Florida State University Law Review

Volume 4 | Issue 4 Article 2

12-1976

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THORNS IN THEIR SIDES: COURTS AND THEIR CRITICS IN FLORIDA

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Since the earliest years of the Republic, the legal issue of constructive contempt has pitted personality against principle and piety against politics.[1] Florida has been no exception to this rule. Most recently, the debate over the authority of judges to restrict out-of-court commentary has occurred in the arena of the fair trial-free press dispute.[2] But if contemporary discussions revolve around the probable effects of pretrial and trial publicity on potential and empaneled jurors, American state and federal court reports confirm that the power of constructive contempt was historically employed to protect judges, not jurors, from scandal, pressure, and attack. For a very long time the question, simply put, was whether a judge had the authority to fine or imprison for remarks concerning him or his court made outside the courtroom.

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1. For a recent treatment of contempt in all its facets, *see* R. GOLDFARB, THE CONTEMPT POWER (1963). Other treatments include J. MORGAN, THE LAW OF LITERATURE (1875); S. RAPALJE, A TREATISE ON CONTEMPT (1884); C. THOMAS, PROBLEMS OF CONTEMPT OF COURT (1934); J. THOMAS, THE LAW OF CONSTRUCTIVE CONTEMPT (1904); Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161 (1908); Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971); Gregory, *The Courts and Free Speech*, 8 ILL. L. REV. 141 (1913); Hughes, *Contempt of Court and the Press*, 16 L. QUARTERLY REV. 292 (1900); Larremore, *Constitutional Regulation of Contempt of Court*, 13 HARV. L. REV. 615 (1900); Worth, *Contempt of Court*, 37 CENTRAL L.J. 273, 294 (1893).

2. In Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791 (1976), the Supreme Court unanimously invalidated a "gag" order which had been issued by a Nebraska trial judge to restrain press coverage of a murder trial. Chief Justice Burger, writing for a majority of the court, left open the possibility that such bans on press coverage might be appropriate under some circumstances; that possibility, however, seems slight because the opinion formulates standards which will be almost impossible to meet. In a concurring opinion, Justices Brennan, Marshall and Stewart stated their view that prohibitions on the reporting of judicial proceedings constitute prior restraints and are constitutionally impermissible under any circumstances. *Id.* at 2809. In separate concurring opinions, Justices White and Stevens indicated that they leaned to the latter viewpoint, but were unwilling to adopt it unless later cases showed the necessity of doing so. *Id.* at 2808, 2830. *See also* Baltimore Radio Show v. State, 67 A.2d 497 (Md. 1949); ABA ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1968); ABA ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, RECOMMENDED COURT PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS (Revised Draft, 1975); Landau & Roney, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A.J. 55 (1976); Note, *Free Press and Fair Trial: An Evolving Controversy*, 19 U. FLA. L. REV. 660 (1967); Note, *Contempt by Publication*, 59 YALE L.J. 534 (1950).

Florida's first statutory limitation on contempt dated from 1828, only a few years after the cession of the territory by Spain to the United States in 1819. It provided that the territorial courts would have the power to punish contempts, but that "any thing said or written or published in vacation, to or of any Judge, or of any decision made by a Judge, shall not in any case be construed to be a contempt."[3] Most of the original wording of this statute remains in the published laws to the present day.[4] The Florida limiting statute, then, granted contempt power to the courts, but excluded from the scope of the power spoken or published remarks about a judge or a case while the court was not in term. Presumably, under the wording of the law, remarks made during a term of court were subject to punishment even if they did not relate to a pending case. The statute contained a temporal limitation, but avoided any geographical limitation, unlike a contemporary federal statute.[5]

Early Florida legal history is a topic to which few writers have devoted much attention and effort. The sources are too few and too weak to determine conclusively from the temper and learning of the times the reasons for adopting the 1828 Act. One incident, however, occurred in 1824 which could have had a causal connection with the passage of the statute 4 years later. Attorneys Fry and Steele of the United States District Court for Florida published an incorrect account of the proceedings of a court, and the trial judge cited them both for contempt. The published account accused Judge Brackenridge of " 'pocketing the presentments of the grand jury without permitting them to be seen or read, and threatening the district attorney with dismissal or imprisonment, for simply moving that they might be filed.' "[6] The judge stated in his opinion that

> contempts are punishable by all courts, where the common law prevails:—*that the misrepresentation of proceedings in courts of justice are invariably considered as offences against the court* . . . . If any one is at liberty to vilify the administration of justice, and to pervert and misrepresent the acts of the courts, so as to excite odium and distrust, the courts may as well be closed, and leave everything to lawless violence, and unprincipled detraction.[7]

3. Act of November 23, 1828, COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA 90 (Duval 1839).

4. *See* FLA. STAT. § 38.23 (1975).

5. The federal statute of 1831 limited summary punishment to acts committed in the presence of the court "or so near thereto as to obstruct the administration of justice." Act of March 2, 1831, ch. 99, 4 Stat. 487.

6. *As quoted in* A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 352 (1972).

7. *Id.* at 353 (emphasis in original).

Judge Brackenridge's opinion centered around what judges have called the integrity argument for contempt of court. That is, to be contemptuous, out-of-court comment did not have to relate to pending cases; the words simply had to demonstrate, in the eyes of the judge, a lack of respect for the dignity of the court.

Measuring the influence and impact of the Fry-Steele incident on the bar of Florida would be an impossible task. However, the fact that the territorial legislature adopted a contempt statute 4 years after Judge Brackenridge's opinion could well mean that the case at least provoked thought and discussion among the members of the territorial bar. After all, when two prominent attorneys come under the ban of a court one would expect the others—prominent, aspiring, ambitious, or just cautious—to take careful note.[8]

At first glance there seems to be little relation between the substance of Brackenridge's opinion and the statute of 1828. The first justified punishment for disrespectful commentary made at any time and place, but the second allowed punishment only for remarks made during the term of a court. This apparent lack of connection, however, would probably vanish if one viewed the statute of 1828 as a compromise solution to a perplexing problem. Presuming that Brackenridge's action attracted the notice of the Florida bar and that the territory's lawyers were aware of other contempt cases in America and England, it is possible to see the 1828 Act as the outcome of a legal debate. The American bar during this time seems not to have been divided on the question of the contempt power and the summary process. Rather, some members of the legal profession distinguished general attacks on the courts from comments published while pertinent cases were awaiting decision. Those making this distinction and upholding the contempt power for the second type of attack argued that the first type was harmless and could in no way be an improper influence on a judge's work.[9]

The statute of 1828 adopted this approach, possibly as a compromise

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8. *Id.*

9. This distinction is found most dramatically in the account of the trial of Judge Peck of Missouri. *Id.* For instance, one of the prosecutors contended that the contempt power

> is indispensable to the due exercise of their [the judges'] high and important functions, that they should have the power to protect themselves while engaged in the administration of justice . . . .
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> . . . It must be a case of actual necessity, obvious to the common sense of every impartial person. The administration of justice must be actually obstructed. It will not do to rely upon a mere constructive interference, impeding the course of justice, by some far-fetched implication.

Id. at 87. *See also* J. BIDDLE & W. MEREDITH, A STATEMENT 34–35 (1822).

position, since some lawyers and judges no doubt supported Brackenridge's action, while others (especially attorneys Fry and Steele) were inclined to limit this discretionary power of the courts. The statute permitted full discussion and criticism once the term of court was done, but permitted punishment for indiscreet comment during term time. Thus the statute did not prohibit attacks on the integrity and dignity of the court, provided the attorneys and litigants held their complaints and charges in reserve until the end of the term. By then, presumably, few cases would still be pending, so the act, in effect, granted the judge the power during term time to curtail and cite those persons making comment he thought improper, prejudicial, or plainly scandalous.

The Florida statute set a more definite standard than its counterpart for the United States courts. At least as far as interpretation was concerned, the Florida statute contained no such vague expressions as "so near thereto" as appeared in the federal act,[10] but instead established the limit of term time within which courts could punish out-of-court comment.

In the 1867 case of *Ex parte Edwards*,[11] the Supreme Court of Florida dealt for the first time with the problem of contempt. The issue at hand was not one of contempt by out-of-court comment; instead, the *Edwards* case concerned the authority of a court of equity to punish disobedience to its orders. No one doubted, Chief Justice DuPont said, that "in the absence of any statutory limitations or restrictions, the power of the several courts over 'contempts' is omnipotent, and its exercise is not to be enquired into by any other tribunal."[12] The power derived from English common law and was "the great bulwark established by the common law for the protection of courts of justice, and for the maintainance [*sic*] of their dignity, authority and efficiency . . . ."[13] That is, the courts had full authority to determine their contempt power in the absence of statutory limitation. "The genius of our people, however, ever sensitively jealous of restraints upon the personal liberty of the citizen, has caused them, through the

10. Act of March 2, 1831, ch. 99, 4 Stat. 487.

11. 11 Fla. 174 (1867).

12. *Id.* at 186.

13. *Id.* The reference to common law was from Blackstone, who claimed that summary punishment for contempt had been "immemorially used by the superior courts of justice." 4 W. BLACKSTONE, COMMENTARIES *280. Recent scholarship, however, has contended that Blackstone's claim rested more on an undelivered opinion by Mr. Justice Wilmot than upon any rigorous study of the past. *See* J. FOX, THE HISTORY OF CONTEMPT OF COURT (1972).

action of the legislative department, to limit and restrict this common law power of the courts."[14]

The Supreme Court of Florida thus accepted the legislative prerogative to define and circumscribe the contempt power. While Chief Justice DuPont maintained that the power was inherent in English and American courts, nowhere did he indicate the power was as invulnerable as it was inherent. And in light of the times, perhaps the Florida decision was all the more remarkable. With the unsettling influence of the Civil War and the continuing uncertainties of Reconstruction, some judges might have used the situation to extend their own power and prestige, were they so inclined. But, however turbulent the times, dominant legal thought of the day still ran counter to any sweeping assertion of judicial sovereignty over contempts. Perhaps possession of considerable power to punish discouraged acquisition of it all.[15]

The *Edwards* decision remained the law of the state through the rest of the nineteenth century and into the second decade of the twentieth. The intervening period witnessed the growing reluctance of judges across the country to keep within the boundaries laid by their respective legislatures. The spirit to wander was rife. In 1916 the Supreme Court of Florida followed suit in *In re Hayes*[16] by citing for contempt a reporter and the editor of a Florida newspaper for articles which the justices found offensive. The court had to make a decision on a contested gubernatorial election, and the published comment was stinging and irritating. Mr. Justice Taylor noted the solemnity of the occasion. "This is the first time in the history of Florida that this court has issued a rule against the editor and reporter of a newspaper to show cause why they should not be attached for contempt . . . ."[17] The court did not accuse the paper of improper comment

14. 11 Fla. at 186. DuPont saw that his duty lay in acknowledgment of the legislative act, but he could have held his duty to be the defense of the sovereignty of the courts.

15. By 1860, 23 of the 33 states had enacted limitations on the summary contempt power. The state courts, as a rule, followed legislative sentiment and narrowly construed their contempt power. Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 525, 533 (1928). A major exception was an Arkansas decision in 1855, State v. Morrill, 16 Ark. 384 (1855), a portent of things to come. In a case involving a published assault on the court's integrity, the court stated that a legislative act restricting summary punishment was to be "regarded as nothing more than the expression of a judicial opinion by the Legislature." *Id.* at 391.

16. 73 So. 362 (Fla. 1916). A summary of the change in legal attitudes in other states is provided in Nelles & King, *supra* note 15, at 536.

17. 73 So. at 363. The opinion was actually per curiam, but the style of the writing was Taylor's. *See* Brief for Amici Curiae at 48, Pennekamp v. State, 22 So. 2d 875 (Fla. 1945).

on a pending case, but pointed instead to "a libelous article impugning the integrity, dignity, and authority of this court."[18]

Justice Taylor found the published attacks incomprehensible, for how could one explain unjustified assaults on a venerable institution?

> It is to be hoped that the good sense of our people, their love of order and respect for the institutions of our government, will operate to restrain the impulsive and ill-natured words of those among us who seem to be so alert to suspect and ready to condemn and that proceedings of this nature may not become necessary in the future to restrain the vicious tendencies of those who traffic in scandal and sensation and which lead them to attacks upon the integrity and authority of our institutions.[19]

So when public opinion failed to check the mischievous editors, the courts had an obligation to act to fill the void. When Taylor claimed that the scandalous accusations were "an insult to the people whose agents the courts are," the logic echoed the decision of *State v. Morrill*,[20] from Arkansas some 61 years before. By ridiculing the courts and by attributing base motives to the judges, the editor was a renegade in his own society. "The author and distributor of such publications, therefore, is an enemy to his people, a veritable traitor to his government whose protection he enjoys."[21]

United with the people and the courts in the effort to secure a free society, Taylor continued, the press had its duties to perform. " 'The court looks to the sober judgment of all reflecting and intelligent men, and to none with more confidence than the enlightened and liberal conductors of the press, who, as before remarked, have generally manifested a disposition to maintain public respect for the judicial tribunals of the country.' "[22] As long as high standards were maintained, neither the courts nor the people had cause to fear "the true journalist," for both the courts and the people "are safely guarded by them in the field of their labors."[23] And in its proper role the press had little to fear from the courts. "It may be said to the credit of the press in this state that, except in very few instances, it has upheld and maintained respect for the judiciary."[24] Only when

18. 73 So. at 363.

19. *Id.*

20. 16 Ark. 384 (1855). *See* note 15 *supra*. The quoted remark by Justice Taylor appears at 73 So. at 363.

21. 73 So. at 363.

22. *Id.* The words came from Chief Justice English's opinion in State v. Morrill, 16 Ark. 384, 411 (1855).

23. 73 So. at 364.

24. *Id.*

the "true journalist" degenerated into the "pseudo-journalist" would the people "expect and receive injury and insult."[25] Pseudo-journalism fell under the scourge of the courts, for the right of free press and the right to discuss judicial proceedings did not "include the right to attempt, by wanton defamation, groundless charges of unfairness and stubborn partisanship to degrade the tribunal and impair its efficiency."[26]

The basis of the authority to curb such pseudo-journalism was not, however, derived from the statute. While the limiting act of 1828 permitted the punishment of scandalous remarks made during term time, the court chose instead to cross the judicial Rubicon. The judges looked away from their state's legal history and ruled that the Florida contempt power existed independent of statutory grant. Curiously, the justices did not go quite as far as their brethren in other states, for they did not erect an impregnable judicial fortress against all legislative attempts to limit the contempt power. The reason was clear: to punish the out-of-court criticism the Florida justices did not have to leap a statutory hurdle built years before. Since the Florida statute did not exclude publications from judicial censure, provided they appeared during a term of court, the court had no occasion to repudiate legislative limitations on the contempt power; it only declared its power inherent, "independent of statutory authority."[27] The justices possibly realized that "[a] grant of power to a court is tempting but the acknowledgment of it presupposes the authority to withdraw same."[28] The founding of the contempt power outside the legislative grant was in a sense a clearing of the court's flanks, securing territory for possible expansion if the jurists of a later day saw fit. Had the circumstances of the *Hayes* contempt been different, had the newspaper jibed the justices during vacation, the Florida Supreme Court might well have taken another step, proclaiming a judicially sovereign contempt power, a la *Morrill.*

With the *Hayes* decision, the Florida courts now had a rationale for punishing obnoxious critics. The standard was essentially that applied by the Arkansas Supreme Court in the *Morrill* case: scandalizing

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25. *Id.*

26. *Id.* at 366. The judges had reason to worry about respect for the law. "Lawlessness was general. . . . The violence of the Civil War and Reconstruction Period contributed heavily to a lack of respect for society's laws. . . . Men . . . came home to find state and local governments ineffectively administered at a time when law enforcement was especially needed. Distrusting authorities, Southerners in many places became their own family defenders." T. CLARK, THE SOUTHERN COUNTRY EDITOR 216 (1948).

27. 73 So. at 365.

28. State *ex rel.* Franks v. Clark, 46 So. 2d 488, 489 (Fla. 1950).

or impugning the integrity of the court.[29] The years following the *Hayes* ruling saw the first decision by the United States Supreme Court ruling squarely on the issue of contempt by publication. In *Toledo Newspaper Co. v. United States*,[30] Chief Justice White used a "reasonable tendency" test for judging whether certain out-of-court statements were contemptuous. The Chief Justice drew the line between permissible and impermissible speech at the point where the words reasonably tended to obstruct the administration of justice by unduly influencing or embarrassing the judge. Discretion remained with the trial judge in determining the tendency of any spoken or published statements brought into question. On the surface, however, the federal standard excluded from the scope of the contempt power remarks which were scandalous but which lacked the tendency to obstruct. While the *Toledo* "reasonable tendency" rule still permitted judges to punish unflattering commentary on the courts, it at least directed the attention of the federal courts to the process and administration of justice, rather than to the sensitive judicial ego.

In two related cases in 1923, the Supreme Court of Florida incorporated White's reasonable tendency test into state law.[31] Judge Davis of the circuit court in West Palm Beach was anxiously trying to secure appointment as a federal district judge. At the same time, Judge Earman of the West Palm Beach municipal court reportedly told friends that he would personally see that Davis did not receive the judgeship. Active opposition to Davis's advancement also came from Mayor Biggers of West Palm Beach.

While Judge Earman and Mayor Biggers were engaged in their surreptitious efforts, the former's court convicted one Edwin Antelo of "lewd and lascivious conduct."[32] Antelo promptly filed a petition for habeas corpus with Judge Davis of the circuit court, who released

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29. With this test the discretion to cite lay with the judge:

> We must, I think, leave the right to try the facts summarily in the hands of the trial court. We can look with but little hope to any plan for controlling bad judges of these trial courts from the outside or through provisions for appeal. What we need is wise statesmanship, even when it is exercised by judges. We may talk as much as we please about the admirable thesis that we have a government of laws and not of men. But probably John Adams himself at the very moment when he put the period to that famous sentence would have remained consistent to his own character and course of life and would have agreed that in matters of conduct and of expediency, like these contempt troubles, laws are a brittle shield and our reliance must be on real "two-legged" men.

Hale, *Public Opinion As Contempt of Court*, 58 AM. L. REV. 481, 498–99 (1924).

30. 247 U.S. 402 (1918).

31. *Ex parte* Earman, 95 So. 755 (Fla. 1923); *Ex parte* Biggers, 95 So. 763 (Fla. 1923).

32. 95 So. at 756.

Antelo on a nominal bond pending a hearing on the petition. Judge Earman of the municipal court wrote a letter to Davis, explaining that "[t]he police department of West Palm Beach was very active last week, with the result that many cases under the charge of lewd and lascivious conduct were presented for trial."[33] Earman stated that, pending Davis's decision in the *Antelo* case, he had released all the other persons similarly charged on a nominal bond before pronouncing judgment. Earman noted in his letter that many "influential friends" had aided Antelo in his habeas corpus action and said that he was temporarily releasing the others as a matter of "fairness."[34]

Judge Davis accepted the letter from his political enemy as a piece of judicial chicanery. Not only was the letter "a reflection upon the court," but Earman supposedly wrote the words "for the purpose of embarrassing" the judge and "influencing him in the disposition of said case."[35] For the circuit judge, no doubt remained that Earman "intended to charge that the court was induced to grant the writ of habeas corpus . . . by the influence and wealth of Antelo and his friends, and by implication to charge that the court was by these corrupt influences induced to grant said writ of habeas corpus."[36] The fact that Judge Earman had shown his letter to several people prior to mailing did not in the least soothe Judge Davis's feelings.

Just before Davis released Antelo on the writ of habeas corpus, Mayor Biggers noted the incident in a speech to the Florida League of Municipalities on February 1, 1923. The Miami *Daily Metropolis* quoted the West Palm Beach mayor as saying, "We have a circuit judge who is weak as water." He also said that, "Our court is absolutely annulled if a man has money and influence."[37]

Judge Earman's letter and Mayor Biggers' statement struck Judge Davis not only as embarrassments but also as impediments to justice in pending cases. The coincidence was that by protecting the streams of justice from pollution, he was at the same time punishing two persons who were doing their best to keep him off the federal bench.[38]

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33. *Id.*

34. *Id.* at 756–57.

35. *Id.* at 757.

36. *Id.*

37. 95 So. at 765.

38. For Thomas Jefferson, at any rate, misbehavior in public office was more than a possibility; it was a probability.

> [I]t would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights; that confidence is every where the parent of despotism; free government is founded in jealousy, and not in confidence; it is jealousy, and not confidence, which prescribes limited constitutions to bind down those whom we are obliged to trust with power . . . .

On appeal from the contempt convictions, Justice Whitfield wrote a separate opinion for each of the two cases. In the *Earman* opinion, the Florida Supreme Court echoed the sentiments of the *Hayes* decision:

> Respect for courts and judicial officers in the performance of their judicial functions or in matters that are incident to administering right and justice, naturally arises in the human mind from an appreciation of the delicacy and importance of the power exercised by courts and judges and by the becoming manner in which the functions are performed by those intrusted with the power.
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> . . . .
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> But, as all persons do not at all times appreciate or recognize their obligations of respect for the tribunals that are established by governmental authority, to maintain right and justice in the various relations of human life, the courts and judges have, under constitutional government, inherent power by due course of law to appropriately punish by fine or imprisonment or otherwise, any conduct that in law constitutes an offense against the authority and dignity of a court or judicial officer in the performance of judicial functions.[39]

But Whitfield, as if to warn that a judge who made free use of his contempt power would soon experience diminishing returns on his popularity and integrity, also noted that the behavior of judges could affect the degree of respect the people exhibited for their institutions.[40]

Having restated the inherent nature of the contempt power which *Hayes* made plain—though still without declaring the power immune to legislative restriction—Justice Whitfield proceeded to apply White's reasonable tendency standard. "The criterion is not the influence the conduct or acts complained of may have had upon the mind of the particular judge, but the true test is the reasonable tendency of the conduct or the acts done to improperly influence or to embarrass or hamper the judicial action of a court."[41]

> In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution.

4 J. ELLIOTT, DEBATES 543 (1941).

39. 95 So. at 760.

40. A statement by de Tocqueville seems relevant here. "Men are not corrupted by the exercise of a power or debased by the habit of obedience: but by the exercise of a power, which they believe to be illegal and by obedience to a rule, which they consider to be usurped and oppressive." Quoted in J. THOMAS, *supra* note 1, at 3.

41. 95 So. at 761.

Whitfield next examined the facts at hand to determine whether the trial judge erred in finding Judge Earman in contempt.

> In this case it does not appear that the circuit judge was actually engaged in hearing or considering the case referred to in the proceedings; but it is clear that, though the letter was received by the judge, the other acts complained of were not done in the presence of the judge or so near as to interrupt judicial proceedings, and it is also clear that the letter and the acts complained of could not reasonably have tended to embarrass the judge in his judicial functions.[42]

Judge Davis's contempt action against Mayor Biggers fared no better before the supreme court, and Justice Whitfield offered a second opinion, expressing views similar to those in *Earman*. The court noted that the mayor's remarks appeared in a newspaper in another city, "though, by reasonable inference, the speech complained of and its publication, as set out in the statement, were intended to be, and were, personally offensive to the judge to whom the statements referred . . . ."[43] While the mayor's comment was "an unjustifiable personal affront," the remark, "in view of the assumed character and fortitude of a circuit judge," could have had "no real tendency to embarrass the court in determining the cause referred to, or to interfere with and hinder and embarrass the court in arriving at a decision and final order in said cause."[44] Even if the mayor's speech had influenced Judge Davis, the mayor was not in contempt. What he said lacked the reasonable tendency to influence, given the qualities a circuit judge should possess. Thus the reasonable tendency test could work against contempt convictions as well as for them. Remarks that might disturb a sensitive judge should not be of concern to the "average" judge.[45]

In his opinion Justice Whitfield attempted to erase scandalizing the court as a basis for contempt in Florida.

> The right to make fair comments and criticisms of official conduct, does not warrant or excuse offensive statements reflecting upon officials as such; but, unless acts or words of criticism or condemnation affecting a judicial officer, not perpetrated in or near his presence, when acting judicially, are of such a nature and occur under such circumstances as to offend the court as such or to hinder or embarrass the orderly discharge of judicial functions, such

42. *Id.*
43. *Id.* at 769.
44. *Id.*
45. *Id.*

> acts, words, or other conduct do not in general warrant imprisonment as for contempt of court.[46]

Repeating an idea of Justice Holmes of the United States Supreme Court, Whitfield added that

> [a] circuit judge is expected to be a man of ordinary firmness of character; and, if the matter complained of as constituting contempt, when fairly interpreted, does not have a reasonable tendency to degrade or to embarrass or hinder such a judge in performing his own duty, or to affect a mind of reasonable fortitude, it is not a criminal contempt for which imprisonment may be lawfully adjudicated, particularly when an intent to offend is denied on oath.[47]

Justice Whitfield in the *Earman* and *Biggers* opinions forgot the reference point of the Florida contempt statute and applied instead a standard used by the United States Supreme Court in *Toledo* some 6 years earlier. The Florida court modified the *Hayes* ruling by excluding from punishment purely scandalous comment which did not tend to influence a judge. In so doing, the court was building the law of contempt on a basis independent of statutory authority, for the justices reaffirmed the inherent nature of the contempt power as stated in *Hayes*. It was the broad purview of the *Hayes* decision, covering comment not tending to pressure the judiciary, which the *Earman* and *Biggers* decisions of 1923 attempted to narrow.

Justice Whitfield, like Chief Justice White before him, avoided explaining the method for determining reasonable tendency. Too often the words could mean all tests to all judges, and a judge eager to punish an insult to his court would probably act accordingly, employing the fashionable test of the era, unless the alleged contempt was so farfetched as to be sure of reversal on appeal. Apparently the reasonable tendency test presumed a judge blessed with an average degree of those good qualities which judges were supposed to possess. In any given situation the judge was required to imagine the outcome if the questioned act or speech were allowed to continue. If the act or speech seemed to lead toward an obstruction or hindrance of the court's work, then the reasonable tendency test was satisfied.

But, given the lack of omniscient powers in human minds, the process of speculation, prediction, and estimation was a dubious one at any time. The rational application of the test was even more unlikely

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46. *Id.*

47. *Id.* The phrase "firmness of character" came from Holmes' dissent in Toledo Newspaper Co. v. United States, 247 U.S. 402, 424 (1918).

when the remarks offended the judge personally and called into question his integrity and fitness to wear the robe. In such a situation, a wounded judge could easily reason that any criticism he felt unjust tended to impede justice, for if the barrage of scandal persisted, the people would surely lose all faith in his court. At this point the reasonable tendency test blended with the broader integrity rule, and with the judge's concern for his professional neck.

The *Earman* and *Biggers* decisions were significant for their attempt to limit the scope of contempt in Florida, and represented the Florida law of contempt until the fourth decade of this century. On at least two other occasions the supreme court reaffirmed these rulings, defining out-of-court contempts in terms of the reasonable tendency test.[48] During this period courts across the land started to question previously held positions, and many legal commentators were calling for a more limited scope of contempt of court.[49] The Florida standard was a narrow one when compared to that prevailing in many other states, and so the gradual broadening of the Florida contempt power after 1930 was a curious contrast to the trend in other jurisdictions. The first real indication of the return of the Florida rule to the level of the *Hayes* decision of 1916 was *Cormack v. Coleman*[50] in 1935.

Judge Jefferson B. Browne, former chief justice of the Florida Supreme Court, was sitting for the criminal court of Dade County. Cormack, a reporter for the *Miami Beach Daily Tribune*, wrote a lively article which was published in that paper.

> Judge Jefferson B. Browne, former Chief Justice of the Supreme Court, was ordered to the Lewis trial by Gov. Dave Sholtz and at first he saw nothing wrong with Pine's prosecuting his friends [Fred Pine was the county solicitor].
>
> It was Judge Browne who presided at the trial of Pine himself a few years ago when the County Solicitor was 'vindicated' on charges of improperly performing the duties of his office in connection with the slot machine scandal that brought about the suicide of former Sheriff Lehman.[51]

But the reporter erred, confusing Browne with a Judge Brown who

48. Wilson v. Joughin, 141 So. 182 (Fla. 1932); Baumgartner v. Joughin, 141 So. 185 (Fla. 1932).

49. *See, e.g.*, Address by Judge Emory Niles, Maryland State Bar Ass'n Annual Meeting, June 28, 1940, in REPORT OF THE FORTY-FIFTH ANNUAL MEETING AND MID-WINTER SESSION OF THE MARYLAND STATE BAR ASS'N 101 (1940). Niles at the time was Associate Judge of the Supreme Bench of Baltimore City.

50. 161 So. 844 (Fla. 1935).

51. *Id.* at 845.

had actually presided at the earlier trial. So, on the following day, the *Tribune* published an apology.

> The Tribune inadvertently made a misstatement yesterday to the effect that Judge Jefferson D. Browne, who presided in the trial of Hayes Lewis, had also presided over the trial of Fred Pine in connection with the slot machine scandals which resulted in the suicide of the late Sheriff Lehman. It was Judge W. F. Brown who presided at one of the Pine trials and Judge Vining Harris who presided over the trial which resulted in the acquittal of Pine.[52]

Honest mistake or not, Judge Browne was offended and held the reporter in contempt of court for failure to display proper respect for the tribunal.

On appeal to the Florida Supreme Court, Justice Whitfield, for the court, accepted the findings of his former colleague. "Such admitted published words are not ambiguous and are necessarily contemptuous of the court and its processes."[53] In addition, the printed apology did not mitigate the harm which the misrepresentation had caused.

Whitfield's brief opinion met sharp dissent from Justice Buford. "I am unable to agree . . . that the acts set forth in the petition for citation for contempt which are alleged to have been acts of contempt of court are sufficient to constitute contempt."[54] Buford did not intend to deny the existence of the contempt power, and noted "that there is a limit to the freedom which may be exercised by the press in unwarranted criticisms of judges and of the courts . . . ."[55] But to preserve respect, "the courts must not fall in the error of arbitrarily adjudging acts to have been perpetrated in contempt of court when there is no basis in fact for such adjudication."[56] According to Buford, the published error could have had no harmful effect on Judge Browne's court.

The *Cormack* case was significant not because of any new concept of contempt contained within the opinion, but because the decision was a swing toward a broader purview for contempt, reminiscent of the *Hayes* ruling of 1916. Explanation for the reorientation would be difficult to establish. Other states during the 1930's were making efforts to narrow the scope of the contempt power, but the experience in Florida indicated a move in the opposite direction. That Judge Browne was a former member of the supreme tribunal no doubt gave credence

52. *Id.* at 846.
53. *Id.* at 849.
54. *Id.* at 850.
55. *Id.*
56. *Id.*

to his citation for contempt, and perhaps the supreme court was simply hesitant to overrule a former chief justice. This possibility received further support from the fact that Whitfield's opinion was very short and avoided any real discussion of applicable contempt law. Whitfield himself had written the opinions in the *Earman* and *Biggers* cases of 1923, and the remarks in those earlier cases probably represented a greater threat to the court concerned than the newspaper's error about Judge Browne. Given the short opinion and Whitfield's previously stated views, one could suggest that the supreme court stretched the legal rule to cover the action of a former colleague and leader. Perhaps only Cormack and his paper objected to such benevolence at the time, but the decision became a precedent, and a precedent could return to haunt in a way its creators never dreamed.

Before the Florida Supreme Court had the chance to expand or contract *Cormack*, the United States Supreme Court changed the variables. First, in *Nye v. United States*,[57] the Court overturned the *Toledo* ruling by confining federal contempts to acts geographically near the courtroom. Then in *Bridges v. California*,[58] the Court applied the clear and present danger standard of free speech to state contempt proceedings. "[W]e cannot allow the mere existence of . . . untested state decisions to destroy the historic constitutional meaning of freedom of speech and of the press."[59]

To some the *Nye* and *Bridges* decisions effectively concluded the chapter on contempt by publication. But these commentators forgot that for decisional law to become law in fact, courts must apply the rulings of the supreme federal bench, and often these courts are state courts. In fact, a Florida construction of the *Bridges* case led to the second controversy involving a state ruling on out-of-court contempt to reach the Supreme Court of the United States within a decade. *Pennekamp v. State*[60] was without a doubt the most celebrated and lively out-of-court contempt case to occur in Florida, for the case brought together intriguing and appealing circumstances, personalities, and debates. On one side was *The Miami Herald*, one of the state's major newspapers, and its associate editor John D. Pennekamp. On the other side was the Dade County Circuit Court, represented by Judges Marshall C. Wiseheart and Paul D. Barns.

Three criminal cases in Miami during 1944 sparked the affair. In the first, Judge Paul D. Barns on October 30 quashed eight indict-

57. 313 U.S. 33 (1941).
58. 314 U.S. 252 (1941).
59. *Id.* at 268.
60. 22 So. 2d 875 (Fla. 1945), *rev'd*, 328 U.S. 331 (1946).

ments for rape because they failed to designate the victim. The record was vague as to whether the prosecutor agreed that the court should have quashed all the indictments. The court, however, arranged for immediate reindictments.

In the second case, vice and other illegal activities at the Brook Club were at issue. On March 22, 1944, the state attorney procured from Judge Holt a temporary restraining order against the club to halt suspected illegal operations. On August 14, the club filed a motion for review of the order, and on October 24, the court notified the state attorney of the hearing on the motion set for October 31. At the appointed time the state attorney was working with the grand jury, and since no one was present to move for continuance of the order or postponement of the hearing, Judge Wiseheart dismissed the case and revoked the order.

In the third case, Judge Holt questioned the validity of the state's affidavits which formed the primary evidence in a suit to enjoin bookmaking at the Tepee Club. On October 12, Judge Holt reminded the state attorney that "you can prove anything by an affidavit,"[61] and denied the state's request for a temporary injunction against the club.

The Miami Herald considered the disposition in each case a variation on a milk-toast theme. The newspaper had been concerned for a long time about lax law enforcement in Miami and Dade County. Much of the notorious Chicago gangster element had settled in the Miami area following the repeal of prohibition, and several of the more successful gangsters operated large gambling empires in the tourist-rich section of southern Florida. Whether true in fact, many citizens of Miami believed that the "gambling interests" had sufficient control of the police and the courts in Dade County to avoid serious prosecution. Attorneys, policemen, and judges not in the "service" of the underworld elements became dismayed at the ease with which persons accused of gambling and other vices secured outright acquittals or reduced sentences in courtrooms where "bought" judges and defense attorneys were receiving more money in fees for a single case than the "honest" legal servants earned in an entire year.[62]

Perhaps indicative of the temper of the community's "respectable" citizens was the Report of the Dade County Grand Jury of May 15, 1944.[63] The grand jurors were generally critical of police and prose-

61. Record at 137, Pennekamp v. State, 22 So. 2d 875 (Fla. 1945) [hereinafter cited as Record].

62. Interview with John D. Pennekamp, Editor of *The Miami Herald*, in Miami, Florida, March 10, 1967.

63. The report is contained in the Record at 43–81.

cutors for allowing illegal gambling operations in Miami and Miami Beach to continue and to flourish. "The very existence of an organized racket means political connivance with it. Obviously, no politician is going to connive—at least for long—unless the gamblers will finance his campaign and make his political life agreeable and pleasant, and even profitable, in return for his 'liberality.' "[64]

Whatever the uncertainties and confusion of the rape and club cases, *The Miami Herald* reported on November 1 that the grand jury had reindicted those previously charged with rape. On the same day, however, the newspaper posted editorial comment which was a foretaste of words to come.

> It's the law. The layman will have to let it go at that, even though he does not quite grasp why an indictment charging eight defendants with rape must be thrown out because of a technicality and the grand jury compelled to go through the indicting process again so that they can be brought to trial.
>
> Some day the American people are going to see to it that the courts can make needed corrections, cross the "t's" and dot the "i's" which now are a fetish of our jurisprudence.[65]

Unhappy with community crime, the newspaper was impatient with the procedural rules of law and was hardly appreciative of their application to despicable sorts of people. Moreover, so overriding was the *Herald's* concern that the author of the editorial was indifferent to the omission from the first indictment of the name of the person who was raped.

The *Herald* published another editorial on November 2, noting the handling of the rape and club cases as a barometer of the law enforcement problem which the community faced.

> The courts belong to the people. The people have established them to promote justice, insure obedience to the law and to punish those who willfully violate it.
>
> The people maintain the courts by providing the salaries of officials and setting up costly chambers and courtrooms for the orderly and dignified procedure of the tribunals.
>
> Upon the judges the people must depend for the decisions and the judicial conduct that will insure society—as a whole and in its individuals—against those who would undermine or destroy the peace, the morality and the orderly living of the community.

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64. Record at 71.
65. The Miami Herald, Nov. 1, 1944, at 6-A, col. 1.

> . . . .
>
> This week the people, through their grand jury, brought into court eight indictments for rape. Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the grand jury for re-presentation to the court.
>
> Only in the gravest emergency does a judge take over a case from another court of equal jurisdiction. A padlock action against the Brook Club was initiated last spring before Judge George E. Holt, who granted a temporary injunction.
>
> After five months, the case appeared Tuesday out of blue sky before Judge Marshall C. Wiseheart at the time State Attorney Stanley Milledge was engaged with the grand jury.
>
> Speedy decision was asked by defense counsel despite months of stalling. The State Attorney had to choose between the grand jury and Judge Wiseheart's court.
>
> The judge dismissed the injunction against the club and its operators. The defense got delay when it wanted and prompt decision from the court when it profited it.
>
> On Oct. 10 Judge Holt had before him a suit by the state to abate a nuisance (bookmaking) at the Tepee Club.
>
> Five affidavits of persons who allegedly visited the premises for the purpose of placing bets were introduced by the state over the objection of the defendants.
>
> Judge Holt ruled them out . . . .
>
> . . . .
>
> If technicalities are to be the order and the way for the criminally charged either to avoid justice altogether or so to delay prosecution as to cripple it, then it behooves our courts and the legal profession to cut away the deadwood and the entanglements.
>
> Make it possible for the state's case, the people's case, to be seen with equal clarity of judicial vision as that accorded accused lawbreakers. Otherwise technicalities and the courts make the law, no matter what the will of the people and of their legislators.[66]

The same issue of the *Herald* also contained a cartoon on the editorial page. The interpretation of the cartoon would depend on one's view of the *Herald* campaign and of the procedure followed by the Dade County officials in the three cases. Briefly, the cartoon showed a judge on the bench, labeled "the law," presenting to a man a paper marked "defendant dismissed." At the judge's right was a short man, identified as "public interest," saying, "But, Judge!"[67]

After this major journalistic assault on November 2, a secondary attack followed on November 7, in the form of a brief editorial.

66. The Miami Herald, Nov. 2, 1944, at 6-A, col. 2.

67. *Id.* cols. 3, 4.

> Here is an example of why people wonder about the law's delays and obstructing technicalities operating to the disadvantage of the state—which is the people—in prosecutions.
>
> After stalling along for months, the defense in the padlock case against the Brook Club appeared before Judge Marshall C. Wiseheart for a decision. The State Attorney was working with the grand jury. The court knocked out the injunction. There was speed, dispatch, immediate attention and action for those charged with violation of the law. So fast that the people didn't get in a peep.[68]

Judges Barns and Wiseheart found the published editorials too scandalous to disregard, and cited John D. Pennekamp and the *Herald* for contempt on November 10. To the readers of the *Herald* during the fall of 1944, the contempt charge was neither unexpected nor surprising. The cumulative effect of the editorials and cartoon tended "to create a distrust for said court and the judges thereof in the minds of the people of this county and state."[69] With reference to the three cases which had sparked the explosion, the published matter tended "to prevent and prejudice a fair and impartial action of the said Court and the Judges thereof in respect to the said pending cases."[70]

As far as Wiseheart and Barns were concerned, the thorn in the flesh was the inaccurate reporting of the cases involved and the charges of corruption which the published accounts seemed to imply. In a county where political chicanery and the buying and selling of justice were hardly unknown, these elected judges felt that to remain silent would signify guilt.

The judges claimed that the editorial of November 2 failed to report the reindictment of the alleged rapists, saying only that Judge Barns "agreed with the defense attorney that the indictments were not properly drawn." As for the Brook Club proceeding, the case did not appear "out of blue sky," but had been languishing for some 90 days because the state attorney had taken no action. The judges also felt the first editorial charged dishonesty in the Tepee Club affair, rather than sincere devotion to duty. Taken together, the editorials and cartoon

> have thereby represented unto the general public that notwithstanding the great public trust vested in the Judges of this Court that they have not discharged their duties honorably and fairly in

68. The Miami Herald, Nov. 7, 1944, at 6–A, col. 1.
69. Record at 5.
70. *Id.*

> respect to said pending cases as hereinbefore set forth, all of which tends to obstruct and interfere with the said Judges as such in fairly and impartially administering justice and in the discharging of their duties in conformity with the true principles which you have so properly recognized in the forepart of said editorial above quoted as being incumbent upon them and each of them.[71]

But if the judges' contention of false accusation had basis in fact, their notion of "pending" cases lacked such solid foundation. The Brook Club and Tepee Club cases were pending on November 2 only in the sense that the state might take further action. True, the rulings were open for modification or rehearing, but the judges made believe that the newspaper comment came at a time when they were pondering weighty questions of law prior to deciding the cases at hand. This contention simply did not correspond with the facts. According to the notion of pendency advanced by Barns and Wiseheart, a newspaper could poison the fountain of justice even before it began to flow.[72]

The judgment for contempt did not come until December 18, but Judge Barns was still smarting from the pain well over a month after the burn. "The public depend [*sic*] upon newspapers for information and the public has a right to assume that a newspaper will fairly report the proceedings of the courts—the people's own institutions. Correct information will remedy evils but misinformation and regimented news may likely destroy the good."[73] The judge spoke of the power of a major newspaper to work for the good or ill of the community.[74] "The public has come to depend upon reputable newspapers for information and a false report by a reputable newspaper is accepted as true and the people are deceived."[75] While the judges might have overlooked incorrect and scandalous reports appearing in a weekly publication of small and scattered circulation, they could not remain silent about editorials in the *Herald*, the daily circulation of which peaked 125,000. "With increased circulation comes greater responsibilities."[76] The *Herald* had violated the people's right not to be "mis-

71. *Id.* at 72.

72. *Id.* at 193–201.

73. *Id.* at 216.

74. Giles Patterson, who entered amicus curiae on behalf of the state when the *Pennekamp* case was before the Supreme Court of Florida, had written 6 years earlier: "The press . . . should realize that its power and opportunity to create sentiment which may affect the trial of individual rights require it to recognize that the social claim of the courts is at least equal to the right of the press." G. PATTERSON, FREE SPEECH AND A FREE PRESS 152 (1939).

75. Record at 216–17.

76. *Id.* at 217.

informed and deceived concerning their courts. Courts are for the people, and they, the people, are entitled to a fair report concerning court actions."[77] Finally, Judge Barns sounded a sober warning to all local commentators on the courts. "To report on court proceedings is a voluntary undertaking but when undertaken the publisher who fails to fairly report does so at his own peril."[78] To enter the *sanctum sanctorum* was a privilege, and to give false reports of what one found there was sacrilege against the holy name of justice.

Five of the seven justices of the Supreme Court of Florida agreed substantially with the circuit judges from Dade County. If only for reasons of fraternalism, the justices sympathized with their brethren on the trial bench for the scathing criticism to which the *Herald* had subjected them. Speaking for the five, Justice Terrell set the tone of the opinion when he pointedly declared, "[I]t is utter folly to suggest that the object of these publications was other than to abase and destroy the efficiency of the court."[79]

The record simply did not substantiate the newspaper's charges, revealing not "a breath of suspicion on which to predicate partisanship and unfairness on the part of the judges."[80] On the contrary, "they acted in good faith and handled each case to the very best advantage possible."[81] Had the supreme court justices themselves heard the three cases at issue, "[t]here was no judgment that could have been entered in any of them except the one that was entered."[82] The contempt resulted not from honest criticism, but from perverse suggestions.

> If the editorials had stated the facts correctly, nothing but a correct conclusion could have been deduced and there would have been no basis for contempt but here they elected to publish as truth a mixture of factual misstatement and omission and impose on that false insinuation, distortion, and deception and then contend that freedom of the press immunizes them from punishment.[83]

Faced with these circumstances, what law were the justices to apply? The *Hayes* decision from 1916 appealed to them, but the *Bridges* decision by the United States Supreme Court presented a formidable obstacle. Rather than tackle the obstacle, the Florida court dodged it altogether. "The Hayes case is the best reasoned case we

77. *Id.*
78. *Id. See* Time, Inc. v. Firestone, 96 S. Ct. 958 (1976).
79. Pennekamp v. State, 22 So. 2d 875, 883 (Fla. 1945).
80. *Id.* at 882.
81. *Id.*
82. *Id.*
83. *Id.*

have found on the subject and is supported by the current of state and Federal decisions throughout the country."[84]

Counsel for Pennekamp and the *Herald* argued that *Bridges* required the existence of a clear and present danger to the administration of justice before a judge could cite for contempt. But the court was unimpressed by this contention. Only since 1925 had "anyone dreamed that the Federal Constitution had anything to do with the punishment for contempt under state law."[85] The reason was apparent, for "[t]he States had been exercising the power to punish for contempt for more than a hundred years . . . ."[86] As for the 1941 *Bridges* decision, "we find nothing in the . . . case indicating a purpose to supersede state law and decisions on the question or to require state courts to conform to Federal pattern."[87] If the *Bridges* decision established a rule, the Florida justices thought it very narrow. "[G]iven its broadest scope, we cannot say that the Bridges case did more than decide the law of that case. We think the rule still persists that each case must stand or fall by the facts presented."[88]

Although Pennekamp's counsel insisted that the *Bridges* decision applied first amendment standards to state contempt cases, the Florida justices remained unmoved. Terrell's opinion recognized that the fourteenth amendment indeed brought certain standards to bear on state governments, but these were not necessarily those of the first amendment. In fact, the only condition imposed by the fourteenth amendment on the states was "the observance of due process."[89] That is, "the judgment . . . must not be arbitrary, unreasonable, or discriminatory."[90] Thus the Florida court simply ruled that the national free speech standard did not apply to the states, without meeting head-on the argument that the *Herald*'s contempt citation violated free speech. Terrell added that even if the clear and present danger test

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84. *Id.* at 881.

85. *Id.* at 883. Terrell's remark about the year 1925 refers to Gitlow v. New York, 268 U.S. 652 (1925), in which the Supreme Court assumed that the first amendment's guarantee of freedom of speech was among the fundamental personal liberties protected by the due process clause of the fourteenth amendment from abridgment by the states.

86. 22 So. 2d at 883.

87. *Id.*

88. *Id.* at 884. "Although the language of the *Bridges* case is broad enough to apply to any charge of contempt by publication regardless of the presence of a statute, the Florida court took the position that in view of the established history of the law in such cases it was not the intention of the Supreme Court to apply the rule so broadly." Note, *"The Clear and Present Danger" Rule and Contempt by Publication*, 41 ILL. L. REV. 690, 691 (1947) (footnotes omitted).

89. 22 So. 2d at 884.

90. *Id.*

were applicable, federal review should confine itself to whether the states had applied the test fairly.[91]

Without the first amendment rule, the state courts were free to rely on state guarantees of free expression. And what was the Florida rule applicable to newspaper comment on courts? "A newspaper may criticize, harass, irritate, or vent its spleen against a person who holds the office of judge in the same manner that it does a member of the Legislature and other elective officers, but it may not publish scurrilous or libelous criticisms of a presiding judge as such or his judgments for the purpose of discrediting the Court in the eyes of the public."[92]

Terrell readily affirmed the principle that "[r]espect for courts is not inspired by shielding them from criticism."[93] Instead, respect was "a responsibility of the judge, acquired over the years by the spirit in which he approaches the judicial process, his ability to humanize the law and square it with reason, the level of his thinking, the consistency of his adherence to right and justice, and the degree to which he holds himself aloof from blocs, groups, and techniques that would sacrifice justice for expediency."[94] On the other hand, while the judge must win respect for himself by devotion to duty, he had every right to protect his hard-earned position from scandalous attacks from the wings. For while the judge was always open to criticism from the press, the latter was hardly immune to a bark or a bite from the former.[95]

Lest he appear opposed to a free press, Terrell offered a rationale for the constitutional status which newspapers enjoyed. "Our forefathers were committed to the doctrine that democratic processes could not survive, absent a public opinion energized by truth, liberty, equality, and justice. Hence the reason for a free and untrammeled press as a medium to generate such a type of public opinion."[96] With

91. *Id.* at 886.

92. *Id.* at 884.

93. *Id.*

94. *Id.* at 884–85.

95. As to the efficacy of leaving newspapers to correct their own abuses, Justice Terrell might have had in mind a statement by H. L. Mencken:

> Journalistic codes of ethics are all moonshine. Essentially, they are absurd as would be codes of street-car conductors, barbers or public jobholders. If American journalism is to be purged of its present swinishness and brought up to a decent level of repute—and God knows that such an improvement is needed—it must be accomplished by the devices of morals, not by those of honor. That is to say, it must be accomplished by external forces, and through the medium of penalties, exteriorly inflicted.

As quoted in Note, *"The Clear and Present Danger" Rule and Contempt by Publication*, 41 ILL. L. REV. 690, 695 n.37 (1947), *quoting* The Daily Record (Baltimore) March 11, 1932, at 3, col. 1, 4.

96. 22 So. 2d at 885.

the bait, however, came the hook. "It therefore follows that while the Bill of Rights endowed the press with liberty, it also imposed on it a trusteeship that it may not abandon or prostitute in the exercise of its freedom."[97] And it was the abandonment and prostitution of this civic duty which had excited the Dade County judges in this instance.

To this point Terrell had rested his opinion on the notion that contempt was necessary to prevent the scandalizing of the court. The law as announced in 1945 was a good copy of the same doctrine applied in the *Hayes* case of 1916. But Terrell suddenly shifted the focus of his reasoning to the pendency of the criminal cases, a point which lay at the heart of the contempt action. Without demonstrating how one could have considered the cases to have been pending, Terrell assumed their pendency and added another pillar to support the contempt ruling fashioned by the circuit court. "The theory of our system of fair trial is that the determination of every case should be induced solely by evidence and argument in open court and the law applicable thereto and not by any outside influence, whether of private talk or public print."[98] Terrell rejected the notion that a judge of ordinary firmness would not be "disturbed or perhaps thrown off the beam by assaults of the character shown here . . . ."[99] Such a belief simply assumed "a trend in the mass mind that common experience knows nothing about."[100] That Terrell devoted very little space and reasoning to the pendency argument was probably indicative of the role pendency played in the case before him. He perhaps felt the topic needed comment, but he was not prepared to rest the conviction on the pendency of cases which were not in fact pending at all.[101]

The editor and his newspaper won only two justices away from Terrell's double-barreled opinion. Justice Buford obtained support from Justice Sebring in dissent. For the minority neither the editorials nor the cartoon imputed "a want of fairness, impartiality, or integrity to any Judge or any Court." The items instead criticized "a judicial system which, to protect the rights of the righteous, must, by the same

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97. *Id.*

98. *Id.* at 886.

99. *Id.*

100. *Id.*

101. "The Florida court . . . did not define 'pending,' and the grounds for its decision had no special dependence on the requirement that a case be pending. . . . [T]he decisive consideration is whether the judge or the jury is, or will soon be, formulating a decision which a questioned comment seeks to affect. In this case the petitioners . . . criticized what the court had already 'put in the scales, not by attempting themselves to insert weights' in the balance of justice." F. THAYER, LEGAL CONTROL OF THE PRESS 526 (3d ed. 1956).

token, see that the alleged rights of the unrighteous are determined."[102] The dissent made clear that, whatever the Florida law of contempt had previously been, the *Bridges* decision commanded the field in 1945. "[I]n the absence of showing of *clear* and *present danger* of influencing or controlling the determination in any particular case, then pending in any court, created by the publication complained of, no punishable contempt is made to appear."[103]

The dissenting views of Justices Buford and Sebring received vindication when the United States Supreme Court accepted review of the *Pennekamp* case in 1946 and reversed the decision of the Florida court.[104] Justice Terrell had challenged the Court's interpretation of the applicability of the first amendment to the states and had attempted to remove most of the meaning from the *Bridges* decision. The Justices in Washington realized that the new law of contempt, the foundations of which they had laid only a few years before, would never become permanent if they permitted the state courts to apply such a watered-down construction of *Bridges*. The *Pennekamp* decision by the Supreme Court of Florida flew in the face of too many federal decisions to be allowed to stand.

Justice Reed wrote for the majority of the Supreme Court.[105] In a direct rebuke to the Florida court, Reed reminded his readers that there was indeed a national standard of free expression which the fourteenth amendment made applicable to the states. While the right to express one's views was not unlimited, the Constitution tipped the scales in favor of free speech and press.

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102. 22 So. 2d at 887.

103. *Id.* A student of the judicial process would like to know the sources judges find impressive and persuasive when deciding cases and writing opinions. The *Pennekamp* file in the clerk's office in the Supreme Court Building in Tallahassee contains several well-worn and well-marked articles and briefs, parts of which appeared in Terrell's opinion for the majority. Giles J. Patterson, himself the author of a book on the freedom of the press, submitted an amicus curiae brief in support of the state's position. And Terrell's theory of the fourteenth amendment with its narrowed scope came directly from Giles's brief. The file also contains a clipping from the *Miami Daily News*, the *Herald*'s competitor. An article of June 15, 1945, criticizes the *Herald* for having the judges' "honor and integrity publicly crucified on a cross nailed together from crate-sticks of inaccurate and irresponsible reporting." A clipping from *The Charlotte Observer*, June 14, 1945, carries a Princeton, New Jersey, dateline. The article quotes Byron Price as saying, "Because in a democracy public opinion holds the power of life and death over public issues and public men, we must do what we can to raise the level of public opinion ever higher."

104. Pennekamp v. Florida, 328 U.S. 331 (1946).

105. Justice Jackson was in Nuremberg at the time and took no part in the consideration or decision of the case. Chief Justice Stone, who presided at the hearing, died before the Court announced the decision.

> Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct. It does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to fair and orderly judicial administration. . . . In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases.[106]

Examining the record and the circumstances, Reed concluded that the criticism leveled at the Dade County Circuit Court was not of the type to affect directly the administration of justice.[107] The danger, if any existed, had "not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it."[108]

In the *Pennekamp* decision, the Supreme Court attempted to append the clear and present danger test to the contempt law of Florida. The Florida Supreme Court had given little attention to the test in its own opinion and had instead applied the old *Hayes* doctrine to Pennekamp's editorials. The United States Supreme Court provided in effect a de novo review, for the Justices were concerned with a test which the Florida court had hardly considered.

"Clear and present danger" was a legal catch phrase.[109] Like the reasonable tendency rule which it replaced, clear and present danger saw service in contempt law, stirring both favorable and unfavorable responses. Earlier catchwords or test phrases in contempt law included the reasonable tendency and the integrity tests. Each rule embodied a concept to someone, at some time, concerning the proper scope of the contempt power regarding out-of-court remarks.[110]

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106. 328 U.S. at 346–47 (footnote omitted).

107. *Id.* at 348.

108. *Id.* at 350.

109. For a discussion of the test, see Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952).

110. When discussing rules, catchwords, and the like, one should remember Wesley McCune's statement that "catchwords passed over lightly today frequently become whole doctrines in the next generation of law, or the one after that." W. MCCUNE, THE NINE YOUNG MEN 211 (1969). Neither was Cardozo silent on this point. "[Concepts] are tyrants rather than servants when treated as real existences and developed with merciless disregard of consequences to the limit of their logic." B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 61 (1970) (footnote omitted).

The integrity doctrine empowered a court to punish any and all remarks detracting from the dignity of the tribunal. The power was an august one, and provided the basis for most American appellate decisions regarding contempt convictions for out-of-court statements. In Florida the integrity argument formed the foundation for the *Hayes* decision of 1916, though the test later had to share quarters with the reasonable tendency rule.

The reasonable tendency test could be viewed as a more narrow basis for contempt than the integrity rule, since it declared comment contemptuous only when the words tended to obstruct justice.[111] No judge ever explained what obstructing justice actually meant or involved, but the reasonable tendency test usually excluded from the scope of contempt remarks directed solely at the judge or the court which had no bearing on pending cases. The clear and present danger concept went a step further in restricting punishment for out-of-court contempt and in a sense was the "great tendency" test. Essentially, as applied in contempt cases, the test required that danger to the administration of justice be imminent.

State judges in Florida seemed especially reluctant to apply the clear and present danger test in their contempt law. The reason was apparent. Under the clear and present danger rule, to punish someone for contempt would entail an admission by the judge that he lacked the strength, stamina, or fortitude to withstand whatever comment or criticism was circulating about him in the community.[112] State judges recognized this point, and, when they used the test at all, they rested their logic upon the older tests. In punishing an outspoken critic for impugning judicial integrity or for tending to obstruct justice, the judge did not have to admit weakness on his part. In the first instance, he protected the good name of the court, with or without the presence of an obstruction. In the second, he ruled that the language at issue

111. Elisha Hanson, who served as counsel for *The Miami Herald* in the *Pennekamp* case, wrote as early as 1942:

> The "reasonable tendency" test is so vague in its contours as to spread a "dragnet which may enmesh anyone" who ventures to comment upon pending court proceedings. To sanction such a nebulous standard as a measure of power is to sanction a pervasive threat of censorship which is aggravated by the very nature of summary punishment for contempt.

Hanson, *The Supreme Court on Freedom of the Press and Contempt by Publication*, 27 CORNELL L.Q. 165, 179 (1942).

112. "No judge could be expected to say that he or his colleagues were, or might be, directly influenced to alter their decision by any publication. Yet many judges are willing to admit that some publications may exert the more subtle influence of disturbing the delicate balance of mind without which a calm perusal of the issues is impossible." Comment, *Free Speech vs. The Fair Trial in the English and American Law of Contempt by Publication*, 17 U. CHI. L. REV. 540, 547 (1950).

would tend to affect the proceedings of the "average" court under the "average" judge, specifically designating himself as above average. The effect of the clear and present danger test, then, was the quashing of judicial power to summarily punish out-of-court remarks without dissolving the power per se.[113]

The phrases "clear and present danger," "reasonable tendency," and "integrity" were merely shorthand references for different approaches to resolving the conflict between free expression and an independent judiciary. The phrases reflected in part the differing opinions as to how much criticism a judge or tribunal could or should take, while at the same time maintaining some semblance of independence. But these shorthand expressions required interpretation and application. Thus one judge would see a reasonable tendency where another would not. A Frankfurter would be inclined to check for a strong tendency to obstruct, while a Terrell would take only a passing glance at the record. Likewise, both a Douglas and a Sebring could speak in terms of clear and present danger, but what was clear and present to the latter would often be vague and distant to the former. Similarly, Florida's Justice Whitfield perceived no tendency in 1923, but the same justice found tendency galore in 1935.[114]

Significantly, the move to deflate the contempt power began as students of law and the judicial process were replacing the judiciary's divine gowns with fallible human garments.[115] At a time when studies stressed the subjective role of personality and personal preferences

113. "Place the test on the success or failure of the press comment to obstruct justice in pending litigations and you have no test at all. For all practical purposes freedom of the press becomes absolute within the confines of this controversy." Comment, *A Re-Examination of Bridges v. California*, 23 ALBANY L. REV. 61, 73 (1959).

114. *Compare* Cormack v. Coleman, 161 So. 844 (Fla. 1935) *with Ex parte* Biggers, 95 So. 763 (Fla. 1923) *and Ex parte* Earman, 95 So. 755 (Fla. 1923).

One sometimes wonders how much thought judges give to the full meaning and premises of the tests they apply. As Holmes stated:

> My object is not so much to point out what seems to me to be fallacies in particular cases as to enforce by various examples and in various applications the need of scrutinizing the reasons for the rules which we follow, and of not being contented with hollow forms of words merely because they have been used very often and have been repeated from one end of the union to the other. We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.

Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

115. *See, e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); J. FRANK, LAW AND THE MODERN MIND (1930); Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). Also note the helpful bibliographical notes in W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1971).

in adjudication, the clear and present danger test removed a formidable hindrance to criticism of the judiciary. If the begowned individual was not divine, comment about him could not be blasphemous. Given the factors which supposedly guided judges in their decisions, the change in contempt law was a recognition that additional sources of stimulus and influence would do no harm. Supporters of the clear and present danger rule argued that judges could not be isolated from society and from opinions about themselves.[116] They perhaps saw little difference between a bitter attack in the press and unfriendly remarks at the country club or at the bar association meeting—at least as far as the effect on thinking was concerned. In the absence of probable harm, these spokesmen cast their vote for free expression.

Initiation of the clear and present danger test in American contempt law also resulted from recognition of the possibility of abuse under the old rules. Even when the offended judge did not himself conduct the summary hearing, only a thin line existed between sufficient and insufficient tendency or between friendly jibes and wounded dignity. To predict obstructions to justice and to measure tarnish on the judicial crest required a judgment from one's own observations, and it was all too easy to find the necessary tendency or tarnish when the criticizing party was unfriendly, objectionable, or downright unpalatable. Even the most honest but nonetheless subjective mind could unknowingly transform summary punishment into a weapon of political warfare or a tool of personal vindictiveness.[117]

Because of the weaknesses of the old rules, a majority of the Justices on the United States Supreme Court after 1941 felt that, whatever the evils incurred by the free play of judicial criticism, the advantages of such free comment far outweighed the disadvantages.[118]

116. *See, e.g.*, Forer, *A Free Press and a Fair Trial*, 39 A.B.A.J. 800 (1953).

> Those who believe that the judge must be protected from the pressures of public opinion are caught on the horns of a dilemma. For if the judge is of such moral frailty that he must be insulated from criticism, then is not society running a fearful risk in freeing him from public surveillance? The very judges who most piously invoked the dignity of the court and the necessity of the contempt power to punish "scandalizing" the court in order to preserve public respect have been those most properly fearful of exposure of their own misconduct.

Id. at 844.

117. Moreover,

> The harm of repression is hardly cured by the fact that matter published after a case is no longer pending is not subject to contempt. Modern criminal prosecutions last for many months, even years, and often result in several trials on one issue or related issues. When unrestricted comment finally becomes permissible, it is of little interest or utility—freedom to publish something when it no longer matters is no freedom at all.

Note, *Contempt by Publication*, 59 YALE L.J. 534, 541 (1950) (footnote omitted).

118. At least one editor is aware of his newspaper's power:

Difficulties with the clear and present danger test persisted, however, not the least of them being the reluctance of any judge to cite for contempt on that basis alone. This reluctance and the resulting freedom for the press perhaps lay behind the Supreme Court's new direction in 1941.

Though the Justices in Washington did not hesitate to accept their new leadership in state contempt law, the justices in Tallahassee were less than eager to acknowledge that assumption of command. In the years after John Pennekamp crossed Judges Barns and Wiseheart in Miami,[119] no contempt case involving out-of-court comment came before the Florida appellate courts, but related cases indicated that if the Florida judiciary had swallowed *Pennekamp*, it had failed to digest the decision.

A case in 1946 involving an attorney's petition brought forth a broad restatement of the contempt rule as it had existed in the *Earman* and *Biggers* cases of 1923. "As a general rule, any publication tending to intimidate, influence, impede, embarrass or obstruct courts in the due administration of justice in matters pending before them constitutes contempt."[120] This repudiation occurred hardly before the ink was dry in the *Pennekamp* decision. In 1955 the Florida justices again mumbled discontent over the exalted position enjoyed by the *Pennekamp* ruling. "The Pennekamp case as misconstrued and misinterpreted has been adopted by some as the beacon light and Bible, shield and protector, of those who would destroy public confidence in judicial processes and eventually in the courts themselves."[121] But the fact remained that no case reached the Florida appellate courts after 1945 which directly involved out-of-court criticism of a judge. As a justice of the Supreme Court of Florida observed more than two decades after *Pennekamp*, "Newspaper comment may bother some judges, but it shouldn't, and there is really no excuse for calling an editor to task for what he's written about a judge."[122] A colleague added that courts

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Sure, newspapers influence judges, especially at election time. A judge will want to try a politically popular case then and he wants plenty of favorable publicity. Judges shouldn't be influenced by what a paper says, but they are—just as they are influenced by what the bar or other prominent groups say. But it's not the paper's fault. We can't be held responsible for the judge's weakness. What we need is a really independent judiciary.

Interview with John D. Pennekamp, in Miami, Florida, March 10, 1967.

119. Mr. Pennekamp crossed Judge Barns in more than one sense. The editor said that a few hours before he received the contempt citation from Barns, the judge passed him on the sidewalk and invited Pennekamp to attend a Rotary Club meeting with him at noon. The citation arrived that very afternoon. *Id.*

120. State *ex rel.* Giblin v. Sullivan, 26 So. 2d 509, 516 (Fla. 1946).

121. State *ex rel.* Huie v. Lewis, 80 So. 2d 685, 686 (Fla. 1955).

122. The statements by the justices were made during conferences with the author,

should use the power sparingly. "I'm for giving people the widest latitude on what they say."[123]

One would be tempted to say today that Florida's law of constructive contempt blended harmoniously with the tone established by the Supreme Court decisions in *Bridges*, *Pennekamp*, and the later case of *Craig v. Harney*.[124] To the extent that no appellate court in Florida affirmed a contempt-by-publication conviction after 1945, the statement would be an accurate one. But if one looked to judicial pronouncements bordering upon contempt by publication, the answer would be equivocal.[125] The *Pennekamp* reprimand to the Florida courts changed their ways but probably not all their thoughts.

March 13–14, 1967. As part of the research for this article, the author talked with several attorneys and appellate judges in Florida. Anonymity was a condition of the conferences cited here.

123. *Id.*

124. 331 U.S. 367 (1947). The opinion strengthened *Pennekamp*.

125. An article published in 1965 summarized Florida's test for constructive contempt as "the reasonable tendency of the acts to obstruct, embarrass, or impede the efficient administration of justice." Whether the author intended to include publications and other out-of-court comment within the definition is unclear. Note, *Criminal Contempt Procedure in Florida—Proposals*, 18 U. FLA. L. REV. 78, 79 (1965) (footnote omitted).

In Clemmons v. State, 141 So. 2d 749 (Fla. 1st Dist. Ct. App. 1962), *modified*, 150 So. 2d 231 (Fla. 1963), the appellate courts ruled that under the circumstances of the case, the trial judge could not hold the entire grand jury in contempt for remarks made in the report of the grand jury. The First District Court of Appeal held that the grand jury had complete immunity, but the supreme court refused to go so far, ruling that the grand jury usually had immunity, as in the case at bar, but was subject to "reasonable corrective measures."