Marquette Law Review

Volume 40
Issue 3 *Winter 1956-1957*

Article 8

Freedom of Speech and Press as a Limitation on the Contempt Power

Thomas Luscher

COMMENTS

FREEDOM OF SPEECH AND PRESS AS A LIMITATION ON THE CONTEMPT POWER

In the last fifteen years a problem has presented itself to the courts in the form of a limitation on a power which, prior to this time, most courts had come to consider as axiomatic. This was the power to punish for contempt. In its broadest sense, this power had existed in the courts from the time of their inception, founded in a public policy which regarded it as an attribute both inherent and necessary for the protection of the judicial function.[1] While never entirely above regulation,[2] restriction upon any aspect of its exercise was regarded as a matter of immediate concern to the courts in which it vested. Thus, when *Bridges v. California*[3] decided in 1941 that the power of state courts to impose criminal punishment for contempt on individuals who, by public comment, attempt to exert influence over judicial proceedings was subject to the freedoms of speech and press guaranteed by the First Amendment, the decision was looked upon by many writers with varying degrees of alarm.[4] Nor was it unnatural that the flood of commentaries which the case evoked should deal primarily with the long range effects of the decision, rather than to attempt more than a surface analysis of the holding itself. Viewing the law as it developed out of the *Bridges* case and the ones which followed, it is felt that there is a need for clarification of this nebulous field, and to submit an interpretation which, it is hoped, represents the law as it stands today.

Contempt may be defined generally as any act which is calculated to embarrass, hinder or obstruct a legislative or judicial body in the proper administration of its duties or which tends to lessen its authority or dignity.[5] Contempt of court usually takes the form of disobedience to a mandate of the court, or of disorderly behavior which tends to have this effect. As such, it may be either direct or constructive in nature. A direct contempt is one committed in the presence of the court in session or, in some cases, before the judge at chambers;[6] constructive contempt, on the other hand, arises from

[1] 17 C.J.S. 55.
[2] *Ibid.*
[3] 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, 159 A.L.R. 1346 (Annotated) (1941).
[4] *Free Speech and Contempt of Court*, 36 ILL. L. REV. 599 (1942); *The Clear and Present Danger Test*, 27 IOWA L. REV. 467 (1942); *Contempt by Publication*, 23 IND. L. J. 192 (1948); *Controlling Press and Radio Influence on Trials*, 63 HARV. L. REV. 40 (1950); *Due Process For Whom?* 4 STAN. L. REV. 101 (1951); *Freedom of The Press—A Menace to Justice?* 37 IOWA L. REV. 249 (1951).
[5] 17 C.J.S. 1; Snow v. Hawkes, 183 N.C. 365, 11 S.E. 621, 622, 23 A.L.R. 183 (1922).
[6] 17 C.J.S. 6; State v. McClaugherty, 33 W.Va. 250, 10 S.E. 407 (1889); Pelletier v. Glacier County, 107 Mont. 221, 82 P.2d 595, 597 (1938).

matters not occurring in the immediate presence of the court, but near enough thereto so as to affect the due and orderly course of the proceedings.[7] Either form may give rise to civil or criminal liability. The distinction between civil and criminal contempt lies in a distinction as to whom the duty violated is primarily owed. While the latter partakes of the nature of an offense against the court, and is punishable summarily, the former is a failure to do something which the party is required to do for the benefit of another party to the proceeding. It is therefore not primarily an offense against the court itself — though it is this as well — but against the party in whose behalf the mandate was issued, and the resultant fine is an indemnity rather than a penalty.[8]

The question presented in the *Bridges* decision, considered in the light of the above definitions, was limited to a determination of whether, under the First Amendment, the publication in newspapers, magazines and other channels of communication of matter tending to affect the impartiality of judges or juries amounts to such disorderly conduct out of the presence of the court as to permit the punishment of such activities as constructive criminal contempt. As in other areas of constitutional law, this involved the ticklish problem of balancing private rights against public needs; weighing the freedoms of speech and press against the necessity of judicial independence from external pressures. While decided on constitutional grounds for the first time in the *Bridges* case, the problem was basically not a new one, but one which had been plagueing courts for well over two centuries.

THE IMPACT OF FREE PRESS ON THE CONTEMPT POWER

The English courts, which were unhampered in their approach to the question by the above mentioned constitutional guarantees, adopted at an early stage an extremely narrow view regarding any limitation which might be imposed on the contempt power. Their attitude is, perhaps, best expressed by the language of Humphreys, J. in *Rex v. Davies:*

> "I venture to think that no judge with long criminal experience will fail to be able to recall instances in which the publication of matters . . . has had the effect of making the task of a judge extremely difficult, and no one has the right to publish matter which will have that effect."[9]

Simply stated, this means that English courts have the power to punish, as contempt, conduct having any tendency whatsoever to affect or prejudice judicial proceedings. In the area of public comment, this would include not only matters affecting issues then pending be-

[7] 17 C.J.S. 6; Maryott v. Maryott, 124 Neb. 224, 246 N.W. 343 (1933).
[8] Staley v. So. Jersey Realty Co., 90 Atl. 1042, 1043, 83 N.J. Eq. 300, L.R.A. 1917B 113, Ann. Cas. 1916E 955 (1914); Fenton v. Walling, 139 F.2d 608, 609 (1943).
[9] 1 K.B. 435, 443 (1945); See also Metzler v. Gounod, 30 LAW TIMES REV. N.S., 264.

fore the court in question, but also matters concerning litigation already terminated at the time of publication, on the theory that such criticism, should it be such as to warrant the inference, would tend to degrade the court and might have a detrimental effect on the court's ability to decide other cases, both future and pending, of a similar nature.[10] As a practical matter, however, in such cases few of the English judges were willing to go this far. While recognizing that they had the power, they limited its exercise to comments involving pending cases.[11]

This view was carried over into the American federal courts by the Act of 1789,[12] which provided that "Courts of the United States shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."[13] Like the English courts most American tribunals recognised that the power was an extraordinary and arbitrary one, and should be exercised only as a last resort, and then only with great caution.[14] Nevertheless, abuses arose,[15] culminating in the celebrated trial to impeach District Judge Peck for having imprisoned and disbarred one Lawless, an attorney who had published an adverse comment on a decision which the judge had made against him, which decision was on appeal at the time of publication.[16] Peck was acquitted, but as a result of the trial the Act of March 2, 1831[17] was passed, which limited the power of federal courts to inflict summary punishment for contempt to cases involving misconduct "in the presence of the said courts, or so near thereto as to obstruct the administration of justice." The language of this statute, which has survived in substantially unaltered form to the present day,[18] was interpreted only four years later in *Ex Parte Poulson.*[19] That case expressly denied the power of federal courts under the statute to punish as contempt the publication of an allegedly "offensive" article relative even to a *pending* case. It was there held that the statute embraced only such misbehavior as occurred in or near the immediate vicinity of the

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[10] 13 C.J. 37; Rex v. Parke, 2 K.B. 442 (1903); See also annotation to Burdette v. Commonwealth, 68 L.R.A. 251.
[11] *Ibid.*, n. 10; Hunt v. Clark, 58 L.J.Q.B. 490-495, 19 English Rul. Cas. 238 (1889); Reg. v. Payne and Cooper, 1 Q.B 577-582, 19 English Rul. Cas. 246 (1896).
[12] 1 STAT. 73, 83.
[13] The language of this statute did not expressly prohibit exercise of the contempt power in cases where the matter published concerned cases already terminated. See Nelles & King, *Contempt by Publication in the U.S.*, 28 COL. L. REV. 401, 409, et. seq.
[14] Hollingsworth v. Duane, Fed. Cas. No. 6, 616 (1801).
[15] See Nelles & King, *supra*, n. 13.
[16] Stansbury, REPORT OF THE TRIAL OF JAMES H. PECK (1833).
[17] 4 STAT. 487.
[18] 18 U.S.C.A. §401.
[19] Fed. Cas. #11, 350 (1835).

court.[20] This marked a complete reversal of the English, or common law rule. Previous decisions had established that adverse comment or criticism on a case already decided would suffice, in principle if not in practice, to invoke the contempt power. The *Poulson* decision, with a single sweep, wiped away the power as an effective control of such activities. The press was literally given free rein, even to the point of subjecting pending controversies to the unfettered power of the pen.

The cause of free press received a temporary setback in 1917 with the decision of *Toledo Newspaper Co. v. U.S.*,[21] which attempted to replace the holding of the *Poulson* case with what has been termed the "reasonable tendency" rule. This was nothing more than an interpretation of the words of the federal statute "or so near thereto," as having a causal, rather than a geographical connotation. Under this theory the court held that the publication of adverse comment on a pending case by a newspaper was punishable as contempt if the article had a "reasonable tendency" to obstruct the impartial discharge of the judicial office. The holding was undoubtedly an attempt to return to the previous rule of unrestricted exercise of the contempt power in pending cases. The *Toledo* case was overruled in 1940 by *Nye v. U.S.*,[22] which reiterated the doctrine of the *Poulson* case and held that the language of the statute necessitated that the conduct punished be "geographically proximate" to the court.[23]

It is important at this point to note that these decisions govern only federal courts. They were not decided on constitutional grounds, but involved questions of purely statutory construction. Whether the statute embodies the full extent of the contempt power permissible under the Constitution is a question which, to this writer's knowledge, has never been expressly decided.[24] Nevertheless, it may be taken as settled that public comment on a pending case, unless circulated in or near the court or in some other manner employed so as to focus the attention of court or jury upon it and thus bring it within the

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[20] "Nor can any publication, which holds out no corrupt motive to influence a juror, witness, or officer, or uses any threats to influence, intimidate, or impede him in his duty, be the subject of an indictment (for contempt) consistently with this law. The press is free, if not set to work in the presence of the court, or so near as to interrupt its business. The law does not prohibit any endeavor made to influence or intimidate a juror or witness, if corruption, force, or threats are avoided." Ex Parte Poulson, *ibid.*, n. 19.

[21] 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186 (1917).

[22] 313 U.S. 33, 61 S.Ct. 810, 85 L.Ed. 1172 (1940).

[23] In the *Nye* case, the misbehavior had occurred some 100 miles from the court.

[24] See, however, Smotherman v. U.S., 186 F.2d 676 (1950). That case seemed to indicate that statutory and constitutional tests would be substantially identical. Actually, it is difficult to see how this could be so, since the constitutional test (the clear and present danger rule, treated later in this article) seems to be causal, rather than spatial, in character.

purview of the statute, will not justify a finding of contempt by a federal court.[25]

In view of the policy of federal law in this area, a constitutional determination of the power as limited by the First Amendment could come only from a consideration of the power of state courts. As might be expected, few of the states copied the federal statute. The majority, by statute or judicial decision, held fairly close to the common law rule,[26] making pendency the primary test.[27] Until 1924, when *Gitlow v. New York*[28] recognized that the guarantees of free expression found in the First Amendment were also embodied in the Fourteenth Amendment, as a limitation on the states, there was nothing to prevent them from doing so. Even after the *Gitlow* decision, since the *Toledo* holding was in effect, the broad rule of the case imposed few restrictions on state power. After the *Toledo* case was overruled, however, the problem became acute, and it was scarcely a year later that the issue was squarely presented before the Supreme Court in the *Bridges* case.

The Clear and Present Danger Rule

Two cases were involved in the *Bridges* decision. In the first, two members of a labor union had been convicted of assaulting and beating a non-union truck driver and had applied for probation. The *Los Angeles Times,* while the applications were still pending, in an editorial captioned *Probation for Gorillas?,* vigorously denounced the two men and admonished the judge before whom the matters were pending that he "will make a serious mistake if he grants probation to Shannon and Holmes. This community needs the example of their assignment to the jute mill."[29] The editorial was cited for contempt and the citation affirmed by the California Supreme Court, under the authority of the *Toledo* case, as having "an inherent and reasonable tendency to interfere with the orderly administration of justice in an action before a court for consideration."[30] The second case involved the publication of a telegram sent by one Harry Bridges, a prominent west coast labor leader, to the Secretary of Labor, characterizing an order made by a Los Angeles judge in a labor dispute[31] as "out-

[25] *Ibid.,* n. 24. See also Laughlin v. U.S., 151 F.2d 281, 285, certiorari denied 326 U.S. 777, 66 S.Ct. 265, 90 L.Ed. 470 (1945). While not strictly in point, the case indicates that this would be the rule in a proper case.

[26] See Annotation, 159 A.L.R. 1379; 12 Am. Jur. 412-418.

[27] See, however, 17 C.J.S. 43 and cases there cited, to the contrary.

[28] 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1924).

[29] Penitentiary.

[30] Times Mirror Co. v. Superior Court, 15 Cal. 2d 99, 98 P.2d 1029 (1940).

[31] See Bridges v. Superior Court, 14 Cal 2d. 464, 94 P.2d 983 (1939). This dispute involved a struggle between two rival unions, I.L.W.U. and I.L.A., for the control of a particular local. When the local attempted to ally with I.L.W.U., I.L.A. sued to enjoin the officers of the local from working on behalf of the

rageous," and threatening that attempted enforcement of the order would "tie up the whole Pacific coast" in a statewide strike. The contempt citation in this case was also affirmed by the California Supreme Court. On appeal, four justices dissenting, the United States Supreme Court reversed the California court. Following the pattern set down in the *Nye* case, the Court rejected the "reasonable tendency" rule as a constitutional measure of the contempt power. As stated by the Court, the defect of this rule lay in its uncertainty, in its tendency to subject the freedoms of speech and press to the "timeliness and importance of the ideas seeking expression."[32] Instead, the Court proposed as a proper test the "clear and present danger" doctrine, a principle well known in other fields of constitutional law and, perhaps, best expressed as "whether or not the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils sought to be prevented."[33] In enunciating this doctrine and extending it to the instant case, the intention of the Court was to introduce a formula which it felt was "more capable of definition" and which, by requiring an extremely high degree of imminence of the substantive evil — far more than would suffice to meet the requirements of the "reasonable tendency" rule — would thereby afford more protection to the freedoms of the First Amendment, which should be interpreted in the broadest sense compatible with good government.

Actually, it is doubtful whether the doctrine of itself accomplishes this purpose. The sole distinction between the two is one of degree. Moreover, the Court itself recognized that the problem of balancing free speech against the necessity of independent judicial action was one which was incapable of being captured completely in a single formula. Once it is established that the matter commented on is pending in a court and is thereby capable of being affected, attempting to differentiate a "reasonable tendency" from a "clear and present danger" and from this determination to emerge with a workable rule of conduct is a task for one skilled in dealing in the subtle realm of rhetorical ether. Nevertheless, applying the rule to the facts of the case, the Court arrived at the following results: First, under no circumstances could mere criticism, justified or unjustified, tending to detract from the dignity of a court constitute a clear and present danger to justice; courts cannot, either as a constitutional or as a

former. The injunction order issued, but enforcement of the order was promptly stated by the court, pending defendant's motion for new trial. It was at this point that the Bridges telegram was published.

[32] *Supra*, n.3. 314 U.S., at p. 269.

[33] Schenck v. U.S., 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1918).

practical matter, preserve the dignity of the bench by forbidding adverse comment on judicial action. Secondly, neither the *Times* editorial nor the Bridges telegram tended, to the degree required, to affect the ability of the court to decide the issues then pending before it. The former merely threatened future criticism, the latter a statewide strike, and both were to be expected anyway should a decision unfavorable to the parties concerned be handed down.[34]

It was argued, with some force, that the *Bridges* decision accomplished on constitutional grounds what the *Nye* and *Poulson* cases had held as a matter of statutory construction. It was contended that, although refusing to deny the power of courts in a proper case to punish publications which tend to prejudice pending judicial proceedings, in effect the court placed an implicit stamp of approval on anything that might be said outside the courtroom.[35] While it is apparent from the above discussion that the majority was manifestly reluctant to find a clear and present danger to justice, it is difficult to see how the decision can be said to have had such far-reaching consequences. Standing alone, and purged of the broad, rhetorical considerations used by the Court in reaching its ultimate conclusions, the actual holding amounts to little more than the limited, and rather obvious proposition that the mind of an individual will not generally be influenced by telling him something he already knows. The real importance of the *Bridges* decision lay, not in what was held on the facts at bar, but in the adoption of an attitude with which future cases would be viewed, and to this extent the criticism of the *Bridges* case was to receive some justification.

The problem received additional attention, and the position of the Court was more closely defined when the issue was again presented in *Pennekamp v. Florida.*[36] That case involved two editorials which appeared in the *Miami Herald,* and which attacked in no uncertain terms the alleged "partiality" of a circuit judge in handling a series of indictments for rape issued by a Miami grand jury. The indictments had been found to be defective and had been returned for rein-

[34] "From the indications in the record of the position taken by the *Los Angeles Times* on labor controversies in the past, there could have been little doubt of its attitude toward the probation of Shannon and Holmes. In view of the paper's long-continued militancy in this field, it is inconceivable that any judge in Los Angeles would expect anything but adverse criticism from it in the event probation were granted. . . ."

As respects the strike telegram the court commented: "Let us assume that the (Bridges) telegram could be construed as an announcement of Bridges' intention to call a strike. . . . With an eye on the realities of the situation, we cannot assume that Judge Schmidt was unaware of the possibility of a strike as a consequence of his decision." Bridges v. California, *supra,* n.3. 314 U.S. at pp. 273, 279.

[35] *Supra,* n.3. Frankfurter, J. dissenting. Frankfurter, in effect, urges the adoption of the reasonable tendency rule, with pendency the primary test.

[36] 328 U.S. 331, 66 S.Ct. 1029, 190 L.Ed. 1295 (1946).

dictment, which was accomplished the following day and before the first editorial reached print. The article all but accused the judge of outright collusion with the accused rapists, charging him with an

> ". . .apparent willingness to go out to find every possible technicality of the law to protect the defendants, to block, thwart, hinder, embarrass and nullify prosecution . . . (so as to) set people to wonder whether their courts are being subverted into refuges for lawbreakers."[37]

The impressions thereby intended to be conveyed were entirely false, and on a finding that the cases were pending at the time of publication the Florida Supreme Court approved the circuit court's issuance of the contempt citation, deeming the *Bridges* case not controlling.[38] Granting certiorari, the United States Court accepted the Florida Court's finding that the cases were pending, but the *Bridges* decision was held to be conclusive of the issue and the state court's ruling was reversed. The theory of the reversal was that, while the cases as a whole were pending at the time of publication, *the particular issue which had given rise to the publication* — the finding that the indictments were defective — had already been decided,[39] and hence the editorials were in the nature of criticism of judicial action taken, which under the *Bridges* case would not support a citation for contempt. Only if the particular issue treated by the publication was pending at the time the article reached print would the Court be at liberty to determine whether there was a clear and present danger that the decision of *that issue only* would be affected thereby.

The contention was strongly urged, in opposition to this holding, that the articles in question were certainly broad enough to affect the future disposition of other matters on which the cases were still pending. Answering the argument, the Court had this to say:

> "The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in

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[37] *Ibid.*, n. 35. 328 U.S. at p. 337.

[38] "The *Bridges* case was disposed of on authority of the 'Clear and Present Danger' cases, which are not analogous to most of the state cases because they arise from a different state of the law. The ultimate test of the *Bridges* case requires that the 'substantive evil must be extremely high before utterances can be punished.' Even if this test is to (be) the rule in the state courts, they are authorized to apply it by their own law and standards and unless the application is shown to be arbitrary and unreasonable, their judgment should not be disturbed." Pennekamp v. State, 156 Fla. 227, 22 So.2d 875 (1945) noted at 159 A.L.R. 1391.

[39] "What is meant by clear and present danger to a fair administration of justice? No definition could give an answer. Certainly this criticism of the judge's inclinations or actions in these pending non-jury proceedings could not directly affect such administration. This criticism of their actions could not affect their ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings." Pennekamp v. Florida, *Supra,* n.35, 328 U.S. at p. 348.

> the face of criticism which individual judges may possess. . . . In this case too many fine-drawn assumptions against the independence of judicial action must be made to call such a possibility a clear and present danger to justice. For this to follow, there must be a judge of less than ordinary fortitude without friends or support or a powerful and vindictive newspaper bent on a rule or ruin policy, and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions."[40]

The Court was apparently unwilling to admit that these conditions existed in Miami at the time.

The above language has been interpreted by many writers to constitute the basis upon which the "clear and present danger" rule will be applied in all cases.[41] Whether this is true or not, it must be admitted that the language is rather startling. In effect, it imposes an objective standard upon the character of jurists and imputes to the "reasonable judge" a stoicism in the face of public pressure which approaches the angelic. It refuses to admit that a judge worthy of the name would allow himself to be consciously influenced by extra-judicial considerations — a conclusion which may or may not be justified, and one which, certainly, this writer would not be so bold as to challenge. But perhaps more unrealistically (if we concur in the opinion of Justice Frankfurter) it overlooks the fact that even the finest judicial logic is essentially subjective in operation, and that the best judges are still human beings, social in nature, and subject to being unconsciously swayed by the psychological pull of public comment.[42] Of course, it must be noted that the language was directed toward the determination of a precise and limited issue, and was employed more as a crutch upon which to justify a somewhat artificial and over-technical limitation on the term "pending" than as a test of clear and present danger.[43] Whether the Court would use the same approach in a case where the

[40] *Supra,* n.35. 328 U.S. at pp. 348, 349.

[41] *Supra,* n.4.

[42] *Supra,* n.35. Frankfurter, J., concurring. It is to be noted, however, that in making this argument, Frankfurter is in substantial agreement with the majority in its definition of "pending" and holds that under the instant facts the judge could not have been affected, consciously or subconsciously. This seems to be a rather unrealistic restriction on what would otherwise be a powerful argument.

[43] *Supra,* n.38. Unfortunately, the majority does not pursue the question of what constitutes "pending" within the meaning of the "clear and present danger" rule beyond this brief commentary. This may be one reason for the emphasis given by most writers to its "objective standard of judges" analysis. The best treatment of the question is found in the concurring opinion of Justice Frankfurter. " 'Pending' is not used with the technical inclusiveness that it has in the phrase *lis pendens.* . . . Where the power to punish for contempt is asserted, it is not important that the case is technically in court or that further proceedings . . . are available. . . . The decisive consideration is whether the judge or the jury is, or presently will be, pondering a decision that comment seeks to affect." 328 U.S. at pp. 350, 369. As was mentioned in n.41, *supra,* Frankfurter and the majority seem to be in substantial accord on this point.

issue criticized is itself pending at the time of publication might be questioned. While some degree of objectivity is necessary in such a case, there are indications that the Court might not be as readily disposed to impose so rigid a standard of character upon the judiciary as was imposed in the *Pennekamp* decision.[44]

Having thus restricted the scope within which the "clear and present danger" rule could effectively operate, it remained to be determined just how the rule would be applied in a proper case — that is, where the particular issue commented upon was pending at the time of publication. *Bridges v. California* had shed some light on this question, but the final word was not to come until 1946, when *Craig v. Harney*[45] was decided. That case involved an action to compel forfeiture of a lease for nonpayment of rent. The defendant was in the armed forces and his affairs were being conducted by an agent. At the close of the testimony both sides moved for an instructed verdict. Without hearing argument on either side, the judge, a layman, granted plaintiff's motion and instructed the jury to return a verdict for the plaintiff. The evidence supported this action. Nevertheless, the jury refused to do so and found for the defendant. The judge repeated his instruction with the same result, and court was adjourned. The following day, on the advice of defendant's counsel, the jury returned the instructed verdict, stating that it was action under coercion of the court and against its conscience. Two days later the defendant moved for a new trial. During the next several days the local newspapers blasted the judge as incompetent and his action as "highhanded," "a refusal to hear both sides" and "a travesty on justice," and in effect demanded that he grant defendant's motion and disqualify himself from sitting further on the case.[46] A contempt citation against the publishers was affirmed by the State Supreme Court, distinguishing the *Bridges* and *Pennekamp* decisions.[47] On certiorari, this holding was reversed; the publications had not created, in the opinion of the Court, a clear and present danger to the judicial determination of the defendant's motion for new trial. The Court pointed to the fact that the chief complaint against the judge's decision was his failure to hear argument on the motions for directed verdict and reasoned:.

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[44] In the *Bridges* case, where the issue was directly considered, the "objective standard" analysis was conspicuous by its absence. Subsequently, in *Craig v. Harney, ante.*, n.45, this statement was made by the majority: ". . . the law of contempt is not made for . . . judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. *Conceivably a campaign could be so aimed at the sensibilities of a particular judge and the matter pending before him as to cross the forbidden line.*" 331 U.S. at p. 376.

[45] 331 U.S. 367, 67 S.Ct. 1289, 91 L.Ed. 1546 (1947).

[46] *Ibid.*, n.44. 331 U.S. at pp. 378-383.

[47] Ex Parte Craig, 150 Tex. Cr. 598, 193 S.W.2d 842 (1946).

". . . it is hard to see on the facts how (the publications) could obstruct the course of justice in the case before the court. The only demand was for a hearing. There was no demand that the judge reverse his position — or else."[48]

It is thus apparent that the complaint which was originally made against the *Bridges* decision was not entirely unjustified. While reiterating that "public comment of every character may (not) be as free as a similar comment after complete disposal of the litigation" and "courts must have the power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action,"[49] the Court has so restricted the use of the contempt power in this area as to render it practically incapable of exercise, and seems willing to indulge in any form of rationalization reasonable on its face in order to avoid the necessity of finding a clear and present danger to justice. Actually, it is doubtful if the press requires such jealous protection. On the other hand, it is difficult to conclude on the basis of the above cases, that this aspect of the contempt power has in effect been held unconstitutional. Conceivably there is still a proper case in which the use of the power would be justified, but such a case would probably involve a type of comment which the ethics of the press would prohibit.

Attempts to Influence Juries

It must be noted that the above material deals primarily with publications which attempt to influence a court in non-jury proceedings. Where a jury trial is involved and a publication appears which contains matters calculated to affect the ability of the jury to judicially decide the issues before it, a rather different question is presented. Possibly due to a decent restraint on the part of the press where jurors are concerned, no decisions since the date of the *Bridges* case have been discovered in which a federal court has had to determine whether the First Amendment would be a defense to a contempt citation on this ground.[50]

[48] *Supra,* n.44. 331 U.S. at p. 377.

[49] Pennekamp v. Florida, *supra,* n.35. 328 U.S. at pp. 346, 347.

[50] A number of cases have treated the issue obliquely, however: see Shepherd v. Florida, 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740 (1950), Justices Jackson and Frankfurter concurring, indicating that the rule might be somewhat different. See also Maltimore Radio Show v. State, 193 Md. 300, 67 A.2d 497 (1949), certiorari denied 338 U.S. 912, 70 S.Ct. 252, 94 L.Ed. 562, but see the opinion of Frankfurter, J., therein. The only case discovered to *directly* consider the issue at all is Hoffman v. Perrucci, 222 F.2d 709 (1955). In that case, defendants had caused to be published a number of advertisements cautioning the public against making excessive awards, when serving on juries, against insurance companies. Plaintiff, who had a jury case pending with which the defendants were not involved, and which had not yet come to trial, moved for a contempt citation. *Held,* the District Court had properly dismissed the citation. There was no clear and present danger that a future jury would be affected by the publication. The case indicates that, in general, only publications containing matter likely to influence a jury which appear after the jury has been selected might come within the operation of the rule.

As might be expected, the English rule on this question was quite strict. Publication of any matter tending to prejudice a jury in a pending proceeding, or of matter which would be inadmissable on the trial, was sufficient to sustain a finding of contempt;[51] nor was it necessary to show that the jury had actually read the article, but only that it had been made public and that jurors had had access to it.[52] Mere criticism of a jury's verdict would not usually give rise to a citation for contempt.[53]

This view was substantially adopted by the American state courts, and generally remains the law today.[54] The federal courts, are of course, governed by the federal statute.[55] Whether the *Bridges* case would operate to change this rule is doubtful. In theory, at least, neither that case nor the ones that followed it completely abrogated the use of the contempt power in this area. Moreover, the function of a jury is relatively limited, usually confined to the determination of a single issue or set of issues at the conclusion of the trial, and the facility with which the court would be able to draw such technical distinctions as were made in the *Pennekamp* decision would be somewhat curtailed. Lastly, since it is to be strongly doubted whether the angelic qualities attributed to judges would be imputed to jurors, the Court might be more disposed to find a clear and present danger.

THOMAS LUSCHER

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[51] The King v. Tibbets, (1902) 1 K.B. 77, 2 B. R.C. 469 (Annotated).
[52] *Ibid.*, n.50.
[53] Reg. v. O'Doherty, (1845) 5 Cox, C.C. 348. *Supra*, n.50.
[54] 12 AM. JUR. 417; In Re Independent Pub. Co., 240 F. 849, L.R.A. 1917E 703, Ann. Cas. 1917E 1084 (1917).
[55] U.S. ex. rel. May v. American Machinery Co., 116 F.Supp. 160 (1953). That case held that circulation of articles and advertisements similar in character to those involved in the *Hoffman* case (*Supra*, n.49) among prospective jurors did not come within the statute.