive. It is therefore thought important to maintain the respect and dignity of the court and its officers, whose task it is to uphold and enforce the law, because without such respect, public faith in the administration of justice would be undermined and the law itself would fall into disrepute.[19]

The tension identified by Stephen[20] between a 'feudal' and 'democratic' view of the role of officers of the state is, however, present in various judgments. While the maintenance of the administration of justice may be the expressed rationale for the law, it will be argued that a closer look suggests the judges may have been more concerned with the protection of reputation and the interests previously served by the law of seditious libel. A review of the real basis for the decisions can help to point the way any reform might take.

Reform Proposals

The Phillimore Committee in England recommended that the present law 'should be replaced by a new and strictly defined criminal offence'. An intention to impair confidence in the administration of justice would be an essential ingredient of the offence, and it would 'be a defence to show that allegations were true and that the publication was for the public benefit'. The offence would become part of the law of criminal libel.[21] An emphasis on the administration of justice does not, however, at first glance rest easily in an offence forming part of the law of libel. Subsequent reports in England have recognized this. The 1979 Report of the Law Commission on Offences Relating to Interference with the Course of Justice suggested a narrower offence of imputing corrupt judicial conduct to a judge, tribunal or member of a tribunal.[22] The offence would require that an allegation be false, the person making it knows it to be false or is reckless whether it is false and intends it to be taken as true.

In a Working Paper on Criminal Libel[23] the Law Commission saw no need in that area of law for any special offence to protect judges. They were concerned not to resurrect the notion contained in *scandalum magnatum* of a distinction between the protection afforded those in public positions and others. The Working Paper envisaged that the narrower offence recommended in their earlier Report, as indicated above, would however be applicable to allegations against judges. The Law Commission sees the proposed offence as 'aimed primarily at preserving the integrity of the course of justice rather than the special protection of a limited class of individuals'.[24] No action has yet been

19 Borrie and Lowe, *op. cit.* 226. The discussion of this area of law occurs in a chapter headed 'Publications interfering with the due course of justice as a continuing process'.
20 *Supra* n.17, p.315.
21 *Supra* n.10, p.314.
22 Law Commission (Eng.), *Report No. 96* (1979) 67-8.
23 Law Commission (Eng.), *Working Paper No. 84 Criminal Libel* (1982) 90, 139-40.
24 *Ibid.* 140; n.75, p.325.

taken to implement these recommendations. They reflect, however, a dissatisfaction with the uncertain state of the law dealing with criticism of judges.

In Canada, the Law Reform Commission Report on Contempt recommended creation of a new statutory offence of (a) affronting judicial authority by conduct calculated to insult a Court or (b) attacking the independence, impartiality or integrity of a Court or of the judiciary. Truth or public benefit were not to be a defence.[25] This recommendation largely restates the existing law[26] and differs substantially from the limited offence recommended by the Phillimore Committee. The Canadian Commission appears to have been largely influenced by the comments of judges who strongly opposed the initial position taken by the Commission which was for the introduction of a more limited offence. The Commission decided that our tradition of moderation, the existence of our democratic system and the judicial guarantees of the rights of the accused mitigated any danger of arbitrariness[27] and thus finally recommended essentially a codification of the present position. Canada has a history of much more active assertion in recent times of the power to punish for scandalizing the Court than in Britain.[28] The unwillingness of the judges to give up power in this area reflects this.

With the Australian Law Reform Commission grappling with similar issues it is timely to examine some of the historical antecedents, and, in particular, to focus on Australian and New Zealand cases in order to examine the justifications given for the law in this area and the context in which the cases have arisen.

Rationale for the Law

Two principal rationales have been given for the law in relation to scandalizing the judges. The first view sees the courts as emanations of the sovereign — 'the King is the fountain of justice and . . . he delegates the power to the Judges . . . the arraignment of the justice of the Judges is arraigning the King's justice . . .'[29] This view

> evolved from the divine law of kings, and its aspects of obedience, co-operation and respect toward government bodies . . . though the king acted through others, in a mystical way he was presumed to be present and subject to being condemned.[30]

The question is whether this historical rationale continues to be relevant today. Some commentators would argue that this 'feudal' conception of the relation of the law to individuals is at the heart of the interpretation and application of contempt law by Australian judges.[31]

25 Law Reform Commission of Canada *Contempt* Report No. 17. See also Working Paper 20, *Contempt of Court* (1977).
26 It 'codifies' it. *Ibid.* 52.
27 *Ibid.* 25-6.
28 Martin, 'Criticising the Judges' (1982) 28 *McGill Law Journal* 1, 14.
29 Wilmot J. in *R v. Almon* (1765) Wilm 243; 97 E.R. 94. See also *Oswald on Contempt* (2nd ed. 1895) 1.
30 Goldfarb, R.L., *The Contempt Power* (1963), 11-12.
31 See Edgeworth, 'Beneath Contempt' (August 1983) *Legal Services Bulletin* 171.

The alternative rationale, perhaps expressed in an extreme but clear way in an old United States decision quoted by Goldfarb, is that:

> all courts derive their authority from the people and hold it in trust for their security and benefit . . . the power the [judges] exercise is but the authority of the people themselves exercised through courts as their agents. . . . Contempts against these courts . . . are insults offered to the authority of the people themselves . . .[32]

While such a view may not fit so easily into current perceptions held by Australian lawyers of the basis of the contempt law, this statement, it will be suggested, is closer to the rationale given in some early Australian cases than is the 'feudal conception' of the relationship between law and individuals. While such a view of the courts would not, on the Stephen approach, support the application of the law of sedition,[33] the question arises as to whether the law of contempt is any more appropriate. Whatever rationale is given, its translation into practice is a different question.

Turning to Australian cases, there are two early leading cases which make useful contrasts. In 1879 in *In re Syme; ex parte The Daily Telegraph News Paper Co. Ltd*[34] a newspaper attacked previous decisions of Stawell C.J. and Barry J. as indicating that the 'political bias of the judge was not without an influence consciously or unconsciously upon his decision'. These remarks were made as part of critical comments on a pending libel action by a rival newspaper which was described as 'bogus' and a 'trumpery'. The Court, including the judges the subject of criticism, were concerned to ensure that conduct calculated to interfere with the fair administration of justice should not be allowed. In the circumstances they decided to take no action on the comments. The judgments are noticeable for the relaxed attitude of the judges and their willingness to allow public criticism of them as individuals. Barry J. very much saw himself and other judges as

> the representative of the majesty of the law, primarily represented by Her Majesty the Queen as head of the whole empire; and for him to entertain any personal feelings would be unmanly, would be ignoble, and would render him ignominious. Nevertheless he is not supposed to be beyond criticism. He is liable for every act he does at every hour of the day; he is responsible to Her Majesty the Queen, to the Parliament, to the country, and, what is, if possible, higher still, responsible to his own conscience.[35]

Certainly Sir Redmond Barry had a strong view about the status and independent position of office of judges, having clashed in 1864 with Attorney-General Higinbotham who had regarded the judges as officers of his Department.[36] Yet despite his clear and close identification of the judges with the Monarch, what is also striking is the readiness to allow public criticism. The concern of the judges only arises where some clear interference with the administration of justice is likely, such as use of the media to inflame public opinion in relation to some pending proceedings. Stawell C.J., who had a similar Anglo-Irish background to Barry J. and also a reputation as upholder

32 Goldfarb, *op. cit.* 4 quoting from *Watson v. Williams* 36 Miss. 331, 341 (1858).
33 *Supra* n.17, p.315.
34 (1879) 5 V.L.R. 291.
35 *Ibid.* 296.
36 (1969) 3 *Australian Dictionary of Biography* 110.

of judicial power[37] and guardian of conservative interests,[38] is also relaxed about criticism of judges.

One can contrast this attitude of the Victorian Supreme Court with that in New South Wales in the following year. In *Re "The Evening News" Newspaper*[39] the Court was concerned with an attack on Windeyer A.J. to the effect that he 'has had another opportunity of showing his utter want of judicial impartiality from the Bench and has delivered once more a bitter and one sided advocate's speech', and that 'with such a system of judicial advocacy, it is only when the jury are exceptionally intelligent, as was the case yesterday, that anything approaching justice can be expected to result from a trial before' the judge.[40]

This attack might be seen as much more serious than that in the Victorian case, and thus justifying the much harsher judicial reactions which resulted in the imposition of a fine of 250 pounds on the publishers. The judgment of Martin C.J. is significant, however, for his democratic view of the courts, which contrasts with the 'regal' view of Barry J. Martin C.J. said that the contempt power was

> necessary for every superior court. What are such Courts but the embodied force of the community whose rights they are appointed to protect? They are not associations of a few individuals claiming on their own personal account special privileges and peculiar dignity by reason of their position. A Supreme Court like this, whatever may be thought of the separate members composing it, is the appointed and recognised tribunal for the maintenance of the collective authority of the entire community. . . . Without armed guards, or any ostentatious display — with nothing but its common law attendant, the sheriff and its humble officials the court keepers and tipstaffs, it derives its force from the knowledge that it has the whole power of the community at its back. This is a power unseen, but efficacious and irresistable, and on its maintenance depends the security of the public. . . . In its collective and representative capacity it is essential that the general respect for it should be rigidly upheld, not on account of the persons who from time to time may happen to compose it, but in consideration of the great objects for which it has been called into existence. . . . the interests of society require that the appointed guardians of those interests should in their collective and corporate capacity be respected and that they themselves should have the power of enforcing that respect.[41]

In this significant statement, Martin C.J. sets out an alternative rationale for the law of contempt and in particular that relating to the scandalizing of the judges. If this rationale is sound and accepted it will carry significant implications, it is suggested, for the penalizing of 'scandalous' conduct in relation to judges. Despite his eloquence it will be suggested, however, that Martin C.J. did not even apply his own statement to the outcome of the *Evening News* case.

Martin C.J. was appointed Chief Justice in 1873 following, as was the case with so many of his contemporary judges, a career as a politician including being Attorney-General and Premier. While he is reputed to have had a 'polemical and snobbish streak' and to have been an 'imperious type' his background was one of humble beginnings, and unlike his Victorian judicial

37 (1976) 6 *Australian Dictionary of Biography* 175.
38 He supported a colonial peerage and supported squatters and not the miners. *Ibid.*
39 (1880) 1 N.S.W.L.R. 211.
40 *Ibid.* 211-13 for facts.
41 *Ibid.* 237, 238.

colleagues he had no sympathy for imperial patronage, preferring to base any colonial upper class on 'merit and patriotism rather than family eminence'.[42]

To this extent his background can be seen clearly reflected in his judgment. His imperious nature is borne out, however, by his unwillingness to contemplate the use of a jury to determine whether a contempt had in fact occurred. Such a procedure would seem to follow logically from the rationale given by him for the law in this area, based as it is on the law being the embodiment of the community. But use of a jury in such cases

> would be a proceeding probably inefficacious, and certainly unseemly . . . . What could be more subversive of respect for supreme tribunals like this than to have every case of contempt, other than those committed in its face, determined by a jury — with all the uncertainty and delay necessarily attendant on such a mode of procedure?[43]

In his reasons Martin C.J. very much argues that the existence of this power is necessary in order to maintain 'that general and habitual respect for the Courts which has made its application so rarely necessary.'[44] This argument is, however, circular. He argues that this power has not been used tyrannously by the courts but only when necessity requires it. He returns to his theme that in this case the attack on the judge strikes at the collective authority of the community, although he then, out of character with what has gone before, speaks of the judges as the representatives and guardians of the Crown.[45]

Sir William Manning, the other judge to give reasons in the case, also refers to the need to repress attacks against judges

> whom the Constitution of the country has entrusted with the guardianship of one of the most sacred rights of the people.[46]

To this extent he reflects similar views to those of Martin C.J.

The decision in this case was not the first scandalizing case in New South Wales. In 1835 an attack on the role of the Supreme Court judges in securing the division of the legal profession into two separate branches led to the publishers of the *Australian* newspaper, being committed for contempt. The Court (Forbes C.J., Dowling and Burton J.J.) considered that there was an obligation to vindicate the authority of the court against attacks on the 'Judges, as ministers of the public justice of the colony'.[47]

The tradition in New South Wales of harsh treatment of those who should criticize the judges was repeated only a couple of years later in 1883 *In the Matter of the Echo and Sydney Morning Herald Newspapers*.[48] Again Martin C.J. repeated the same arguments as in the 1880 case: the courts ensure that

> the collective will of the community is authoritatively carried out . . .. Decisions should be accepted with respect . . .. In all well-ordered societies the interpretation and application of the laws must be accepted from the courts which the society itself has set up.[49]

42 (1974) 5 *Australian Dictionary of Biography* 216.
43 (1880) 1 N.S.W.L.R. 211, 238.
44 *Ibid.* 239.
45 *Ibid.* 246.
46 *Ibid.* 244.
47 Reported in a Note in (1880) 1 N.S.W.L.R. 244, 246.
48 (1883) 4 N.S.W.L.R. 237.
49 *Ibid.* 250-1.

It was necessary to punish criticism of decisions

> on behalf of the public whose real liberties are placed in jeopardy by any attempt to overawe or disparage this tribunal, which is the duly appointed guardian of public rights.[50]

Despite the fact that the courts derive their authority from the people, Martin C.J. could not envisage that it was for the press to dispute the correctness of the law. They must defer to the decision of the judges.

The attack involved in this case was directed at Innes J. who was criticized for his summing up in a libel trial and for his attitude towards the role of the press. Further critical comments from other papers about the case were reproduced a few days later in the Sydney Morning Herald. Among the remarks made was reference to the fact that an ex Chief Justice and a puisne judge were patrons of the charity in whose favour the libel case had been successfully brought. Certainly in what appears a heated exchange between Darley Q.C. and the Chief Justice it was made clear that the basis on which the judges acted was that the attack was seen as implying partiality in the judge. Darley Q.C. sought clarification of the charges and allegations of contempt, but the Chief Justice did nothing but repeat the allegations of partiality, and that the comments were made while an appeal was pending.[51]

Darley subsequently became Chief Justice in 1886 and unlike his predecessor had no clear party or political alignments.[52] In a case in 1892, however, he indicates his view of the objects of the press as being to 'uphold the cause of justice, to educate the mass of the people, and to raise and elevate their minds'. He did go on, however to castigate certain elements whose publications 'pander to the low tastes of the most depraved sections of the community.'[53]

The rationale expressed in the New South Wales cases, while at first glance of considerable significance and a foundation for subsequent application of the law in this area, surprisingly fades quickly away. There are not many more reported cases for a considerable period of time and the early decisions seem little noticed. In a Tasmanian case in 1905, *R v. Fowler*, Dodds C.J. justifies the law in this area as being exercised 'simply for the good of the people' but at the same time acknowledges the arbitrary nature of the court's jurisdiction and the need to exercise it 'with the greatest anxiety'.[54] No reference is made to the New South Wales authorities, which seems a little surprising.

It was for the New Zealand Supreme Court in *Attorney-General v. Blomfield*[55] in 1913 finally to inter the judgments of Martin C.J. A bench of six judges heard charges of contempt brought against the printer and publisher of a newspaper containing cartoons entitled 'Experience' and 'Justice is blind' and imputing to a judge 'partiality, bias, injustice, corruption and impropriety

50 *Ibid.* 254.
51 *Ibid.* 240-1.
52 See Bennett, 'Sir Frederick Darley: Sixth Chief Justice of New South Wales' (1977) 63 *Journal of Royal Australian Historical Society* 40.
53 *Ex parte Abigail, In re McLeod* (1892) 13 N.S.W.L.R. 183, 193.
54 (1905) 1 Tas.L.R. 53, 56.
55 (1913) 33 N.Z.L.R. 545.

in the conduct of his judicial office.' The majority of the Court determined that although possibly libellous and objectionable, the cartoons were not calculated to interfere with the administration of justice and were not, therefore, contempt. The Privy Council decision in *McLeod v. St Aubyn*[56] that scandalizing was an almost obsolete form of contempt was obviously of significance.

Denniston J., in response to the argument by Martin C.J. in the *Evening News* case[57] that the existence of this summary power to punish for contempt has maintained habitual respect, says:

> it merely begs the question. It assumes the major premise that the admitted general and habitual respect for the Courts exists only by virtue of their insisting upon their right to judge and punish any and all attacks upon a Court or Judge.[58]

He went on to say that he regarded the New South Wales cases as:

> of little value as authorities . . . . You cannot compel public respect for the administration of justice by flouting public opinion. Judges, like all other public men, must rely on their own conduct to inspire respect.[59]

These frank and welcome comments by Denniston J. expose the problem with the earlier Australian judgments discussed above. Whether founded on a regal or democratic view of the law, they all assume without evidence, or any proof of actual impact, that criticism will inevitably undermine respect for the legal system and hence stability. Denniston J. is honest enough to acknowledge the lack of substance in much of the argument made by judges like Martin C.J. He is, however, very much a rare voice amongst judicial office holders and the enforcers of the law in this area. Yet he does represent a voice that appears to have existed for the first few decades of this century, a voice that if allowed to speak without interruption might well have seen this area of contempt law disappear.

Apart from *McLeod*[60] in the United Kingdom, *Nicholls*[61] in 1911 in the High Court confirmed the trend at that period not to regard 'an imputation of want of impartiality to a judge (as) necessarily a contempt of Court'. Griffith C.J. suggested that a clear distinction should be drawn between cases involving libel and those involving contempt and confirmed that in the latter cases one needs to look for some calculated obstruction or interference with the course of justice.[62] This was an element that was certainly not central to the reasoning of the earlier Victorian and New South Wales cases. This case arose out of attacks made on Higgins J. in his capacity as judge of the Arbitration Court as well as a

56 [1899] AC 549.

57 *Supra* n.48, p.320.

58 (1913) 33 N.Z.L.R. 545, 572.

59 *Ibid.* 574. Denniston J. considered that scandalizing as a form of contempt 'originated in a period of high prerogative ideas'. It was 'inconsistent with the trend of modern ideas. Public opinion nowadays has a strong and, in my opinion, a wholesome suspicion of privileged, self-constituted, and co-optative tribunals. Judges, like all other public men, must rely upon their own conduct to inspire respect'.

60 [1899] A.C. 549 (P.C.) But *cf. R v. Gray* [1900] 2 Q.B. 36 in which Lord Russell C.J. upheld a conviction for contempt in relation to a newspaper comment which he described as 'personal scurrilous abuse of a judge as a judge'.

61 (1911) 12 C.L.R. 280.

62 *Ibid.* 286 *per* Griffith C.J. speaking for the Full Court.

High Court judge. The contempt proceedings were brought by the Attorney-General after the criticism was drawn to his attention by representations from Higgins. The criticism suggested that Higgins was 'a political judge' and that he had been appointed because he 'had well served a political party'. The High Court colleagues of Higgins J. were not, however, sympathetic to the action and their reasoning has been described as amounting to a 'rather offhand dismissal'.[62A] Perhaps it was a case of Higgins J. being too sensitive to criticism. Yet as Arbitration Court judge he did find himself subjected to considerable blunt and outspoken criticism, of a type that is uncommon today. Griffith C.J. indicated his lack of sympathy towards Higgins by saying:

> I think that if any judge of this Court or any other Court were to make a public utterance of such character as to be likely to impair the confidence of the public or of suitors or any class of suitors in the impartiality of the Court in any matter likely to be brought before it, any public comment on such an utterance, if it were a fair comment would, so far from being a contempt of Court, be for the public benefit, and would be entitled to similar protection to that which comment upon matters of public interest is entitled under the law of libel.[62B]

What happens however, is that judicial reaction changes. The cases that arise around World War I, in the turbulent years that follow and again in the 1950s and 1970s in Australia seem to be very much directed to the suppression of political statements and not primarily at muzzling press criticism of judicial performance. At the same time restraints on public criticism or imputations against judges for whatever reason will have, and appear clearly to have had, a chilling effect on the press.[63] Yet the situation deteriorates gradually, with the cases around World War I still conceding a considerable right of criticism.

In 1917 contempt proceedings were brought before the New South Wales Supreme Court following publication of criticism of Pring J. who had convicted 12 members of the International Workers Union (Wobblies) of criminal conspiracy. The comments were made on the day preceding the hearing of appeals by those convicted and the majority of the Supreme Court disposed of the case on the ground that the comments amounted to contempt having been made pending an appeal. However, scandalizing of judges was also considered in the light of the strong attacks on Pring J. by Bailey, the owner of *The Australian Worker*. The newspaper accused the judge of being 'insolent' and class-biased and bitter as well as criticizing the jury. The sentence was attacked as 'one of the most ghastly atrocities that the law has ever been guilty of, and that is saying something' — 'He (Grant, one of the convicted) got fifteen years for saying fifteen words.'[64]

Counsel for the Attorney-General argued that the distortion of facts contained in the article upon which the criticism of the judge was based was 'a dangerous attack on the integrity and impartiality of all courts and the general administration of justice' and, thus, amounted to contempt.[65] Counsel for the

62a Rickard, J., *H. B. Higgins, The Rebel as Judge* (1984) 186-8.
62b (1911) 12 C.L.R. 280, 286.
63 *Per* Murphy J. in *Gallagher v. Durack* (1983) 45 A.L.R. 53, 59.
64 *Attorney-General v. Bailey* (1917) S.R. (N.S.W.) 170.
65 *Ibid.* 174.

respondents sought to rely on *Nicholls*, where the High Court insisted that there must be action calculated to, or actual interference with the course of justice before one could find contempt saying 'that was a stronger case than this, for there was a deliberate charge of political subserviency, a far more serious charge than that of class bias.'[66] In the judgment of Cullen C.J. one finds a conclusion that the article contained 'grave imputations of partiality and harshness' yet he was relaxed about punishing for contempt on this ground, finding no necessity for the exercise of summary jurisdiction.[67] Of interest is the fact that this relaxed attitude existed even though Cullen C.J. gave a similar rationale for the law as did Martin C.J. in the 1880s. Attacks on a judge mean that 'the community suffers through the lowering of the authority of any one of its duly appointed arbiters'.[68] Yet the Chief Justice recognized that little would be done to enhance public confidence by summary punishment for contempt, and that 'a bench of Judges should be most scrupulous about undertaking any pronouncement on an allegation of "class bias" whether made against itself or one of its members.'[69] This approach seems far more consistent with the democratic conception of the law than the earlier approach of Martin C.J.

Sly J., who dissented with respect to the question of scandalizing conduct and considered summary punishment justified, also stressed, however, that the rationale was that the real offence is the 'wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone.'[70]

Apparently Boote, the publisher of *The Australian Worker* who was prosecuted for contempt along with Bailey, the owner, had written a previous 'characteristically trenchant piece of journalism' in defence of the I.W.W. This piece had been drawn to the attention of Cullen C.J. by the Attorney-General, but the Chief Justice had advised that contempt proceedings not be taken.[71]

When Boote and Bailey were found guilty of contempt on the second occasion, primarily because appeals were pending, they had costs awarded against them. Their treatment — actual prosecution by the Attorney-General — stood in sharp contrast to the comment and statements of the politicians, press and others who, prior to the actual trial of the 12 'Wobblies' had made 'unscrupulous use' during the Conscription campaign 'of material which was to serve as evidence against the accused' in order to discredit the anti-conscription forces.[72]

While Bailey and Boote may have been found guilty of contempt, the feeling of ill-justice against Grant, the person committed for 'fifteen years for saying fifteen words', was so great that a Royal Commission was appointed which 'in

66 *Ibid.* 175.
67 *Ibid.* 177-84.
68 *Ibid.* 181.
69 *Ibid.* 182.
70 *Ibid.* 186.
71 Turner, I., *Sydney's Burnings* (1967) 65.
72 Childe, V.G., *How Labour Governs* (1923) 168; Turner, I., *Sydney's Burnings* (1967) 66. For an account of the trial see Rushton, P., 'The Trial of the Sydney Twelve' (Nov. 1975) 25 *Labour History* 53; Turner, I., *Industrial Labour and Politics* (1965) 124.

effect found that Grant had been wrongly convicted', and he was released in August 1920. Grant went on to become a Senator from 1943-1959.[73]

In a case the next year (1918) also involving comments made in relation to a pending trial of another Wobbly sympathiser the New South Wales Supreme Court again reiterated its views on contempt. In *Re Brookfield*[74] the Commonwealth Attorney-General brought contempt proceedings against a member of State Parliament. The politician spoke in defence of the accused, Judd, at a public meeting and criticized the moving of his trial to the Central Criminal Court. This case clearly was not one involving scandalizing of the judges but of comment on a pending trial. It led Cullen C.J. to say however, imposing a 50 pound fine, that one must 'bring to the minds of the public the value of the purity of their institutions and the grievous wrong to the public that is done by destroying confidence in those institutions . . .'[75] One again sees judicial rationalising of the law as grounded in a democratic or populist foundation. In this case there is however a return to the familiar argument that criticism automatically destroys confidence. The judges, while still relatively restrained about criticism, at this time again show a certain lack of confidence in their own ability to retain public confidence without repression of criticism. In the earlier cases like *Nicholls* and *Blomfield* there was much more judicial confidence; what was important was some interference with the administration of justice itself. This lack of confidence was evident in 1928 in Tasmania in *R v. Ogilvie*.[76] A former Attorney-General had been critical of Crisp J. who had served as a Royal Commissioner inquiring into the Public Trust Office. The report led to the resignation of Ogilvie as Attorney-General. Crisp J. then sat on the Full Court hearing a motion brought by the Law Society against Ogilvie. He was in dissent, the other two judges accepting Ogilvie's explanation. In a number of electioneering speeches Ogilvie criticized Crisp J. whom he believed had set out to get him.

In the contempt proceedings that were brought, Nicholls C.J. found difficulty in accepting the view of Griffith C.J. in *Nicholls* that imputations of want of impartiality do not amount to contempt, and considered that only fair or proper comment must have been contemplated. The court 'must not be weakened by charges of bias, corruption or other wrong doings which would deprive it of its authority and power, since, if they go, the basis upon which order, law and peace rest goes with them.'[77] However, Ogilvie apologized and only costs were awarded. The judges show some restraint in imposition of penalty, but their view of the law is becoming more restrictive of criticism.

The restrained attitude of the judges was not, however, maintained in two High Court cases in 1935. In *R v. Fletcher; ex parte Kisch*[78] Evatt J. set out a

[73] See McNamara, W., 'Donald Grant — A Tribute' (Nov. 1970) 19 *Labour History* 63.
[74] (1918) 18 S.R. (N.S.W.) 479.
[75] *Ibid.* 488.
[76] [1928] Tas.L.R. 69.
[77] *Ibid.* 75.
[78] (1935) 52 C.L.R. 248.

number of propositions concerning the power of the court to act summarily to punish critical comment in a newspaper of a judicial decision 'where the Court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where these attacks are unwarrantable.' Evatt J. considered that

> all the recent decisions show that it is the duty of the court *to protect the public* against every attempt to overawe or intimidate the Court *by insult or defamation* . . . .[79] (emphasis added)

Criticism, he said, must be accurately stated and fair. One sees here a combination of both a democratic basis for the law combined with an emphasis on the dignity of judges and hence a focus on the words, rather than their impact, real or imagined. 'Publications calculated to obstruct or interfere with the administration of justice' amount to contempt, but they are not the only publications which do.[80]

In the result, Evatt J. decided not to impose punishment, but he clearly considered that the letters to the editor which were the subject of complaint exceeded the limits of fair criticism. What is noticeable about the judgment is the failure to explain or justify the view of the law expounded. It is said to reflect earlier decisions — yet the earlier Australian decisions are almost ignored. While justifying the law by reference to protection of the public, Evatt J., unlike the judges in *Nicholls*, sees no necessity for the administration of justice actually to be endangered, or even that the criticism be calculated to interfere with the administration of justice. The emphasis is put on the element of insult or defamation, and the damage to public confidence. Just a few months later in *R v. Dunbabin; ex parte Williams*,[81] the Full High Court endorsed the principles stated by Evatt J. Once again the actions of Mr Kisch and the High Court decision which enabled him to remain in the country were the subject of newspaper comment. The decision occurred at a time of strident anti-communism. Mr Kisch had been invited by the Left to speak at a Congress against war and fascism but the government sought to prevent the entry by administering a language test in Gaelic. Mr Kisch failed the test, but the High Court held that Gaelic was not a European language and hence the test was not valid under the relevant legislation. Thus, the decision was unpopular with the government and large sections of the public. The comments in question were sarcastic attacks on the Kisch and other decisions of the High Court, made in colourful language which suggested that the High Court spent its time searching for 'splits in hair' and 'the precise difference between Tweedledum and Tweedledee.' The judgments are noticeable for lack of any detailed examination of the rationale of the law, other than statements that, to maintain public confidence, publications which detract from the authority of the court will amount to contempt. The emphasis is not on whether the conduct in question impaired in some way the administration of justice. Rather, attention is

[79] *Ibid.* 257.
[80] *Ibid.*
[81] (1935) 53 C.L.R. 434.

placed on maintenance of the authority of the High Court, the importance of which is 'even greater than is the case of Courts under a unitary system of government.'[82]

Rich J., in a famous passage which has been repeated by judges since, regarded as contemptuous interference from

> publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office . . . . The law permits in respect of Courts . . . the fullest discussion of their doings so long as that discussion is fairly conducted and is honestly directed to some definite public purpose.[83]

This clearly represents a considerable limitation on the sort of criticism that is permissible, and must be seen as a new departure rather than a reflection of earlier decisions. The decision reflects the weakness, already identified in relation to the judgment of Martin C.J. in *Re "The Evening News" Newspaper* case, in the argument that repression of attacks can instil respect. The 'democratic' basis is being qualified by insisting that only certain criticism can be permitted, and insisting on judicial dignity, which the judges themselves must uphold.

These two decisions in 1935, thus, mark a new direction in Australia in relation to the law of scandalizing the judges. The decisions were made at a time of social unrest, in response to political criticism of the High Court for its decisions in what were *cause celebres* of the day. The judgments are, as mentioned, noticeable for the lack of detailed reasoning and, by contrast, the amount of dogmatic assertion. Yet the decisions quickly became accepted and were endorsed in 1983 in *Gallagher*[84] without question.

It is interesting to contrast these decisions with other earlier High Court decisions on contempt, and decisions by State Supreme Courts. These decisions, it is suggested, better reflect the attitude to criticism taken in the earlier Australian cases dealt with above. *Nicholls*[85] in 1911 has already been mentioned.

In *Bell v. Stewart*[86] in 1920 the full High Court had considered a contempt prosecution brought under section 83 of the Conciliation and Arbitration Act, alleging wilful contempt by publishing remarks alleging 'lack of judicial knowledge of the facts' in a case before the Conciliation and Arbitration Court. Isaacs and Rich JJ. considered 'scandalizing the court' an exceptional form of contempt as 'the good sense of the community is ordinarily a sufficient safeguard.' Summary punishment for contempt can only be justified

> to protect the public by guarding the administration of justice from any obstruction or interference which might affect its purity, its impartiality or its effectiveness. It is not the personal feelings of the Judge that are to be regarded, nor is it even the dignity of the court that is a proper subject of solicitude; it is the public welfare only, and that is to be sought in maintaining the proper administration of justice.[87]

82 *Ibid.* 443.
83 *Ibid.* 442.
84 (1983) 45 A.L.R. 53.
85 (1911) 12 C.L.R. 280. *Supra* n. 61, p.322 and accompanying text.
86 (1920) 28 C.L.R. 419.
87 *Ibid.* 428.

Rich J. clearly abandoned this view in *Dunbabin*. The other members of the Court (Knox C.J., Gavan Duffy and Starke JJ.) agreed that the words in question could not, 'in the mind of any reasonable man, bring the Court into disrepute.' The section of the Act was, they said 'designed for the protection of the public.'[88] In adopting these views the Court was adopting the argument of Mr Dixon (as he then was), counsel for the appellant, who suggested that for disparagement to constitute contempt it must be 'such as to create a very general belief that the tribunal cannot be trusted.'[89] The emphasis is clearly placed on the administration of justice, an emphasis which it is suggested disappears in later cases.

This attitude of the High Court reflected in *Nicholls* in 1911 and *Bell* in 1920, as has been indicated, was not maintained in 1935. It is interesting to note that in *Porter v. R; ex parte Yea* in 1926 Isaacs J. began to reflect the move towards an emphasis on dignity that culminates in *Dunbabin* with reference to cases of scandalizing as involving 'the direct interference with the constitutional agent of the King in the administration of justice.'[90] He relies on a 1836 Privy Council case, *Beaumont v. Barrett*,[91] which justified the inherent power of a legislative assembly to punish for 'insults and indignity wherever offered' on the ground of self-protection. Isaacs J. does not, it appears, require any calculated or actual interference with justice, although it is of interest that Dixon K.C. in argument had suggested that 'a real and substantial interference with the administration of justice' needs to occur before the court can exercise its contempt jurisdiction.[92]

The change in the expressed basis for the law, having been well established in *Fletcher* and *Dunbabin*, is then applied in subsequent cases with little examination of whether it was an accurate or appropriate statement of the basis for the law in the area.[93] There are exceptions. For instance in Queensland in a case in 1937, *Dunbabin* is hardly mentioned.[94] That case is interesting as it involved a letter to the press criticizing remarks of a judge in a divorce case. It clearly is not a case imputing 'political' motives to judges. The correspondent complained of the perceived cynical attitude of the judge to the institution of marriage reflected by his remark in relation to a *de facto* relationship that 'I suppose they will go and get married and spoil it all.' Macrossan S.P.J. the judge hearing the case and in respect of whose remarks the criticisms had been made, directed proceedings to be taken and imposed fines of 25, 10 and 10 pounds respectively on the three persons concerned. On appeal the majority (Webb and Henchman JJ.) decided there was no contempt. Blair C.J. dissented.

[88] *Ibid.*
[89] *Ibid.* 421.
[90] (1926) 37 C.L.R. 432, 443.
[91] 12 E.R. 740.
[92] (1926) 37 C.L.R. 432, 437.
[93] See for instance *R v. Bolger et al; ex parte Wallace* [1937] 31 Q.J.P. 152 which applied the words of Rich J. in *Dunbabin* exactly.
[94] *R v. Foster; ex parte Gillies* [1937] St. R. Qd 368.

In rather lengthy judgments which review the origin of this area of law, primary emphasis is placed on the Privy Council decision in *Ambard* in 1936.[95] There is little consideration given to the rationale; rather precedent is all that matters. The majority judges did not consider that the evidence showed beyond reasonable doubt that the criticism was malicious or had the object of bringing the administration of justice into disrespect. Henchman J. said

> I do not agree that whatever is defamatory is a proper subject matter for proceedings in contempt. Contempt proceedings are to protect the public, not the Judges or the Court.[96]

The Privy Council in *Ambard*, while not as strident in their statement of the law as the High Court in *Dunbabin*, did nevertheless state a more restrictive rule than contained in their earlier decision in *McLeod* around the turn of the century.

The Privy Council said that:

> provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and are not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.[97]

While this statement at first glance may appear to allow wide-ranging criticism, a closer reading suggests only certain types of criticism are possible. In this sense it is similar to *Dunbabin*. One cannot impute improper motives regardless of any impact or likely impact on the actual administration of justice.

The restrictive approach of the Australian judges was reflected in a number of decisions of the Conciliation and Arbitration Court in the late 1940s.[98] Suggestions that the Court succumbed to union or government pressure were seen as weakening the authority of the Court and had to be punished. The High Court maintained its restrictive view in *R v. Taylor; ex parte Roach*,[99] another industrial case, in 1951. This case concerned remarks made by a union official and distributed in a union circular which attacked the conduct of Kirby J. in the Commonwealth Court of Conciliation and Arbitration. The judge had been sitting in the exercise of his arbitral powers under the Stevedoring Industry Act 1949, and it was argued that the contempt powers of the Court did not extend to a judge in this capacity. The High Court rejected this, saying that contempts that reflect upon a judge 'as an occupant of the office of judge' can amount to contempt even though the remarks arise out of the discharge by a judge or court of industrial powers.[1] The Full Court of the Commonwealth Court of Conciliation and Arbitration imposed a sentence of twelve months imprisonment, which is an unusually severe penalty. The High Court made no comment on this.

[95] *Ambard v. Attorney-General* [1936] A.C. 322.
[96] [1937] St. R. Qd 368, 388, 396.
[97] [1936] A.C. 322, 335.
[98] *Morrison v. John Fairfax* (1945) 54 C.A.R. 716; *Morrison v. Burns* (1945) 54 C.A.R. 724; *Taylor v. Metal Trades Employers Association* (1948) 62 C.A.R. 165; *Taylor v. McPhillips* (1949) 63 C.A.R. 308.
[99] (1951) 82 C.L.R. 587
[1] *Ibid.* 599.

It is of interest that the contempt charge was framed in terms of the definition of scandalizing given by Rich J. in *Dunbabin*. The main judgment given by Dixon, Webb, Fullagar and Kitto JJ. did not expressly refer to this case. Instead, the judges resorted to an 1838 case[2] which regarded words 'importing scorn, reproach or diminution of the court' as sufficient. The case is notable for its complete failure to refer to Australian precedents or to analyse the rationale for the law. All the emphasis is on judicial dignity. While reference is made to the attacks being calculated to undermine confidence in the administration of justice, this is not seen as the core of the offence. Yet it is clear from this case and the earlier Court of Conciliation and Arbitration cases that the industrial area is a peculiarly political area. The application of contempt law to incidents in this area in an attempt to maintain judicial authority has not, it is suggested, been effective. In fact, attempts to apply the law relating to scandalizing in the industrial area only make the law of contempt appear more political and less connected with the actual protection of the administration of justice. This is discussed further below.[3]

Other recent Australian cases confirm the move away from any examination of the rationale of the law and again illustrate a simple acceptance of authority. While the cases regularly trace this area of law back to Lord Hardwicke in 1742[4] and *R v. Almon*[5] in 1765 they then jump to the decisions of the 1930s and subsequently. They thus ignore the significant statements concerning the rationale for the law set out in earlier Australian cases and the restrained application of the law displayed therein. Failure to examine the rationale has led, it is suggested, to a less coherent and harsher application of the law than would probably have resulted if the 'democratic' view with its link to the actual administration of justice had been kept at the forefront. While 'public confidence' continues to be referred to, more often than not, no examination of how or if public confidence would be affected occurs.

A number of Victorian cases in the 1950s provide interesting contrasts in this regard. In *R v. Brett*,[6] O'Bryan J. dealt with criticism in the *Guardian* of the appointment of Mr Sholl as a judge of the Supreme Court. After criticizing the judge as 'a die-hard tory', his life as 'sheltered', his mission as 'defending the positions of power and privilege of the wealthy', the paper concluded that 'the appointment throws a clear light upon the nature of the judiciary — namely the institution forming an integral part of the repressive machinery of the State.' O'Bryan J., as in most of the Australian cases of this and later periods, quotes particularly from *Dunbabin* as to the law. What is of interest, however, are references by O'Bryan J. to what a jury might consider and what an ordinary reader might think.[7] Other judges, despite references to the confidence of the

2 *Miller v. Knox* (1838) 4 Bing. N.C. 593, 594; 132 E.R. 918.
3 See *infra* n.33 and accompanying text.
4 *St James Evening Post* case (1742) 2 Atk 469; 26 E.R. 683.
5 (1765) Wilm 243; 97 E.R. 94.
6 [1950] V.L.R. 226.
7 *Ibid.*

public, have rarely been prepared to consider the actual words in question by reference to the standards of the ordinary reader. In the circumstances he took no action. One sees in this case a clear mingling of defamation concepts with the separate contempt issues.

By contrast Dean J. in the same year had to consider comment critical of Sir Charles Lowe, a Judge of the Court, in his capacity as a Royal Commissioner.[8] The Royal Commission Act had been retrospectively amended in 1949 after the *Guardian* newspaper had attacked the business connections of the Commissioner. The attack came after a Communist Party pamphlet attacking 'Collins House Monopolists' was not allowed to be read at the Commission which was inquiring into the activities of the Communist Party. Dean J. found an attack on the partiality of the judge. His discussion is essentially about whether the facts fit within the words used by Rich J. in *Dunbabin*. The rationale for the law gets little attention.

This trend is repeated in *R v. Collins*[9] in 1954 when Sholl J. (who had been the subject of attack in *Brett*) considered contempt proceedings in relation to publication of alleged scandalous comment in an affidavit. *Dunbabin* and other leading cases are quoted. Sholl J. places emphasis on embarrassment to the Court which allegations of partiality create. If such attacks were permitted

> in the long run such a practice would, of course, tend to destroy the status and dignity of the Courts and be greatly to the disadvantage of the public in consequence.[10]

Sholl J. seems to some extent to erase the usual distinction that is made between attacks on the personal feelings of the judges and attacks on judicial dignity, by his emphasis on the need to avoid judges being distracted and having to endeavour to disregard the critical matter.[11]

In New South Wales several further cases have been reported dealing with scandalizing. They are all noticeable for their reliance on the words of Rich J. in *Dunbabin* that 'publications detracting from authority, impairing the confidence of the public and exciting misgivings' amount to conduct that is scandalous.[12] As in the Victorian cases, reference is made to earlier authorities which support the existence of summary jurisdiction in this area, and the conduct in question is judged against the judicial statements of the law, particularly that of Rich J. In *Ex parte the Attorney-General: Re Truth & Sportsman Ltd*[13] the Court was concerned with newspaper attacks on sentences imposed by a judge in culpable driving cases. While the case was disposed

8 *R v. Arrowsmith* [1950] 5 V.L.R. 78. Also see in relation to attacks on Royal Commissions, *R v. O'Dea* unreported, Federal Court, Davies J., Oct. 83.

9 [1954] V.L.R. 46.

10 *Ibid.* 50.

11 *Ibid.* 49. See also *Attorney-General v. Tonks* [1939] N.Z.L.R. 533 which also placed emphasis on the need to avoid embarrassment (especially Reed J. at 541). This embarrassment is considered contempt not because it actually interferes with the administration of justice or is calculated to do so, but simply because of its tendency to shake public confidence which, without any doubt, must be prevented.

12 (1935) 52 C.L.R. 434, 442.

13 [1961] S.R. (N.S.W.) 484.

of on the ground that criminal proceedings were still *sub-judice* as appeal time had not expired, there was also considerable discussion of scandalizing the court. The Court indicated that the power to punish exists in order to protect 'the due and orderly administration of justice' and 'the rule of law, based on public policy, against scandalizing a court applies to all in the same degree and within precisely the same limitations.'[14] The press has no special privileges.

The Court puts considerable emphasis on the need to prevent 'unfair' discussion and comment. The Court is concerned with the nature of the criticism, the tenor of the articles themselves, the unfair and incorrect presentation of the facts.[15] This further indicates the change in judicial emphasis from looking to the actual impact on the administration of justice or on likely public perceptions to a focus on the words themselves. It is very much as if defamation law concepts were in use.[16] A similar approach is manifest in *Ex parte Attorney-General: Re Goodwin* in 1969.[17] Allegations that a judge had made a 'malicious unwarranted attack (and) showed himself to be an unfit and improper person to preside as judge' contained in letters to the Attorney-General and Registrars was regarded as scandalous by the Court of Appeal. A heavy fine was imposed. An alternative approach would have been for the Court to have acknowledged the comments were untrue, but to have recognized that in the circumstances the public were likely to have known that and hence imposed no fine. This approach would be expected if the actual harm to the administration of justice was given prominence over the words themselves. Instead the emphasis again is on the words which go 'much further than mere strong criticism'.[18] No specific response is given to the argument of Counsel for Goodwin that 'there was no evidence to support a claim that the administration of justice had been or was likely to be prejudiced.'[19]

One cannot but suspect that in recent years judges have been ready to regard conduct as amounting to scandalous conduct and contempt in circumstances where a libel might well have been committed, because of judicial reluctance to bring libel actions.[20] This is a misuse of the law of contempt.

This attitude, however, in recent cases does seem to have led the judges to ignore the original rationale for the law in this area. The law of contempt in general was never designed as a substitute for the law of libel although, as noted above, scandalizing does have close historic links with seditious libel. Contempt law was and is designed to prevent conduct that interferes with or impairs the administration of justice. What the judges seem unable to accept, however, is that allegations of partiality should be able to be made, despite the statement by Griffith C.J. in *Nicholls* that not every allegation of partiality is

14 *Ibid.* 489.
15 *Ibid.*
16 See also O'Bryan J. in *R v. Brett* [1950] V.L.R. 226 who also used defamation concepts but focussed on what the ordinary person would have thought, rather than on the content of the words in isolation.
17 [1969] 2 N.S.W.R. 360.
18 *Ibid.* 362.
19 *Ibid.*
20 A.L.R.C. *Research Paper No. 5, Reference on Contempt* (1984) para. 134-5.

contempt.[21] More recent judgments see any such imputation *per se* and without more as calculated to prejudice the administration of justice.[22]

In *Attorney-General (NSW) v. Mundey*[23] in 1972, Hope J.A. tried to interpret the law in the area of scandalizing so as to reflect changing attitudes. The emphasis is on the need to balance 'the interests of the administration of justice' with 'the right of free speech and the right to criticize.'[24] Hope J.A. said however that 'the law has undoubtedly imposed qualifications on the right of criticism and they are qualifications that relate to the effective performance by courts and judges of their role in the administration of justice.' He recognized, however, that 'these qualifications are ones the boundaries of which are difficult to define with precision, and indeed in respect of which courts have from time to time had different attitudes.'[25] While finding it difficult to reconcile *Dunbabin* with the decisions which allowed criticism, Hope J.A. was prepared to follow the principles expounded therein.[26] So instead of asking what was the actual or calculated impact of particular words on the administration of justice, Hope J.A. adopts the approach of trying to see if the words in question are 'merely scurrilous abuse' or, using words from *Dunbabin*, they 'excite misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.'

The facts in *Mundey* involved what might broadly be classed as political comment on the handling of charges brought in relation to demonstrations against the South African rugby tour. The judge was accused of being 'racist', but also it was alleged that he changed his mind due to threat of a union strike if he had sent the men concerned to gaol. Hope J.A. regarded the first comment concerning racism as part of an attack on society as a whole, and not contempt. He concluded that the latter comment 'must tend to induce a lack of confidence in the "ordered and fearless administration of justice", as it implied partiality and therefore amounted to contempt.[27] The penalty imposed was to pay two-thirds of the plaintiff's costs.

This tendency in the recent cases automatically to regard certain statements as contempt, regardless of any particular impact on the administration of justice, was certainly reinforced by *Gallagher v. Durack*.[28] The judge at first instance, Northrop J.,[29] the Full Federal Court on appeal[30] and the High Court accept that a suggestion that a party has the power to direct a court what to do by outside action constitutes a contempt.

> That conduct tends to detract from the authority and influence of judicial determinations and of necessity must impair the confidence of the public in the courts' judgment since it creates misgivings as to the integrity propriety and impartiality necessary to the exercise of judicial office.[31]

21 *Supra* n.62, p.322.
22 As well as the Australian cases discussed in the text see *Attorney-General v. Tonks* [1939] N.Z.L.R. 533.
23 [1972] 2 N.S.W.L.R. 887.
24 *Ibid.* 906.
25 *Ibid.* 908.
26 *Ibid.* 910.
27 *Ibid.* 915, quoting from *R v. Fletcher; ex parte Kisch* (1935) 52 C.L.R. 248, 257.
28 (1983) 45 A.L.R. 53.
29 (1982) 44 A.L.R. 272.
30 (1982) 44 A.L.R. 477.

The emphasis is on what the words mean, and once the judges are satisfied that they meant the judge was overawed by the union action that is enough to constitute contempt. This is a far departure from the emphasis of the earlier cases on what was the *effect* or likely effect of the words. One also notices a willingness to impose a harsh penalty (in this case 3 months imprisonment), largely related to the background and circumstances surrounding the defendant as a prominent union official. The aspect of penalty will not be considered further, however, in this paper.

This approach was endorsed by the High Court without the consideration that the issue deserved. Their decision was given after only six days consideration. Again reference is made to the need to reconcile free speech and the need to repress 'imputations which, if continued, are likely to impair (the) authority' of courts.[32] Yet *Dunbabin* is seen as an adequate statement of the law and consistent with earlier decisions. This is a view which the present writer would not share, as the preceding discussion has attempted to show. The High Court majority believe, without any indication of a doubt, that public confidence in the administration of law and justice can be undermined by statements imputing partiality and that, therefore, they must be stopped. There is no attempt to balance the competing interests identified by Hope J. A. or Murphy J. despite statements that the existing law does in fact establish such a balance. As suggested at the beginning of this article, the judges have created a myth or ideological assumption which they assert as fact, with the result that any focus on the actual or likely impact of words or any reference to what the ordinary person might think has disappeared. One has what sociologists might call a 'reification' concerning the likely consequence on law and order of certain criticism of the judiciary.[33] While emphasis is placed on the need to exercise caution in application of the contempt law in this area and it is only certain criticisms *e.g.* scurrilous abuse or allegations of impartiality which are prevented, nevertheless the judges have transformed public perceptions of what is acceptable in this area.

In another recent High Court case, *Lewis v. Ogden*, involving a charge of contempt brought against counsel for wilfully insulting a judge in an address to a jury, the Court confirmed its willingness to regard an insult to a judge as 'something which necessarily interferes, or tends to interfere with the course of justice.'[34] The Court regarded these as elements of the common law of contempt in the face of the Court. One notes here the same readiness, as has been remarked on, to find interferences without proof. The Court cited some English cases, including an 1864 case but made no mention of recent Australian contempt cases. On the facts of the case, the Court was prepared, however, to find the conduct 'extremely discourteous, perhaps offensive, and deserving of rebuke by His Honour, but in our view it could not be said to constitute con-

31 44 A.L.R. 280 *per* Northrop J. See also *Viner v. B.L.F.* [1982] 2 I.R. 177.
32 (1983) 45 A.L.R. 53, 55.
33 Gabel, P., 'Reification in Legal Reasoning' (1980) 3 *Research in Law & Sociology* 25.
34 (1984) 58 A.L.J.R. 342, 344.

tempt.'[35] The judgment concluded with a number of comments, one of which was that the contempt power is exercised 'to vindicate the integrity of the Court and of its proceedings, it is rarely, if ever, exercised to vindicate the personal dignity of a judge.'[36] It is suggested that not all the cases examined above would support this latter conclusion. The ideological myth concerning the need to protect judges from insult is confirmed.

What lies behind this ideological myth, and the importance of maintaining it intact is well demonstrated by the judgment of Northrop J. in *Viner v. Builders Labourer's Federation.*[37] In that case it was alleged that comments by Mr Fraser the Prime Minister were scandalous in that they suggested the executive could control the decision in a case, in which it was a party, seeking the deregistration of the union. The judge rejected that interpretation of the comment, but went on to give an exposition on the importance of an independent judiciary and on how any attempt to weaken that independence 'should be opposed most vigorously.'[38] Not only, it is argued, do allegations of partiality or subjection to influence made against a judge undermine public confidence in the administration of justice, an assertion that as has been shown the cases regularly support, but such allegations strike at one of the foundations of the State as it is portrayed to its citizens. If the notion of an independent judiciary is allowed to be questioned by suggestions to the contrary, the existing constitutional order is seen as under threat. Thus, it is suggested is one of the main motivations behind the approach taken in the more recent contempt cases involving politically or ideologically motivated comments. Thus it was the suggestion that the courts were involved in the class struggle that no doubt aggravated in the eyes of the judges the conduct of Mr Gallagher. But as Murphy J. noted, to attempt to penalize all allegations linking the courts with class struggle is bound to fail as 'there would not be enough gaols.'[39] Yet it is generally in these cases involving allegations of partiality on class grounds that the judges impose the harshest penalties.[40] The Privy Council recently took a similar view of allegations that a judge was biased in favour of wealthy companies against an injured worker.[41] The emphasis is on the words and not on their actual impact.

There are scandalizing cases where the criticism is not so closely related to broader social or political issues, but rather the result of individual dissatisfaction by an aggrieved litigant. The most recent Australian case like this is *Regina and M*[42] in the Family Court. This case involved a dissatisfied litigant who distributed pamphlets containing 'calumnies on judges, vituperation of this court and the High Court, and other vulgar abuse.' Elliott J. refers to recent English cases which refer to the need to allow public criticism of the judiciary.[43] But —

35 *Ibid.* 346.
36 *Ibid.*
37 [1982] 2 I.R. 177.
38 *Ibid.* 183.
39 (1983) 45 A.L.R. 53.
40 In *Roach* 1 years imprisonment; in *Gallagher* 3 months imprisonment; even, as in *Mundy*, the penalty of costs can be significant.
41 *Lutchmeeparsad Badry v. D.P.P.* [1983] 2 W.L.R. 161.

> at a certain point comment may pass beyond criticism and become personal abuse and denigration, and at this point the public interest becomes involved. Although, in general, courts may treat insults with disdain, when they become gross they may be calculated to or tend to lower the repute of the court or judges and so undermine public confidence in due administration of justice.[44]

Significantly, however, Elliott J. goes on to say that a serious contempt has been committed for the litigant 'defamed' the judges. The judgment is a classic illustration of the trend outlined above. The argument that abuse of judges undermines administration of justice is accepted as axiomatic, without evidence. In fact the judge seems to say that intended insults must, without more, be taken as calculated to undermine public confidence in the administration of justice. Throughout, the emphasis is on the defamatory nature of the words. This case highlights the way in which contempt actions are used as substitutes for libel actions. The case was, however, conducted against a background of violence against the court and some judges and this was certainly seen as adding to the gravity of the offence. Yet the litigant had apparently distributed similar pamphlets to a wide range of public officials over a number of years previously without any warning or action being taken. The litigant was also found guilty of contempt by bringing pressure to bear on a particular judge by writing a letter enclosing a copy of the pamphlet. While found guilty on this count, no penalty was imposed, even though one might regard that form of contempt, directed as it is to the actual administration of justice, as a more serious form of contempt than scandalizing. In relation to the scandalizing a suspended sentence of imprisonment for 3 months was imposed. An appeal to the Full Family Court on the question of penalty was dismissed.[44A]

While in these cases involving dissatisfied litigants the independence of the judiciary may not have been directly challenged, the cases show a sensitivity to maintaining judicial dignity and respect free from verbal attack. This is just as important an ideological assumption as is the maintenance of their independence. But instead of honestly acknowledging this by resort to seditious libel, or criminal libel, the courts (and the executive who often bring the action) resort to scandalizing.

Conclusion

It is suggested that what is needed is a fundamental rethink of the rationale of the law in this area — a rethink that goes back and looks at the earlier Australian authorities. It is suggested that the present approach is very much a substitute for libel actions and so focuses on the individual judge and the words themselves despite assertions that it is not the individual judge for whose benefit the action exists. The anomaly, of course, is that scurrilous abuse about a judge but not related to his judicial office may well have more impact on public confidence in the judicial system than any other, yet it is outside the

[42] Unreported, 53974 of 1984, judgment delivered August 1984.

[43] *R v. Commissioner of Police; ex parte Blackburn* (No. 2) [1968] 2 Q.B. 150; *Morris v. Crown Office* [1970] 2 Q.B. 114.

[44] Unreported Judgment, August 1984, pp.2-3.

[44a] *In the Marriage of M and Attorney-General of the Commonwealth*, unreported, appeal no. 188 of 1984. Judgment delivered 6 February 1985.

scope of the present action for scandalizing the judges.

Despite the Australian path which has been taken, and which it is suggested is in error, the New Zealand Court of Appeal seems more conscious of the complex issues involved. In *Solicitor-General v. Radio Avon* in 1978[45] the law in this area was restated in quite different terms from that in *Dunbabin*. Yet in *Gallagher* this decision was not referred to by the High Court. The Court of Appeal saw the whole area of contempt law as founded on the need to ensure the proper administration of justice and the law relating to scandalizing as designed to prevent conduct calculated to undermine public confidence in the proper functioning of the courts. The Court insisted, however, that one must on the facts establish 'beyond reasonable doubt that there was a real risk, as opposed to a remote possibility that the broadcast item would undermine public confidence in the administration of justice.'[46] This emphasis on the need for evidence of risk is in contrast to the Australian approach which is, as indicated, to focus on the meaning of the words and whether they are of a particular type. (Although in *Gallagher* the likely impact of the words was seen as relevant in relation to the question of penalty). The New Zealand court also contemplated a defence of justification. Yet it is suggested that if the real rationale for the law is the preservation of the administration of justice and a real risk of prejudice must be demonstrated, then such a defence does not logically appear relevant. At the same time the New Zealand court did not adopt the United States approach, championed by Murphy J., of looking for a 'clear and present danger' which reflects a primary concern with questions of free speach.[47] While the New Zealand decision cannot be seen as a radical departure from earlier decisions, it is at least cognisant of the need for perhaps some modification of the law in this area and the need to tie it, with other contempt laws, to real interference in the administration of justice.

It is suggested that the Australian cases show an almost complete grounding for the law in this area in a 'democratic' conception of law as an embodiment of the interests of the community. This common grounding does not, however, lead to a common approach either in terms of what criticism is permissible, or how repressive the judges should be in terms of penalty. The cases reflect a fluctuation in the extent to which the judges have confidence in the legal system to survive attacks on it. During a relatively short period the judges were prepared to accept that criticism, even to the extent of imputations of partiality, need not bring the administration of justice to an end. The more prevalent approach and the one most recently adopted by the High Court, sees an imputation of partiality as sufficient in itself to amount to contempt. One cannot but see this as almost a substitute defamation action to protect the reputation of a judge. If this is so, it seems quite misplaced as part of the law of contempt.

It is suggested that a new offence narrowly tailored to actual interference with the administration of justice is required. The focus would not be on the

[45] [1978] N.Z.L.R. 225.
[46] *Ibid.* 234.
[47] This test was set out in *Bridges v. California* 314 U.S. 252 (1941).

nature of the words, but on the actual effect of any alleged scandalous remarks. No assumptions would be made that certain words automatically threaten the administration of justice. In this way, the law could be taken back to the rationale given in some of the cases during the relaxed period at the beginning of this century. It would also better reflect the rationale given for the law by commentators such as Borrie and Lowe who deal with it under the heading of 'Publications interfering with the due course of justice as a continuing process.'[48]

It is of interest that the Report of the Commonwealth Parliamentary Joint Committee on Parliamentary Privilege has recommended abolition of the equivalent offence in relation to remarks about Parliament and its members.[49] It is to be hoped that Australian courts will also be set free to be the subject of criticism, even if strong and challenging of some of the ideological assumptions on which our legal system is said to operate. Any reform needs to address as well the procedural issue of the summary jurisdiction of the courts and the question of penalty. Even in the absence of statutory changes, it is hoped that the courts will themselves have another look at the law and tie it to its real rationale, the protection of the administration of justice. Without such reforms one can only conclude that scandalizing as a form of contempt 'resembles some antique weapon which will probably do more harm to those who use it than to those against whom it is used.'[50] This article has sought to demonstrate this.

Postscript

A further scandalizing case, *Trnka v. Trnka*[51] was recently decided in the Family Court. A brochure entitled 'Contempt' was published with the intention of sending it to people in the television industry. It outlined a proposed television mini-series based on an actual case in the Family Court, identified the judge in the case and contained a statement that the judge in making the custody order was influenced by the wealth and influence of her husband. Ross-Jones J. relied on the usual statement by Rich J. in *Dunbabin* and on *Gallagher v. Durack*. He considered that 'whether a judge was identified or not, I am satisfied that the whole tendency and object of the Brochure is to disparage the authority of the Court and weaken confidence in it.' The fact that the brochure, while based on fact, was supposed to describe a fictionalised incident for the purposes of a television drama was not significant.

The case again illustrates the sensitivity of judges to any public suggestion that the ordinary and actual differences in society might in fact be relevant in the administration of justice. Such suggestions are opposed to what is supposed to exist under the idealistic and ideological position that all are equal before the law and therefore are to be resisted. The judge imposed a $2,000 good behaviour bond for 2 years on the principal respondents, plus ordered them to pay the applicant's costs. This cannot be regarded as a nominal sentence.

48 *Supra* n.9, p.314.
49 Parliamentary Paper 000/1984.
50 (1913) 33 N.Z.L.R. 545, 563 *per* Williams J.
51 Unreported, judgment delivered 26 July 1985; judgment on sentence, 13 September 1985.