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# THE CASE FOR ABOLISHING THE OFFENCE OF SCANDALISING THE JUDICIARY


## Abstract

This article assesses the philosophical foundations and the practical remit of the common law offence of scandalising the judiciary (also known as 'scandalising contempt'), and finds that the continued existence of this offence as presently constituted cannot be justified. The elements and scope of this offence, it is suggested, are ill-defined, which is a matter of great concern given its potentially fierce penal consequences. Moreover, given the extent to which it may interfere with free expression of opinion on an arm of government, the offence's compatibility with the implied freedom of political communication guaranteed by the *Australian Constitution* is also discussed — though it is noted that in most instances, prosecutions for the offence will not infringe this protection. The article concludes by suggesting that the common law offence must either by abolished by legislative fiat or replaced by a more narrowly confined statutory offence. It is suggested that an expression of genuinely held belief on a matter of such profound public interest as the administration of justice should not be the subject of proceedings for contempt of court.


## I Introduction

'How far can one go in criticising a Judge?'[1] This is the question at the heart of the common law offence known as scandalising the judiciary — an offence that may sound 'wonderfully archaic',[2] yet is regrettably anything but. This article attempts to chart the metes and bounds of this offence and to assess its empirical application in Australia and elsewhere. It is concluded that the offence is both vague in definition and savage in its potential punitive consequences. Given the offence's capacity to seriously impinge on a principle as fundamental as freedom of expression, its compatibility with the *Australian Constitution's* implied freedom

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1 *S v Mamabolo* [2001] 3 SA 409, 413; [2001] ZACC 17 [1] (Kriegler J) (Constitutional Court) ('*Mamabolo*').

2 United Kingdom, *Parliamentary Debates*, House of Lords, 2 July 2012, vol 738, col 561 (Lord Beecham).

of political communication is also considered. It is ultimately submitted that the offence ought to be abolished by legislative fiat, or at very least seriously circumscribed in its operation.

## II Nature of the Offence

### A *Situating the Scandalising Offence in the Contempt Landscape*

One eminent legal historian has observed that prosecutions for scandalising contempt have typically 'arisen when free comment about judges has become too free for the taste of the bench',[3] and they continue across the Commonwealth of Nations to this day. But what is scandalising contempt? Contempt of court in its criminal strain essentially takes one of two forms: *in facie curiae* (contempt in the face of the court) or *ex facie curiae* (contempt committed outside the courtroom).[4] The scandalising offence is of the latter form; but what sets this offence apart from other forms of contempt is that scandalising contempt 'does not relate to any *specific* case either past or pending'.[5] Rather, it may be triggered by comments 'made *outside of* court and *not* relating to ongoing proceedings'[6] that are said to 'undermine the authority of the courts and public confidence in the administration of justice'.[7]

### B *Safeguarding the Administration of Justice?*

With regard to the offence's alleged rationale, it is said that there is an 'overriding interest in protecting the public's confidence in the administration of justice'.[8] Courts have repeatedly stressed that the harm against which the scandalising offence purports to guard is not harm to the emotional wellbeing of judges as individuals, but rather to the administration of justice — those judges being 'the channels by which the King's justice is conveyed to the people'.[9] The judiciary is said to require special

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3 Douglas Hay, 'Contempt by Scandalizing the Court: A Political History on the First Hundred Years' (1987) 25(3) *Osgoode Hall Law Journal* 431, 433.

4 See, eg, *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 364 (Dixon CJ, Fullagar, Kitto and Taylor JJ) ('*McRae*').

5 *Chokolingo v A-G (Trinidad and Tobago)* [1981] 1 WLR 106, 111 (Lord Diplock) (emphasis added) ('*Chokolingo*'). See also *Mamabolo* (n 1) 441 (Sachs J).

6 *Mamabolo* (n 1) 441 (Sachs J) (emphasis added). See also *Solicitor-General (NZ) v Radio Avon Ltd* [1978] 1 NZLR 225, 230 (Richmond P) ('*Radio Avon*'); *Li Shengwu v A-G (Singapore)* [2019] 1 SLR 1081, 1112 (Steven Chong JA).

7 *Chokolingo* (n 5) 111 (Lord Diplock).

8 *A-G (Singapore) v Chee Soon Juan* [2006] SGHC 54, [45]; [2006] 2 SLR(R) 650, 664 (Lai Siu Chiu J) ('*Chee Soon Juan*').

9 *R v Almon* (1765) Wilm 243, 256; 97 ER 94, 100 (Wilmot J); *McRae* (n 4) 372.

protection in this respect because it is 'the weakest arm of government', lacking both parliament's ability to raise revenue and the executive's coercive powers.[10]

The stakes in matters constituting scandalising contempt are said to be high indeed: should such contempt go unpunished, this would 'shake the confidence of litigants and the public in the decisions of the Court' in question 'and weaken the spirit of obedience to the law' more generally.[11] In this connection, some authorities stress that the harm done is not to the Court, but 'to the public by weakening the authority … of a tribunal which exists for their good alone'.[12] With respect to their Honours, this seems a rather contrived view of the nature of political institutions in modern society. An Ontarian Court spoke more realistically of a scandalising prosecution as 'a matter which concerns the State', viz, 'whether there is an offence against the State itself in its administration of justice'.[13]

It is true that a loss of public confidence in the municipal court system's capacity or willingness to administer justice efficiently and without fear or favour is a deeply undesirable outcome. Public confidence is regarded as foundational for the simple reason that it is 'the ready acceptance' by ordinary citizens of orders made by judges that prevents the courts from sliding into popular irrelevance.[14] Once lost, such confidence is difficult to restore, and one need only look to the many nations where such a loss of confidence has occurred — where courts are regarded as possessing about equivalent utility to 'a door in the middle of an open meadow'[15] — to observe the disastrous social and economic implications of such an eventuality. However, this article argues that the scandalising offence is not necessary to avert this loss of confidence.

### C *Judges Cannot Respond to Criticisms?*

Another justification for the retention of the scandalising offence is the fact that judges may regard it as either inappropriate for, or unworthy of, their office to publicly respond to critics of the courts (by, say, writing letters to the editor of a newspaper), and that there may seem to be no 'official' channel through which judges may issue such responses.[16] Lord Denning MR remarked that 'from the nature of our office, we

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10 See generally Marilyn Warren, 'Does Judicial Independence Matter?' (2011) 150 (Summer) *Victorian Bar News* 12, 18; Emilios Kyrou, 'The Independent, Low Profile Third Arm of Government' (2017) 91(12) *Law Institute Journal* 32.

11 *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434, 445 (Rich J) ('*Dunbabin*').

12 *A-G (NSW) v Bailey* (1917) 17 SR (NSW) 170, 186 (Sly J). See also *Re Brookfield* (1918) 18 SR (NSW) 479, 488 (Cullen CJ).

13 *Re R v Solloway; Ex parte Chalmers* [1936] OR 469, 479–80 (McTague J).

14 *Gupta v Union of India* [1982] AIR (SC) 149, 526 (Pathak J).

15 Martin Krygier, 'The Hart–Fuller Debate, Transitional Societies and the Rule of Law' in Peter Cane (ed), *The Hart–Fuller Debate in the Twenty-First Century* (Hart Publishing, 2010) 107, 122.

16 *Chee Soon Juan* (n 8) [46] (Lai Siu Chiu J). See also Michael Kirby, 'Attacks on Judges: A Universal Phenomenon' (1997) 72(8) *Australian Law Journal* 599, 605–6.

cannot reply to their criticisms'.[17] With respect to the judiciary, this difficulty may be readily overcome, and there are signs that judges' practice in this respect is changing. The modern judiciary has developed 'defensive techniques',[18] viz, means by which 'the system explains itself to the community'.[19] Lord Judge has remarked that 'the days when … communication between the judiciary and the media was regarded as anathema' are long past, and judges and journalists 'can and should' communicate to 'ensure the open administration of justice'.[20] Indeed, Sir Daryl Dawson observed that since the 1960s judges have often availed themselves of newspaper column inches to respond to criticism of the judiciary.[21] In England, the Lord Chief Justice periodically holds 'press conferences to address issues of judicial administration' and to issue 'public statement[s] in answer to criticisms, where appropriate'.[22] Victorian County Court judges recently took to the television airwaves to counter suggestions in the media 'that courts are too soft'.[23] Bearing these factors in mind, much of the force of the 'judges-cannot-reply' argument for retention falls away.

### D *Geography?*

Singaporean courts have justified retention of the scandalising offence by reference to the nation's 'small geographical size'[24] (viz, that popular disquiet with the judiciary would spread rapidly in such a jurisdiction — a justification also used by the Privy Council on appeal from the Windward Islands).[25] Further, it is suggested that 'the fact that in Singapore, judges decide both questions of fact and law'.[26] Yet even if one accepts the legitimacy of these two rationales in the Singaporean context

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17 *R v Commissioner of Police of the Metropolis; Ex parte Blackburn [No 2]* [1968] 2 QB 150, 155 (Lord Denning MR).

18 JD Heydon, 'Does Political Criticism of Judges Damage Judicial Independence?' (2018) 37(2) *University of Queensland Law Journal* 179, 180.

19 Murray Gleeson, 'Who Do Judges Think They Are?' (1998) 22(1) *Criminal Law Journal* 10, 15.

20 Lord Judge, *The Safest Shield: Lectures, Speeches and Essays* (Hart Publishing, 2015) 157. See also Kirby (n 16) 599.

21 Sir Daryl Dawson, 'Judges and the Media' (1987) 10(1) *University of New South Wales Law Journal* 17, 27.

22 Lord David Pannick, '"We Do Not Fear Criticism, Nor Do We Resent It": Abolition of the Offence of Scandalising the Judiciary' [2014] (Jan) *Public Law* 5, 10.

23 Tineka Everaardt, 'County Court Judges Defend Judicial System Amid Calls for Overhaul' *9News* (online, 26 September 2018) <https://www.9news.com.au/2018/09/26/18/45/victorian-county-court-judicial-process-inside-look-judges>. See also Marilyn Warren, 'Chief Justice's Comments on the Appeals Process and Published Judgments in Response to Questions from the Herald Sun Newspaper' [2010] (1) *Victorian Judicial Scholarship* 37 <http://www5.austlii.edu.au/au/journals/VicJSchol/2010/37.pdf>.

24 *A-G (Singapore) v Hertzberg Daniel* [2008] SGHC 218, [33] (Tay Yong Kwang J) ('*Hertzberg Daniel*').

25 *McLeod v St Aubyn* [1899] AC 549, 561 (Lord Morris) ('*McLeod*').

26 *Hertzberg Daniel* (n 24) [33] (Tay Yong Kwang J).

(and acceptance is not universal),[27] neither rationale is applicable in Australia, which is comparatively much larger and retains jury trials.[28] At any rate, as even a Singaporean court has recently conceded, advances in telecommunications technology have rendered 'geographical size' largely irrelevant in this context 'for the very simple reason that even in a geographically large jurisdiction, information can still be disseminated both quickly and widely'.[29] A scurrilous Tweet or WhatsApp message about, say, alleged curial misconduct is transmitted more or less instantly, regardless of whether the sender and recipient are separated by the breadth of a small island or of an entire continent.

### E *Is the Offence Obsolete?*

The scandalising offence has on several occasions been confidently declared moribund, only for it to later re-emerge from beyond the proverbial crypt. In 1899, the Privy Council remarked that the offence was 'obsolete' in England,[30] only for proceedings to be brought against a Birmingham publisher the following year.[31] In 1984, Lord Diplock once again provided assurances that the offence was 'virtually obsolescent' in Britain,[32] only for scandalising contempt to be revitalised in 2012 by an attempt to prosecute a former government minister for describing a judge as 'off his rocker'[33] — sparking a media furore that led to the offence's statutory abolition. A British Columbian judge felt able to declare in 1990 that 'the offence … seems to have disappeared … from the judicial horizon in this country'.[34] However, notwithstanding his Honour's optimism, prosecutions have in fact continued across Canada.[35] In the first two decades of the 20th century, the High Court of Australia twice referred to the scandalising offence in England as falling into desuetude[36] — only for a newspaper editor to be successfully prosecuted in the 1930s for an article

27 Kevin YL Tan, 'Defaming Politicians, Scandalizing the Courts: A Look at Recent Developments in Singapore' in Andrew T Kenyon, Tim Marjoribanks and Amanda Whiting (eds), *Democracy, Media and Law in Malaysia and Singapore: A Space for Speech* (Routledge, 2014) 105, 113–15.

28 *Australian Constitution* s 80. See generally *Alqudsi v The Queen* (2016) 258 CLR 203.

29 *Shadrake Alan v A-G (Singapore)* [2011] SGCA 26, [31]; [2011] 3 SLR 778, 793 (Andrew Phang Boon Leong JA).

30 *McLeod* (n 25) 561 (Lord Morris).

31 *R v Gray* [1900] 2 QB 36 ('*Gray*').

32 *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 347 (Lord Diplock).

33 United Kingdom, *Parliamentary Debates*, House of Lords, 2 July 2012, vol 738, col 556–7 (Lord Pannick).

34 *R v High Sierra Broadcasting Ltd* [1990] BCJ No 1998; [1990] BCSC 1542 (17 September 1990) (MacDonald J).

35 *A-G (Newfoundland) v Hanlon* (2000) 195 Nfld & PEIR 241 (Supreme Court of Newfoundland); *R v Gillespie* [2001] 3 WWR 125 (Court of Queen's Bench of Manitoba) ('*Gillespie*'); *R v Prefontaine* [2003] 5 WWR 367 (Court of Queen's Bench of Alberta).

36 *R v Nicholls* (1911) 12 CLR 280, 285 (Griffith CJ); *Bell v Stewart* (1920) 28 CLR 419, 428–9 (Isaacs and Rich JJ).

describing the High Court as a 'pestilent' institution whose decisions 'pleased no one but "the Little Brothers of the Soviet [and kindred intelligentsia]"'.[37] Five decades later, a majority of the High Court confirmed the vitality of the law of scandalising contempt in *Gallagher* (notwithstanding a furious dissent from Murphy J).[38] However, *Gallagher* was a (failed) application for special leave, and as members of the High Court have recently reiterated, remarks made in the published reasons for the dismissal of such applications are of no precedential value 'and are binding on no one'.[39] Nevertheless, Mason CJ seemingly accepted the offence as part of the law of Australia in *Nationwide News*.[40] More recently, the High Court was almost called upon in *Re Colina* to consider whether 'the offence of scandalising the court was obsolete', but counsel ultimately dropped this argument at trial.[41] Despite John Basten assuring an audience in 2005 that 'prosecutions for … scandalising a court are rare in recent times',[42] and notwithstanding what might be construed as ambiguous High Court authority, the offence has 'made something of a comeback' in this country.[43] The Family Court recently reiterated its jurisdiction to punish where a publication 'contemptuously scandalises th[e] [c]ourt',[44] as have the New South Wales and Queensland Courts of Appeal,[45] the Supreme Courts of New South Wales and Western Australia[46] and the New South Wales Land and Environment Court.[47]

The jurisdiction to punish the scandalising offence 'is always potentially a political' one.[48] And indeed, courts around the Commonwealth of Nations have often used purportedly febrile political situations to justify the existence of the jurisdiction. During

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37 *Dunbabin* (n 11) 444 (Rich J).

38 *Gallagher v Durack* (1983) 152 CLR 238, 243–5 (Gibbs CJ, Mason, Wilson and Brennan JJ); 245–53 (Murphy J) ('*Gallagher*').

39 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 133 (Kiefel and Keane JJ).

40 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31–2 (Mason CJ) ('*Nationwide News*').

41 *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 405–6 (Kirby J) ('*Re Colina*').

42 John Basten, 'Court and Media Relationships' (Speech, National Judicial College Conference, 30 October–4 November 2005) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Basten/basten_2005.10.30c.pdf>.

43 *Howard v Gallagher* (1988) 18 FCR 233, 249 (Gray J).

44 *Xuarez v Vitela* [2012] FamCA 574, [50], [56] (Forrest J).

45 *Mahaffy v Mahaffy* (2018) 97 NSWLR 119, 156–7 (Simpson JA); *Markan v Queensland Police Service* [2015] QCA 22, [13]–[14] (Jackson J).

46 *Yeshiva Properties No 1 Pty Ltd v Lubavitch Mazal Pty Ltd* [2003] NSWSC 775, [48]–[49] (Young CJ in Eq); *Re Glew; Ex parte A-G (WA)* [2014] WASC 107, [30]–[32] (EM Heenan J).

47 *Environment Protection Authority v Pannowitz* (2006) 164 A Crim R 325, 341–2 (Lloyd J).

48 Tim Hamlett, 'Scandalising the Scumbags: *The Secretary for Justice vs the Oriental Press Group*' (2001) 11(3) *Asia Pacific Media Educator* 20, 29.

the Malayan Emergency,[49] a Kuala Lumpur Court convicting a newspaper publisher held that 'the continued defiance of the forces of law and order by bands of armed terrorists' made it 'more than ever essential that the confidence of the community' in judicial integrity 'should be sustained at the highest pitch'.[50] Admittedly, a prosecution launched amid a violent communist insurgency is an extreme example of the scandalising jurisdiction at work. However, even in the comparatively placid political context of present-day Australia, there still lurks the danger of actions for scandalising contempt having unpalatably political implications, as it involves courts setting limits on acceptable forms of discourse about public institutions (namely, courts themselves). In a highly publicised 2017 incident, for instance, three federal ministers were brought before the Victorian Court of Appeal following the publication of statements critical of that Court's sentencing practices[51] — in part because the Court was 'concerned that some of the statements purported to scandalise the court', viz, were 'calculated to improperly undermine public confidence in the administration of justice in [Victoria]'.[52]

## III Issues with the Offence

### A *No Clear Definition of the Sort of Speech it Covers*

The Constitutional Court of South Africa, in upholding a conviction for the scandalising offence, admitted that it may be impossible to formulate a 'litmus test' to determine in every instance 'whether the mark of acceptable comment has been overstepped'.[53] In *Ahnee v Director of Public Prosecutions (Mauritius)*,[54] the Privy Council considered whether the somewhat amorphous nature of the scandalising offence violated the 'requirement that in criminal matters any law must be formulated with sufficient precision to enable the citizen to regulate his conduct'.[55] While conceding that the offence is 'sui generis and … not part of the ordinary criminal

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49 A conflict centred on a communist insurgency against first the British colonial authorities in the Federation of Malaya and later the independent Malaysian state that ran from 1948 to 1960.

50 *Public Prosecutor (Malaya) v Palaniappan* (1949) 15 MLJ 246, 248 (Spenser-Wilkinson J).

51 Simon Benson, 'Judiciary "Light on Terrorism"', *The Australian* (online, 13 June 2017) 6.

52 Victorian Court of Appeal, 'Statement of the Court of Appeal in Terrorism Cases: *CDPP v Besim* and *CDPP v MHK*' *Supreme Court of Victoria* (Web Page, 17 October 2017) <https://www.supremecourt.vic.gov.au/contact-us/news/statement-of-the-court-of-appeal-in-terrorism-cases>. See also *DPP (Cth) v Besim [No 2]* (2017) 52 VR 296, 297–8 (Warren CJ, Weinberg and Kaye JJA).

53 *Mamabolo* (n 1) [26] (Kriegler J).

54 [1999] 2 AC 294 ('*Ahnee*').

55 Ibid 306 (Lord Steyn), quoting *Sunday Times v United Kingdom* [1979] 2 Eur Court HR 245.

law', the Board nevertheless concluded that sufficient clarity could be obtained from the body of existing case law.[56] With respect to their Lordships, this author cannot agree. It has been said that one of the cardinal principles of the criminal law is that 'no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it',[57] and the vagueness with which the scandalising offence has been defined offends this principle.

One of the elements of scandalising contempt repeatedly referred to by courts is that the impugned comments amount to 'scurrilous abuse'.[58] Assurances that legitimate criticisms of judges are permissible are often followed by declarations that '[t]here is, however, a limit' — defined in only the vaguest terms — and that the criticisms in question 'exceeded that limit'.[59] This leaves future commentators little practical guidance on whether they too may inadvertently violate this limit. Martin, surveying the Canadian cases, suggests that courts' inconsistent decisions — with one court holding a description of a curial decision as 'silly' to constitute scandalising contempt, but another acquitting a defendant who described a coronial proceeding as 'one of the worst examples of idiocy … [he had] ever seen' — indicates that no reliable 'standard for determining what is or is not scurrilous abuse' has coalesced.[60] In Victoria, calling a judge 'a wanker' has been held not to constitute scandalising contempt as this expression does 'not undermine confidence in the administration of justice'.[61] Ultimately, whether a given set of words constituted 'scurrilous abuse' appears to hinge on little more than 'the literary taste of the presiding judge'.[62] Put another way, the offence attaches liability pursuant to 'a criterion … based on politeness' — a state of affairs that creates 'serious difficulties' both in principle and, as noted, in practice.[63] This lack of clarity is important, given that the question of scurrilous or not scurrilous conduct appears to be one of the only yardsticks courts are able to employ to determine whether a given utterance undermines the administration of justice generally. This is so because no other form of empirical verification is truly available — 'difficult' (perhaps even insuperable) 'sociological questions' lie

56 Ibid.

57 *R v Rimmington* [2006] 1 AC 459, 482 (Lord Bingham), quoting *R v Clark (Mark)* [2003] 2 Cr App R 363, [13].

58 See, eg, *Gray* (n 31) 39–40 (Lord Russell CJ); *Chokolingo* (n 5) 109 (Lord Diplock); *R v Hoser* [2001] VSC 443 [46] (Eames J); *A-G (Qld) v Lovitt* [2003] QSC 279 [56] (Chesterman J); *Secretary of Justice v Choy Bing Wing* [2011] 2 HKC 342, 355 (McMahon and Macrae JJ).

59 *R v Murphy* (1969) 4 DLR (3d) 289, 295 (Bridges CJNB) (Supreme Court of New Brunswick, Appeal Division) ('*Murphy*').

60 Robert Martin, 'Criticising the Judges' (1982) 28(1) *McGill Law Journal* 1, 15.

61 *Anissa Pty Ltd v Parsons* [1999] VSC 430 [22] (Cummins J).

62 Martin (n 60) 16.

63 Pannick (n 22) 9.

at the heart of the scandalising 'analysis'.[64] Chief amongst these is 'to what extent do [the media] create community attitudes?'[65]

Karl Marx once wrote that any defence of censorship must be ultimately be rooted in the belief in the 'immaturity of the human race', the belief that there are certain topics that human beings cannot rationally discuss if left to their own devices.[66] The view that media coverage of courts and judicial officers that is 'too negative too often' imperils public confidence in the administration of justice is predicated on the assumption that the audience of that media coverage is so unsophisticated and so lacking in critical faculties that it will simply accept the unfavourable stories as gospel truth, losing confidence in the judiciary accordingly. Put another way, this view assumes that public perceptions are a direct function of media reporting — but empirical evidence on this point is somewhat equivocal.[67]

The notion that a 'gullible' public[68] are liable to have their confidence in the courts easily shaken by unkind remarks about the judiciary is a 'highly speculative' one that discounts the public's ability to assess and ultimately reject such remarks.[69] One Manitoban judge, casting doubt on the 'validity of this assumption', also observed that 'it is not recognized in the United States'.[70] This was confirmed in *Pennekamp* where the United States Supreme Court overturned a conviction for contempt recorded against the publishers of the *Miami Herald* on the basis that the Court was not convinced that the 'solidity of evidence' existed such as to conclude that the impugned publication represented a sufficiently clear threat to the administration of justice.[71] Sir Daryl Dawson remarked that he could see no obvious means of assessing the impact of media commentary on public confidence in the courts beyond the rather unsophisticated (and, one might add, empirically unverified) assumption that the harsher the words, the greater the impact.[72] And indeed, what possible barometer could be used to assess public confidence in the administration of justice, or indeed whether given utterances have dented that confidence? In the Singaporean context,

64 Comment, 'Free Speech vs. the Fair Trial in the English and American Law of Contempt by Publication' (1950) 17(3) *University of Chicago Law Review* 540, 552.

65 Ibid.

66 Karl Marx and Friedrich Engels, *Collected Works* (Lawrence & Wishart, 2010) vol 1, 153.

67 New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper No 43, July 2000) 53–61; Law Reform Commission of Western Australia, *Discussion Paper on Contempt by Publication* (Project No 93, March 2002) 16–29.

68 *R v Kopyto* (1987) 47 DLR (4th) 213, 255 (Houlden JA) (Ontario Court of Appeal).

69 Ibid 223 (Cory JA). See also Lynn McDonald, 'Contempt of Court: An Unsuccessful Attempt to Use Sociological Evidence' (1970) 8(3) *Osgoode Hall Law Journal* 573, 581–2; Australian Law Reform Commission, *Contempt* (Report No 35, 1987), 251; Pannick (n 22) 8.

70 *Gillespie* (n 35) 132 (Morse J).

71 *Pennekamp v Florida*, 328 US 331, 347 (Reed J) (1946) ('*Pennekamp*').

72 Dawson (n 21) 30.

Tsun Hang Tey observes that the terminological 'laxity' courts have demonstrated in alternating between speaking of 'ordinary' and 'reasonable reader[s]' in this context has created uncertainty as to the precise content of the relevant test.[73]

Put more simply, the very existence of the mischief that the scandalising offence purports to remedy is entirely open to question — and surely sturdier foundations than this are necessary before penal consequences as severe as those associated with the law of contempt are brought to bear on accused persons.

### B *No Certainty as to Mens Rea Required*

It has been judicially observed that '[m]ens rea in the law of contempt is something of a minefield'.[74] Indeed, an ongoing area of uncertainty in relation to the scandalising offence is whether there is even a requirement for mens rea. In *S v Van Niekerk*, a South African court held that 'the act complained of must … be wilful' and 'made with the *intention* of bringing the Judges in their judicial capacity into contempt'.[75] Canadian courts have sometimes reasoned similarly to find that '*mens rea* is clearly an important element in the offence'.[76] In *Perera*, the Privy Council held that the appellant had not scandalised the Ceylonese judiciary because his criticisms were 'honest' and made 'in good faith'.[77] Yet authority exists in support of precisely the contrary proposal, namely, that there is no such mental element to the offence and 'that lack of intention or knowledge is no excuse'.[78] In *Ahnee*, for instance, the Privy Council held that there was no such requirement, provided that the publication of the impugned material was intentional so as to undermine the authority of the court.[79] Likewise, Canadian authority suggests that 'intent to … interfere with the course of justice is not an essential ingredient', it is enough if the action complained of is inherently likely so to do'.[80] Australian courts have suggested that the defendant's 'inten[tion] … to scandalise the court'[81] is not itself dispositive of the matter.[82] In New Zealand, 'the mens rea element is satisfied by proof that the defendant knowingly

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73 Tsun Hang Tey, 'Criminalising Critique of the Singapore Judiciary' (2010) 40(3) *Hong Kong Law Journal* 751, 768–70.

74 *A-G (UK) v Newspaper Publishing PLC* [1988] Ch 333, 373 (Donaldson MR).

75 *S v Van Niekerk* [1970] 3 SA 655, 657 (Claassen J) (Provincial Division) (emphasis added).

76 *Re Ouellet [No 1]* (1976) 67 DLR (3d) 73, 91–2 (Hugessen ACJ) (Superior Court of Quebec) (emphasis in original).

77 *Perera v The King* [1951] AC 482, 488 (Lord Radcliffe). See also *Re A-G (Canada)* (1975) 65 DLR (3d) 608, 619 (Disbery J) (Supreme Court of the Northwest Territories).

78 *R v Odhams Press Ltd, Ex parte A-G (UK)* [1957] 1 QB 73, 79–80 (Lord Goddard CJ).

79 *Ahnee* (n 54) 307 (Lord Steyn).

80 *Newfoundland Association of Public Employees v A-G (Newfoundland)* (1984) 14 DLR (4th) 323, 330 (Morgan JA) (Newfoundland Court of Appeal).

81 *Wade v Gilroy* (1986) 83 FLR 14, 27 (Frederico J).

82 *McRae* (n 4). See also *Fitzgibbon v Barker* (1992) 111 FLR 191, 201, (Barblett DCJ, Nygh and Purdy JJ).

carried out the act or was responsible for the conduct in question'.[83] In *Bing*, a Hong Kong court found that while there was no evidence that the defendant had engaged in 'a deliberately orchestrated campaign of interference with the administration of justice',[84] his 'invective and vilification directed against a particular judicial officer in her public capacity' was nevertheless sufficient to 'amount to a contempt of court' of the scandalising variety.[85] Milton suggests that regarding the offence as one of strict or absolute liability is 'both anomalous and contrary to principle'; no other species of contempt is so regarded. Moreover, removing this fault element is at odds with the common law presumption that mens rea is (absent express legislative stipulation) a requisite element of an offence.[86] And indeed, this was ultimately consistent with the conclusion reached by the Privy Council in *Dhooharika*[87] — a conclusion that accords with principle.

### C *Unlimited Penal Consequences*

The penal consequences of a scandalising conviction can be 'savage',[88] and indeed, strictly speaking there exist 'technically no legal limits' as to the fine or term of imprisonment that may be imposed.[89] In practice, modest fines are the typical penalty (NZD500 in *Radio Avon*, for instance).[90] However, custodial sentences are sometimes handed down: in 1969, a New Brunswick student newspaper contributor who condemned Canada's courts as being in the pocket of moneyed interests found himself sentenced to 10 days' imprisonment.[91] Likewise, in *Gallagher*, the appellant spent three months behind bars for suggesting that industrial action had resulted in an appeal against an earlier conviction being allowed by the Full Court of the Federal Court.[92] Moreover, Kirby J once suggested in obiter that the sentence in 'a serious case of scandalising a court would certainly be liable to extend beyond imprisonment for twelve months'.[93] It is contrary to principle that an offence with as vague a definitional outline as scandalising contempt should be accompanied by such swingeing penal powers.

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83 *Solicitor-General (NZ) v Radio New Zealand Ltd* [1994] 1 NZLR 48, 55 (Eichelbaum CJ and Greig J).

84 That is, that his poison-pen letters regarding the alleged corruption of a High Court registrar were unlikely to actually impair confidence in the judiciary.

85 *Choy Bing Wing* (n 58) 355 (McMahon and Macrae JJ).

86 JRL Milton, 'A Cloistered Virtue' (1970) 87(4) *South African Law Journal* 424, 426.

87 *Dhooharika v DPP (Mauritius)* [2015] AC 875, 891 (Lord Clarke JSC).

88 *Gallagher* (n 38) 252 (Murphy J).

89 *Radio Avon* (n 6) 229 (Richmond P).

90 Ibid 242 (Richmond P).

91 *Murphy* (n 58) 291 (Bridges CJNB).

92 *Gallagher* (n 38) 242 (Gibbs CJ, Mason, Wilson and Brennan JJ).

93 *Re Colina* (n 41) 427 (Kirby J).

### D *Extremely Wide Standing*

That the standing to bring actions for scandalising contempt is so broad only adds to the oppressiveness of the offence: in *McGuirk*, the Supreme Court of New South Wales held that any 'private litigant' may initiate scandalising offence proceedings.[94]

It is true that the standing requirements for all species of contempt of court have always been broad. For contempt committed during specific court proceedings, anyone possessing a 'personal stake or special interest' in those proceedings may bring proceedings for contempt.[95] In *European Asian Bank AG v Wentworth*, for instance, an employee of the appellant bank (a witness in litigation in which the bank was at that time involved) was physically assaulted in a courtroom by the respondent during proceedings involving the bank. The New South Wales Court of Appeal affirmed the bank's right as a private litigant to launch contempt proceedings against the respondent for this contempt.[96] There is no requirement that such proceedings be brought by either the relevant Director of Public Prosecutions or Attorney-General;[97] though, especially for alleged contempt in criminal matters, it may be that private persons may bring an action only if the relevant Attorney-General has declined to do so,[98] and that once proceedings are in motion that Attorney-General may intervene to take carriage of them.[99]

The justification for this breadth of standing has been held to inhere within individual litigants a personal interest in the maintenance of 'the integrity of the administration of justice'.[100] Wide though it may be, standing for contempt connected with particular proceedings is nevertheless probably restricted to an easily ascertainable group of persons with some interest of the requisite kind in those proceedings. To borrow a concept from the law of trusts, 'list certainty' could theoretically be achieved as regards the class of persons with the relevant *locus standi*.[101] However, with the scandalising offence, matters stand differently. Insofar as every member of the community has a stake in the upholding of the due administration of justice, every individual in a given jurisdiction might well have standing to pursue an action for the scandalising offence. It is unclear, however, why any exception to the general principle that private persons may not, absent some tangible individual stake in the matter (that is, some stake 'over and above that of being a member of the public'),[102]

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94 *McGuirk v University of New South Wales* [2009] NSWSC 1058, [284]–[286] (James J).

95 *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323, 328 (Samuels AP) ('*United Telecasters*').

96 (1986) 5 NSWLR 445.

97 *New South Wales Bar Association v Muirhead* (1988) 14 NSWLR 173, 184 (Kirby P).

98 *Re Whitlam; Ex parte Garland* (1976) 8 ACTR 17, 24 (Connor J).

99 *United Telecasters* (n 95) 330–1 (Samuels AP).

100 *DPP (NSW) v Australian Broadcasting Corporation* (1987) 7 NSWLR 588, 595–6.

101 *Re Gulbenkian's Settlements* [1970] AC 508; *McPhail v Doulton* [1971] AC 424.

102 *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81, 101 (Kirby P) ('*Doe*').

'sue on behalf of the public for the purpose of preventing public wrongs'.[103] The one exception to this principle that may be acceptable as a matter of policy is where the alleged scandalising words or conduct threatens in some way to 'interfere with [the would-be plaintiff's] right to a fair trial'.[104]

It has been said in the United States that the ultimate purpose of standing is to ensure that questions placed before the courts will be dealt with in 'a concrete factual context conducive to a realistic appreciation of the consequences of judicial action', rather than in purely abstract terms.[105] To permit litigants to bring matters without such a concrete basis would be to waste courts' time by insisting they take on 'the rarified atmosphere of a debating society'.[106] Absent restrictions on standing, the volume of frivolous litigation would multiply, as any 'mere busybody who is interfering in things which do not concern [them]' would be free to fill the court lists with action after action.[107] Curial time and resources being finite, courts rightly take a dim view to such busybodies, and seek to restrict as far as possible their capacity to bring litigation that is personally meaningless to them. To the extent that the breadth of the scandalising offence's standing permits such busybodies to bring frivolous actions of this kind, the offence appears to pose just such a threat. If the offence is not abolished, any statutory reform of its scope must restrict the breadth of the class of persons who possess the necessary *locus standi*.

### E *Incompatibility with the Implied Freedom of Political Communication*

So far this article has assessed the scandalising offence by reference to non-jurisdiction-specific criteria, such as vagueness and oppressiveness. However, there is a further, distinctly Australian benchmark: whether the offence is compatible with the implied freedom of political communication detected by the High Court in the *Australian Constitution*. The High Court has held that even 'unreasonable, strident, hurtful and highly offensive communications' may well 'fall within the range of … "robust" debate' in Australian politics.[108] Can the communications often prosecuted under the scandalising offence be regarded as a protected political communication?

Analytic clarity is not enhanced here by the fact that the breadth of the freedom is somewhat uncertain. McHugh J took a narrow view in *Australian Capital Television* — that the freedom is restricted to 'information concerning matter intended

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103 *Gouriet v Union of Post Office Workers* [1978] AC 435, 494 (Viscount Dilhorne); *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 538 (Stephen J).

104 *Doe* (n 102) 84 (Gleeson CJ).

105 *Valley Forge Christian College v Americans United for Separation of Church and State Inc*, 454 US 464, 472 (Rehnquist J) (1982).

106 Ibid.

107 *A-G (The Gambia) v N'Jie* [1961] AC 617, 634 (Lord Radcliffe). See also *Hussein v Secretary, Department of Immigration and Multicultural Affairs [No 2]* (2006) 155 FCR 304, 322 [73] (Graham J).

108 *Monis v The Queen* (2013) 249 CLR 92, 131 (French CJ).

or likely to affect voting in an election'[109] — while French CJ in *Hogan* articulated a broader rule — that the implied freedom conceivably went so far as to embrace 'social and economic features of Australian society' insofar as these are 'matters potentially within the purview of government'.[110] Let us accept for argument's sake that discussion of the courts may fall within French CJ's broader rule. Insofar as the law of scandalising contempt constitutes a law that impinges on the freedom to communicate about such matters, the question then becomes whether this law satisfies the two limbs of the test in *Lange*.[111]

First, 'is … the object of the law … compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'?[112] Insofar as the law's object is purportedly ensuring that the judiciary commands the confidence of Australians, it seems that the scandalising offence satisfies this criterion. If nothing else, the existence of the Court of Disputed Returns (as a branch of the judiciary) is essential for the proper operation of elections and of representative government, and that at least in this sense there exists a connection between the courts and representative democracy in Australia.[113]

Second, 'is that the law is reasonably appropriate and adapted to achieving that legitimate object or end'?[114] The majority in *McCloy* clarified that this second-limb analysis involves questions of 'proportionality'.[115] The proportionality of a given measure is assessed by reference to three criteria: suitability (is the measure rationally connected to its purpose?), necessity (is there truly 'no obvious and compelling alternative' to the measure?) and 'adequa[cy] in its balance' (is the gravity of the measure's infringement on political communication justified by the importance of the object it serves?).[116] Put another way, the High Court has held that a 'severe burden … requires a strong justification',[117] and the burden the scandalising offence places on freedom of expression — exposing criticism of an entire arm of government to unlimited criminal penalties — is severe indeed.

While there can be no doubt that the scandalising offence is rationally connected to its purpose (the offence stipulates that verbal attacks on the judiciary be met with swingeing penalties in order to deter others from making such attacks), the requirements of necessity and balance are less readily satisfied. The question of necessity is

109 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 232 (McHugh J).

110 *Hogan v Hinch* (2011) 243 CLR 506, 544 (French CJ).

111 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561–2 ('*Lange*').

112 *Lange* (n 111).

113 See generally *Commonwealth Electoral Act 1918* (Cth) pt XXII.

114 *Lange* (n 111) 561–2.

115 *McCloy v New South Wales* (2015) 257 CLR 178, 195 (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*').

116 Ibid.

117 Ibid 269 (Nettle J).

dealt with in Part IV below; it is concluded that the mischief the scandalising offence seeks to combat (viz, commentary that might sap public confidence in the judiciary) is amply dealt with by other institutional safeguards. For the purposes of the implied freedom, this means that 'compelling alternative[s]' exist to the scandalising offence that are both 'practical' and which would impinge on the implied freedom to a substantially lesser degree.[118] As such, the offence cannot be said to be 'necessary' in the requisite sense.

The question of balance has been considered in other jurisdictions; these considerations provide fruitful suggestions for Australian jurisprudence. In New Zealand, it has been held that the scandalising offence represents a 'reasonable' burden 'upon freedom of expression' insofar as scandalising contempt purportedly attacks the very foundation of respect for the judiciary upon which that freedom is said to rest.[119] Conversely, in Canada, assessing the scandalising offence against the requirement of proportionality under the *Canadian Charter of Rights and Freedoms*,[120] Goodman JA of the Ontario Court of Appeal suggested that the scandalising offence would 'not meet the … test' absent 'a clear, significant and imminent … danger' to the proper functioning of the judiciary.[121] Justice Cory further suggested that the extent to which the offence relies on the 'questionable assumption' that scandalous words will automatically diminish respect for the courts meant that the offence could not be said to have 'been 'carefully designed to achieve [its] objective'.[122] This Canadian analysis, it is suggested, is appropriate to adopt pursuant to the *Australian Constitution*. The unbounded character of the penalties that may be imposed on contemnors further weakens the suggestion that the scandalising offence is 'adequate in [its] balance'.[123] It is essentially at odds with the ideals of liberal democracy to allow a powerful 'public institution to be exempt from … public comment' — a fortiori in an age when it is increasingly the case that judges' discharge of their function 'can often amount to nothing less than law-making', and law-making that may diverge from the will of elected parliaments.[124] Criticism is, ultimately, 'a central and unavoidable part of the democratic ideal'.[125] Australian judges, like their British counterparts, 'have had

118 *Comcare v Banerji* (2019) 93 ALJR 900, 913; [2019] HCA 23, [35] (Kiefel CJ, Bell, Keane and Nettle JJ) ('*Comcare*').

119 *Solicitor-General (NZ) v Smith* [2004] 2 NZLR 540, 568 (Wild and MacKenzie JJ). See generally *New Zealand Bill of Rights Act 1990* (NZ) s 14.

120 See generally *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

121 *Kopyto* (n 68) 263 (Goodman JA).

122 Ibid 239 (Cory JA).

123 See *Comcare* (n 118) 914; [39] (Kiefel CJ, Bell, Keane and Nettle JJ).

124 Michael K Addo, 'Can the Independence of the Judiciary Withstand Criticism? An Introduction to the Criticism of Judges in Europe' in Michael K Addo (ed), *Freedom of Expression and Criticism of Judges: A Comparative Study of European Legal Standards* (Ashgate, 2000) 3, 14–15.

125 Ibid 23.

sufficient time to earn the respect and confidence of the public',[126] such that their reputation for competence and probity is not in the balance each time some attack appears in the media — even an attack as ludicrously intemperate as the defendants' in *Oriental Press Group* (where judicial officers were described as 'stupid men and women who suffer from congenital mental retardation', and 'pigs and dogs' whom the defendants were 'determined to wipe … out').[127]

There is, however, an admitted difficulty with this argument; viz, that there is strong authority for the proposition that communications about judges and the judiciary are not 'political' in such a sense as to fall within the ambit of the implied freedom. Notwithstanding some early Mason Court murmurings that such communications may be protected,[128] the decision in *APLA* has definitively narrowed the scope of the implied freedom in such a way as to largely exclude discussions of judicial conduct.[129] In *APLA*, McHugh J described the implied freedom as a means of safeguarding 'representative and responsible government', and the concomitant imperative of protecting communications pertaining to 'matters relevant to executive responsibility and an informed electoral choice'.[130] In his Honour's view, notwithstanding the sense in which the judiciary is often described as an arm of 'the government', communications about the judiciary cannot be said to bear on that responsibility or that choice, and so cannot be protected by the implied freedom. The particular character of Australian democracy, it is said, compels such a conclusion. In contrast to the situation in many American jurisdictions, Australian judges are not elected to the bench. This being so, it cannot (according to this line of authority) be said that judicial conduct (and commentary thereupon) is 'a manifestation of any of the [constitutional] provisions relating to representative government' from which the implied freedom is derived.[131]

It is true, then, that *most* criticism of the judiciary will not fall within the remit of the constitutional protection provided by the implied freedom of political communication. There is certainly scope to debate the political or philosophical palatability of the line of authority that culminates in *APLA*. In *Popovic*, for instance, Gillard AJA appeared inclined towards a view (albeit without deciding) that commentary on the judiciary is relevantly a form of political communication insofar as 'administration of justice … is a vital and essential ingredient in the system of government' and

126 Michael K Addo, 'Scandalizing the Court in England and Wales' in Michael K Addo (ed), *Freedom of Expression and Criticism of Judges: A Comparative Study of European Legal Standards* (Ashgate, 2000) 31, 41.

127 *Secretary for Justice v The Oriental Press Group Ltd* [1998] 2 HKLRD 123, 137–8 (Chan CJHC and Keith J) (Hong Kong Court of First Instance), affd *Wong Yeung v Secretary for Justice* [1999] 2 HKLRD 293 (Hong Kong Court of Appeal).

128 See, eg, *Nationwide News Pty Ltd* (n 40) 72 (Deane and Toohey JJ).

129 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 ('*APLA*').

130 Ibid 361–2.

131 *John Fairfax Publications v A-G (NSW)* (2000) 181 ALR 694, 709 (Spigelman CJ) (New South Wales Court of Appeal).

that consequently judicial (mis)conduct is a matter that 'every member of the … community has a real and legitimate interest in knowing about'.[132]

However, such a debate need not presently detain us, as it can readily be demonstrated that even under the more restrictive view of the implied freedom of political communication enunciated in *APLA*, the scandalising offence as it presently stands is *still* incompatible with that implied freedom. Notwithstanding the trenchancy of the views expressed in these cases, the authorities nevertheless recognise a category of critique of judges and judging that *would* be sheltered by implied freedom; this category is comprised of communications concerning the overlap of the judiciary with the institutions of representative and responsible government in Australia. For present purposes, the most important manifestation of such overlap is in the procedure by which Australian parliaments may remove judges from the bench for misconduct or incapacity.[133] In *Popovic*, Winneke ACJ suggested that, in connection with this parliamentary procedure, speech pertaining to judicial conduct may well constitute 'discussion on government or political matters in the relevant sense':

> This would particularly be so where the discussion impacts directly or indirectly on the executive government itself; whether in the exercise of its powers to appoint the officer, or in exercising or failing to exercise its powers to initiate the officer's removal. Such a discussion may well bear the characteristics of one which is capable of informing and shaping the views of the electors about the performance of their elected representatives.[134]

The Full Court of the Supreme Court of South Australia was also prepared to countenance the possibility of discussions of 'the conduct of a judge' being protected by the implied freedom if the 'real thrust' of the discussion in question was a critique of 'the conduct, acts or omissions of an elected representative and how that representative is responding to or dealing with the conduct of that judge'.[135] The New South Wales Court of Appeal, however, has suggested that even in situations where a given speaker is 'in effect, seeking the removal of [a] judicial officer' by Parliament, communications impugning that judicial officer's professional conduct (such as some alleged mishandling of a particular case) would nevertheless fall outside the remit of the implied freedom.[136] It is conceded that this would only impinge on a fairly narrow class of communication. However, such speech may nevertheless diminish popular regard for the judiciary, and thereby fall within the purview of the scandalising offence — a reasonable inference from a statement such as 'Parliament are mad

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132 *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 53 ('*Popovic*').

133 *Australian Constitution* s 72; *Australian Capital Territory (Self-Government) Act 1988* (ACT) s 48D; *Constitution Act 1902* (NSW) s 53; *Supreme Court Act 1979* (NT) s 40; *Constitution of Queensland 2001* (Qld) s 61; *Constitution Act 1934* (SA) s 75; *Supreme Court (Judges' Independence) Act 1857* (Tas) s 1; *Constitution Act 1975* (Vic) s 87AAB; *Constitution Act 1889* (WA) s 55.

134 *Popovic* (n 132) 10–11 (Winneke ACJ).

135 *Peek v Channel 7 Adelaide Pty Ltd* (2006) 94 SASR 196, 227 (Besanko J).

136 *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698, 727 (Beazley P).

for not initiating proceedings to remove Justice Smith from the bench' is that Justice Smith has fallen short of the standard of competence or probity expected of judges, and that any court over which Justice Smith presides ought not to be held in the highest possible esteem. To the extent that such a statement would both scandalise the judiciary and represent a communication in respect of the functioning of Australia's representative system of government, the scandalising offence would operate in a manner fundamentally irreconcilable with the implied freedom of political communication.

A final objection remains. On one view, the very persistence of the scandalising offence in Australia may itself serve as prima facie evidence that it is not incompatible with the form of democracy prescribed by the *Australian Constitution*. Such an argument, however, is persuasive only to the extent that Australia as a polity and as a society has remained static over the past century. Yet as the High Court observed in relation to the law of defamation in *Lange*, it is eminently possible for courts to examine the evolution of a given common law doctrine and find that, when the 'varying conditions of society' are taken into account,[137] that doctrine may well fail to meet essential legal criteria that have developed since the doctrine's inception. In the particular situation at issue in *Lange*, the common law rules of qualified privilege in defamation as they then stood were held to no longer be compatible with the requirements for freedom of political communication that the Mason Court had discerned in the *Australian Constitution*. As discussed in Part II above, the social conditions that may have once at least notionally justified savage penal intervention to quell popular criticism of the judiciary no longer obtain in modern Australia. To paraphrase the Court in *Lange*, then, the law of contempt of court should be free to evolve in harmony with that evolution of societal conditions.[138]

## IV Reform

### A *Abolition*

This article has outlined a number of conceptual and practical difficulties that beset the scandalising offence. The question may well be asked: what ought to be done? This author submits that the only viable means of rationalising the law of contempt is to abolish the scandalising offence by statute, as has been done in the United Kingdom[139] and in New Zealand.[140] This is, as the Privy Council have conceded, an argument with 'considerable force'.[141] The following sections will detail several bases supporting this contention.

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137 *Wason v Walter* (1868) LR 4 QB 73, 93 (Cockburn CJ), quoted in *Lange* (n 112) 570 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

138 *Lange* (n 111) 571.

139 *Crime and Courts Act 2013* (UK) s 33; *Criminal Justice Act (Northern Ireland) 2013* (NI) s 12.

140 *Contempt of Court Act 2019* (NZ) s 26(5).

141 *Dhooharika* (n 87) 891 (Lord Clarke JSC).

### B *Irony: The Scandalising Offence May in Fact Diminish Respect for the Courts*

There is an irony at the heart of the scandalising offence: by punishing mere statements of opinion 'as criminal contempts', 'the scene' may well 'be set for the court to be brought into actual contempt' amongst the public at large.[142] Prosecuting the offence, in other words, risks having an utterly 'counter-productive effect' on popular respect for the courts.[143] In extreme instances, use of the power to punish scandalising contempt — far from safeguarding public confidence in the integrity of the judiciary — can in fact serve to vindicate the contemnor's criticism. It is a cliché of human experience that if respect — be it for an individual or for an institution — is to have any genuineness or durability it must be earnt, rather than simply demanded by the individual or institution *ex nihilo* — '[y]ou cannot compel public respect for the administration of justice'.[144] And indeed, Lord Denning once remarked that the courts' capacity to punish for scandalising contempt ought 'never [be] use[d] as a means to uphold our own dignity. That must rest on surer foundations'.[145] In 2002, the Booker Prize-winning novelist Arundhati Roy wrote in an affidavit submitted to the Supreme Court of India that the Court displayed a 'disquieting inclination' to 'harass … those who disagree with it'.[146] Purportedly to prevent Indians from regarding Roy's criticism as correct, the Court responded by fining and briefly imprisoning her for scandalising contempt[147] — that is, by effectively harassing her for disagreeing with it. Heydon observes that there may have been an irony implicit in the 2017 Victorian ministerial contempt matter discussed earlier' discussed earlier: while the objective of the law of contempt 'is to increase respect for the law', it is nevertheless very possible that the Victorian Court of Appeal's conduct in connection with 'in fact actually engendered less respect for the law'.[148] To Lord Pannick's mind, an attempt to sue a former cabinet minister for scandalising a Northern Irish judge in fact 'damaged the reputation of the legal system in Northern Ireland'.[149] Tey, too, has concluded that, far from shoring up public confidence in the due administration of justice, the Singaporean courts' 'inflexib[ility] and illiberal[ity]' in trying scandalising cases have in fact *harmed* the judiciary's standing in the eyes of the public.[150] There is also the fact that initiating a scandalising prosecution may resurrect from

142 *Gallagher* (n 38) 252 (Murphy J).

143 Law Reform Commission (Australia) (n 69) 264.

144 *A-G (NZ) v Blomfield* (1913) 33 NZLR 545, 574 (Denniston J).

145 *Commissioner of Police of the Metropolis* (n 17) 155.

146 Justice Hosbet Suresh, 'Contentious Contempt', *The Times of India* (Mumbai), 16 August 2002, 14. See also Venkat Iyer, 'The Media and Scandalising: Time for a Fresh Look' (2009) 60(2) *Northern Ireland Legal Quarterly* 245, 254.

147 Suresh (n 145) 14.

148 Heydon (n 18) 17.

149 United Kingdom, *Parliamentary Debates*, House of Lords, 2 July 2012, vol 738, col 557 (Lord Pannick).

150 Tey (n 73) 785.

the oblivion created by the ephemeral nature of mass media imputations that had otherwise been forgotten (or not noticed in the first place) by the public.[151]

Moreover, the possibility of facing criminal penalties for critiquing the work of the courts 'will inevitably deter people from speaking out on perceived judicial errors'.[152] There will be instances in which public confidence in the judiciary *should* be diminished — that is, when judges discharge their functions in a manner that is manifestly incompetent or corrupt, the public should not fear that loudly drawing attention to this fact (and so acting as a spur for positive change) will see them facing prosecution for contempt.[153] Indeed, 'the only remedy' for some judicial impropriety or incompetence might well be blunt criticism in a public forum such as the press.[154] In jurisdictions beset by genuine corruption in their judiciaries, the scandalising offence provides a ready 'instrument to silence honest criticism of biased judges'.[155] Even in a jurisdiction as free of judicial corruption as Australia, there will inevitably be curial sloth and incompetence that ought properly be exposed to public scrutiny; such scrutiny may be impeded by the existence of the scandalising offence.[156]

### C *Reformulate the Offence: 'Real Risk', Public Figures?*

If the offence must be retained, it is submitted that the only instance in which it ought to be used is in matters involving persons of significant public influence, such as when members of the executive directly threaten the judiciary, viz, pose a 'real risk' to the administration of justice.[157] Consider *Borowski*, a case from Manitoba. Here, a cabinet minister (Borowski) was sued by a provincial employee. Borowski made an application to the Court to stay the employee's proceedings, which was dismissed by a magistrate. After the stay application was concluded (when the matter was no longer sub judice), Borowski described the magistrate as biased against him on a party-political basis and threatened to have 'that bastard … defrocked and debarred'.[158] As Nitikman J observed, this latter comment was 'unbelievably outrageous … coming from the mouth of a Minister of the Queen' because it constituted 'an arrogant threat against the independence of the judiciary', and an ugly

151 Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (Cambridge University Press, 2nd ed, 2013) 414.

152 Pannick (n 22) 9.

153 See Sophie Turenne, 'Free Speech and Scandalising the Court in Mauritius' (2015) 74 *Cambridge Law Journal* 7, 9.

154 Dyson Heydon, 'Court in the Crosshairs', *The Weekend Australian* (Sydney), 29–30 September 2018, 17.

155 Shetreet and Turenne (n 151) 413.

156 Heydon (n 18) 16.

157 See *Ahnee* (n 54) 306 (Lord Steyn); *Shadrake* (n 29) 789–93 (Andrew Phang Boon Leong JA); *Dhooharika* (n 87) 895 (Lord Clarke JSC).

158 *Re Borowski* (1971) 19 DLR (3d) 537, 540 (Nitikman J) (Court of Queen's Bench of Manitoba).

reminder of the dark Stuart days of judges' tenure depending on their loyalty to the Crown.[159] To his Honour's mind, that Borowski tendered to the Court a statement that *of course* the government would not *really* seek to have the magistrate 'defrocked and debarred' only aggravated matters: had Borowski not regarded his threat as one 'calculated to … interfere with the due process of justice' — that is, unless he realised that his threat represented a clear and credible danger to the independence of the judiciary — he would not have felt compelled to provide 'such [an] assurance'.[160] This article argues that it is here that the crucial distinction between remarks made by the likes of Borowski and those made by the likes of the columnist-in-a-gutter-newspaper defendants in *Oriental Press Group*. While the comments of the latter are no doubt more insulting and perhaps even more injurious to the personal feelings of judges, they are in the final analysis the words of a (gutter) newspaper columnist, someone whose ability to actually impair the functioning of the courts is limited to whatever nebulous impact their columns may have on public confidence in those courts. Such commentators are unable to attack judges directly, and are restricted to attacking public confidence, which may or may not yield to their depredations. By contrast, a minister of the Crown actually possesses real political clout with which to directly and effectively attack the judiciary. There is no need to ponder the empirical impact of media commentary (which is, as noted above, difficult to quantify) on 'public confidence' (a slippery concept): the minister has, through the executive's control over judicial appointments, the power to interfere with the integrity of the judiciary in a much more straightforward fashion. With Goodman JA of the Ontario Court of Appeal, this article suggests that it is not so much in the character of the words used (however 'vitriolic') that the true threat to the courts inheres, but rather in the social and political 'standing' of the person uttering them — profoundly savage words from 'a person of no standing in the community' will wreak far less harm than 'polite words … calculated to bring the administration of justice into disrepute' spilling from the pen or mouth of 'a person of good reputation'.[161] And in that sense, the misuse of the bully pulpit afforded to those in power is far more of a threat than the grumblings (however vituperative) of the private citizen or even the newspaper columnist.

## V Is the Offence Necessary?

### A *A Superfluous Offence?*

This article has argued that, in the struggle to safeguard the administration of justice from harmful public commentary, the scandalising offence is, in the final analysis, superfluous. Instances of public commentary that pose a genuine threat to actual court processes are covered by the other branches of the law of contempt. If vile remarks are directed at particular judges with the intention or effect of damaging that judge's reputation for competence or probity, then those remarks will be actionable

159 Ibid 547 (Nitikman J).

160 Ibid 548 (Nitikman J).

161 *Kopyto* (n 68) 263–4 (Goodman JA).

in defamation (though it is submitted that such actions ought, as a matter of policy, to be rare). The only field of operation unique to the scandalising offence is thus comments directed to the judiciary at large (that is, not in connection with actual concrete cases before the courts), which in this author's view pose a threat too nebulous to justify the possibility of criminal prosecution. The former Lord Chief Justice of Northern Ireland, a man whose judicial career was marked by 'deeply scandalous assertions' by the media in connection with his decisions in terrorism trials, supported abolition of the scandalising offence notwithstanding the profound hurt such assertions caused him personally: 'judges have to be able to … shrug their shoulders and get on with it', and even when judges regard some line as having been crossed, 'there are other ways of dealing with it than this offence'.[162] Even in the face of savage attacks on the British judiciary as '[e]nemies of the [p]eople'[163] in connection with Brexit litigation,[164] Lord Neuberger suggested that while 'some of what was said was undermining the rule of law', 'most' of the comments — even those his Lordship 'didn't … think w[ere] fair' — were 'within the ambit of what a reasonable press could do'.[165] Lord Borrie, author of a leading text on contempt,[166] remarked that the offence 'has a chilling effect on freedom of speech' and that its abolition would cause 'hardly any loss' for the judiciary in practice.[167] As Lord McNally observed in the same debate, the undesirable conduct the offence purports to regulate may readily be dealt with under other heads of contempt, or under other 'criminal offences or civil remedies', such as 'corruption, threat or defamation' such that abolition would leave no discernible 'gap in the law'.[168]

Moreover, the range of other voices that may be raised to rebut irresponsible criticism of the courts further weakens the rationale of the scandalising offence. As discussed above, judges themselves are no longer so squeamish as they once were about entering the media fray to defend themselves and the curial institutions they serve. Attorneys-General, for instance, have historically been charged with the defence of the judiciary, though it may be that this tradition has weakened in recent times.[169] Law societies may also serve as a vehicle for rebutting undue criticism of judges, as

162 United Kingdom, *Parliamentary Debates*, House of Lords, 2 July 2012, vol 738, col 561 (Lord Carswell).

163 See, eg, James Slack, 'Enemies of the People: Fury over "out of Touch" Judges Who Defied 17.4m Brexit Voters and Could Trigger Constitutional Crisis', *Daily Mail* (London), 4 November 2016, 1.

164 See generally *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

165 Ian Drury, 'Politicians "Too Slow" to Back Courts over Brexit, Says Top Judge', *Daily Mail* (London), 17 February 2017, 10.

166 Gordon Borrie and Nigel Lowe, *The Law of Contempt* (Butterworths, 1973).

167 United Kingdom, *Parliamentary Debates*, House of Lords, 2 July 2012, vol 738, col 559–60 (Lord Borrie).

168 Ibid vol 738, col 564 (Lord McNally).

169 See, eg, Daryl Williams, 'The Role of the Attorney-General' (2002) 13 *Public Law Review* 252.

may peak legal industry bodies such as Law Council of Australia,[170] though these can sometimes be 'an unwieldy means of reply'.[171] To the extent that the rationale of the scandalising offence purports to rest on the offence's function as a sort of sword and shield of the courts, the existence and vigour of these alternative voices diminishes the force of that rationale.

### B *Possible but Unsatisfactory Alternative: Judges Suing in Defamation?*

That the discharge of the judicial function may bring down a 'whole artillery of libels' has been recognised for centuries;[172] but it has also been said that such '[i]nsults are best treated with disdain — save when they are gross and scandalous'.[173] The Family Court considered that while 'a court may prefer to maintain a dignified silence when under unwarranted attack',[174] the attractions of such a silence may be outweighed by the imperative of defending the court's 'dignity and authority'.[175] For judges who feel they must so defend themselves, the law of defamation may provide some recourse, despite High Court obiter that the notion of a judge suing in defamation is 'unseemly'[176] Sir Redmond Barry embodied the traditional attitude when he said that as a 'representative of the majesty of the law' it would be 'unmanly' and 'ignoble … for [judges] to entertain any personal feelings' in connection with the performance of their official functions.[177] Nevertheless, judges' ability to do so in connection with comments on their capacity as judicial officers was recently confirmed by the New South Wales Court of Appeal.[178] Shetreet and Turenne remark that actions in defamation by judges are 'rare and … should remain so'[179] — though the authors make an exception for matters in which 'the accusations were so severe that the judges could have been said to be unfit to practise as a result'.[180]

Sir Zelman Cowen suggested that while it may be 'readily understandable' why judges are reluctant to sue in defamation, this reluctance is itself no grounds for

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170 See, eg, Arthur Moses, 'Unfair Criticism and Sexist Attack on High Court Judges Should Not Be Tolerated' (Web Page, 25 June 2019) <https://www.lawcouncil.asn.au/media/media-releases/unfair-criticism-and-sexist-attack-on-high-court-judges-should-not-be-tolerated>.

171 Dawson (n 21) 27.

172 *R v Wilkes* (1770) 4 Burr 2579, 2562; 98 ER 327, 347 (Lord Mansfield CJ).

173 *Balogh v St Albans Crown Court* [1975] QB 73, 86 (Lord Denning MR).

174 *Wade* (n 81) 27 (Frederico J).

175 *Dunbabin* (n 11) (Dixon J), quoted in ibid.

176 *Mann v O'Neill* (1997) 191 CLR 204, 236 (McHugh J).

177 *Re Syme; Ex parte The Daily Telegraph Newspaper Co Ltd* (1879) 5 VLR 291, 296.

178 *O'Shane* (n 136) 715 (Beazley P). See also *Re a Special Reference from the Bahama Islands* [1893] AC 138.

179 Shetreet and Turenne (n 151) 414.

180 Ibid 415.

the retention of a draconian criminal jurisdiction for scandalising contempt.[181] Yet nevertheless, examples of such actions abound. By one estimate, some 10 per cent of libel actions in the United States in 2005 were launched by judicial officers.[182] A New York judge sued the publishers of a book suggesting that his Honour was 'tough on long-haired attorneys and black defendants … [b]ut [that] his judicial temper soften[ed] remarkably before … organized crime figures'.[183] In 2014, a Northern Irish judge sued the *Sunday World* newspaper in response to an article suggesting he was less than impartial in sentencing a Crown prosecutor for traffic offences,[184] while in 2017 a Manhattan judge launched a defamation action against a newspaper that described her judicial style as 'slow' and 'lazy'.[185] In 2007, a Massachusetts judge successfully sued in defamation after a newspaper printed allegations that his Honour had suggested that a teenage rape victim (whose case his Honour had presided over) should 'get over it'.[186] In 1992, an English judge was awarded damages after an independent arbitrator held that a newspaper had defamed him by suggesting that 'he nodded off during a murder trial'.[187] And in Australia, one New South Wales magistrate successfully sued a radio broadcaster in defamation for describing her as 'deliver[ing] the most diabolical and wrong decisions in law',[188] while a Victorian magistrate took similar (and similarly successful) action against a newspaper columnist who alleged that the magistrate had pre-judged a case in advance of hearing it, had mistreated a police prosecutor 'for simply arguing the law' and had 'hugged two drug traffickers she let go free'.[189]

Such developments are not without their difficulties. It has been repeatedly stated that the scandalising offence exists not for the protection of judges' personal reputation,

181 Zelman Cowen, *Sir John Latham and Other Papers* (Oxford University Press, 1965) 99.

182 Michael D Schoepf, 'Removing the Judicial Gag Rule: A Proposal for Changing Judicial Speech Regulations to Encourage Public Discussion of Active Cases' (2008) 93(1) *Minnesota Law Review* 341, 342.

183 *Rinaldi v Holt, Rinehart & Winston Inc*, 366 NE 2d 1299, 1303 (Jasen J) (New York Court of Appeals).

184 'Judge Settles Libel Action with Sunday World', *Belfast Telegraph* (online, 13 May 2014) <https://www.belfasttelegraph.co.uk/news/northern-ireland/judge-settles-libel-action-with-sunday-world-30270946.html>.

185 Jason Grant, 'Manhattan Judge Says Post Articles Were "Attack on the Judiciary"', *New York Law Journal* (online, 7 September 2017) <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/09/07/manhattan-judge-says-post-articles-were-attack-on-the-judiciary/>.

186 *Murphy v Boston Herald Inc*, 865 NE 2d 746, 750 (Greaney J) (2007) (Supreme Judicial Court of Massachusetts).

187 Clare Dyer, 'Judge's Quickie Libel Sets Example', *The Guardian* (London), 24 July 1992, 4.

188 *O'Shane* (n 136) 703 (Beazley P).

189 *Herald & Weekly Times Ltd* (n 131) 16 (Gillard AJA).

but rather to safeguard the administration of justice on a systemic level.[190] Yet in the decided cases this line has often been blurry indeed: frequently defendants have been hauled before the courts for statements that effectively constituted '[p]ersonal attacks on a judge' in matters not bearing 'directly to his administration of justice' — an issue magnified by the notion that 'maintain[ing] judicial dignity' on an individual level may well be 'an aspect of … public confidence' in the courts.[191] In this connection, a Manitoban court commented that 'the dignity and majesty of the Courts' was an absolutely foundational component of the due administration of justice — with any harm to the former necessarily impacting 'adversely' on the 'orderly operation' of the latter.[192] It is not easy to cleanly demarcate the boundary 'between the personal dignity of judges and their public roles'[193] — while 'contempt may include defamation', the 'offence is something more than mere defamation, and is of a different character'[194] — and it is submitted that actions in defamation unhelpfully blur this line further, and are best avoided as a matter of policy.

## VI Conclusion

The law of contempt plays an invaluable role in safeguarding the due administration of justice. It is possible to use the tools of the modern media to comment on or to interfere with judicial proceedings in a fashion that ought rightly to attract penal sanction: filming Crown witnesses giving evidence in a criminal matter,[195] for instance, or by printing details of jury deliberations.[196] In such cases, it is sometimes necessary to use the force of criminal prosecution to 'to keep the springs of justice undefiled'.[197] But prosecuting commentary on the judiciary in the abstract cannot be justified, save in extraordinary circumstances such as those described above. The offence of scandalising the judiciary must be statutorily abolished. The central role the judiciary plays in a given society means that inevitably courts will become 'the subject of comment and criticism' — and '[n]ot all will be sweetly reasoned'.[198] Yet the intemperance or indeed even the incoherence of some of these criticisms does not demand that the full force of the law be brought against their progenitors — '[j]ustice is not a cloistered virtue',[199] and nor are 'the courts … fragile

190 See, eg, *Dunbabin* (n 11) 442 (Rich J); *Newfoundland Association of Public Employees* (n 80) 328 (Morgan JA).

191 Milton (n 86) 429 (emphasis altered).

192 *Borowski* (n 158) 547.

193 Addo, 'Scandalizing the Court in England and Wales' (n 124) 31.

194 *Banerjea v High Court of Bengal* (1883) 10 IA 171, 179 (Sir Barnes Peacock) (Privy Council).

195 *Prothonotary of Supreme Court (NSW) v Rakete* (2010) 202 A Crim R 117.

196 See, eg, *A-G (UK) v Associated Newspapers* [1994] 2 AC 238.

197 *Grant v DPP (Jamaica)* [1982] AC 190, 200 (Lord Diplock).

198 *Kopyto* (n 68) 227 (Cory JA). See also Kirby (n 16) 603–4.

199 *Ambard v A-G (Trinidad and Tobago)* [1936] AC 322, 335 (Lord Atkin).

flowers that … wither in the hot heat of controversy'.[200] As Sir Zelman Cowen rightly observed, the administration of justice 'is not imperilled by unmannerly, tasteless, intemperate or even unbalanced verbal or written attacks'.[201] And indeed, even if the impugned statements ultimately consist of 'the whining of an unhappy loser', insofar as they are made as part of 'the expression of a sincerely held belief on a matter of public interest', they should not be the subject of contempt proceedings.[202]

200 *Kopyto* (n 68) 227 (Cory JA).

201 Cowen (n 180) 99.

202 Ibid 223–4 (Cory JA).