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John W. Oliver

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CONTEMPT BY PUBLICATION AND THE FIRST AMENDMENT*

JOHN W. OLIVER**

The legal problem presented by a discussion of contempt by publication and the first amendment is the conflict between constitutionally guaranteed freedom of the press on one side and constitutionally guaranteed impartial trial by jury on the other; also involved is the concern of the judiciary over the maintenance of public respect for the law and our system of administering justice. Perhaps it is obvious at once that the conflict is not the immediate result of the simultaneous operation of these principles in our society, but rather the sometimes overzealous acts of judges and newspapermen done under their guise. Thus there are those who decry "trial by newspaper," the fate of a criminal defendant being decided by a jury whose minds have been conditioned by a barrage of pictures, confessions, purported testimony, theories of the case and discussion in the newspapers prior to the trial. Equally deplored is uninformed criticism of judges and decisions which tends to undermine public confidence in the courts and their administration of justice.¹

Judicial reaction to these alleged abuses of freedom of the press for many years was a proceeding known as constructive contempt of court whereby the persons responsible for the offending publications were brought before the court and fined or jailed without a jury trial. Since the same judge who objected to the publication determined the guilt or innocence of its perpetrators, serious objections to the constitutionality of this practice were raised. Furthermore, journalists were put in the unenviable position of predicting at their peril what they could print without being cited for contempt of court.

Frequently newspapermen ask why there are contempt citations in some sensational cases and not in others? And, how such a proceeding is justified

*The substance of this article was the subject of a speech at the Fourth Annual Freedom of Information Conference held in Columbia, Missouri, on November 2, 1961, delivered before the author was appointed to the Bench.

**Judge, United States District Court for the Western District of Missouri; A.B., University of Missouri, 1934; LL.B., 1936.

1. See generally SULLIVAN, *TRIAL BY NEWSPAPER* (1961).

in view of the constitutional guarantee of freedom of the press? The purpose of this paper is to examine and survey the law relating to contempt of court by publication.

To begin with, when one asks why there are contempt citations in some sensational cases and not in others, he assumes, validly or invalidly, that a court trying a particular sensational case does have power to issue a contempt citation against a particular newspaper. And, in a similar fashion, the question of how the exercise of contempt power can be justified in view of the constitutional guarantee of freedom of the press assumes, validly or invalidly, that a court may constitutionally exercise contempt power over newspaper publications that can be reconciled with the first amendment's guarantee of freedom of the press. The ensuing discussion will deal with the validity of these assumptions.

It is understandable that invalid assumptions are made concerning the courts' power in this area, for, since 1742, judges have been putting newspapermen in jail with somewhat monotonous regularity. And, an examination of the law of England and that of most jurisdictions in the United States, both state and federal, before World War II, shows that the adjudicated cases sustained these assumptions as being valid.²

The law did stand in favor of the exercise of contempt power by courts over newspapermen for approximately two hundred years. However in 1941, the Supreme Court of the United States made a fundamental and basic change in the law of contempt in this country by its decision in the case of *Bridges v. California*,³ the significance of which to this day has not been fully comprehended by either the courts or newspapermen.

Prior to the *Bridges* decision, in spite of statutes passed in the first half of the nineteenth century by Congress and the vast majority of state legislatures which purported to limit the contempt power of courts, a newspaper never knew how far it could go in commenting on a particular case. This was true whether that case was actually pending or whether it had ended; one could only guess what printed words might fire a particular judge into action. However, it was apparent that if a particular judge in the vast majority of American jurisdictions became offended by an article or a cartoon published in a newspaper, he had the power to bring the publisher of the newspaper into court and to fine him or order him sent

2. For a compilation, by jurisdiction, of cases involving contempts by publication, see SULLIVAN, *CONTEMPTS BY PUBLICATION* 189-98 (2d ed. 1940).

3. 314 U.S. 252 (1941), together with *Times-Mirror Co. v. Superior Court*.

to jail for contempt. The author of the article and the cartoonist were, of course, similarly exposed. So far as the English law is concerned this is true today if the newspaper comment relates to a pending case.

Before 1941, any defense that newspapermen were only exercising the freedom of the press guaranteed them by the first amendment was generally overruled, if noticed at all, by language to the effect that "freedom of the press is subordinate to that of the independence of the judiciary" and that "it is the paramount obligation of courts to protect liberty of the press only when that liberty is not abused."

WHAT IS CONTEMPT OF COURT?

The term "contempt by publication" generally concerns the power of a judge to fine or put a newspaperman in jail because of something published in a newspaper. The trial of whether or not the particular publication is contemptuous is before the judge. Although it is a quasi-criminal trial, the constitutional guarantee of a jury trial does not extend to contempt cases. The judge determines both the law and the facts in a case of contempt of court.

Contempt by publication is only one facet of the power courts have to punish for acts which are offensive to them. In order to understand more fully contempt by publication, it is necessary to place it in the context of the larger concept of "contempt of court."

Sir John Fox, in his authoritative work, *The History of Contempt of Court*,⁴ stated that "the rules for preserving discipline essential to the administration of justice, came into existence with the law itself, and Contempt of Court (*contemptus curiae*) has been a recognized phrase in English law from the twelfth century to the present time."⁵

The first distinction to be made is between "civil contempt" and "criminal contempt." A civil contempt involves generally the disobedience of a party to a case of an express order of the court entered in that particular case. It is obvious that the law could not operate without exactly this type of power.

Criminal contempt, to be sharply distinguished from civil contempt, is traditionally defined as an act which "strikes at the discipline and

4. FOX, *THE HISTORY OF CONTEMPT OF COURT* (1927).

5. *Id.* at 44.

efficiency of judicial authority."⁶ Criminal contempt must be further subdivided into contempts committed in the presence of the court, *in facie curiae*, and those which are committed out of the presence of the court. An early English case⁷ relates how the unfortunate contemnor tossed "un brickbat a le dit justice que narrowly mist." That act was obviously in the presence of the court and such an act is called a direct criminal contempt. Again it is apparent that a judge must have and exercise power over what happens in his presence in his own courtroom.

Criminal contempts which are committed out of the presence of the court are sometimes denoted "indirect" or "constructive" contempts. Contempt by publication falls in this last category, for newspapers are obviously published out of the presence of the court.

When a court entertains a contempt proceeding, it is said to exercise "summary jurisdiction." This means that it not only determines the law, but it also, and most importantly, decides the facts without the aid and assistance of a jury. When the judge who was "narrowly mist" by the brickbat thrown at him in open court sentenced the thrower to jail for contempt of court, he simultaneously performed the functions of prosecutor, judge and jury. And when a judge convicts a newspaper of an indirect contempt by publication case, he operates in the same manner. One does not have to elaborate on the fact that a newspaperman would more likely be convicted by the judge whom he insulted than he would by a jury who might well agree with what the newspaperman had to say about the judge.

DEVELOPMENT OF THE LAW OF CONTEMPT

The power that courts have exercised over newspapers, like much of our American law, is of English origin. Lord Hardwicke in 1742, in the case of *Roach v. Garvan*,⁸ sent the printer of the *St. James's Evening Post* to prison for publishing an article about witnesses in a pending case. *Roach v. Garvan* remains the law of England today. Said Lord Hardwicke in 1742:

Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented

There are three different sorts of contempt. One kind of contempt is, scandalizing the court itself.

6. 36 HARV. L. REV. 617, 618 (1923).

7. Anonymous, Dyer 188 b. (1631).

8. 2 Atk. 469, 26 Eng. Rep. 683 (1742), variously cited as the *St. James's Evening Post* case.

There may be likewise a contempt of this court, in abusing parties who are concerned in causes here.

There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard.⁹

Roach v. Garvan, while it did put a newspaperman in jail, really did not establish the summary power of a judge to imprison a newspaperman for contempt by publication. The modern law on the subject springs from the case of *The King v. Almon*.¹⁰ Chief Justice Wilmot stated in *Almon* that the practice of judges exercising summary jurisdiction in contempt cases was established by "immemorial usage" and that it was justified by the "necessity" of keeping a Blaze of Glory around the King's judicial ministers.

American law on the subject followed that of England, at least until the 1920's. By the end of the 1940's, however, a complete revolution in the American law of contempt had taken place. A ready explanation for the rejection of the English philosophy might be found in the first amendment of the Constitution, which has no English counterpart.

That portion of the first amendment which is pertinent to this discussion provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." All federal courts, except the Supreme Court, must be created by congressional action. It logically follows therefore that Congress could not create a court which could have power to abridge freedom of speech or of the press without violation of the first amendment. Congress did, on March 2, 1831, pass an act which provided that:

[Federal] courts shall have power . . . to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice¹¹

In 1835, the General Assembly of the State of Missouri passed a similar act, typical of those being passed by other states about the same time, which provided that as to Missouri courts:

9. *Id.* at 469-71, 26 Eng. Rep. at 683-84.

10. *The King v. Almon*, WILMOT, NOTES AND OPINIONS OF JUDGMENTS 243 (1802).

11. Act of March 2, 1831, ch. 98, 4 Stat. 487.

Every court of record shall have power to punish, as for criminal contempt, persons guilty of any of the following acts, and no others:

First, Disorderly, contemptuous or insolent behavior, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority¹²

Despite the clear language of these statutes and the command of the first amendment, for nearly one hundred years American courts meted out punishment for offensive newspaper articles and cartoons published out of their presence. In fact it was not until 1941 that the first case involving a newspaper's assertion of its rights under the first amendment in a contempt proceeding reached the Supreme Court of the United States and a clear look was taken at the question of why statutes of this type had been passed and what they really meant.

MISSOURI AND FEDERAL CONTEMPT BY PUBLICATION CASES DECIDED BEFORE 1925

State ex inf. Crow v. Shepherd,¹³ a 1903 Missouri case, is typical of the cases that can be found in other states. J. M. Shepherd was the publisher of the Warrensburg, Missouri, *Standard Herald*. In June of 1903, Mr. Shepherd began an editorial with the following language:

"When a citizen of Missouri stops long enough to think of the condition of affairs in this State, it is enough to chill his blood. A grand jury in Cole county has just found indictments against four members of the highest lawmaking body in the State, and the St. Louis grand jury has heard evidence within the past few months that, if it had the necessary jurisdiction, would have indicted many other members of the State Senate. . . . They also see the Chief Executive sitting passively at his office in the statehouse, not making a move to bring to justice the men who have been proven guilty of boodling in the Missouri Legislature by the St. Louis grand jury, but over whom the authorities of that city have no jurisdiction. . . ."¹⁴

12. Courts § 57, at 160, RSMo 1835.

13. 177 Mo. 205, 76 S.W. 79 (1903) (en banc). For an extended discussion of this case, see THOMAS, *THE LAW OF CONSTRUCTIVE CONTEMPT* (1904).

14. Quoted from the court's opinion, *id.* at 209, 76 S.W. at 79-80.

After thus covering the legislative and executive branches of the government of Missouri, Mr. Shepherd turned to the Missouri Supreme Court and stated:

“And now, as the capsheaf of all this corruption in high places, the Supreme Court has at the whipcrack of the Missouri Pacific railroad, sold its soul to the corporations Learned men of the law say that Rube Oglesby had the best damage suit against a corporation ever taken to the Supreme Court. This very tribunal . . . rendered a decision sustaining the judgment of the lower court, which decision was concurred in by six of the seven members of the court. This is usually the end of such cases But not so in the Oglesby case. . . .”¹⁵

Mr. Shepherd then detailed how, in his judgment, the Democratic Party, at the behest of the Missouri Pacific’s “political department” had “hoisted” railroad attorneys onto the Supreme Court so that, to return to Mr. Shepherd’s words, as quoted by the court:

“The railroad, backed by four judges on the bench, allowed the case to come up for final hearing, and Monday the decision was handed down, reversed and not remanded for retrial. The victory of the railroad has been complete, and the corruption of the Supreme Court has been thorough. It has reversed and stultified itself in this case until no sane man can have any other opinion but that the judges who concurred in the opinion dismissing the Oglesby case have been bought in the interest of the railroad. . . . The corporations have long owned the Legislature, now they own the Supreme Court, and the citizen who applies to either for justice against the corporation gets nothing. . . .”¹⁶

An information was filed against Mr. Shepherd in which he was charged with defaming, degrading, and insulting the Supreme Court, and accusing its members of “corruption and partiality in the discharge of their official duties.” It is an understatement to say that the language used in the editorial is somewhat rough. But the legal question is whether a man is to be found guilty of contempt of court by the very judges about whom he wrote. The Supreme Court of Missouri emphatically answered that question in the affirmative and fined Mr. Shepherd 500 dollars and ordered him “to stand committed until the same was paid.” He paid.

15. *Id.* at 209, 76 S.W. at 80.

16. *Id.* at 210, 76 S.W. at 80.

Said the court:

The books are full of cases, both English and American, where other courts have been similarly scandalized, and have punished the villifiers as for a contempt of court. . . .

The power to punish for contempt is as old as the law itself, and has been exercised so often that it would take a volume to refer to the cases.¹⁷

The books to which the court turned to sustain its legal theories, however, were English, and not American. In the reports of the *Shepherd* case is found mention of Lord Hardwicke,¹⁸ who spoke about "scandalizing the court" in 1742; and the *Almon* case was also cited as authority.¹⁹

The constitutional question concerning freedom of the press was disposed of with the short statement:

Newspapers and citizens have the same rights to tell the truth about any body or any institution. Neither has any right to scandalize any one or any institution. . . .

The liberty of the press means that any one can publish anything he pleases, but he is liable for the abuse of this liberty. If he does this by scandalizing the courts of his country, he is liable to be punished for contempt.²⁰

To settle the question completely, the court ruled that the Missouri statute requiring that contempts be committed in the "immediate view and presence" of the court was totally unconstitutional because it violated the inherent power of the judicial branch of the government.

Newspapers were not faring any better in the Supreme Court of the United States. *Patterson v. Colorado ex rel. Attorney General*²¹ is a case in point. A newspaper in Colorado published news articles, editorials and a cartoon suggesting that the Supreme Court of Colorado was aiding and abetting the Republican Party "to seat various Republican candidates, including the governor of the State, in place of Democrats who had been elected, and that two of the judges of the court got their seats as a part of the scheme."²² It was Mr. Justice Holmes who held that:

When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interfer-

17. *Id.* at 218, 76 S.W. at 82-83.

18. *Id.* at 229, 76 S.W. at 86.

19. *Id.* at 232, 76 S.W. at 87.

20. *Id.* at 244, 253, 76 S.W. at 91, 94.

21. 205 U.S. 454 (1907).

22. *Id.* at 459.

ence with the course of justice by premature statement, argument or intimidation hardly can be denied.²³

In another Missouri case decided in 1913, a trial judge in Kansas City fined and committed William Rockhill Nelson of the *Kansas City Star* to jail for contempt of court.²⁴ A newspaper article regarding a sixty dollar attorney's fee in a divorce case was the cause of the citation. This case was unusual in that the day before the trial was to commence, the trial judge before any evidence was presented, "proceeded to and did write an opinion therein, finding, from the citation and return, the facts of the case, and determined that the petitioner (Nelson) was guilty of contempt."²⁵

The fact that Mr. Nelson's case obviously had been decided before it was ever tried was too much for the Supreme Court of Missouri. The primary authority relied upon the reverse, however, seemed to be The Bible. The court stated: "This conduct of the [trial] court was a plain violation of the following fundamental rule of right, viz.: 'He that answereth a matter before he heareth it, it is folly and shame unto him.' [Proverbs, 18:13.]"²⁶

And again: "This is the best form of government given to man upon earth; but thank God we are promised a better one in the world to come, where everyone, great and small, shall be judged out of the book of life, 'according to their works.' [Revelation chap. 20, verse 12.]"²⁷

It is perfectly clear from the rest of its opinion where the Supreme Court of Missouri really wanted William Rockhill Nelson to go in the next world, but so far as this one was concerned, it held Mr. Nelson did not have to go to jail. The case is important only to illustrate that so far as power was concerned, the law of Missouri remained as it had been stated in the earlier *Shepherd* case.

Another five years passed. In 1917, the Supreme Court of the United States decided *Toledo Newspaper Co. v. United States*.²⁸ The *Toledo News-Bee* took what it considered the "people's" side in a street railroad receivership involving the three cent fare. A cartoon also figured in the case. The streetcar company was represented "as a moribund man in bed with his friends at the bedside and one of them saying, 'Guess we'd better call in

23. *Id.* at 463.

24. *Ex parte* Nelson, 251 Mo. 63, 157 S.W. 794 (1913) (en banc).

25. *Id.* at 100, 157 S.W. at 807.

26. *Id.* at 103, 157 S.W. at 808.

27. *Id.* at 104, 157 S.W. at 808.

28. 247 U.S. 402 (1918).

Doc Killits.' "Killits" was not a doctor; he was the federal judge. And, after waiting nearly six months, he determined that the administration of justice in his court had been adversely affected, so he fined the newspaper for contempt by publication. The Supreme Court of the United States affirmed.

This case is important because the dissent of Mr. Justice Holmes, concurred in by Mr. Justice Brandeis, was eventually to become the law of the land. That dissent, however, was not based on the first amendment. It was based on the idea that a newspaper simply was not published "in the presence of the court or so near thereto" as to obstruct the administration of justice within the meaning of the 1831 federal statute.

Craig v. Hecht,²⁹ is the last case of this particular group to which attention is to be called. It was decided in 1923, and represents the high water mark of the assertion of contempt power by the federal courts. Charles Craig, Comptroller of New York City, wrote and published an uncomplimentary letter concerning Federal Judge Mayer. Some fifteen months after the offense, Mr. Craig was sentenced to jail for sixty days for contempt.

A majority of the United States Supreme Court held that Mr. Craig's conviction could not be reviewed on the merits, but even so, the Court sustained Judge Mayer's power to throw Craig into jail. Justices Holmes and Brandeis again dissented. While Mr. Justice Holmes did not mention the first amendment, it is clear that he was thinking about freedom of speech when he sharply stated that: "Unless a judge while sitting can lay hold of anyone who ventures to publish anything that tends to make him unpopular or to belittle him I cannot see what power Judge Mayer had to touch Mr. Craig. . . . A man cannot [thus] be summarily laid by the heels"³⁰

FOUNDATIONS OF THE PRESENT DAY LAW OF CONTEMPT IN AMERICA

It has thus far been noted that a court must determine two legal questions against a newspaperman before that person can be "summarily laid by his heels" for contempt by publication. First, a court must, and up to this point did, find some way around the federal and state statutes that require contempts to take place "in the presence of the court or so

29. 263 U.S. 255 (1923).

30. *Id.* at 281.

near thereto as to obstruct the administration of justice." Second, and by far the most important, a court must, and up to this point did, determine that putting a newspaper publisher in jail for contempt by publication somehow does not abridge the first amendment.

A reconsideration came in connection with the statutory question before much real attention was paid to the first amendment question. The person who was primarily responsible for this reconsideration was a British lawyer by the name of Sir John Fox.

His book, *The History of Contempt of Court*,³¹ published in 1927, demonstrated conclusively that Mr. Justice Wilmot in the *Almon* case simply was wrong when he asserted that courts had exercised contempt power over out-of-court publications by "immemorial usage." He also demonstrated that Mr. Justice Wilmot had, in 1765, done about the same thing that the judge in the William Rockhill Nelson case was later to do in 1913, namely, written his opinion in advance of any actual trial. But Justice Wilmot ended up in an even more embarrassing position than did our Missouri judge. In the case of Wilmot, the case for which he had prepared his opinion was actually dismissed and never tried. The pre-prepared opinion in the untried case of *The King v. Almon* was found by Judge Wilmot's son and was published in a book entitled *Notes and Opinions of Judgments*³² in the year 1802, some thirty-seven years after the case was to have been tried. *Almon*, therefore, becomes a most interesting authority upon which to base power to throw newspapermen in jail.

But Sir John Fox went even deeper. He also demonstrated beyond question that Lord Hardwicke's decision in *Roach v. Garvan*³³ was the single case that was out of step with all the other early English cases, and that the accepted rule of decision in the 1740's in England was that a publisher responsible for an out of court contempt was entitled to a trial by jury and was not subject to the summary power of a judge.

In the last chapter of his book, Sir John dealt briefly with the effect of the *Almon* case on American law. The dry British concluding words of his book were as follows:

If the conclusion submitted by the present writer is correct . . . if the doctrine definitely laid down by Mr. Justice Wilmot in *Almon's Case*, confirmed by Mr. Justice Blackstone, and, in

31. Fox, *op. cit. supra* note 4.

32. WILMOT, *op. cit. supra* note 10.

33. *Supra* note 8.

effect, declared by Lord Hardwicke in *Roach v. Garvan*, is founded on a fallacy . . . the result may be that where, as in the United States . . . the decisions asserting the power of the Court to punish certain classes of contempt by summary procedure will need re-consideration. The [American] Courts have discarded the statutes and founded themselves on the English decisions, whereas the law turns out to be, not what the decisions indicate, but what the American statutes have declared it to be.³⁴

Walter Nelles, an American lawyer, having become interested in the subject while reviewing Fox's book, went to work on his own to do the same sort of historical research of the law in the United States that Sir John had done in connection with the law of England. Nelles' research, conducted in collaboration with Carol Weiss King, appeared in two law review articles published by *Columbia Law Review* in April and May of 1928.³⁵ Their historical research brought to light the precise history of the nineteenth century statutes limiting the summary contempt power of state court judges. That research dusted off for modern eyes an extremely interesting bit of early Missouri history that had provided the actual background for the enactment of the 1831 federal statute that attempted to limit the power of a federal judge to punish for contempt of court. The scene therefore must shift to St. Louis in the 1820's and the story of Judge Peck and Luke Lawless.³⁶

Because Missouri was carved out of the Louisiana Purchase, the owner of an individual tract of land had to trace his title to a French or Spanish grant. Land speculators obtained forged "grants" from retired French and Spanish officials and litigation was rampant as to the validity of the various claims. United States Senator David Barton, who in 1820 was much more popular than Senator Thomas Hart Benton, happened to represent professionally the confirmed land grants. Senator Benton represented the opposing group of litigants. Benton, after his election to the United States Senate asked Luke Lawless, a St. Louis lawyer, to take over his clients.

Senator Barton had sponsored the appointment of Judge J. B. C. Peck to the Federal District Court of Missouri. Lawless' test case came on for trial in 1824 and 1825. After a stormy trial, even for that day, Judge Peck ruled against Lawless' clients and published his opinion on March 30, 1826.

34. Fox, *op. cit. supra* note 4, at 252.

35. Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 525 (1928).

36. *Id.* at 423.

Lawless, over the signature of "A Citizen" published in a rival newspaper a "concise statement of some of the principal errors" that he thought Judge Peck had made. Judge Peck reacted as some federal judges in those days could be expected to react and promptly held Lawless in contempt of court, sentenced him to one day's imprisonment, and uniquely enough, ordered that Lawless be suspended from practice for eighteen months.

Lawless, evidently figuring that if a judge could get rid of a lawyer, that perhaps a lawyer might get rid of a judge, filed a memorial with the United States Congress requesting that Judge Peck be impeached. The House eventually voted 123 to 49 to present impeachment articles against Judge Peck. After a protracted trial before the Senate, Judge Peck's impeachment failed by only one vote in the Senate.³⁷

The most important result of the trial was the immediate passage of the 1831 federal statute which obviously was designed to prevent any other federal judge from exercising the sort of jurisdiction over out of court contempts by publication as had been exercised by Judge Peck.

The British have never given up their control of the press in the realm of contempt by publication. But within thirteen years of its printing, the United States Supreme Court relied upon the historical work of Nelles and King expressly to overrule *Toledo Newspaper Co. v. United States*.³⁸

As the foundation had thus been laid for a re-examination of the statutory question, movement was also taking place on the first amendment front.

The fourteenth amendment to the United States Constitution forbids the taking of "life, liberty, or property" without "due process of law" by state action. It is now clear from a constitutional law viewpoint that at least some of the guarantees of the Bill of Rights, including without question the first amendment's guarantee of freedom of speech and press, are protected against state legislative and judicial action by the "due process of law" clause of the fourteenth amendment.

In 1919, in *Schenck v. United States*,³⁹ the "clear and present danger" test of free speech was evolved by Mr. Justice Holmes. In sustaining federal convictions against the defense of the first amendment guarantee of free speech that case stated:

37. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833).

38. *Supra* note 28.

39. 249 U.S. 47 (1919).

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether 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 that Congress has a right to prevent.⁴⁰

However, American judicial acceptance of the English contempt by publication doctrine, reinforced by the express refusal of the United States Supreme Court to recognize the very real limitations imposed by the 1831 federal statute, by the similar state statutes, and by the first amendment was yet to be rejected. It was not until 1941 that the case of *Nye v. United States*⁴¹ expressly overruled *Toledo Newspaper Co. v. United States*,⁴² decided in 1917. This meant that so far as the federal courts were concerned, their power to punish out of court contempts by publication had come to an abrupt end. The long forgotten history of Judge Peck's impeachment trial, brought to light by Nelles and King, formed the basis of the Supreme Court's adjudication. After detailing that history, the court acknowledged that: "[T]he history of that episode makes abundantly clear that it served as the occasion for a drastic delimitation by Congress of the broad undefined power of the inferior federal courts"⁴³

The Court then turned to the construction of that portion of the act of 1831 which required that the contempt be committed "in the presence of the court or so near thereto as to obstruct the administration of justice." The court decided that: "It is not sufficient that the misbehavior charged has some direct relation to the work of the court. 'Near' in this context, juxtaposed to 'presence,' suggests physical proximity not relevancy."⁴⁴

Sir John Fox's recommendation for a reconsideration of the American law was accepted in a second case decided in 1941. That case, *State ex rel. Pulitzer Publishing Co. v. Coleman*,⁴⁵ popularly known as the "Post-Dispatch" case, was decided by the Supreme Court of Missouri in June of 1941. Portions of Editor Coghlan's editorial were quoted by the court:

"A Burlesque on Justice

"THE AMAZING CASE OF PUTTY NOSE, a legal skit, in one very short act, presented under the auspices of the State of Missouri

40. *Id.* at 52.

41. 313 U.S. 33 (1941).

42. *Toledo Newspaper Co. v. United States*, *supra* note 28.

43. 313 U.S. at 45.

44. 313 U.S. at 49.

45. 347 Mo. 1238, 152 S.W.2d 640 (1941) (en banc).

. . . with the following cast: Putty Nose . . . Putty Nose's First Lawyer . . . Putty Nose's Second Lawyer . . . Circuit Attorney . . . Assistant Circuit Attorney . . . His Honor, the Judge . . . Noise (off stage)

An utterly unconvincing performance was given Presumably it was a serious presentation, but those hardy spectators who gathered in the hope that drama of some proportions would unfold saw what fell little short of a burlesque on justice.⁴⁶

To make sure that he would come through loud and clear, Mr. Coghlan wrote a follow up editorial the next day. And, the *Post-Dispatch* published a "Rat Alley" cartoon by Fitzpatrick. With great forthrightness, the Missouri Supreme Court in reliance upon the work of Sir John Fox and Nelles and King held:

In the case of *State ex inf. Crow v. Shepherd*, supra, we said that such publication did constitute contempt. . . . The elaborate argument in the *Shepherd* case to prove that a publication scandalizing the court was punishable as contempt is based upon a misunderstanding of legal history. The English authorities . . . start with an opinion prepared by Mr. Justice Wilmot in *Rex v. Almon* It contained an elaborate argument to prove that a publication of this character was punishable as contempt. . . . Later English cases followed and applied the rule as we did in the *Shepherd* case. More exhaustive historical research in recent years has proved that Wilmot was wrong and that the power he claimed had never been exercised by the common-law courts, but only in a few instances by the court of Star Chamber⁴⁷

The victory, however, was far from complete on the freedom of speech question. But the Supreme Court of Missouri's ruling on that question is relatively unimportant because the Supreme Court of the United States was to make its binding determination in regard to the first amendment in a matter of months. *Bridges v. California*,⁴⁸ together with *Times-Mirror Co. v. Superior Court*, was first argued in the Supreme Court in October 1940, and after reargument in October 1941, was decided on December 8, 1941.

All former United States Supreme Court decisions, and for that matter, all former decisions of the various state courts relating to contempt by publication were overruled by *Bridges*. That ruling was based on the basic

46. *Id.* at 1250, 152 S.W.2d at 642.

47. *Id.* at 1257-58, 152 S.W.2d at 647.

48. *Supra* note 3. The *Times-Mirror* and *Bridges* litigations were consolidated for consideration by the United States Supreme Court.

re-examination given the first amendment in the case. *Bridges*, being based on constitutional grounds, is the law throughout the country today.

BRIDGES V. CALIFORNIA, ITS PROGENY, AND ITS EFFECT

The *Times-Mirror* of Los Angeles published an editorial under the title, "Probation for Gorillas?" The editorial suggested, in the then pending case, that: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."⁴⁹

In another pending case involving two labor unions, in one of which Harry Bridges was an officer, Mr. Bridges sent a public telegram to the Secretary of Labor in which he referred to the judge's decision as being "outrageous" and that his union "did not intend to allow state courts to override the majority vote of members . . . and to override the National Labor Relations Board."⁵⁰

The California trial court held both the *Times-Mirror* and Harry Bridges in contempt for their publications. The Supreme Court of California affirmed the convictions on the theory that those publications had a "reasonable tendency" to interfere with the orderly administration of justice.⁵¹ That court also held that freedom of expression was subordinate to judicial decorum.

The Supreme Court of the United States reversed. It held that the exercise of summary contempt power by a state court to punish out of court publications concerning even pending cases was forbidden by the first amendment, excepting only the situation in which a particular publication created such a likelihood of bringing about substantive evil as to deprive the publisher of the constitutional protection of freedom of the press. This means that for all practical purposes the court adopted the theory and the language of the "clear and present danger" test originally announced by Mr. Justice Holmes in *Schenck v. United States*⁵² as the rule of decision to be applied in all contempt by publication cases.

The Court noted that it had "not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger

49. 314 U.S. at 272.

50. 314 U.S. at 276.

51. *Bridges v. Superior Court*, 14 Cal. 2d 464, 94 P.2d 983 (1939) (en banc), *Times-Mirror Co. v. Superior Court*, 15 Cal. 2d 99, 98 P.2d 1029 (1940) (en banc).

52. *Supra* note 39.

may be and yet be deemed present.’”⁵³ But this recognition of the relative, as distinguished from the absolute, does not mean that adjudications cannot be made, because, as the court pointed out: “[T]he ‘clear and present danger’ language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue.”⁵⁴ In summary, the court held that:

[T]he only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.⁵⁵

It should be realized, however, that the Court went on to point out that the shift of the balance of power from judges to newspapermen was historically something of a choice of evils. Thomas Jefferson, the greatest of our champions of liberty, was quoted by the Court as follows: “I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste.”⁵⁶ Jefferson is also often quoted in his letter to Edward Carrington of January 16, 1787, where he states: “[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.”⁵⁷ But as the Court observed, Jefferson did not defend freedom of the press because he admired the way the press was discharging its responsibilities. His defense was predicated on the optimistic idea, as he expressed it in a portion of the Carrington letter that is seldom quoted, that because

the basis of our governments being the opinion of the people . . . the way to prevent irregular interpositions of the people is to give them full information of their affairs thro’ the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people.⁵⁸

Jefferson was merely hopeful, not happy, with the way the press of his day discharged its responsibilities.

53. 314 U.S. at 261.

54. 314 U.S. at 262.

55. 314 U.S. at 265.

56. 314 U.S. at 270 n. 16.

57. Letter from Thomas Jefferson to Edward Carrington, Jan. 16, 1787, in 11 THE PAPERS OF THOMAS JEFFERSON 48, 49 (Boyd ed. 1955).

58. *Ibid.*

The Court, not without significance, pointed out that: "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."⁵⁹

The principal matter determined was that the Court refused to accept "the assumption that . . . it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases."⁶⁰ On the facts, the Court held that the editorial and the telegram did not present a clear and present danger to the administration of justice.

Mr. Justice Frankfurter, writing in dissent, felt that:

Our whole history repels the view that it is an exercise of one of the civil liberties secured by the Bill of Rights . . . for a powerful metropolitan newspaper to attempt to overawe a judge in a matter immediately pending before him.⁶¹

What really concerned Mr. Justice Frankfurter was that the majority's opinion might be construed as holding "that trial by newspaper has constitutional sanctity." He not only stated the English rule prohibiting any comment on a pending case, he quoted from *Rex v. Clarke*⁶² to show what British justice thought about trial by newspaper: "Probably the proper punishment . . . will be imprisonment in cases of this kind."⁶³

The underlying problem of constitutional conflict between "trial by newspaper" and an individual's right to a fair trial unprejudiced by newspaper comment came to the surface in *Pennekamp v. Florida*,⁶⁴ decided five years after *Bridges*. As in the *Post-Dispatch* case, two editorials and a cartoon were involved. The newspaper complained that a defense motion had been sustained "so fast the people didn't get in a peep." Another editorial criticized a trial judge because he had refused to close down the Tepee Club, identified in the record as a bookie joint. Similar complaints were made concerning still another judge's ruling in regard to eight indictments of rape that had been improperly drawn by a grand jury composed of laymen. It was fully established at the contempt trial that the newspaper had failed to report that the rape indictments had been quashed on the recommendation and with the approval of the Assistant State Attorney,

59. 314 U.S. at 271.

60. *Ibid.*

61. 314 U.S. at 279 (dissenting opinion).

62. 103 L.T.R. (n.s.) 636 (K.B. 1910).

63. *Id.* at 640.

64. 328 U.S. 331 (1946).

and that the defendants had been re-indicted the next day. The cartoon somewhat unimaginatively caricatured a judge tossing papers marked "Defendant Dismissed" to a thug while a futile individual labeled "Public Interest" vainly protested.

The Supreme Court of Florida upheld the contempt convictions of the trial court.⁶⁵ The Supreme Court of the United States reversed. It held that the first amendment protected such obviously irresponsible out of court comment on pending cases. The following sentences quoted from the opinion will sufficiently reveal the rationale of the decision:

Bridges v. California fixed reasonably well-marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation. . . . A theoretical determinant of the limit for open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the clear and present danger rule. . . .

[I]t is clear that the full truth in regard to the quashing of the indictments was not published. . . . We agree that the editorials did not state objectively the attitude of the judges. We accept the statement of the Supreme Court that under Florida law, "There was no judgment that could have been entered in any of them except the one that was entered."

We must, therefore, weigh the right of free speech . . . against the danger of the coercion and intimidation of courts in the factual situation presented by this record. . . .

We are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida.⁶⁶

Mr. Justice Reed wrote the majority opinion for the full Court. Three other judges, however, wrote concurring opinions. And in each of those concurring opinions the problem of free press versus fair trial was fully developed. The majority opinion noted that after the decision in *Bridges* "it was expected that . . . a decent self-restraint on the part of the press . . . would emerge which would guarantee the courts against interference"⁶⁷ The concurring opinions demonstrate rather clearly that the judges who wrote those opinions were not impressed with the sense of responsibility

65. *Pennekamp v. Florida*, 156 Fla. 227, 22 So. 2d 875 (1945) (en banc).

66. 328 U.S. at 334, 344, 346, 348.

67. 328 U.S. at 334.

that the press was in fact demonstrating. Mr. Justice Frankfurter, for example, stated:

A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies a responsibility in its exercise. . . . In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. . . .

"Trial by newspaper," like all catch phrases, may be loosely used but it summarizes an evil influence upon the administration of criminal justice in this country. Its absence in England, at least its narrow confinement there, furnishes an illuminating commentary. It will hardly be claimed that the press is less free in England than in the United States. Nor will any informed person deny that the administration of criminal justice is more effective there than here. . . . There are those who will resent such a statement as praise of another country and dispraise of one's own. What it really means is that one covets for his own country a quality of public conduct not surpassed elsewhere. . . .

In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote.⁶⁸

CONCLUSION

Since 1941, there has been a complete revolution in the American law of contempt. Like all revolutions, we are now faced with some new problems, of which a major one is the constitutional balance between the exercise of freedom of the press and the right for one to have a fair trial free from outside pressure of trial by newspaper. That question and the complicated considerations that affect the problem are not going to go away.

Judge Holtzoff, when opening a panel discussion in 1955 entitled "Fair Trial and Freedom of the Press,"⁶⁹ almost understated the question when he suggested that "the relation between the right to a fair trial and the right to freedom of the press, gives rise to difficult problems. . . ." He came much closer to the mark when he said:

Fundamentally the problem grows out of the fact that the various privileges guaranteed by the Bill of Rights are not entirely unrelated, unqualified, or unlimited. They do not operate in a

68. 328 U.S. at 355-56, 359-66.

69. Reported in 19 F.R.D. 16 (June 11, 1955).

vacuum. They frequently impinge and encroach on one another. It becomes necessary, therefore, to find and steer a true course, and to maintain a balance that would accord to each of these rights its due, and yet would not adversely affect any other.⁷⁰

The issue of fair trial versus free speech, of course, is an extremely complicated matter that will ultimately be determined by the Supreme Court of the United States as a matter of constitutional law. That court has already made some rather definitive declarations on the subject. And it has rendered a few decisions that get close to at least part of the general question. In this respect, attention is called to such cases as *Shepherd v. Florida*,⁷¹ to Mr. Justice Frankfurter's opinion on the denial of certiorari in *Maryland v. Baltimore Radio Show, Inc.*,⁷² and to *Irvin v. Dowd*,⁷³ and to the cases cited in those opinions to illustrate the growing body of authority in the Supreme Court of the United States that has determined that a defendant may be, and was in fact, denied a fair trial and therefore due process of law by the abusive exercise of freedom of the press. In his concurring opinion in the *Irvin* case, Mr. Justice Frankfurter not only asked one of the basic questions involved, he also answered it. The question was:

How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused?⁷⁴

And the answer given was:

A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception. . . .

[A]gain and again, such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a week ago, to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome.⁷⁵

There may be just a rumble of distant thunder in Mr. Justice Frankfurter's two closing sentences:

70. *Id.* at 17.

71. 341 U.S. 50 (1951).

72. 338 U.S. 912 (1950).

73. 366 U.S. 717 (1961).

74. *Id.* at 729-30.

75. *Ibid.*

This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.⁷⁶

76. *Ibid.*