CONTEMPT BY PUBLICATION IN THE UNITED STATES

THE power of courts to punish summarily for criminal contempt is, as Mr. Justice Black recently observed, "an anomaly in the law." [1] The Justice continued as follows [2]:

> "The vices of a summary trial are only aggravated by the fact that the judge's power to punish criminal contempt is exercised without effective external restraint. First, the substantive scope of the offense of contempt is inordinately sweeping and vague; it has been defined, for example, as 'any conduct that tends to bring the authority and administration of the law into disrespect or disregard.' It would be no overstatement therefore to say that the offense with the most ill-defined and elastic contours in our law is now punished by the harshest procedures known to that law. Secondly, a defendant's principal assurance that he will be fairly tried and punished is the largely impotent review of a cold record by an appellate court, another body of judges. Once in a great while a particular appellate tribunal basically hostile to summary proceedings will closely police contempt trials but such supervision is only isolated and fleeting. All too often the reviewing courts stand aside readily with the formal declaration that 'the trial judge has not abused his discretion.' But even at its rare best appellate review cannot begin to take the place of trial in the first instance by an impartial jury subject to review on the spot by an uncommitted trial judge. Finally, as the law now stands there are no limits on the punishment a judge can impose on a defendant whom he finds guilty of contempt except for whatever remote restrictions exist in the Eighth Amendment's prohibition against cruel and unusual punishments or in the nebulous requirements of 'reasonableness' now promulgated by the majority."

The power of English and American courts to punish summarily for constructive contempt—chiefly contempts by publication out of court—is derived from the same sources, namely, Mr. Justice Wilmot's undelivered judgment in *The King* v. *Almon* [3] and Lord Chancellor Hardwicke's pronouncements in *Roach* v. *Garvan*.[4] In practice today, however, there is a wide divergence. In England the power to punish as contemptuous publications "calculated to interfere with the due course of justice" has been carried by the courts to what some consider extreme limits. In the United States,

[1] *Green* v. *United States*, 356 U.S. 165 at 193 (1958).
[2] *Ibid.*, at 199.
[3] Wilmot, *Notes of Opinions and Judgments*, 243 (1802).
[4] 2 Atk. 469 (Ch. 1742). Also cited as *Re Read and Huggenson* and as the *St. James's Evening Post* case.

this power has been emasculated by statutory and constitutional limitations. How are we to account for this difference in direction?

In the early years of American legal development, Blackstone was often the sole source of authority and he had accepted the views of Mr. Justice Wilmot and published them as the law of England.[5] The first statute bearing on the contempt powers of federal courts was enacted in the first Judiciary Act of 1789. Section 17 stated that federal courts " shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same. . . ." The generality of this language suggests an intent to codify those powers to punish for contempt possessed by English courts at common law. In the early nineteenth century, following what were considered several flagrant abuses of the contempt power, Pennsylvania, New York, and the Federal Government enacted statutes strictly curtailing the power to punish for constructive contempt. The Federal Act of 1831 [6] confined the summary power of punishment to ". . . misbehaviour of any person . . . in the presence of the . . . courts, or so near thereto as to obstruct the administration of justice. . . ." The lower federal courts, aware of the events prompting the enactment of this statute, respected its restrictions. Many states copied the new federal law.[7]

It is clear that the Act was intended to limit drastically the contempt power. During the following century, however, the historical antecedents of the Act became obscured and it was vitiated by a broad construction. In *Toledo Newspaper Co.* v. *United States*,[8] the Supreme Court construed the " so near thereto " provision in a causal rather than a geographical sense. As a result, substantially all of the pre-1813 powers were resurrected. Under a " reasonable tendency " test adopted to avoid the geographical limitation imposed by the Act, contempt proceedings against the press were left largely in the discretion of the trial judge. The test permitted the presiding judge to punish summarily for contempt if the publication had a " reasonable tendency " or " an inherent tendency " to interfere with justice. His discretion would not be questioned unless greatly misused.

The *Toledo Newspaper* case was the federal law of contempt by publication until 1940 when it was overruled in *Nye* v. *United*

[5] Sir John Fox has shown that Wilmot's views found their way into the *Commentaries* published in 1769, and, through them, strongly affected Anglo-American law. Fox, " The Summary Process to Punish Contempt " (1909) 25 L.Q.R. 238, 247, 253–254.

[6] 4 Stat. 487 (1831). Currently see, 18 U.S.C.A. 401 (1948).

[7] For a history of this development, see Nelles & King, " Contempt by Publication in the United States," 28 Col.L.Rev. 401, 525 (1928) and Ludwig, " Journalism and Justice in Criminal Law," 28 St.John L.Rev. 197 (1954).

[8] 247 U.S. 402 (1918).

States.[9] The Supreme Court there returned to a strict interpretation of this Act, giving the words " so near thereto " a geographical instead of a causal meaning. Since most press publication occurs neither in the presence of the court nor " near thereto " geographically, the power to punish contemptuous publications was made ineffectual.

Inasmuch as the *Nye* case concerned a federal statute the power of state courts was not affected. The following year, however, the Supreme Court held that constitutional guarantees of freedom of the press forbade both state and federal courts from punishing for constructive contempt press comment on pending cases unless the comment presented a " clear and present danger " to the orderly and impartial administration of justice.

The first case raising this issue was *Bridges* v. *California* and its companion case, *Times-Mirror Co.* v. *California*.[10] In these cases a prominent labour leader and a leading anti-labour newspaper both sought to prevent state court judges from interfering with their freedom to comment on the way pending cases should be decided. In the first case, a state judge had decided that a local of longshoremen was not entitled to transfer its allegiance from an AF of L union to a CIO union. While a motion for new trial was pending, Bridges telegraphed the Secretary of Labour:

> " This decision is outrageous. . . . Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. . . . The ILWU does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

Bridges published this telegram in the Los Angeles and San Francisco papers but Bridges alone was fined for contempt.

In the *Times-Mirror* case, two labour unionists, who had been convicted of assaulting non-union truck-drivers, requested probation. A month before the day set by the trial judge for passing on this application and pronouncing sentence, the *Los Angeles Times* published an editorial entitled " Probation for Gorillas? "

> " Two members of Dave Deck's wrecking crew, entertainment committee, goon squad or gorillas . . . have asked for probation. . . . Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. . . .
>
> " It will teach no lesson to other thugs to put these men on good behaviour for a limited time. Their ' duty ' would simply be taken over by others like them. If Beck's thugs, however, are made to realise that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to the defendants. This

[9] 313 U.S. 33 (1940).
[10] 314 U.S. 252 (1941).

community needs the example of their assignment to the jute mill."

For this the editor and the publisher were fined $100 each. After losing in the highest court of California, they appealed to the Supreme Court and won a five-to-four decision, along with their foe, Bridges.

Mr. Justice Black delivered the opinion of the court (supported by Justices Reed, Douglas, Murphy and Jackson). He referred to the clear-and-present danger test as " a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." He refused to place publications which tended to obstruct the orderly administration of justice in a special category, to which this test of constitutional immunity from punishment would not be applicable. Comments on a pending case are as much entitled to the benefit of the test as other utterances about governmental action and public questions.

What is the serious substantive evil to be averted? Mr. Justice Black stated that it appears to be two-pronged: Disrespect for the judiciary; and disorderly and unfair administration of justice. The first, he in effect discarded as a substantive evil. To consider it would " be to impute to judges a lack of firmness, wisdom or honour—which we cannot accept." " The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion."

The second—disorderly and unfair administration of justice—then is the substantive evil to be prevented and he intimated that this would be restricted to pending litigation. The court must examine the particular utterances and the circumstances of their publication to determine to what extent the evil of unfair administration of justice was likely to result, and what was the degree of likelihood.

Mr. Justice Frankfurter dissented and was joined by Chief Justice Stone and Justices Roberts and Byrnes. He recognised limits on the power to punish for contempt, but thought the majority had set the limits too narrowly. On the permissible side of the line he placed criticism of courts and judges in general and discussion of past or future cases. On the forbidden side he put publications which interfere with the impartial and calm disposition of matters under judicial consideration. Later, in another opinion, he said that since judges, " however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print." [11]

Two subsequent cases developed the philosophy of the *Bridges* case and attempted to define the limits of the clear and present

[11] *Pennekamp* v. *Florida*, 328 U.S. 331 at 357 (1946).

danger test. In *Pennekamp* v. *Florida*,[12] the court characterised the problem as one of striking " a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes." The court then proceeded to reverse the contempt citation, which grew out of a severe criticism of the court during a bench trial for rape, holding that although it must protect the defendant's right to a fair trial, " Freedom of discussion should be given the widest range compatible with the essential requirements of the fair and orderly administration of justice."

In *Craig* v. *Harney*,[13] the Press was cited for contempt in attacking the judge, an elected layman, who refused to accept a jury verdict in a forcible entry and detainer action. The criticism came after the trial but during the pendency of a motion for a new trial. The Supreme Court, in reversing, stated that freedom of the Press should not be impaired " unless there is no doubt that the utterances . . . are a serious and imminent threat to the administration of justice." " The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." [14]

The Supreme Court's formula seems to grant the Press a virtual immunity from contempt rather than resolve its historic struggle with the courts. Nevertheless, the actual scope of this immunity continues to be uncertain. First of all, the clear and present danger test has been reformulated in a non-contempt context. If the danger does not have to be imminent, the courts would have more control over Press interference. Modification of the imminence requirement may be forthcoming. In *Dennis* v. *United States*,[15] the Supreme Court placed emphasis on the magnitude rather than the imminence of the evil. " In each case (courts) must ask whether the gravity of the ' evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The evil there was the overthrow of the government.

In addition, in each of the Supreme Court cases the danger asserted was to judge, not jury deliberations. Although no explicit distinction was made, the opinions leave room for the inference that the clear and present danger test might lead to different results if jury decisions are threatened. If jurors are more susceptible to influence than judges, then the same comment which constitutes no danger in the one instance could still be found a danger in the other.

The judge-jury distinction was advanced for the first time in

[12] *Ibid.*, at 336 and 347.
[13] 331 U.S. 367 (1947).
[14] *Ibid.*, at 373 and 376.
[15] 340 U.S. 494 at 510 (1951).

State v. *Baltimore Radio Show*.[16] A little girl had been brutally murdered in one of the parks of Washington, D.C. Ten days later, an eleven-year-old girl was dragged from her bicycle on one of the public streets of Baltimore, Maryland, and stabbed to death. Because of the similarity and atrociousness of the crimes, great public alarm was aroused and parents became most concerned for the safety of their children. Three nights later a Baltimore radio announcer opened his broadcast with the words " Stand by for a sensation." He then stated that Eugene James had been arrested and charged with the second murder. He went on to say that James had confessed to the crime, that he had a long criminal record, that he had gone to the scene of the crime with the police and there re-enacted the murder, and that he dug up the knife he had used to kill the little girl. Similar newscasts were made over other radio stations located within and without the state. Two months later James stood trial and was convicted of first degree murder, his confession and prior convictions being received in evidence. His counsel had waived jury trial because he felt he could not risk a jury trial in a community that had been so aroused. The trial was held before a three judge court.

Three Maryland Broadcasting companies were cited for contempt under a rule of the court making it contempt to publish any matter " which may prevent a fair trial, improperly influence the court or the jury, or tend in any manner to interfere with the administration of justice." [17] The Criminal Court of Baltimore City found them guilty and imposed fines, the trial court stating that the broadcasts constituted " not merely a clear and present danger to the administration of justice, but an actual obstruction of the administration of justice, in that they deprived the defendant of his constitutional right to have an impartial jury trial." [18] On appeal, the Court of Appeals of Maryland reversed the convictions.[19] It relied largely upon the three decisions of the Supreme Court of the United States applying the " clear and present danger " test to the contempt power—that a publication to be contemptuous and not within the protection of the First and Fourteenth Amendments must constitute a clear and immediate threat to the administration of justice and a fair trial. To the argument that the three cases involved court trials and criticisms of judges and that a different view should be taken when juries or potential juries are concerned, the court dismissed the distinction as " hardly tenable." Judges are no more immune to human influences than the rest of mankind. Conversely, jurors are capable of the same firmness and impartiality as the judiciary.

[16] 193 Md. 300, 67 A.2d 497 (1949).
[17] *Ibid.*, at 505.
[18] The opinion of the trial court is set out in *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912 at 916 (1950).
[19] See *supra*, note 16.

The Supreme Court of the United States denied certiorari [20] but Mr. Justice Frankfurter wrote a long opinion emphasising that a denial of a petition for certiorari carries with it no implication regarding the court's views on the merits of the case. " The one thing that can be said with certainty about the court's denial of Maryland's petition in this case is that it does not remotely imply approval or disapproval of what was said by the Court of Appeals of Maryland." [21] The justice, a member of the court's minority in favour of a rule more restrictive of Press comment, supplemented his opinion with a sixteen-page appendix cataloguing twentieth-century English cases concerning contempt of court for comments prejudicial to the fair administration of criminal justice.

Unfortunately, the *Baltimore* case did not settle the possibility of a future judge-jury distinction. The specific refusal to affirm or reverse leaves state courts free to determine what limits the " clear and present danger " test sets on their power to restrict Press comment in jury cases. Notwithstanding the Maryland court's refusal to limit the presumption of fortitude to judges, it is contrary to one of the basic assumptions of the law of evidence to equate the stamina of judges and jurors. The assumption may be wrong but the rules of evidence are based upon it, namely, that jurors must be protected from the undue prejudice of improper evidence upon which, however, the judge may safely pass. And a trial judge who erroneously admits evidence in a trial before him alone will rarely, if ever, be reversed. The appellate courts assume that he excluded it from his deliberations.[22] The greatest danger to fair trial in a jury case arises when the Press publishes evidence not admissible at the trial, such as a coerced confession or the defendant's criminal record. And admissible evidence may not be offered at the trial. Its publication in the Press is objectionable as not given under oath nor subject to cross-examination. Finally, produced evidence may be misrepresented by misleading headlines, one-sided selection of material, or other slanting of the report.

In the United States, the contempt power is a negligible device for protecting a defendant's right to a fair trial. As a result, the courts have resorted to other techniques in an effort to afford this protection. The most common safeguards against prejudicial pretrial publicity are a postponement of the trial, a change of venue and a careful *voir dire* examination of persons called for jury duty to eliminate any prejudiced person.[23] None of these is satisfactory. A change of venue may involve delay, extra expense or inconvenience. Its utility is limited by the existence of state-wide—

[20] *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912 (1950).

[21] *Ibid.*, at 919.

[22] See McCormick, *Evidence*, 137 (1954).

[23] See Comment, " Free Press—Fair Trial," 50 J.C.L. & Crim. 374 (1959) and Note, " Free Press; Fair Trial—Rights in Collision," 34 N.Y.U.L.Rev. 1278 (1959).

even regional and nation-wide—newspaper, radio and television coverage. And if the trial moves, the publicity may move with it. A continuance, too, may involve extra expense or inconvenience and there is always the possibility the publicity will be revived. Furthermore, the law with respect to changes of venue and continuances requires not only proof of prejudicial publicity but also of resulting public hostility so strong as to make a fair trial unlikely. This standard of proof is too high. With regard to the *voir dire* it is not enough to show that prospective jurors have heard or read publicity items critical of the defendant. So long as the juror expresses an ability to decide the case solely on the evidence presented in court a challenge for cause will usually not be sustained. This is so even where the prospective juror admits having formed an opinion as to the defendant's guilt or innocence, on the basis of the pre-trial publicity.[24] Furthermore, defence counsel is placed in a real dilemma. If he questions jurors about Press reports he is likely to refresh their memories of the events reported or to drive home the importance of the remembered event.

In some situations the defendant may waive jury trial and proceed before a judge. Defendant's attorney felt compelled to do this in the *Baltimore Radio* case. However, in some states a jury trial cannot be waived in capital cases. In others, the prosecutor must consent to the waiver and the judge approve and such consent or approval may not be forthcoming.[25] Lastly, the defendant may wish to exercise his constitutional right to a jury trial. To coerce its waiver by Press publicity raises additional difficult questions of due process.

During the trial itself reports are often highly coloured and replete with editorial comment on the evidence and the conduct of the proceedings. In cases which arouse strong public feeling the Press may become highly partisan, sometimes trying to outdo the parties in procuring evidence and publishing material ruled inadmissible because of its prejudicial effect. Thus, the problem of assuring an accused a fair and impartial trial by jury does not end with the impanelling of an " impartial " jury. The jurors must remain impartial.

Instructions by the trial judge at the outset and close of the trial that jurors should avoid reading or listening to commentaries on the trial and that only the evidence presented in court should be considered in reaching a verdict are usually considered sufficient to protect the defendant against inflammatory publicity. Although these instructions may keep jurors away from prejudicial publications it is difficult to understand how they prevent jurors from being unconsciously influenced by what they have already read.

[24] *Ibid.*

[25] See Donnelly, " The Defendant's Right to Waive Jury Trial in Criminal Cases," 9 U.Fla.L.Rev. 247 (1956).

Not infrequently jurors do read inflammatory newspaper publicity during the trial. When this occurs the usual practice has been for the judge to question them as to whether they have been prejudiced and whether they can still decide solely on the basis of the evidence offered in court. If the jurors answer that they can still decide solely on the basis of the evidence a motion for a mistrial is usually denied. However, in *Marshall* v. *United States*,[26] the Supreme Court recently reversed a conviction where this had occurred. The petitioner was convicted of selling drugs without the required prescriptions. In an effort to refute the defence of entrapment, the Government sought to prove that he had previously practised medicine without a licence. The trial judge refused the offer of proof as having no bearing on the issues and as too prejudicial. During the course of the trial two newspaper accounts containing this information came to the attention of some of the jurors. The judge called the jurors into his chambers and asked each of them whether they had seen these articles. Although some had read the articles, all stated they had not been influenced by them and that they could decide the case solely on the basis of the evidence of record. Thereupon the trial judge denied the motion for a mistrial. The Supreme Court reversed on the ground that if the information was so prejudicial that the trial judge refused to admit it, it was error to deny the motion for a mistrial, since the prejudice it would arouse was sure to be as great if read in the newspaper. The court recognised the large discretion of the trial judge in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial but apparently felt the facts of the *Marshall* case were quite special. Although this may indicate nothing more than a sensitivity toward the special facts of this case an element of uncertainty into an area which appeared well-settled has been introduced. Lower courts may read the decision as a limitation of their discretion and feel compelled to grant a mistrial where formerly they would have denied the motion. It should be noted that the decision was not based on any constitutional ground of due process but upon the general supervisory power of the court to formulate and apply proper standards for enforcement of the criminal law in the federal courts.

That Press conduct and prejudicial newspaper coverage may be so flagrant as to violate due process was indicated by Justices Jackson and Frankfurter in *Sheppard* v. *Florida*.[27] There the defendants had been convicted of rape and sentenced to death. A majority of the court reversed because of racial discrimination in jury selection. However, Mr. Justice Jackson wrote a concurring opinion in which Frankfurter joined, charging the majority with

[26] 360 U.S. 310 (1959).
[27] 341 U.S. 50 (1951).

emphasising the trivial and ignoring the important issues. He said [28]:

> "But prejudicial influences outside the courtroom, becoming all too typical of a highly publicised trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the Press and the public opinion which it generated."

As the *Sheppard* case, the *Hauptmann* case,[29] and others,[30] indicate, many American newspapers handle crime news so unfairly and sensationally that they deprive the accused of an impartial jury. If they lived in England, the majority of American newspaper editors and crime reporters would probably be sent to jail for contempt. Here is another example of quite recent date:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the pre-indictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life."

Notwithstanding this exegesis the Supreme Court of Ohio [31] upheld Sam Sheppard's conviction of second-degree murder, and the Supreme Court of the United States declined [32] to review the case.

There is much dissatisfaction in the United States with existing efforts to resolve the conflict between a free Press and an impartial trial. Prejudicial publicity constitutes a serious threat to an accused's right to an impartial jury trial. He is without adequate means to combat it. Various solutions have been proposed.

Perhaps the chief source of prejudicial publicity is the Press release or conference by persons connected with the trial—defence or prosecuting attorneys or police officers. A typical example is *Strobel* v. *State of California*.[33] Strobel was apprehended in connection with the brutal sex murder of a six-year-old girl. His

[28] *Ibid.*, at 51.

[29] For an excellent account of this case see Robbins, "The Hauptmann Trial in the Light of English Criminal Procedure," 21 A.B.A.J. 301 (1935).

[30] The cases are collected in Wolfram, "Free Press, Fair Trial and the Responsibility of the Bar," (1954) 1 Crim.L.Rev. 3.

[31] *State* v. *Sheppard*, 165 Ohio St. 293, 135 N.E. 2d 340 (1956).

[32] 352 U.S. 910 (1956).

[33] 343 U.S. 181 (1952).

arrest and subsequent confession attracted what Mr. Justice Clark referred to as " a spate of newspaper publicity." For, in the words of the court, " between the time of the murder and the time of petitioner's arrest, newspapers of general circulation in the Los Angeles area featured in banner headlines the ' manhunt ' which the police were conducting for petitioner. On the day of petitioner's arrest these newspapers printed extensive excerpts from his confession in the District Attorney's office, the details of the confession having been released to the Press by the District Attorney at periodic intervals while petitioner was giving the confession. On the following Monday, four days later, Los Angeles newspapers reprinted the full text of that confession as it was read into the record at the preliminary hearing. Most of these events were given top billing on the front page of the papers, and were accompanied by large headlines. Petitioner was variously described, both in headlines and in the text of news stories, as a ' werewolf,' a ' fiend,' a ' sex-mad killer,' and the like. The District Attorney announced to the Press his belief that petitioner was guilty and sane." [34]

Strobel's conviction was affirmed by the Supreme Court of California and, later, by the Supreme Court of the United States. Mr. Justice Clark, writing for the majority, stated that petitioner had failed to demonstrate that the newspaper accounts had aroused against him such prejudice in the community as to " necessarily prevent a fair trial." [35] In his dissent, Mr. Justice Frankfurter stated [36]:

> " I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of the traditional concept of the ' American way of the conduct of a trial.' "

Although Canon 20 of Professional Ethics [37] looks with strong distaste upon any attorney who publicises his case, it has largely been ineffective. Not only has it not been enforced by the Bar but is inadequate in its phrasing. It does not cover releases made by law enforcement officers other than attorneys nor releases made to radio or television media. Nor does it strictly condemn all or a particular type of publicity but merely states that generally publicity is to be condemned. If Bar associations would get tough with members who give tips and stories to the Press in violation

[34] *Ibid.*, at 192.

[35] *Ibid.*, at 193.

[36] *Ibid.*, at 201.

[37] ABA, *Canons of Professional Ethics* No. 20, states: " Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement."

of Professional Canon No. 20, defendants in criminal jury trials would receive considerable protection since such " leaked out " information is far more damaging to the accused than mere conclusions by the Press as to his guilt or innocence.

In the United States there is a right of appeal from a criminal contempt conviction. Although full review is not always given in state courts, it is now the federal practice. A full review seems highly desirable, particularly when the contempt charged contained elements of personal criticism or attack upon the judge.

In some quarters today there are suggestions for additional procedural reforms. Recently, three justices of the Supreme Court were willing to wipe out a century and a half of legislative and judicial history by holding that contempts not committed in the presence of the court are " entitled to be tried by a jury after indictment by a grand jury and in full accordance with all the procedural safeguards required by the Constitution for ' all criminal prosecutions.' " [38] *Green* v. *United States* [39] involved the summary conviction of two Communist leaders who, after being convicted for violation of the Smith Act, had jumped bail and had hidden out for five years. Four members of the court, speaking through Justice Harlan, voted to sustain the conviction. " The answer to those who see in the contempt power a potential instrument of oppression lies in assurance of its careful use and supervision, not in imposition of artificial limitations on the power." [40]

Mr. Justice Black, joined by the Chief Justice and Mr. Justice Douglas, filed a vigorous and eloquent dissent. Black admitted he was opposing an unbroken line of Supreme Court decisions but thought these decisions had been based on the assumption that the summary contempt power ran back in English law beyond the memory of man. Citing a great deal of historical research, including that of Sir John Fox [41] and Professor Frankfurter,[42] Black concluded that there had been no " immemorial usage " allowing summary punishment. It was probably not older than the eighteenth century. Since the opinion of Mr. Justice Wilmot, who was responsible for the " immemorial usage " legend, had not been published until after the adoption of the Constitution, and since the Founding Fathers had shown such concern for jury trials, Black was unconvinced that the Framers had meant to exclude contempt from the normal procedural protections.

The intent of the Framers, however, was probably less important to his dissent than the belief that no official should be granted " autocratic power ":

[38] *Green* v. *United States*, 356 U.S. 165 at 195 (1958).
[39] 356 U.S. 165 (1958).
[40] *Ibid.* at 188.
[41] Fox, *Contempt of Court* (1927).
[42] Frankfurter & Landis, " Power to Regulate Contempts," 37 Harv.L.Rev. 1010 (1924).

> " When the responsibilities of lawmaker, prosecutor, judge, jury, and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused." [43]

Mr. Justice Brennan added a fourth dissent on the ground that there was insufficient evidence to justify a finding beyond a reasonable doubt that the defendants had knowledge that the surrender order had been entered.

This four-to-four division made Mr. Justice Frankfurter's vote crucial. Filing a separate opinion, Frankfurter, the judge, relegated Frankfurter, the professor, to a lower place in the judicial process: " The fact that scholarship has shown that historical assumptions regarding the procedure for punishment of contempt of court were ill-founded, hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumptions." [44] After calling the roll of the fifty-three distinguished justices of the Supreme Court who had upheld the summary contempt power, Frankfurter found himself unwilling to break with tradition and voted to sustain the conviction.

Mr. Justice Black also made the suggestive observation that the tendency of the court to restrict the substantive scope of the contempt power to narrow bounds is attributable in substantial part to " a deeply felt antipathy toward the arbitrary procedures now used to punish contempts." [45]

Comment on the work of a court not related to pending proceedings ranges from a law journal's calm discussion of the merits of a decision to a libellous attack upon the integrity of the judge. The English courts declare the right to honest criticism of the work of the court but reserve the power to punish scandalous attacks upon the court itself. This power has been used infrequently but two rather recent examples show that it will be used on occasion. One is *R.* v. *Editor of the New Statesman.*[46] In this case, the editor commented upon a case in which Dr. Marie Stopes, an advocate of birth control, had suffered a verdict against her in a libel action for suggesting that the *Morning Post* had suddenly refused to print her advertisements because of Roman Catholic influence. The *New Statesman's* article said: " The serious point in this case, however, is that an individual owning to such views as those of Dr. Stopes cannot apparently hope for a fair hearing in a court presided over by Mr. Justice Avory—and there are so many Avorys." The editor was found guilty of contempt and ordered to pay all costs of the proceedings. The editorial " imputed," said Lord Hewart, " unfairness and lack of impartiality to a judge

[43] 356 U.S. 165 at 198.
[44] *Ibid.*, at 189.
[45] *Ibid.*, at 196. note 5.
[46] (1928) 44 T.L.R. 301.

in the discharge of his judicial duties. The gravamen of the offence was that by lowering his authority it interfered with the performance of his judicial duties." [47]

A later case reached a similar result. In *R.* v. *Colsey*,[48] the editor of *Truth* was ordered to pay a fine of £100 and costs for having commented on Lord Justice Slesser's judgment in the case of *R.* v. *Minister of Labour* in the following terms: " Lord Justice Slesser, who can hardly be altogether unbiased about legislation of this type, maintained that really it was a very nice provisional order or as good a one as can be expected in this vale of tears." Lord Justice Slesser had been attorney-general in a former Labour government which supported this legislation. Professor Goodhart has commented on the case as follows: " This case seems to carry the doctrine of constructive contempt to its extreme limits, for the administration of justice can hardly have been seriously endangered by the editor's mild but expansive humour." [49]

Prior to the *Bridges* case the majority of the states held that this branch of the contempt power violated constitutional principles of free speech and in the *Bridges* case the Supreme Court categorically rejected " disrespect for the judiciary " as a substantive evil which would warrant any form of restriction upon speech. This exercise of the contempt power has little justification and is subject to much abuse. The rationale for punishing abusive attacks upon the court is that they create public dissatisfaction with the judiciary and the administration of justice. As a result parties are discouraged from bringing rightful claims to the courts and may ultimately take the law into their own hands. The countervailing argument is that the only way for courts to secure public respect is to earn it by the ability, impartiality and essential justice of their proceedings; that if the courts are inefficient, biased or corrupt, they should be quickly exposed and the evil eliminated.

Although the Administration of Justice Act of 1960 [50] does not appear to deal with " scandalising the court," it has made changes in the law of contempt that meet with considerable approval by those in the United States who advocate a restoration of the power to punish for contempts by publication. In authorising an appeal in cases of contempt of court, the Act is in agreement with long-standing practice in the United States. Section 12, which provides that the publication of information relating to proceedings in private shall not in itself constitute contempt of court, with certain exceptions, is in accord with the law in most American jurisdictions. Apparently, the purpose of the section is to modify the judgment in *Alliance Building Society* v. *Belrum, Ltd.*[51]

[47] *Ibid.*, at 303.
[48] See Note (1931) 47 L.Q.R. 315.
[49] Goodhart, " Newspapers and Contempt of Court in English Law," 48 Harv. L.Rev. 885 at 904 (1935).
[50] 8 & 9 Eliz. 2, c. 65. See p. 261, *post*.
[51] [1957] 1 All E.R. 635.

It is section 11, however, that is of most interest. *R.* v. *Odhams Press Ltd.*[52] and *R.* v. *Griffiths*,[53] imposing strict liability for innocent publication and dissemination, were not greatly admired in the United States. These two cases were apparently the targets of section 11, which makes lack of knowledge " having taken all reasonable care " a defence. Although the Supreme Court of the United States has not passed on the question of strict liability for contemptuous publications it has shown a reluctance to extend the area in which strict liability can be made the basis of criminal liability. The recent case of *Smith* v. *California* [54] is illustrative. Appellant, the proprietor of a bookstore, was convicted under a Los Angeles ordinance making it unlawful " for any person to have in his possession any obscene or indecent writing, (or) book . . . in any place of business where . . . books . . . are sold or kept for sale." Appellant was convicted on the basis of possession alone. The ordinance had been construed by the California court as requiring no element of scienter-knowledge by appellant of the contents of the book—and thus the ordinance was construed as imposing strict or absolute liability. In holding the ordinance unconstitutional, Mr. Justice Brennan writing for the majority said [55]:

> " The appellee and the court below analogise this strict-liability penal ordinance to familiar forms of penal statutes which dispense with any element of knowledge on the part of the person charged, food and drug legislation being a principal example. We find the analogy instructive in our examination of the question before us. The usual rationale for such statutes is that the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors—in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used. . . . His ignorance of the character of the food is irrelevant. There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the Press stand in the way of imposing a similar requirement on the bookseller. By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfils its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. It has been well observed of a statute construed as dispensing with any requirement of

[52] [1957] 1 Q.B. 73. See Note (1957) 73 L.Q.R. 8. Also, see Hall Williams, " Unintentional Contempt of Court " (1957) 20 M.L.R. 275 at 276.
[53] [1957] 2 Q.B. 192.
[54] 361 U.S. 147 (1959).
[55] *Ibid.* at 152.

scienter that: 'Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience': *The King* v. *Ewart*, 25 N.Z.L.R. 709, 729 (C.A.). And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarise himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the state could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the state, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

A similar rationale would condemn absolute liability in contempt cases.

Perhaps the most effective way to give real meaning to the guarantee of an impartial jury trial in the United States is to restore the contempt power to the courts. Is it possible to draft a narrow contempt statute that would survive American constitutional limitations and still be effective? Such a statute to cover the period beginning with the bringing of formal charges (or perhaps when arrest is imminent) and ending with conviction or acquittal. There are reasons to believe it could be done. First of all, in the *Bridges* case Mr. Justice Black said [56]:

"It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 307–308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' But as we also said there, the problem is different where 'the judgment is based on a common law concept of the most general and undefined nature. . . .' For here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation."

Secondly, in denying certiorari in the *Baltimore* case, the court

[56] 314 U.S. 252 at 260 (1941). In reliance upon this quotation, at least one state has upheld the constitutionality of its contempt statute. *Weston* v. *Commonwealth*, 195 Va. 175, 77 S.E. 2d 405 (1953), noted in 22 Geo.Wash. L.Rev. 242 (1953). Also see *People* v. *Goss*, 10 Ill. 2d 533, 141 N.E. 2d 385 (1957) and *Re Jameson*, 340 P.2d 423 (Col. 1959) (dissenting opinion).

has left open the judge-jury distinction and has not specified the limits the " clear and present danger " test sets on the powers of courts to restrict Press comment in jury cases.

Thirdly, the test itself has been reinterpreted in the Smith Act cases as emphasising probability rather than imminence. This new interpretation has not been applied as yet in the contempt context.

It also appears that a statute would have a better chance of survival if it provided certain procedural safeguards for the defendant such as a right of appeal, a jury trial, a trial before a different judge, and a limitation on the amount of fine or term of imprisonment that could be imposed for violations.

On the substantive side, it would be unwise to use broad and general terms that could be construed as re-enacting the common law contempt power. Instead, a legislative determination of specific evils threatening a fair trial should be specified. Some of the types of situations that might be covered are the following:

1. The issuance by the police authorities, the prosecutor, counsel for the defence, or any other person having official connection with the case of any of the following:
   (a) Any criminal record or photograph of the accused except as part of an official notice to alert the community to the fact that a potentially dangerous person is eluding or has escaped from lawful custody;
   (b) Any alleged confession or admission of fact bearing upon the guilt of the accused;
   (c) Any statement of personal opinion as to the guilt of the accused;
   (d) Any statement that a witness will testify to certain facts or opinions;
   (e) Any comment upon evidence already introduced;
   (f) Any comment as to the credibility of any witness;
   (g) Any statement of matter excluded from evidence by the court.
2. The publication by newspaper, magazine, radio or television of any material obtained as a result of a violation of the statute.

These instances are meant to be suggestive rather than definitive but they do cover most of the abuses by officials and the Press in the United States. With appropriate changes the same restrictions could be made applicable to civil cases. And, underlying them all, should be the elimination of absolute liability. Criminal liability in this area should be limited to intentional or reckless conduct. Whether negligence should be a basis of liability is more debatable.

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