DISORDER IN THE COURT: THE JUDGE'S RESPONSE

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I. "GO DIRECTLY TO GAOL ... DO NOT PASS 'GO'..."

On 17 August, 1970, six men appeared in a Sydney Magistrates' Court to answer charges of trespass. The nature of the alleged trespasses does not appear from relevant law reports, but they may well have arisen from a political demonstration. On entering the courtroom to answer the charges, each of them raised an arm in a clenched fist salute. In later explanations to the presiding magistrate, they said that these gestures expressed "solidarity" for the "oppressed people" of the world, and were not directed at the Court. An Australian Law Journal editorial at the time expressed the view that they were in fact "quietly submitting to the authority of the court".[1] Nevertheless, they were charged by the magistrate with contempt under s.152 of the Justices Act 1902 (N.S.W.), which provided (and still provides) a maximum penalty of 14 days' gaol or a $4 fine. The Magistrate remanded each of the men in custody for about two hours and then asked them individually to "show cause" why they should not be found guilty of contempt. He refused to accept their explanations, found them guilty and sentenced each of them to 14 days' gaol, the maximum allowed by s.152.

Applications brought by the six men for common law and statutory prohibition — there being no wider right of review — were rejected by the Court of Appeal. The reasons given by the Court, reported as *Ex parte Tuckerman; re Nash*,[2] are very revealing as to the nature of the brand of

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1 "The Faces of Contempt" (1971) 45 *ALJ* 165, 166.
2 [1970] 3 NSWR 23 (hereinafter *Tuckerman*).

common law contempt on which the statutory provision in s.152 of the Justices Act 1902 is based. This form of contempt is known as "contempt in the face of the court" and it covers, broadly speaking, acts of contempt which take place within the sight and/or hearing of a judge or magistrate presiding in court proceedings.[3]

The outcome of the magistrate's finding of contempt was the imposition of criminal penalties. Yet, in upholding this finding, the joint judgment of Asprey, Holmes and Mason JJ.A. expressly or implicitly endorsed a number of important principles regarding contempt in the face of the court, each of which conflicts in some way with one or more well-established tenets of criminal law and procedure.[4] These principles are as follows:

1. Contempt in the face of the court may be committed even though the relevant conduct does not actually disrupt or interfere with the conduct of the particular court's business. Instead a contempt of this nature may be constituted solely by "interference with the authority of the courts in the sense that there may be a detraction from the influence of judicial decisions and an impairment of confidence and respect in the courts and their judgments".[5] The normal assumption of the criminal law that offences should be defined in precise language is contravened by a formulation in such broad terms.
2. The magistrate was justified in putting to one side the applicants' protestations that they intended no insult to the court, while at the same time taking due account of some comments in the course of these protestations which suggested that there was, after all, "an attitude of opposition to the authority of the Court".[6] What mattered most was the objective appearance or effect of what the applicants did, rather than their underlying intention:

   > [w]hatever in fact the gestures of the applicants were intended by them to represent, in our opinion, acts, words or other forms of behaviour which give the appearance of defying the authority of a Court of law or which by intimidation, ridicule or otherwise tend to lessen the authority of the courts to administer the law and to seek to apply even-handed justice between parties in a calm and orderly manner may be regarded as a contempt of Court.[7]

In other words, the pre-requisite of *mens rea*[8] did not apply.

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3 Contempt in the face of the court may also arise from behaviour outside the courtroom, provided that it occurs within the vicinity of the courtroom or in the precincts of the courthouse, or has otherwise a direct impact on the conduct of particular court proceedings. For different views as to the scope of this extension, see *e.g. Registrar, Court of Appeal* v. *Collins* [1982] 1 NSWLR 682; *Fraser* v. *R.* [1984] 3 NSWLR 212 (hereinafter *Fraser*).

4 For an extended discussion of this conflict, see *e.g.* Australian Law Reform Commission Report No. 35, *Contempt* (1987) paras 93-110; and see generally R. Phillipps, Australian Law Reform Commission, Contempt Research Paper No. 2, *Improper Behaviour in Court* (1984).

5 *Tuckerman*, note 2 *supra*, 27.

6 *Id.*, 28

7 *Ibid.*

8 That is, in the sense of an intention to defy the authority of a court or lessen the authority of the courts in general, as opposed to an intention merely to commit the relevant act (*e.g.* making a clenched fist salute).

3. Having regard to the fact that the six men admitted making the clenched fist salutes, it was quite in order for the magistrate:
   (a) to exercise the traditional judicial power to try and to punish contempt in the face of the court in a summary fashion (this power having been expressly conferred by s.152);[9]
   (b) to proceed after an adjournment of no more than two hours, even though the six men had had no real opportunity to obtain legal advice or representation;
   (c) to treat his own unaided observations as the basis for the crucial findings of fact; and
   (d) to make no offer to submit to cross-examination in relation to those findings.

   This manner of proceeding denies to the accused major safeguards that have become the hallmark of criminal proceedings: notably, the assurance that the court hearing the case will be free, as far as may reasonably be achieved, from any appearance or risk of bias or partiality; the opportunity, save in exceptional circumstances,[10] to be legally represented; and the right to confront and cross-examine every prosecution witness. Indeed, as Justice Murphy, has pointed out, an even more fundamental principle of criminal justice is put in jeopardy:

   > [t]he requirement to show cause is not mere form, for the accused is required to meet, not a case which is presented against him by evidence given at his trial, but a case which exists in the mind of the judge at the commencement of the trial, although it may be explained ... by reference to various matters which formed the basis of the judge's opinion. This can only mean that the tribunal commences, not with a presumption of innocence, but with a presumption of guilt. Such procedures are not easily reconcilable with fundamental principles of justice.[11]

4. In the absence of an express statutory provision, there is no general right of appeal against a conviction for contempt in the face of the court, or its statutory equivalent. The scope of judicial review depends on the status of the court handing down the conviction and on general principles governing review of its orders, whether on appeal, through prerogative writ or otherwise.[12] Once again, a general principle of criminal process is not followed.

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9 It is not clear whether a magistrate has power at common law to deal summarily with contempt in the face of the court. It depends on whether a magistrate's court is a court of record. The better view is probably that it does not possess this status, and accordingly that any power of summary trial of this form of contempt must be conferred by statute. See *e.g.* C.J. Miller, *Contempt of Court* (1976) 26-27; Australian Law Reform Commission, note 4 *supra*, paras 28-33.

10 There is no absolute right to legal representation, even for an accused person facing the possibility of a prison sentence. See *e.g. McInnis* v. *R.* (1979) 143 CLR 575.

11 *Keeley* v. *Brooking* (1979) 143 CLR 162, 186 (hereinafter *Keeley*).

12 See *e.g. R.* v. *Macindoe; ex parte Searson* [1938] VLR 277; *Ex parte Bellanto; re Prior* (1962) 63 SR (N.S.W.) 190 (hereinafter *Ex parte Bellanto*).

II. "STAY IN GAOL FOR A GOOD LONG WHILE..."

The Court of Appeal in the *Tuckerman* case stated in conclusion that it had no power to review the sentence passed by the magistrate.[13] It refrained from making any comment on this sentence. A comment may, however, be offered here: in view of the derisory maximum fine of $4 — which is still, seventeen years later, the figure stipulated — the magistrate was compelled to impose a prison sentence if he was to deploy his sentencing powers at all. The upper limit of $4 may seem laughable at first, but on closer examination it has a sinister effect.

An issue of greater significance is that, if conduct found to be contempt in the face of the court occurs in a superior court, such as the Federal Court of Australia or a Supreme Court of a State, there are no formal limits on the sentence that may be imposed. Once again, a general principle of criminal process — that maximum sentences should be specified by law — is not followed in contempt law.

An incident in a Scottish Court in 1972, briefly reported in a case called *Cordiner, Petitioner,*[14] illustrates the dangers of this. It is described more fully in an article by the *Times* columnist, Bernard Levin, than in any of the law reports:

> [i]t took place in Edinburgh, a place noted, over the years, for both the quantity and the quality of its legal absurdities, and the poor devil at the receiving end was a Mr Cordiner... It was stated in the course of the proceedings in which he was involved — a successful petition for divorce by his wife on grounds of cruelty — that he had a long string of convictions, the most recent of which was for attempting to extort money from a gaming-club proprietor by threatening to stab him, blow him up, set fire to his premises and cut his head off, which does seem to be over-egging the pudding a bit...
>
> As the judge (Lord Stott) was giving his decision, Mr Cordiner began to shout and scream words to the effect that the evidence had been a pack of lies, that the proceedings constituted a kangaroo court, that nobody present would sleep in peace thereafter, that they would all have something to be afraid about, that he would take the law into his own hands, and that they would find out what stabbing was.
>
> Well, now; the courts of this country have frequently seen prisoners or litigants displeased with the conduct or outcome of the case in which they are involved, lose their tempers — Mr Cordiner, incidentally, explained to the judge that he had lost his...[Yet] Lord Stott ordered Mr Cordiner arrested, had him brought handcuffed back into court, *and sentenced him to three years' imprisonment for contempt...*
>
> I hope that Lord Stott's savage reaction — for a reaction, rather than a sentence, is what it was — will receive appropriate rebuke.[15]

It is not clear from the law reports whether this rebuke was actually ever administered to Lord Stott. Three months after being sent to prison, Cordiner petitioned the High Court of Justiciary for release pending the

13 *Tuckerman,* note 2 *supra,* 28-29.
14 [1973] SLT 125 (hereinafter *Cordiner*).
15 "Why Silence in Court is Especially Golden" (1972) *The Times,* November 21, 14.

hearing of his appeal. The petition stated that he had sent a full written apology to Lord Stott. The High Court dismissed the petition on the ground of lack of jurisdiction, without making any comment on the conviction or the sentence. The law reports do not otherwise refer to the fate of Mr Cordiner.

III. "THE POLITICAL CLIMATE MATTERS..."

The results in these two cases — *Tuckerman* and *Cordiner* — are extreme, in the sense that they illustrate respectively the adoption of a particularly broad definition of contempt in the face of the court and a particularly severe exercise of the unlimited sentencing power of a superior court in this context. They may be contrasted, for instance, with the South Australian decision in *O'Hair* v. *Wright,*[16] in which a man who announced to the court that he did not accept its authority was held not to have committed a statutory form of contempt in the face of the court, and with the story (probably apocryphal) of the English county court judge who, when an angry litigant had just thrown a dead cat at him (which missed), simply said: "I shall commit you for contempt if you do that again."[17] Many judges have said that a court's contempt powers should be exercised "sparingly",[18] and no reported Australian gaol sentence in this area of contempt has been anywhere near three years.[19] Undoubtedly the rulings in *Tuckerman* and *Cordiner* illustrated what courts *could* do in cases of disruption of court proceedings or courtroom challenges to judicial authority, rather than what they *normally* do or did.

So far as the decision in *Tuckerman*[20] (at least) is concerned, this is clearly attributable in part to the political climate of the late 1960s and early 1970s in Australia. It was a time of widespread political dissent, focussing chiefly on the Vietnam War, but finding expression in a wide range of extra-parliamentary contexts, including courtroom hearings. The Australian Law Journal editorial already referred to, while expressing its disapproval of the contempt convictions handed down in the case, spoke of

> a growing disenchantment with legal institutions among certain politically active young people, who think they see these institutions operating with a political bias to the right... Their views may by some be regarded as quite unimportant; but on the other hand they quite possibly include some of the future leaders of our society.[21]

16 [1971] SASR 436 (hereinafter *O'Hair*).

17 This story is told in R. Megarry, *Miscellany-at-Law* (1955) 295, note 19.

18 See *e.g. O'Hair,* note 16 *supra,* 441 *per* Mitchell J.

19 Recorded sentences in recent years include one of six months' imprisonment for refusal to answer a question in criminal proceedings in the District Court of Western Australia (*Cullen* v. *R.,* unreported, Supreme Court of W.A., 25 September 1986) and one of three months, subsequently set aside on appeal after the offender had served seven weeks, for an outburst of rudeness in the District Court of Queensland (*Dow* v. *Attorney-General* [1980] Qd R 58). In a recent New South Wales case, a Supreme Court judge imposed what was in effect a suspended sentence of unlimited duration in response to a series of insults from a litigant appearing before him (*Tectran Corp. Pty Ltd* v. *Raybos Australia Pty Ltd,* unreported, 15 October 1986). This sentence was not, it seems, ever put into effect. For comments on sentencing practices in England and in the United States of America, see *e.g.* Australian Law Reform Commission, note 4 *supra,* para. 87.

20 *Tuckerman,* note 2 *supra.*

21 Note 1 *supra,* 165.

The next editorial item in the same issue of the Journal described a recent prosecution in Sydney under the National Service Act, in which

> the proceedings were interrupted by boos, cheers, clapping and shouting. Counsel for the prosecution was jostled by the crowd outside the court, and it was considered prudent for the police to escort him from his chambers back to court at the commencement of the afternoon proceedings.[22]

The note on this incident suggested that it was anomalous that nobody was charged with contempt of court in consequence of this demonstration, whereas the six men involved in the *Tuckerman* case had been convicted and imprisoned for two weeks.

Organised courtroom challenges to judicial authority are now much less frequent than in the early 1970s. In a somewhat calmer atmosphere, the courts have accordingly been prepared in recent years to strengthen the procedural protections available to a person accused of this branch of contempt. In particular, it is no longer possible, at least in New South Wales, for justice to be administered "on the spot", without any significant delay. Although in 1980 the Supreme Court of Queensland upheld an "on the spot" conviction for contempt in the face of the court,[23] the New South Wales Court of Appeal held in 1984 that the accused person is entitled to an adjournment of proceedings for a sufficient period to permit preparation of his or her case in defence.[24] This implies that there should be an opportunity to obtain legal advice and/or legal representation.[25] In addition, a High Court decision in 1984[26] has reaffirmed earlier High Court authority[27] to the effect that the accused person is entitled to the following procedural safeguards: a reasonably distinct formulation of the charge being laid, accompanied by appropriate particulars of the conduct relied on to support the charge; an opportunity to give evidence (sworn or unsworn), to cross-examine any witness or witnesses called by the prosecution (though not the presiding judge or magistrate) and, it would seem, to call witnesses in defence; and an opportunity to make submissions regarding liability and sentence. The summary contempt procedure has, in short, been significantly leavened by elements of the important principle of natural justice known as *audi alteram partem.*

In view of this strengthening of procedural safeguards in favour of the accused, to read nowadays an account of the *Tuckerman* and *Cordiner* cases is a less chilling experience than it would otherwise be. Yet the courts have still not extinguished the crucially significant power of the presiding judge or magistrate to determine liability and impose punishment where conduct

22 "Doing Violence to Justice" (1971) 45 *ALJ* 167.
23 *Dow,* note 19 *supra.*
24 *Fraser,* note 3 *supra.*
25 In England it has been said that it is highly desirable for the court to ensure that legal representation is obtained if the court is contemplating a prison sentence: See *e.g. Balogh* v. *St Albans Crown Court* [1975] QB 73, 90 *per* Stephenson L.J.
26 *Lewis* v. *Ogden* (1984) 153 CLR 682 (hereinafter *Lewis*).
27 *Coward* v. *Stapleton* (1953) 90 CLR 573, *Keeley,* note 11 *supra.*

which he or she deems to be contemptuous occurs in the courtroom. The closest that they have got to taking away this power is to insist on occasions that it should be regarded as an "exceptional" power, "to be confined, both as a matter of law and of discretion, to a limited number of emergency cases where, for some good reason, it is inappropriate to proceed in the way more consonant with our normal criminal procedures".[28] This view of the matter is in accordance with recommendations made in 1974 by the Phillimore Committee on reform of contempt law in England.[29] But it still leaves open the way for fundamental objections, based primarily though not solely on principles of natural justice. They focus particularly on the "natural justice" doctrine that the adjudicator of a legal dispute must be, and must be seen to be, free from bias, though they also raise the question of *audi alteram partem.*

Bernard Levin's article on the *Cordiner* case provides an eloquent non-lawyer's summary of these objections:

> why is it that contempt in the face of the court alone among offences, is subject to scarcely any of the normal court procedures, rules, safeguards or checks upon the exercise of judicial power? What other charge is heard by a judge (sometimes in the most literal sense a judge in his own cause) without a jury, without witnesses, without evidence, with virtually no defence at all other than a plea in mitigation...?
>
> Is this not odd? Of course, contempt of court is, and must remain, a serious offence. But why should not those who are alleged to have committed it be prosecuted, for a specified offence, in the ordinary way? Why should they not have an opportunity to plead guilty or not guilty... and to cross-examine witnesses against them...? Why should not the normal rule which would, for instance, make it inconceivable for a man charged with burgling a judge's house to be tried by the judge in question, operate in contempt cases?
>
> I really cannot for the life of me see why contempt of court should remain in its bizarre and unsatisfactory limbo, and I bet Mr Cordiner cannot, either.[30]

The answers to Levin's questions are in part historical, so a historical excursus at this stage is useful.

IV. "IT'S BEEN DONE THIS WAY FOR HUNDREDS OF YEARS..."

In a book entitled *The Contempt Power* (published in the U.S.A. in 1963), R.L. Goldfarb drew attention to the inherent potential of all government institutions — not merely courts — in early times to exercise contempt powers. This is because contempt of any such institution used to be viewed as contempt of the personal, divinely bestowed authority of the monarch. In relation specifically to contempt of court, Goldfarb developed this theme as follows:

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28 *European Asian Bank* v. *Wentworth* (1986) 5 NSWLR 445, 453 *per* Kirby P. (hereinafter *European Asian Bank*).

29 Great Britain, Lord Chancellor's Department, *Report of the Committee on Contempt of Court* (1974) paras 32-33.

30 Note 15 *supra.*

[t]he power of courts to punish contempts is one which wends historically back to the early days of England and the crown. A product of the days of kingly rule, it began as a natural vehicle for assuring the efficiency and dignity of, and respect for the governing sovereign. Viewed as a legal doctrine which was articulated and immersed in the common law, it is generally a product of Anglo-American society.

Those informal groups which ruled the primitive associations of men undoubtedly looked to some pagan, religious, or divine and natural right to enforce their systems. There is some evidence that schemes akin to contempt were at least thought of in more antiquated societies. The writings of Emperor Justinian refer to certain judicial punishing powers which were conceded to be necessary means of official force, and which resemble contempt. The Codes of Canon Law, the religious rules of the Roman Popes, contain sections which deal with disciplinary or penal powers akin to judicial contempt as we now know it. Maitland referred to these sources as influences upon the original equity jurisdiction of the king's chancellors, whose judicial culture was inspired by the canon law...

The idea that the headman must be obeyed, at the risk of committing an unnatural and punishable offense, cannot be traced with scientific exactness to a precise moment and place. It is agreed though that authority for that premise can be traced in part to ancient concepts of government, both secular and religious. The idea that obedience to divine commands was good and disobedience sinful has been traced to the assertions of the early popes, as well as the emperors... With the rise of the feudal system in England, accompanying the pre-eminence of royal power after the Norman Conquest, there developed manifestations of the idea of the complete ownership, authority, and power of the king. This was but another, though not different, step from the sanctity of the medicine man, the priestly character of primitive royalty, and the Christian concepts of obedience — starting in Christian history with papal obedience and bridging Middle Age centuries of monarchistic, secular governments...

As society became more diverse and extensive, the English kings found it necessary to have their kingly governmental powers exercised by representatives. The courts of early England acted for the king throughout the realm. And their exercise of contempt powers derived from a presumed contempt of the king's authority. Violation of their writ or disobedience to their officers violated the peace and flouted the king they represented. Though the king acted through others, in a mystical way he was presumed to be present and subject to being contemned...

Gradually, any questions about the right of the judiciary to punish disobedience, obstruction, or disrespect (and they were few) were answered with the claim that this was an inherent right of English courts. Necessity then became with maturity the mother of this claimed innate, natural right of courts. The natural inclination to claim this power as one innate in judicial institutions was but one step in the rise in power of the courts and later the Parliament, in England. The king had pointed the way...

Justice was as strict as it was swift. In a case in 1631, a man threw a brickbat at the Chief Justice after being convicted of a felony. Though he missed the judge, his right hand was cut off and fixed to the gibbet, and he was immediately hanged in the presence of the court. It was said that such misconduct must be summarily punished by the courts because without this power of punishment they could not perform, and the kingdom would stand still if 'justice' was not immediate — and, of course, custom and necessity called for it.[31]

31 R.L. Goldfarb, *The Contempt Power* (1963) 9-13, 15. See also A. Arlidge and D. Eady, *The Law of Contempt* (1982) paras 1.01-1.02.

In the threefold classification of types of authority propounded by the sociologist Max Weber, judicial contempt powers, as thus described by Goldfarb, belong within the category of "traditional authority".[32] Weber describes traditional authority as based in the "sanctity" of the social order, as being exercised by persons designated according to "traditionally transmitted rules" and as being a form of personal authority, rather than authority exercised by an impersonal institution. It confers wide discretionary powers on the "chief", who is free to confer favours or mete out punishment by reference to broad notions of ethics or justice or indeed tradition, rather than precisely formulated legal rules.

Seeing that judicial contempt powers originated within a feudal form of society in which, according to Weber's own account, the mode of authority was largely traditional, it is not surprising that such powers also present an example of predominantly traditional authority. The crucial point is, however, that while the general development of the common law, in response to the emergence of capitalism, has been, according to Weber's thesis, in the direction of "rational-legal" authority, the powers of a court in modern times to punish contempt in the face of the court still retain many of the hallmarks of traditional authority. The powers of the presiding judge or magistrate in such cases are not confined, as is normal under a system of "rational-legal authority" and indeed under constitutional doctrine as to separation of powers, to merely adjudicating on issues of fact and law as presented by opposing counsel and determining a sentence or other remedy, where necessary. Instead, in the words of Kirby P.,

> when a judge deals summarily with an alleged contempt he may at once be a victim of the contempt, a witness to it, the prosecutor who decides that action is required and the judge who determines matters in dispute and imposes punishment.[33]

The Report of the Australian Law Reform Commission on *Contempt* identifies three further roles which may be played by a presiding judge or magistrate: that of a senior police officer, in ordering that disruptive people should be removed from a courtroom; that of a legislator, in specifying, either in advance or retrospectively, what types of conduct should not be permitted in his or her court; and that of counsel for the prosecution, in examining any witnesses that may be called in a contempt matter.[34]

Judicial contempt powers thus appear to constitute an enclave of traditional, personal authority exercised by judges and magistrates in the midst of a system of "rational-legal" authority. In partial response to the criticism that they thus exhibit "autocratic medievalism" [35] which should be eliminated from the law, it is sometimes asserted that there are modern justifications for them, having nothing to do with the divine right of

32 M. Weber, *The Theory of Social and Economic Organisation* (transl. A.M. Henderson and T. Parsons) (1964) 341-342.

33 *European Asian Bank*, note 28 *supra*, 452.

34 Australian Law Reform Commission, note 4 *supra*, para. 92.

35 See *e.g.* M. Harris, "Separate Law Applies to Judiciary" (1983) *The Australian*, March 5.

monarchs to insist that they and their delegates, the judges of the realm, should enjoy absolute power. As Goldfarb indicates in the passage quoted above, it is argued that contempt powers are a necessary ingredient of the "inherent powers" of courts, without which a court could not dispense its function of adjudicating rights and liabilities and granting criminal or civil remedies.[36] Furthermore, the power of the courts to fulfil these tasks rests not upon the wish and command of our sovereign lady the Queen, but on community acceptance. As a Chief Justice of New South Wales said about 100 years ago, in a case of contempt by "scandalising":

> [w]ith nothing but its common law attendant, the sheriff, and its humble officials the courtkeepers and tipstaffs, [a court] derives its force from the knowledge that it has the whole power of the community at its back.[37]

In line with this changed formulation of the basis of judicial power, it is also asserted that the injury inflicted by an act of contempt in the face of the court — or indeed by any other act of contempt — is not an injury to the judicial officer directly affected by it, but to the court to which he or she belongs, and/or to the judicial system as a whole, and thus ultimately to society.[38]

This interpretation of the survival of contempt powers is, however, disputed by at least one commentator. According to a recent article by Brendan Edgeworth, dealing with the separate branch of contempt known as "scandalising the court",[39] judicial powers to punish for contempt are more than just an isolated relic of the English way of administering justice in medieval times. Edgeworth argues that the law of scandalising, as restated and applied by the majority of the High Court in *Gallagher* v. *Durack*,[40] reflects "a pervasive inegalitarianism, traceable to the very nature of the British, and derivatively, the Australian state".[41] He develops this argument as follows:

> [i]t is an enduring feature of both political cultures that 'sovereignty' — in the sense of absolute political power — resides not in the 'people' but in the Crown, i.e. the institutions of government and of course, through institutions of government and of course, through them, their personnel. That this is the case is not some historical accident, or some interesting snippet of constitutional wisdom, but rather, captures the essence of the state and represents the culmination of a specific material history that created it. Briefly, as far as Britain goes, its uniqueness resides in the fact that unlike many other emerging capitalist economies, it did not suffer the catharsis of a genuine popular revolution. Significant movements from below were not sufficiently powerful to extract major concessions from above...

36 See *e.g.* I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Prob* 23.

37 *Re "The Evening News"* (1880) 1 NSWLR 211, 237 *per* Martin C.J.

38 See *e.g. Lewis,* note 26 *supra,* 693; *Ex parte Bellanto,* note 12 *supra,* 200, 202.

39 This renders punishable (potentially) any publication which has a tendency to undermine public confidence in the administration of justice by the courts. See *e.g.* M.R. Chesterman, Australian Law Reform Commission, Contempt Research Paper No. 5, *Public Criticism of Judges* (1984); Australian Law Reform Commission, note 4 *supra,* Ch. 10.

40 (1983) 152 CLR 238.

41 B. Edgeworth, "Beneath Contempt" (1983) 8 *LSB* 171, 172.

> What has happened as a matter of historical development is that the social hegemony of the feudal upper classes has continued as intact as before, the only change being that the fractions of the stratum are differently constituted. Australia inherited this in an even more acute form by virtue of colonial status. The material effect of this has constantly pervaded this country's constitutional history, of which the sacking of democratically elected governments, in the name of the 'Crown' is just the tip of an unfortunate and disagreeable iceberg. The extensive protections given to individuals suitably located in the social hierarchy by the law of contempt and defamation is part of the submarine bulk. In other words, in terms of participation in the political processes generally, ordinary people, are assigned the role not of citizens but of *subjects*. Such an ideological climate distinctly supports notions of respect, deference, and putting it in its crudest form, not answering back. As mentioned above, the British judges are not so defensive, though they are obviously much more infused with these conceptions than their American counterparts. The Australian judiciary, with sovereignty even further removed physically from the 'people', represents the most extreme form of this world view.[42]

This argument derives support from the fact that the European civil law systems do not contain a concept of contempt and, indeed, were found by Weber, amongst others, to proceed more rapidly than England to a system of "rational-legal" authority. Not only in the retention of contempt powers but in other important respects — for example, retaining lay gentry to administer local justice as justices of the peace — England adhered for a comparatively long time to traditional modes of authority, even though it was the first country to experience industrial capitalism.[43] Edgeworth's argument also fits in with the claim, sometimes made, that despite persistent assertions that Australia is a classless, egalitarian society, there is in fact greater deference in Australia to status and tradition than in England.

V. "SO IT SHOULD STAY THIS WAY..."

Edgeworth's argument provides a useful starting-point for a critique of the modern law of contempt in the face of the court. It can be used to support two diametrically opposed value-judgments. It can provide a basis for contending, as Edgeworth does, that the retaliatory exercise of contempt powers, whether in scandalising cases or in cases of contempt in the face of the court, constitutes an highly undesirable aspect of our present-day legal system, because it offends basic requirements of natural justice, and innocence until proof of guilt. However, it can also be taken to imply community acceptance of the proposition that judicial status should carry with it the power to deal peremptorily with direct challenges to the judicial system by ordinary citizens, who ought not, in Edgeworth's words, to "answer back". This alternative contention is summed up as follows in the Australian Law Reform Commission's Report on *Contempt:*

> [n]owadays, although sentences for contempt in the face of the court are considerably less savage than in feudal times, the general public still regards presiding judges as powerful

42 *Id.*, 172-173.

43 See D.M. Trubek, "Max Weber on Law and the Rise of Capitalism" [1972] *Wis L Rev* 720, 746-748; M.R. Damaska, *The Faces of Justice and State Authority* (1986) 38-44.

> figures of authority, and anticipates that, in accordance with long-established and well-accepted practices and procedures, they will deal directly and peremptorily with disruptive or unruly conduct in the courtroom. So deeply embedded is this way of thinking about courts that many people would not consider a judge to be a 'true judge' if he or she could not make a firm show of authority in dealing with such conduct.[44]

Unfortunately, comprehensive surveys of public expectations regarding judges are singularly lacking in Australia and there is no way of telling whether these particular expectations regarding the behaviour of judges and magistrates when confronted with courtroom misconduct really are held by a majority within the community.

It may well be, however, that this version of what constitutes a "true" judge is an important ingredient of the professional self-image of many judges themselves. In responding to a survey of judges and magistrates carried out by the Law Reform Commission, 68.4% of Australian judges and 74.6% of magistrates considered that the advantages of summary trial of courtroom contempts by the presiding judge or magistrate outweighed the disadvantages.[45] Rather smaller proportions of respondents (50.3% and 53.9% respectively) were prepared to endorse the proposition that there was no conflict between this procedure and the general requirement of trial of legal disputes by an "independent and impartial tribunal" in Article 14 of the International Covenant on Civil and Political Rights.[46] More significantly, perhaps, it has been the experience of the writer and of fellow-researchers in discussing this aspect of contempt procedure, whether publicly[47] or privately, with individual judges or magistrates, to encounter strong feelings on the matter, particularly when preservation of the *status quo* is being advocated. There is a powerful concern — which would appear from the survey results to be also a majority concern — that a judge or magistrate who cannot deal personally and reasonably swiftly with disruptive conduct or other improper behaviour within the court will be viewed by those present, and indirectly by the community as a whole, as lacking the necessary authority to maintain order and due decorum in the court, or indeed to make determinations and grant remedies which will be accepted as binding upon all concerned. Such authority, it is felt, will not be sufficiently preserved even if the judge or magistrate retains powers (a) to expel disruptive people from the court, (b) to direct, where necessary, that they be charged with contempt (or an equivalent offence) before a differently constituted court and (c), if the circumstances clearly require it, to remand them, pending trial, in custody or on conditional or unconditional bail. There should also be the leeway to show mercy and forgiveness: this may actually reinforce the authority and dignity

44 Australian Law Reform Commission, note 4 *supra*, para. 96.

45 *Id.*, App. C, Table 23.

46 *Id.*, App. C, Table 24.

47 *E.g.*, in a discussion (reported in the *Gazette of Law and Journalism*, No.7, October 1987, 4) following the writer's delivery of a paper, "Reform of the Law of Media Contempt", at the 24th Australian Legal Convention at Perth, 24 September 1987 (reprinted 61 *ALJ* 695).

of the court.[48] Significantly, in view of the foregoing discussion of types of authority, the analogy of schoolteachers' powers is sometimes invoked. It is strongly urged that, just as a schoolteacher could not control a classroom if he or she could not decide summarily whether to punish a disruptive pupil, so a judge or magistrate needs patriarchal authority to impose discipline *personally* within a disrupted courtroom.

Anxiety as to the possible erosion of the position of judges and magistrates as authority-figures is also apparent in another strand of the argument against abolishing existing procedures. This is the contention that, if the trial of cases of contempt in the face of the court were referred to a differently constituted court, the judge or magistrate who presided at the relevant proceedings might have to be called as a witness and subjected to cross-examination, in which event his or her authority might suffer severely. The accused person would, in effect, be given a licence to take revenge on the judge or magistrate for bringing the contempt charge, and if the court disbelieved the judicial testimony, it would have no choice but to inflict a severe blow to judicial credibility.

Other arguments in favour of the *status quo* focus on the advantages of speed and efficiency to be gained from permitting presiding judges or magistrates to make findings on the basis of what they saw and heard — including their perceptions of such things as the "tone and demeanour" of the accused person at the crucial time — in comparison with eliciting such matters through the slow and painful processes of examination and cross-examination of witnesses, and through reading court transcripts.[49]

If the opinion of a majority of judicial officers that the "true" judge must be equipped with peremptory authority to deal with courtroom contempts genuinely coincides with a majority view within the community, the case for preserving this enclave of traditional personal authority within a system constructed along very different lines is a strong one. It seems to be yet another case of experience — or, indeed, democratic values — being a better guide than logic to the development of law. But, as already indicated, this assumption as to the community's views cannot be made. Furthermore, even if it were shown that most people did in fact feel more confident in the workings of the courts through knowing that a judicial officer could, in extreme cases, take control of a courtroom by invoking powers of summary punishment akin to those of a schoolteacher, it does not follow that the *status quo* should prevail. This community preference must be balanced against the right of persons accused of contempt to a fair trial before an "independent and impartial tribunal", to quote again Article 14 of the International Covenant on Civil and Political Rights.

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48 *Cf.* the discussion of the role of 18th century judges in criminal cases in England, by D. Hay, "Property, Authority and the Criminal Law" in D. Hay, P. Linebaugh and E.P. Thompson (eds), *Albion's Fatal Tree* (1975) Ch.1.

49 For further elaboration of these arguments, see Australian Law Reform Commission, note 4 *supra*, paras 95-110.

The writer's personal view on this fundamental issue is that the latter consideration is paramount. This is in line, more or less, with the Law Reform Commission's recommendations. Undoubtedly courts must, from time to time, impose penalties on those who disrupt court proceedings. If nothing is done on this matter, courts will lack the "space", metaphorically speaking, to fulfil their important tasks. In the absence of any other appropriate institution, liability and punishment for this form of challenge to a court must be determined within the court system. But it does not follow that the particular judge or magistrate whose proceedings were affected should exercise a broad-ranging, "traditional" authority to deal with the matter in all its aspects. As indicated at many points in this article, too many fundamental precepts of natural justice — above all, the prohibition against a risk of bias — and too many fundamental rules of criminal procedure — above all, the presumption of innocence — are put in jeopardy. It is surely essential that the punishment of a person for interfering with the administration of justice should take place according to laws and procedures to which the term "justice" can be unhesitatingly applied. In the last analysis, this is a more important consideration than anything stemming from judicial or community perceptions as to judicial authority.

Three supporting arguments in favour of this position are as follows:

1. Judicial powers to expel disrupters, charge them with contempt and (where necessary) remand them in custody or on bail give scope for an ample show of authority in the courtroom, if such is needed. At common law, a power of expulsion exists wherever "interruption to the ordinary procedures of the court is caused or is reasonably to be apprehended" on account of a person's courtroom behaviour.[50]
2. If courtroom contempt cases are referred elsewhere, the presiding judge or magistrate can usually be protected from having to give evidence and submit to cross-examination. This can be done through (for instance) a rule that the court trying the case must first give leave and that such leave should not be given unless his or her testimony is deemed essential. In practice, it will scarcely ever be essential because other witnesses, such as court officers, can supply the necessary evidence. Their collective evidence, tested in cross-examination, is in fact likely to be more reliable than the unaided perceptions of the judicial officer trying the case alone.
3. The recent infusion (as described above) of principles of *audi alteram partem* into the traditional summary procedure, by rendering "on the spot" trial impermissible, has significantly undermined those arguments for the *status quo* that are based on the need for a swift assertion of judicial authority to punish.[51]

50 *Ex parte Tubman; re Lucas* [1970] 3 NSWR 41, 53 *per* Asprey J.A. A narrower criterion applies where it is proposed to expel an accused person in criminal proceedings. See generally Phillipps, note 4 *supra,* Ch.5.

51 For elaboration of these arguments, see Australian Law Reform Commission, note 4 *supra,* paras 105-110.

On the basis of these considerations, the Australian Law Reform Commission's Report on *Contempt*[52] recommends that the common law of contempt in the face of the court be abolished and replaced by appropriately confined statutory offences. The principal one of these should be based on a concept of "substantial disruption" of the relevant proceedings[53] and should import a requirement of *mens rea.* (On these two issues, the rulings in *Tuckerman*[54] are reversed.) Maximum penalties should be prescribed in the usual way. A presiding judge or magistrate should retain the common law power to expel persons from the court, and should also have a power to charge a person with one of the substituted offences, remanding him or her (where necessary) on bail or in custody. Trial of the offence should take place within the court involved — the ordinary criminal processes are, on this issue, put to one side. But — and this is the crucial point — the accused person, after having had an opportunity to take legal advice, should have the option (as should also the presiding judge or magistrate) to require that the court be differently constituted. In other words, trial by the presiding judge or magistrate should only take place when this judge or magistrate and the accused person so agree. Where a differently constituted court hears the case, the presiding judge or magistrate should not be compellable to give evidence unless the court gives leave.

The crucial recommendation that the presiding judge or magistrate should not act, in effect, as judge in his or her own cause without the informed consent of the accused has only once, as far as the writer is aware, been officially recommended elsewhere in the common law world. This was in a Bill which was presented to the Canadian Parliament in 1984, but which lapsed when the Trudeau Government was voted out of office.[55] In terms of principle, it is a recommendation of basic importance. In view of the comparative calm of our courts at present and of current moves, in the High Court particularly, towards using video links in place of formal hearings,[56] its importance may, in time to come, seem more symbolic than real. But it will still have been worth arguing for.

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52 *Id.*, paras 112-136.

53 Three accompanying offences are also recommended, relating respectively to "witness misconduct" (*i.e.* refusal by witnesses to attend court, produce documents, be sworn or make an affirmation, or answer a question lawfully put in the proceedings), taking or publishing photographs, video-tapes or films in court without the leave of the court and publishing sound-recordings of court proceedings without the leave of the court. These offences would leave scope for the unobtrusive sound-recording of court proceedings, even where leave was not given. See generally *id.*, paras 117-126.

54 *Tuckerman*, note 2 *supra*.

55 Bill C-19, inserting a new Cl.131-13 into the Criminal Code of Canada. Law reform reports have favoured retention of summary powers, at least in cases requiring urgent trial: see *e.g.* Great Britain, Lord Chancellor's Department, note 29 *supra* (Phillimore Report) paras 32-33; Criminal Law and Penal Methods Reform Committee of South Australia, Report No. 4, *The Substantive Criminal Law* (1977) 228-232; Law Reform Commission of Canada, Report No. 17, *Contempt of Court* (1982) 23. In the United States of America, there is a constitutional requirement of jury trial if the sentence to be passed is a prison term of six months or more; otherwise, summary trial by the presiding judge or magistrate is permitted. See *e.g. Bloom* v. *Illinois* (1968) 391 US 194.

56 See *e.g.* B. Young, "High Court Tries Hi-Tech" (1987) *Australian Financial Review*, August 3, 1.