JUDGES AND THE MEDIA

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Not long ago Justices of the High Court were asked to make themselves available to be interviewed for a radio programme, which was to be along the lines of a previous programme in which judges around the world were interviewed and expressed their views upon various subjects to do with their responsibilities. Some of you may have heard the broadcast on A.B.C. radio and, if you did, you would, I think, agree that it was a responsibly conducted programme which was both interesting and, at any rate for lawyers, entertaining. Nevertheless, I, for my part, refused the request to be interviewed for this purpose, just as I have refused similar requests before. This time, however, I did so less automatically than I have done in the past with some reflection upon whether, in an age which tends to function upon images as much as upon facts, judges are right in turning their backs upon the world of the news media. Of course, there was an obvious difference between an interview in Australia which was to be broadcast in Australia and was to deal with local issues, and an interview to be broadcast overseas. Whether it should be so or not, it seems easier to talk about such things for an overseas audience. It is one thing to be interviewed in London or New Delhi or Washington for Australian consumption, as were the judges in the previous programme. It is another thing to be interviewed locally for a local audience.

That is, however, only part of it. There is a substantial reason why, to my mind, judges do not allow themselves to be interviewed. It is that the function of a judge is to judge cases. That he does in open court and when he makes his decisions he gives his reasons for them publicly. Everything is there for public scrutiny and there is no real point to be served by any further

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explication. Indeed, the danger of the judge discussing his function in the news media, even in a general way, is that emphasis would be placed upon the individual personality which is something which the processes of the law are designed to play down. The judicial method, court dress and court procedure are all aimed at fostering an objective rather than a subjective approach to the administration of justice, whereas the inevitable tendency of the media is to personalize issues in a way which is inimical to this aim.

Of course, with interviews there is another objection. If their function were merely to inform or to instruct, one might be tempted to resist them less adamantly, but they are at least as much to entertain as to instruct and judges have no business in the world of entertainment; at all events where there are dangers of compromising their proper function. And, of course, it is to be borne in mind that at least one objective of a newspaper article or a radio or television programme is to increase circulation or ratings, often with any eye to profit. Even if assurances are given that the final product will be pitched at the level of education rather than titillation, experience has shown that the result often does not meet expectations and is likely to trivialize rather than explain the processes of the law.

So it is that judges do not make public comments upon particular cases tried in their courts nor, although it cannot be said categorically, are they available for interview upon general questions or upon matters relating to the law, the courts and the administration of justice.[1] There may be some latitude where the independence of the judiciary is seen to be under threat, as we have seen in New South Wales in the past couple of months, but there is a recognized code of conduct. Occasionally, however, there have been judges who have not observed this code and it may be of interest to look briefly at two recent instances.

Judge James Pickles, a northern circuit judge in the United Kingdom, who maintains a view that judges should not be "as monastically remote" as they have been in the past, has engaged in a recent course of conduct in the media which has been described as bringing the full opprobrium of the Lord Chancellor upon him. So far as I can gather from newspaper reports, he first wrote two newspaper articles upon sentencing, the parole system and the prison system. The Lord Chancellor, Lord Hailsham of Marylebone, invoked the Kilmuir Rules (to which I shall refer in a moment) in a letter to the judge in which he said that he considered the articles as prima facie judicial misbehaviour. Judge Pickles protested and the Lord Chancellor replied that recent events and, in particular, the newspaper articles, "show you have not heeded the warnings which those senior to you have given. This must be the result of foolishness or a complete lack of sensitivity." The judge gave an undertaking not to write further newspaper articles, but apparently withdrew that undertaking.[2]

1 See S. Shetreet, *Judges on Trial* (1976) 319.
2 See (1986) *The Times* February 21.

In a further article he wrote about over-assertive police officers in public house brawls and upon two B.B.C. radio programs dealt with the subject of prostitution and sentencing, interviewing some prostitutes and some of the criminals whom he had sentenced for the purpose. He is described as having launched a personal campaign to give judges freedom to speak out in the media and is reported as having said "[a] judge works for the public and has a responsibility to the public and ought to be amenable to the media to explain what he is doing and why he is doing it."[3] In addition to the newspaper article and the broadcasts, the judge wrote for *The Listener* and gave press interviews.[4]

An English circuit judge may, of course, be removed from office by the Lord Chancellor for incapacity or misbehaviour. I am not aware of the eventual fate of Judge Pickles, but it would appear that he *was* in breach of the Kilmuir Rules as the Lord Chancellor asserted. Those rules derive their name from a letter in 1955 by the then Lord Chancellor, Lord Kilmuir, to the then Director-General of the B.B.C.

In that letter Lord Kilmuir said:

> [i]t is, I think, agreed that there are positive advantages to the public when serious and important topics are dealt with through the medium of broadcasting by the highest authorities. We are likely, for example, to get a better assessment of the qualities of some eminent Judge of the past through an existing member of the Judiciary than from anyone else. But the overriding consideration, in the opinion of myself and of my colleagues, is the importance of keeping the Judiciary in this country insulated from the controversies of the day. So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the actual performance of his judicial duties, must necessarily bring him within the focus of criticism. It would, moreover, be inappropriate for the Judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment; and in no circumstances, of course, should a Judge take a fee in connection with a broadcast.
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> My colleagues and I, therefore, are agreed that as a general rule it is undesirable for members of the Judiciary to broadcast on the wireless or to appear on television. We recognize, however, that there may be occasions, for example, charitable appeals, when no exception could be taken to a broadcast by a Judge. We consider that if Judges are approached by the broadcasting authorities with a request to take part in a broadcast on some special occasion, the Judge concerned ought to consult the Lord Chancellor, who would always be ready to express his opinion on the particular request.[5]

The second instance which I want to look at is, perhaps, less diverting than that of Judge Pickles. It happened in Canada. At the end of 1981, when the debate about patriation and the amendment of the Canadian Constitution

3 *Id.*, 6 May 1986.
4 A.W. Bradley, "Judges and the Media: the Kilmuir Rules" [1986] *Public Law* 383, 384.
5 *Id.*, 385.

was at its height, Mr Justice Berger of the Supreme Court of British Columbia criticized the constitutional accord that had been reached between the Prime Minister, Mr Trudeau, and the premiers of nine provinces.[6] His criticisms were twofold: the failure to mention native or aboriginal rights and the refusal to concede to Quebec a veto over constitutional change.[7] In a speech which he gave he was reported in a newspaper as saying on the native rights issue:

> the native peoples lie beyond the narrow political world of the Prime Minister and the premiers, a world bounded by advisers, memoranda, non obstante clauses and photostat machines... The agreement reveals the time limits of the Canadian conscience and the Canadian imagination... In the end, no matter what ideology they profess, our leaders share one firm conviction: that native rights should not be inviolable; the power of the state must encompass them... Under the new Constitution the first Canadians shall be last... It is an abject and mean-spirited chapter.[8]

He also wrote an article for a newspaper which was no less direct in its language.

In Canada there is a Canadian Judicial Council and a number of provincial and territorial judicial councils. Mr Justice Addy of the Federal Court of Canada wrote to Chief Justice Laskin, then Chairman of the Canadian Judicial Council, "complaining that Mr Justice Berger was guilty of conduct inconsistent with his judicial office".[9] The Council appointed a committee to inquire into the charges. Mr Justice Berger refused to participate in the committee's findings saying that, "because the facts were not in dispute, there was no need for an investigation"[10] and disputing the authority of the Judicial Council to rule on a judge's conduct "unless that conduct constituted grounds for removal from office".[11] The committee delivered a unanimous report, concluding that, although Mr Justice Berger's conduct

> would support a recommendation for removal from office, such a severe sanction should not be invoked in this instance because it would be unfair to remove a judge on the basis of standards of judicial restraint which had not previously been enunciated.[12]

When the report of the committee was brought before the full Judicial Council, it passed a resolution declaring that although Mr Justice Berger had committed an "indiscretion" his actions constituted no basis for a recommendation that he be removed from office. Eventually, however, Mr Justice Berger stepped down from the Bench.

If the action taken against Mr Justice Berger and the eventual outcome may seem to some of us to be extreme, it must be remembered that the

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6 J. Webber, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger" (1984) 29 *McGill LJ* 369, 371.
7 *Ibid.*
8 *Id.*, 373.
9 *Id.*, 371.
10 *Id.*, 371-372.
11 *Id.*, 372.
12 *Ibid.*

matter upon which he commented was a matter of "serious political concern and division when that division or controversy was at its height".[13]

Of course, it was the political content of Mr Justice Berger's remarks that gave rise to the complaint and the proceedings rather than the fact that he offered his remarks to the media.

The committee expressed the view:

> [j]udges, of necessity, must be divorced from all politics. That does not prevent them from holding strong views on matters of great national importance but they are gagged by the very nature of their independent office, difficult as that may seem. It can be argued that the separation of powers is even more emphatic here than in England. In England, High Court Judges have the right to vote. Here, federally appointed judges are denied the right both in federal elections and in a number of provinces they have been deprived by statute of a right to vote in provincial elections, and in some cases, even in municipal elections.[14]

Difficult as it is to make comparisons, I wonder whether such a strict view would be taken in this country. Perhaps the answer lies in the political climate at the time. For example, it seems to me that currently in this country it is hardly likely that an adverse view would be taken of the public expression by a judge of his support for, or opposition to, the inclusion of a bill of rights in the Australian Constitution. Perhaps that subject is not really a matter of political controversy, at least in any partisan sense. On the other hand, there may be a distinction between expressing views on that issue and criticism of the present human rights legislation or the policy which lies behind it. And it may be recalled that in delivering the Hamlyn Lectures in 1974, Scarman L.J. called for an extended bill of rights and a supreme court with power to overturn any "oppressive and discriminatory statute".[15]

Of course, the media may give a dimension to remarks made by a judge which, if made privately, would be of no consequence. The occasion upon which views are expressed is of significance. Critical statements by judges upon aspects of the administration of justice from the Bench or in a lecture before a learned society are occasionally reported in the press without any ill effects.

Whilst it may be remarked that generally members of the judiciary should and do avoid controversy, there have been same notable exceptions. For example, Lord Hewart C.J. wrote *The New Despotism* whilst he was in office and it was generally accepted that it was not an appropriate work for a judge. The *Law Quarterly Review* commented that the book "furnishes one of the rare instances in which one of His Majesty's judges has written upon a controversial, although not a political, subject".[16] Lord Hewart was not, apparently, affected by criticism. It is related by Professor Shetreet that

13 See *Report of the Committee of Investigation to The Canadian Judicial Council,* reported in (1983) 28 *McGill LJ* 378, 389.

14 *Id.*, 391.

15 Lord Scarman, *English Law — The New Dimension* (1974) 18, 20, 81-82.

16 (1930) 46 *Law Q Rev* 6.

> whilst in office he [Lord Hewart] wrote a series of articles in the *News of the World* on controversial topics such as 'Should a man be hanged?', 'The meaning of democracy', and 'Licensing Law Reform'. Hewart was paid 100 pounds for each article. Both the articles and the newspaper in which they were published attracted criticism from his brethren, who suggested to him that the Lord Chief Justice should not contribute to the Press except on rare occasions and only on non-controversial matters. Hewart argued that he was writing 'not as Lord Chief Justice of England but as a peer of the realm', and 'besides', he added, 'I need the money'. Asked in Parliament about Hewart's press articles, the Prime Minister, Stanley Baldwin, said: 'It is obviously undesirable that His Majesty's judges should write for publication on matters of political controversy or on questions upon which they might have to decide judicially, but the limit of action in this respect must be left to the good sense of each individual judge'.[17]

Obviously, we have become more sensitive with the passage of time or else the changed nature of our society is such that we cannot acommodate a flexibility of that kind.

Yet even relatively recently there are examples of judges who are prepared to enter into matters of controversy. In 1953 Lord Denning attempted to define the limits when he said:

> [t]he true principle, as I understand it, is that judges are entitled to make responsible comments or suggestions on the way in which Acts work, if it appears to them necessary to do so in the public interest ... [This principle is] subject to the qualification that judges must never comment in disparaging terms on the policy of Parliament, for that would be to cast reflections on the wisdom of Parliament and would be inconsistent with the confidence and respect which should subsist between Parliament and the judges.[18]

It has been remarked, however, that

> later in his career, Lord Denning seemed to feel free to speak out on whatever moved him. He criticized the policy of Parliament in relation to such matters as the European Economic Community and the powers of trade unions ... Finally, in one of his later books [*What Next in the Law* (1982)], he indulged himself in what were generally seen as prejudiced and racist observations about members of a jury which had acquitted persons charged with rioting in Bristol. When some members of the jury threatened to sue, Lord Denning apologized and resigned, thus bringing a great career to a rather sad end.[19]

Notwithstanding the exceptions, it seems clear that judicial propriety requires a judge to avoid off-the-Bench contact with the media which might result in the publication of his views upon matters of controversy. The reason is a practical one, for if a judge is observed to be taking sides, it will impair his ability to appear detached and impartial. It must largely be, I think, a matter of appearance, because, as every lawyer knows, to hold a particular view upon a subject does not necessarily preclude impartiality. I do not think that it has ever been questioned that a privately held view does not disqualify a judge from exercising his function. But appearance is important in ensuring that confidence in the law is maintained. Moreover, the appearance sometimes assists the fact.

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17 Shetreet, note 1 *supra*, 342.

18 Sir Alfred Denning, *The Changing Law* (1953) 14.

19 See W.A. Esson, "The Judiciary and Freedom of Expression" (1985) 23 *U W Ont L Rev* 159.

It is not, however, in every quarter that the gagging of judges against the public expression of views is accepted. The *Law Guardian* wrote in 1971:

> [h]eaven prevent Judges appearing on party hustings or in slick television programmes envenomed by their producers with fabricated controversy. But, choosing their ground, they should be free to expound to any audience ... what an English Judge's business is, why the rules of procedure are as they are, or how they personally think our system of justice can be made more just. The public ought to be able to appreciate their Judges as people doing a job of great import to everybody's well-being. Let them be seen, not as gowned robots, but men, warts and all.[20]

And Professor Van Niekerk has said:

> [j]udges, especially senior judges, are in a peculiarly well-placed social position to give leadership in matters where leadership will often not be forthcoming from other sources. Secure as they normally are from the pressures to which professional lawyers may be exposed, endowed as most of them are with considerable prestige, and exposed as they ought to be to the fundamental problems inherent in the arduous search for justice, their position to be creative architects of the law and society instead of merely being leak repairing plumbers is unique. The potential role which they can thus play in making a meaningful input into the intellectual cauldron which constitutes both the general opinion forming process and the judicial process in society is accordingly unanswerably important and valuable. And yet it would seem that in other than popular or neutral issues, the individual judge in the West is not blithely tolerated when he stakes out his claim for his part of our basic human and democratic patrimony of free speech. At the very least it would seem that it has become time for writers on free speech to consider also this part of the complex undertaking of achieving a vital system of free speech premised on democratic principles.[21]

Fortunately for me, my subject is restricted to "Judges and the Media" and I may say that I doubt whether the high aims which Professor Van Niekerk expresses would be advanced by the judiciary debating issues, particularly issues which they have decided or may have to decide in their judicial capacity, in the news media. They seldom provide an appropriate forum for the dispassionate discussion of controversial matters of any complexity and, in the absence of controversy, the media has little interest. Moreover, constraints of time or space, to which the media are subject, inevitably result in the incomplete presentation of a complex subject with the result that it is either trivialized or sensationalized. Perhaps this comment, for comment it is rather than criticism, has more application to television, but obviously that is the medium with the most widespread impact today. There is today practically no subject which, for better or worse, is not fodder to appease the voracious appetite of the box. But I think that those matters which might usefully be discussed by judges would prove particularly indigestible and would be likely to be spewed out in a form that would do no service to the search for justice.

And yet the functioning of the law is something with which the media must and do from time to time deal. If the result is not altogether to our liking,

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20 See (1971) 74 *Law Guardian* (November), 1.

21 See B.V. Niekerk, "Silencing the Judges: A Comparative Overview of Practices Concerning Restrictions and Inhibitions on the Free Speech of Judges" (1979) 4 *The Journal of the Legal Profession* 157, 179.

then we must ask where the responsibility lies. Sir Richard Blackburn in the inaugural Blackburn Lecture this year, pointed out that, given the traditional restraints, the courts do not have many opportunities to communicate, as it were, directly with the community. He recognized, of course, that much can be said from the Bench which cannot be said in other circumstances, but he observed, rightly in my view, that a judge's function is to decide, and to give reasons for his decision in a formal judgment in which he speaks ex officio. As soon as he speaks informally he is acting without authority, and it is better to keep silent; moreover the risks of misquotation of informal oral statements are very clear. He expressed the view that there is much to be said for a practice which he understood had been sometimes adopted by the High Court, whereby the Court releases a prepared statement which is an explanation, in summary, of the Court's decision, for the benefit not only of the legal profession but of the general public.

The only instance of such a course being adopted is, so far as I know, *Commonwealth* v. *Tasmania*.[22] The public interest in the case was considerable, the constitutional issues were both complex and extensive and there was a considerable degree of diversity in the individual judgments. The judgments were handed down in Brisbane where the usual facilities afforded the press were absent and it seemed desirable, to avoid misunderstanding, to state accurately the effect of the decision of the Court. Nevertheless the statement, which was made with the agreement of all Justices, went little further than that and was quite obviously designed to make clear the limited function of the Court. The first paragraph said:

> [i]t seems convenient to state shortly the effect of the answers given by the Court to the questions asked in these actions. The questions concern the validity of certain Commonwealth Acts, regulations and proclamations which have been brought into being for the immediate purpose of preventing the construction of the Gordon below Franklin Dam. They are strictly legal questions. The Court is in no way concerned with the question whether it is desirable or undesirable, either on the whole or from any particular point of view, that the construction of the dam should proceed. The assessment of the possible advantages and disadvantages of constructing the dam, and the balancing of the one against the other, are not matters for the Court, and the Court's judgment does not reflect any view of the merits of the dispute.[23]

The statement went on to set out what it was that the case actually decided in terms of formal, legal result.

Obviously the Court was concerned that the decision in that case should not be interpreted more widely than was warranted. Some submissions which counsel sought to put during argument and the general atmosphere in which the case was fought gave grounds for that concern. But it was an unusual course which was adopted and if it is to be repeated I am sure it will be infrequently. Moreover, what was said can only have had limited value, although it was probably worthwhile in the particular case. Any attempt to

22 (1983) 158 CLR 1.
23 *Id.*, 58-59.

interpret the actual legal effect of the judgments delivered, as opposed to the formal result of those judgments, would, I think, be wrong. As Sir Richard Blackburn pointed out, judges should say what they mean in their reasons for judgment.[24] If they are allowed to say afterwards what they intended, why not call them as witnesses in later cases in which the particular decision has to be applied? He restricted this comment to decisions of a single judge, but I do not see why it does not apply with equal force to decisions of an appellate court. Moreover, if the statement of the legal effect of the judgments of an appellate court is to be a composite one (and it would need to be to be of much use), experience would suggest that there would be insuperable difficulty in getting agreement upon its content. No judge takes kindly to being told what he intended, at least if the explanation is contemporaneous with his judgment.

Another procedure once adopted by the High Court to facilitate the performance of the role of the press was to make available to them behind locked doors a number of judgments some hours before their delivery, so that when they were handed down, accurate and considered reports might be given by the reporters to their newspapers. It was done on one occasion only and in unusual circumstances in that some ten judgments were handed down simultaneously immediately before the retirement of Sir Ninian Stephen. Obviously it was expecting too much of the press to imagine that they might assimilate this material in the ordinary time available to them before their deadlines. The procedure has not been repeated nor have I heard any suggestion that it should be, although there would seem to be no reason why it should not be if similar circumstances should arise again.

One other suggestion favoured by Sir Richard Blackburn, or at least one to which he can find no objection in principle, is the televising of court proceedings.[25] He applies the qualification that the facilities for televising proceedings would have to be built in so that there would be no distraction to those taking part in the proceedings. That, of course, can be done and, I understand, is done in some parts of the United States. Indeed, in the High Court at Canberra proceedings are continuously televised but not for publication. Closed-circuit television screens are used by the court reporters and in a few other places in the building. No one in the Court is, I think, at all conscious of the fact that the proceedings are being televised and there certainly is no distraction. And yet, for reasons which I find difficult to formulate, I have some misgivings about the televising of court proceedings for publication. The difficulty is that if, as is the case, proceedings in court are public as a matter of fundamental principle, there can be no reason in theory why they should not be made more public. Probably in the High Court there could be no objection, but the proceedings there would not often constitute

24 Sir Richard Blackburn, unpublished paper, held in the Library of the High Court of Australia.
25 *Ibid.*

good viewing and I have not discerned any enthusiasm for putting them on the television screen. With trial courts, however, the situation may be different and I suspect that once the actors in the trial process — counsel, witnesses, even the judge and jury — knew that proceedings were being broadcast to the outside world, a change in their approach might well develop and the exacting standards of the trial process might suffer. There would, I think, be an inevitable tendency on the part of even the best advocates on occasions to play to the camera. Moreover, there would be problems, such as the preservation of the anonymity of the jury. Nevertheless the televising of court proceedings has arrived in the United States and it is something to which we shall almost certainly be required to give consideration. After all, the sight of artists sitting in court sketching the scene for the daily newspaper (because that is all that is presently allowed) may be seen as somewhat outmoded.

Whilst the physical facilities afforded to the press in the High Court in Canberra are probably not equalled anywhere else and whilst the Court is conscious of their needs and difficulties as the two occasions which I have just mentioned show, there is nevertheless little in the procedures of the Court or of courts in general by way of concession to the media. Perhaps that is as it should be. Perhaps the courts should not be seduced by the desire to present an image or to promote public relations. But it cannot be denied that, despite what I think is a generally fair and accurate standard of reporting, from time to time it would assist the ends of justice if there were some means by which the position of the Court could be more clearly presented to those in the media who have the responsibility of reporting to the public. When one observes the paraphernalia of press relations officers, speech writers, press releases and the like which politicians employ as a matter of course, it is perhaps a matter of wonderment that, with none of these, the relationship of the courts with the media is generally as sound as I believe it to be.

Nonetheless there are occasions when criticism of the courts and individual judges is made and is made unfairly and it is on these occasions that the inadequacy of the means available to meet the criticism becomes apparent. Of course, there is the blunt and somewhat unsatisfactory instrument of contempt for extreme cases of "scandalizing the judges". I shall turn to that in a moment, but that is not what I have in mind. On lesser occasions something often needs to be said but there is no real means of saying it. In the United Kingdom there is the Lord Chancellor to speak up for the judges. We do not have that office here and whilst in other times Attorneys-General might be relied upon, I doubt whether that is generally the case today.

Sometimes counsel come to the aid of a judge who is unable by custom to reply to criticism himself. Professor Shetreet relates an incident where, after the Court of Appeal ordered a new trial in a case, a Sunday newspaper asserted that two named judges were unfit to try tort cases as they were commercial judges. Opening the case in the new trial before Megaw J., one of the judges attacked, counsel said that the attack in the newspaper "was

grossly unjustified".[26] The colloquy continued thus:

The Judge: It is an occupational risk or hazard which we all run.

Counsel: Members of the Bar could at least reply, whereas members of the judiciary could not and at least by custom did not and I thought I ought to have said what I said.

The Judge: Yes certainly.[27]

I may perhaps be forgiven for thinking that nowadays, that civilized little incident might not (if, indeed, it was at the time) be effective to eradicate a slur unfairly cast upon a judge. Certainly there have been other occasions when judges have thought it necessary to vindicate themselves by writing to the newspapers. In 1887 Stephen J. did so in answer to suggestions that he doubted whether a death sentence should be carried out. And in 1975 Bridge J., who was criticized for failing to recommend minimum terms in a criminal case, took what he called "the wholly exceptional course" of writing to *The Times* newspaper to deny unfounded charges and to justify this omission "in the hope of forestalling further ill-informed comment".[28] This action was criticized as "a departure from constitutional convention which may have wide implications".[29] Professor Shetreet also notes that in 1968 Justice Potter Stewart of the United States Supreme Court wrote a letter to the *Wall Street Journal* commenting upon an editorial in that newspaper which criticized a recent decision of the Supreme Court. It was unusual and attracted criticism.[30]

On occasions, Bar councils, law societies or law institutes are prepared to repel publicly unfounded attacks upon the judges or the courts but, being representative bodies, they are an unwieldy means of reply, although in the United States some equivalent bodies have organized themselves for immediate response to unjustified attacks upon what are described as their "battered" courts.[31] What is required is stated in the following guidelines with characteristic frankness and vigour, born perhaps of necessity in the climate of the United States:

> [a] bar responding to unjust criticism should be reluctant to take a substantive position on the underlying controversy. Choosing sides loses at least half the audience and may be seen to be political activity. The focus should be on correcting the unfair comments or placing the situation in a proper perspective.
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> The response should come as promptly as possible, consistent with careful review of the situation (inaccuracy could damage the bar's credibility). Most responses should be made within 24 to 48 hours, and should be timed to meet media deadlines. A late response may either be ignored as no longer newsworthy or may rekindle the controversy by republishing the original charge.
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> The bar should seek to have the response receive as much exposure as the attack.[32]

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26 Shetreet, note 1 *supra*, 319.
27 *Ibid.*
28 *Id.*, 320.
29 *Ibid.*
30 *Ibid.*
31 See E. Schoenbaum and S. Goldspiel, "Answering Unjust Criticism" (1982) 21 *Judges' Journal* (No.4) 39.
32 *Id.*, 40.

I do not think that our Bar councils or law societies are similarly organized, nor, perhaps, is there any real need in this country for them to be so, having regard to the sense of responsibility with which the media generally approaches matters relating to the administration of the law. Nevertheless it would be comforting to know that professional bodies could always be relied upon to speak up for the judges, who cannot do so for themselves, when occasion requires it.

That leaves me to deal with the one means of protection the judges have at their disposal for protecting themselves from unjustified attack, namely, contempt proceedings for "scandalizing the court". It is not, as I have said, a comprehensive remedy, being reserved for extreme cases. Of this I make no complaint since the proceedings are criminal and if they were not reserved for extreme cases they would be destructive of free speech. The actual expression "scandalizing the court" was first used by Lord Hardwicke in 1742,[33] and it was during the eighteenth century that the modern law of contempt developed. Contempt was extended from speaking disrespectfully of the court on service of process to publications, whenever made, which scandalized the court.[34]

The present law in Australia upon the subject has been recently laid down by the High Court in *Gallagher* v. *Durack*,[35] and I shall turn to that case in a moment. Perhaps by way of diversion, I want to refer first to an English decision, *R.* v. *Commissioner of Police of the Metropolis; ex parte Blackburn (No.2)*.[36] In that case an order for contempt was sought by a private citizen in the Court of Appeal against The Rt Hon. Quintin Hogg, Q.C., M.P., who was, of course, none other than the Lord Hailsham who sought to invoke the Kilmuir Rules against Judge Pickles.

The Court of Appeal had heard an appeal from a decision in which mandamus was refused directing the Commissioner of Metropolitan Police to assist in prosecuting contraventions of s.31(1)(a) of the Betting, Gaming and Lotteries Act 1963 (U.K.). The hearing was widely reported in the press and the Court, dismissing the appeal, delivered judgments critical of the way in which the law had been enforced, of the drafting of the relevant Acts, and of the interpretation of the statutory provisions by, in particular, decisions of the Queen's Bench Divisional Court.

Mr Hogg wrote and published in *Punch* magazine an article under the general heading "Political Parley" and entitled "The Gaming Muddle", in the course of which he not only vigorously criticized the Court of Appeal's strictures on lawyers, Parliament, police and earlier decisions, but incorrectly attributed to the Court of Appeal decisions which were in fact decisions of the Queen's Bench Divisional Court. The salient passage is set out in the judgment of Lord Denning M.R. and is as follows:

33 See *The St. James Evening Post Case* (1742) 2 Atk 469, 471; 26 ER 683, 684.
34 H. Burmester, "Scandalizing the Judges" (1985) 15 *MULR* 313, 315.
35 (1983) 152 CLR 238.
36 [1968] 2 QB 150.

> [t]he recent judgment of the Court of Appeal is a strange example of the blindness which sometimes descends on the best of judges. The legislation of 1960 and thereafter has been rendered virtually unworkable by the unrealistic, contradictory and, in the leading case, erroneous, decisions of the courts, including the Court of Appeal. So what do they do? Apologise for the expense and trouble they have put the police to? Not a bit of it. Lambaste the police for not enforcing the law which they themselves had rendered unworkable and which is now the subject of a Bill, the manifest purpose of which is to alter it. Pronounce an impending dies irae on a series of parties not before them, whose crime it has been to take advantage of the weaknesses in the decisions of their own court. Criticise the lawyers, who have advised their clients. Blame Parliament for passing Acts which they have interpreted so strangely. Everyone, it seems, is out of step, except the courts ... The House of Lords overruled the Court of Appeal ... it is to be hoped that the courts will remember the golden rule for judges in the matter of obiter dicta. Silence is always an option.[37]

In refusing the application Lord Denning granted that the article was critical of the Court, but pointed out that the use of the contempt jurisdiction in such circumstances should be sparing. He added:

> [l]et me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.
>
> It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticism. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.[38]

Salmon L.J. and Edmund Davies L.J. were of the same view, the latter adding:

> [m]y conclusions regarding the fairness and good taste of the article in question are immaterial, and I therefore refrain from revealing them. To that extent, and that extent only, I propose to observe what Mr Hogg, in his article, described as 'the golden rule' for judges in relation to obiter dicta, namely, that 'silence is always an option'.[39]

Gallagher v. *Durack* [40] was a different matter. Mr Gallagher, who was the Federal Secretary of the Australian Building Construction Employees' and Builders Labourers' Federation, was successful in his appeal to the Full Court of the Federal Court against a conviction for contempt. On the same day as the appeal was allowed he held a press conference. He said:

> I'm very happy to the rank and file of the union who has shown such fine support for the officials of the union and I believe that by their actions in demonstrating in walking off jobs ... I believe that this has been the main reason for the court changing its mind.[41]

37 *Id.*, 154.
38 *Id.*, 155.
39 *Id.*, 157.
40 Note 35 *supra.*
41 *Id.*, 239.

The Federal Court held that, in making that statement, Mr Gallagher was guilty of a contempt of court. He sought special leave to appeal to the High Court and, by a majority, his application was refused.

The majority followed an earlier case *R.* v. *Dunbabin; ex parte Williams,*[42] in which it was pointed out that in cases of this sort the law endeavours to reconcile two principles, each of which is of cardinal importance. One principle is that "speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed".[43] The other principle is that "it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority".[44] The majority pointed out that the summary remedy of contempt "is applied only where the Court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable".[45]

In refusing special leave to appeal the majority said that it had not been shown that the Federal Court had ignored or misapplied the proper principles. It is as well to bear in mind that the High Court refused special leave to appeal. It did not hear the appeal. Whether it would have reached the same conclusion as the Federal Court had it heard the case itself is a matter of conjecture. Nevertheless the decision has not escaped criticism along the lines that regard was had only to the words used and to conclude that, because they amounted to a disparaging accusation of being subject to influence, they were automatically in contempt. The correct approach, it is said, is to take into account in each case the actual effect or the likely effect of the words used upon the administration of justice.[46] How a court is to measure the effect of the words on the administration of justice, other than by accepting the proposition that the more serious the accusation the more serious the effect is likely to be, I do not know. It is certainly not something upon which evidence could easily be called or upon which it would be desirable to call evidence.

However, I think that it is clear that the use of the contempt procedure must be reserved for extreme cases in which an adverse effect, or likely adverse effect, upon the administration of justice can be sufficiently seen. It is not, therefore, a practical means of protecting the reputation of the courts and ensuring that their function is understood in ordinary day-to-day affairs.

It seems to me that, apart from ensuring that our conduct is as far as possible its own vindication, we must, as has been done in the past, look to

42 (1935) 53 CLR 434.
43 Note 35 *supra,* 243.
44 Note 42 *supra,* 447 *per* Dixon J.
45 Note 35 *supra,* 243.
46 See Burmester note 34 *supra,* 333-335, 337-338.

others to safeguard our reputation and to explain our processes. In times which are critical of authority that is a constraint which is not always easy. Nevertheless, judges have accepted in the past and do accept now the general rule that they should not publicly express an opinion upon any controversial matter except to the extent necessary to decide a case. Such a rule is, I think, necessary not only to preserve the appearance of impartiality but also, to some extent, the ability to be impartial. The rule is not absolute. Where the independence of the judiciary is affected it seems to be accepted that judges may speak out in an appropriate manner, even if that means criticism of the policies of the executive or even of parliament. We have seen recent instances of this in New South Wales. Attempts to formalize the rule have not been conspicuously successful. The American *Code of Judicial Conduct* does not really offer any more guidance in those difficult situations where guidance would help. But a rule there is and its observance ought, I think, to be the more strictly maintained now when the pressures are greater than they have been before for its relaxation.