SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 13 | Issue 1 Article 10

1961

A Free Press and a Fair Trial: England v. the United States

Frank Berndt

NOTES

A Free Press and a Fair Trial: England v. The United States

> The liberty of the press is no greater and no less than the liberty of every subject of the Queen. ENGLAND[1]

> In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. THE UNITED STATES[2]

In England the free press bows only to the rights of one accused of a crime.[3] In the United States the free press, backed by a written constitution, has insisted upon and has achieved a preferred status, even when scrutinizing an embattled accused and knowingly dedicated to his jeopardy.[4] Such a stand, when occasionally urged by an English newspaperman, is promptly punished by contempt of court, by fine or imprisonment.[5] But such a contempt power directed toward journalists is absent in the United States, and although it may properly be yearned for, frequently, in the face of gross abuse, such yearnings are suppressed by law and mortgaged to our historic and peculiar constitutional preference for free speech and a free press.[6] Thus, he who is accused of an obnoxious crime in the United States must, almost as a matter of course, endure the unhappy fate of scrutiny by the press.[7] It is the added burden of any accused, whether guilty or innocent. The newspapers, of course, do not have to pay for the exercise of their rare privilege to know and to speak.[8] This note will examine the payment made by the accused for our right to a free press and consider the English power of contempt.

1. Regina v. Gray, [1900] 2 Q.B. 36, 40.

2. Pennekamp v. Florida, 328 U.S. 331, 347 (1946).

3. Rex v. Editor of the "Surrey Comet," 75 SOL. J. 311, 312 (K.B., C.A. 1931).

4. Pennekamp v. Florida, 328 U.S. 331, 347 (1946).

5. Rex v. Editor of the "Daily Herald," 75 SOL. J. 119 (K.B. 1931); Rex. v. Editor of the "Evening Standard," 40 T.L.R. 833 (K.B. 1924).

6. Pennekamp v. Florida, 328 U.S. 331, 347 (1946); 1 MADISON, ANNALS OF CONGRESS, 1789-1790 434 (1834).

7. Marshall v. United States, 360 U.S. 310 (1959); Stroble v. California, 343 U.S. 181 (1952); Shepherd v. Florida, 341 U.S. 50 (1951).

8. None of the contempt citations have been upheld by the Supreme Court of the United States since Toledo Newspaper Co. v. United States, 247 U.S. 402 (1917), was overruled by Nye v. United States, 313 U.S. 33 (1940). See also Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

THE ENGLISH COURTS AND THE POWER OF CONTEMPT

The Nature of the Contempt Power

The English courts have discouraged "trials" outside of the courtroom by retaining the power to punish, as contempt, conduct having any tendency whatsoever to affect or prejudice judicial proceedings.[9] Such conduct as applied to newspapers means the publication before trial of any statement as to possible guilt or any comment concerning alleged evidence,[10] and the publication during trial of any comment concerning other than the record of admitted evidence:[11]

> In the article complained of there was a long account, carefully got together, which included at least three statements of grave prejudice against the man who afterwards was charged. A newspaper was entitled to report, fairly and accurately, what took place in open court, but, in the present case, *ex concessio,* nothing had taken place in court, and there was no question of reporting proceedings in court. The newspaper had busied itself in the deplorable enterprise of collecting materials which might be thought to be of interest concerning that which

9. Rex v. Davies, [1906] 1 K.B. 32, 35 (1905); Rex. v. Parke, [1903] 2 K.B. 432, 436, 437.

10. Pre-trial newspaper commentary is considered by the English courts as a greater danger to securing a fair trial than is commentary during or after trial. Rex v. Editor of the "Surrey Comet," 70 SOL. J. 311 (K.B., C.A. 1931). The cases on pre-trial newspaper comment in which contempt citations were upheld are collected here in summary fashion:

A newspaper published statements to the effect that a woman, then under arrest on a charge of abandoning a child, had practiced wholesale baby farming and had previously been convicted of fraud. For making these statements the newspaper was convicted of contempt and fined 100 pounds though the woman was eventually committed to trial for attempted child murder. Rex v. Davies, [1906] 1 K.B. 32 (1905). Likewise a citation for contempt and a fine of 220 pounds were upheld against a newspaper which had stated that a certain party had confessed to having killed his wife, but had denied the act was murder. At the time of publication the party was being held in custody but had not yet been formally charged. The court said: "After the man was in custody the newspaper commented upon the case as to whether he had committed the crime, not to assist in unravelling the case. It was merely an attempt to minister to the idle curiosity of the people as to what was passing within the prison before the trial took place. . . ." Rex v. Clark, 27 T.L.R. 32 (K.B. 1910).

In another case where a newspaper had actually sent amateur detectives to investigate a killing and had published what was uncovered by the detectives after a charge of murder had been made and the time of trial set, the court levied a fine of 1000 pounds. Rex v. Editor of the "Evening Standard," 40 T.L.R. 833 (K.B. 1924).

A contempt conviction was sustained in another instance for the publication of a poster containing the words "Another Blazing Car Murder," which in fact related to a separate case, at a time when an accused stood committed for trial on the charge of murdering a man found in a gutted car. Rex v. Editor of the "Daily Herald," 75 SOL. J. 119 (K.B. 1931). And again, the court held that the publication of a photograph calculated to prejudice a fair trial was an action just as susceptible to a citation for contempt as any prejudicial narrative. Rex v. "Daily Mirror," [1927] 1 K.B. 845. Finally, prior to the actual prosecution of Haigh, the so-called Bluebeard, at a time when the defendant had been formally charged with only one murder, the *Daily Mirror,* in banner headlines, accused him of being a vampire, of having murdered other persons, giving the names of these persons, as well as a description of how these murders were carried out. In this instance the court fined the newspaper 10,000 pounds and sentenced the editor to three months in prison. The Prosecution of Haigh, The Times (London), March 26, 1949, p. 3, col. 1.

11. Rex v. Astor, 30 T.L.R. 10 (K.B. 1913); Rex v. Tibbits [1902] 1 K.B. 77 (1901).

> had been done and the person who, it was expected, would be accused. Once a newspaper departed from a fair and accurate report of what was actually stated in open court it not only took a great risk itself, but it also imperiled the unfortunate man, guilty or innocent, who was charged. For what had been done in the present case there was no conceivable excuse.[12]

So too, comment on the weight of evidence during trial will invite a citation for contempt.[13] Moreover, there is some risk encountered by the journalist who writes unwisely even after trial, especially if an appeal is pending.[14] Nor are the contempt citations to be considered anything but serious and effective punishment, for an offending reporter, editor, or even publisher may very well pay a 10,000 pound fine and find himself in jail for three months.[15]

In *Rex v. Parke*,[16] Justice Wills, referring to a pre-trial newspaper article which recounted a history of the accused's prior conviction, stated a rationale for the English attitude:

> The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists — namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned.[17]

The depth of the English court's concern, in this respect, especially in

---

12. Rex. v. Editor of the "Surrey Comet," 75 SOL. J. 311 (K.B., A.C. 1931).

13. Rex v. Hammond & Co., [1914] 2 K.B. 866.

14. In Rex v. Parke [1903] 2 K.B. 432, the court held that the contempt power could be used to prevent comment on matters concerning litigation already terminated at the time of publication, on the theory that should the criticism be adverse to the decision, it would make it more difficult for the court to decide future cases of a similar nature as well as have a tendency to degrade the court in the public eye. However, there are no such cases expressly using the contempt power to punish for post-trial comment. Thus in a case wherein a newspaper was charged with contempt for publishing articles in which one Hobbs had been called a "wizard crook" after he had been convicted, the court held that since the articles were calculated only to prejudice the fair hearing on appeal rather than on trial, they did not come within the law of contempt. Rex v. Editor of the "People," The Times (London), April 7, 1925, p. 5, col. 4 (K.B.). Thus the earlier case of Rex v. Parke, *supra*, would seem to be overruled but for some more recent dictum in a case in which a newspaper published information concerning a party convicted of procuring a miscarriage. These articles were published after conviction and after notice of appeal. The court indicated that merely because a trial has ended a newspaper is not granted blanket immunity. In this case although the newspaper did not suffer a contempt citation, one of the justices commented: "Why . . . should a judge be embarrassed by having matters put into his mind the effect of which it is impossible to estimate or assess? Obviously, far less would amount to a contempt of court if the matter were published before the hearing by a jury than would be required before hearing by a judge or by a court of criminal appeal." Rex v. Davies, [1945] 1 K.B. 535. An English editor who authorizes publication of particularly abusive post-trial commentary may some day make this dictum law.

15. The Prosecution of Haigh, The Times (London), March 26, 1949, p. 3, col. 1.

16. [1903] 2 K.B. 432.

17. *Id.* at 436-37.

regard to a possible prejudicial effect upon a jury, was made clear when, in *Rex. v. Tibbets,*[18] the court cited a newspaper for contempt for publication of matter tending to prejudice a jury in a pending proceeding and held that it was not necessary to show that the jury had actually read the article, but only that it had been made public and that jurors had had access to it. And in *Rex v. Davies,*[19] Justice Humphreys completed the circle with a final practical justification:

> I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and while I do not suggest that it is likely that any judge, as the result of information which had been improperly conveyed to him, would give a decision which otherwise he would not have given, it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty.[20]

Fines, Imprisonment, Apology

The power of the English court's contempt weapon can be witnessed in the court's willingness to add a sentence of imprisonment to a fine levied against a reporter, an editor, or even a publisher:

> [H]is Lordship added that, so long as they sat there, they were determined that trial by newspaper would not be substituted for trial by jury. The primary punishment in a case of this kind was imprisonment. The Court could not be blind to the fact that newspapers were frequently owned by wealthy people who would take their chance and cheerfully pay any fines that might be inflicted for the sake of the advertisement. If this practice was not stopped the Court would have to inflict the primary punishment.[21]

Apology by the offending newspaper, however, can sometimes mitigate the punishment, but only when the court is convinced of good faith and the injury is believed to be meager.[22] Under these circumstances an apology will suspend costs or even a fine.[23] In other cases, when the court doubts the sincerity of an apology, such a maneuver is without effect and might even tend to antagonize the court.[24] One case even considered the apology to the court as without significance in spite of historical precedent: "The apology was due to the people wronged and to the public. The Court had no feeling in regard to the matter."[25] In this case the fine and costs of the contempt were sustained.

---

18. [1902] 1 K.B. 77 (1901).
19. [1945] 1 K.B. 435.
20. *Id.* at 442-43.
21. Rex v. Clarke, 27 T.L.R. 32, 35 (K.B. 1910).
22. Rex v. Hutchinson [1936] 2 All Eng. 1514 (K.B.).
23. *Ibid.*
24. Rex v. Hammond & Co., [1914] 2 K.B. 866.
25. Rex v. Clarke, 27 T.L.R. 32, 35 (K.B. 1910).

In *Rex v. Haigh*[26] the editor and publisher were called before the court for having charged in their newspaper that Haigh, the so-called Bluebeard, had committed several murders although at the time of publication he had been charged with only one murder. There was an apology, but

> in view of the gravity of the case the Court had ordered the proprietors of the newspaper to be brought before the Court. He [the Court] would add a word of warning: Let the directors beware; they knew now the conduct of which their employees were capable, and the view which the court took of the matter. If for the purpose of increasing circulation of their paper they should venture to publish such matter as this, the directors themselves might find that the arm of that Court was long enough to reach them and to deal with them individually. The Court had taken the view that there must be severe punishment.
>
> His Lordship then called on Mr. Bolanto [the editor] to stand up, and, addressing him said: "The writ of attachment will be issued, and you will be taken in the custody of the tipstaff and committed to Brixton Prison for three calendar months."
>
> Continuing, his Lordship said that the respondent company would be fined 10,000 [pounds] and pay costs of the proceedings.[27]

Contrast Between the English and American Exercise of the Power of Contempt

In England the contempt power is used by the courts as a preventive measure, the object being to stop altogether abuses by the press that might in any way imperil the fate of an accused.[28] In the United States, the accused, and even the court itself, must accept with resignation the sensationalism of the press, for there is no effective means of controlling it.[29] The constructive contempt power directed by the courts in the United States against the free press has been rendered impotent by judicial decision.[30] The only remedy for such abuse in America is corrective rather than preventive. It is a post-trial remedy. It is the right of one who has been convicted to appeal on grounds that his trial was influenced prejudicially by newspaper commentary.[31] Although this remedy does not much insulate a court or jury from the pressures of newspaper intimidation or insult,[32] it can bring a comfort to the accused himself. Occasionally a conviction is reversed because of prejudicial newspaper commentary.[33]

---

26. The Times (London), March 26, 1949, p. 3, col. 1.
27. *Ibid.*
28. Rex v. Parke, [1903] 2 K.B. 432, 436.
29. See discussion concerning Pennekamp v. Florida, 328 U.S. 331 (1946), p. 154 *infra.*
30. *Ibid.*
31. Marshall v. United States, 360 U.S. 310 (1959).
32. Shepherd v. Florida, 341 U.S. 50 (1951); Craig v. Harney, 331 U.S. 367 (1947).
33. Marshall v. United States, 360 U.S. 310 (1959).

An impressive difference between these two attitudes regarding a free press was demonstrated in 1957, when Dr. John Adams was brought to trial at Old Bailey in London.[34] He was charged with the murder of elderly patients through the excessive administration of drugs. The American press printed pictures of the Doctor together with pictures of various of his deceased patients. There was much detailed speculation. Dr. Adams was caricatured as a cunning old murderer out to make himself heir to his elderly patients. Conviction, it was implied, would be a mere formality. There was, however, no such comment in the British press, and Dr. Adams was acquitted by a jury after a deliberation of forty-five minutes.[35] Thus the presumption of the American press was not the fact of the English jury's decision.

THE CONTEMPT POWER IN THE UNITED STATES

Origins and History

The English common-law view that courts have the power to punish, as contempt, conduct having any tendency whatsoever to affect or prejudice judicial proceedings was carried over into the American federal courts by the Act of September 24, 1789:[36]

> Courts of the United States shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before same.[37]

Abuses resulted from this discretionary contempt power given to the courts, and the issue demanded a new appraisal after the celebrated impeachment trial of Judge James Peck.[38] Judge Peck had disbarred and imprisoned an attorney named Lawless for having published an adverse comment on a decision which the judge had made against him and from which an appeal was pending at the time of the publication. Although Judge Peck was acquitted, public sentiment against the severity of his action led to new legislation limiting the contempt power of the courts.[39] By the Act of March 2, 1831[40] the summary punishment of contempt could only be directed against misconduct committed "in the presence of the said courts, or so near thereto as to obstruct the administration of justice." Some four years later the statute was given judicial interpretation. In *Ex parte Poulson*[41] it was held that the federal courts

34. Life, April 22, 1957, pp. 53-55.
35. *Ibid.*
36. 1 Stat. 73.
37. 1 Stat. 83.
38. STANSBURY, TRIAL OF JAMES H. PECK (1833).
39. *Ibid.*
40. 4 Stat. 487.
41. 19 Fed Cas. 1205 (No. 11,350) (C.C.E.D. Pa. 1835).

could not punish as contempt the publication of an article allegedly directed against the process of a pending trial, for the statute embraced only such misbehavior as occurred in or near the immediate vicinity of the court. Thus by 1835 the English position on contempt powers had been repudiated in America, and newspapers could do what they pleased about trial reporting.

During the First World War, however, in *Toledo Newspaper Company v. United States*,[42] an attempt was made to return to the courts a more effective power of contempt. The Supreme Court of the United States held that the publication of adverse comment on a pending case by a newspaper was punishable as contempt if the article had a "reasonable tendency" to prejudice the rights of an accused. The federal statute was thus given a causal rather than a geographical interpretation. Courts could now punish as contempt activity which interfered with the administration of the court's business, even though the activity was not committed in the physical presence of the court. This interpretation of the contempt statute was, however, rejected by the Court in a case decided in 1940. In *Nye v. United States*,[43] the Court reverted to the position which had been taken by a lower federal court in *Poulson*[44] in 1835, and held that only that misconduct which had been committed "geographically proximate" to the court could be punished as contempt.

Although these decisions at first governed only federal courts, it must be recalled that *Gitlow v. New York*[45] recognized that the guarantees of free expression found in the first amendment were also applicable through the fourteenth amendment as limitations on the states, and that the contempt power exercised by state courts, in this regard, could be no greater than that of federal courts.

The Preferred Position of Freedom of the Press

In *Bridges v. California*[46] the Supreme Court of the United States heard two separate cases, each having a labor background and each involving a contempt citation. In one case a California court had cited a newspaper for contempt for having stated in an editorial entitled "Probation for Gorillas,"[47] that the defendants, two union organizers, should be denied probation and that the judge, were he to grant probation, would be making a serious mistake. In the other case, a labor leader was con-

42. 247 U.S. 402 (1917).

43. 313 U.S. 33 (1940).

44. *Ex parte* Poulson, 19 Fed. Cas. 1205 (No. 11,350) (C.C.E.D. Pa. 1835).

45. 268 U.S. 652 (1925).

46. 314 U.S. 252 (1941).

47. The text of this *Los Angeles Times* editorial of May 5, 1938 may be found in the Court's footnotes. 314 U.S. 272 n. 17.

victed of contempt for having published a telegram sent by him to the Secretary of Labor denouncing a decision rendered by a judge of a state court as "outrageous" and threatening a general strike which would tie up the ports of the Pacific coast. For the first time the Court introduced the clear and present danger test into the contempt area. Both cases were reversed. The Court held that publication is not to be denied the constitutional protection of a free press merely because it concerns a judicial proceeding still pending in the courts. Only if the evils emerging from indiscriminate publications are extremely serious and the degree of imminence extremely high will a contempt citation be sustained. Specifically, the Court felt that there was no clear and present danger involved in the first case because the newspaper involved was anti-labor and it was therefore only natural that a judge considering granting probation to these union members would come under some form of attack. In other words, because under these circumstances the editorial comment might have been expected, there was no clear and present danger. In the second case, the Court felt that the threat of a general strike could not be considered as such intimidation of the court as to amount to contempt, for strikes, not being illegal, could not be considered a clear and present danger.

In *Pennekamp v. Florida,*[48] the appearance of newspaper editorials intimating bias on the part of the court toward those who were charged with crime resulted in a citation for contempt. The Supreme Court of the United States reversed, concluding "that the danger under this record to fair judicial administration had not the clearness and immediacy necessary to close the door of permissible public comment."[49] More important, however, were the remarks of Justice Reed who, writing for the majority, stated succinctly the position at which the Court has now arrived. This statement reveals the unarticulated rationale behind the decisions which have been handed down from the time of the trial of Judge Peck and the Act of March 2, 1831, when the common law of contempt was first limited in this country.[50] It undoubtedly represents the rationale upon which the clear and present danger test rests, as applied to the contempt power, and it suggests that perhaps the clear and present danger formula is more a means to an end than it is an actual test. In a sentence Justice Reed has stated the American position:

> In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases.[51]

48. 328 U.S. 331 (1946).
49. *Id.* at 350.
50. See notes 38, 40, and 41 *supra* and accompanying text.
51. Pennekamp v. Florida, 328 U.S. 331, 347 (1946).

There are two other notable contempt cases which were considered by the Supreme Court. In *Craig v. Harney*[52] the clear and present danger test was again followed, the Court reversing a contempt citation on the ground that the newspaper commentary in question had fallen "far short" of meeting that test. In *Maryland v. Baltimore Radio Show*[53] the Court refused to review a case in which a contempt citation against a broadcasting company had been dismissed by a state appellate court.[54] The citation had originally been issued because of inflammatory radio broadcasts directed against a man accused of murdering a child. Justice Frankfurter wrote a long and unusual opinion respecting the denial, by the Court, of the petition for the writ of certiorari. In it he indicated that a denial of the writ of certiorari means nothing more than that fewer than four members of the Court deem it desirable to hear a case, and that an inference as to the merits cannot be taken from such a denial. In other words he was insistent on showing that the denial of the writ in *Baltimore Radio Show* did not mean that the Court necessarily approved the dismissal of the contempt citation by the state appellate court. Then, demonstrating his antipathy for trial by newspaper, he added: "Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with other means for establishing the charge."[55] This is the latest pronouncement by a member of the Court on the contempt question.[56] It does not even rise to the level of dictum and must be considered as a personal remark of Justice Frankfurter who, it should be remembered, dissented in the *Bridges* case.[57] The rule in *Pennekamp*, giving the free press a preferred position, appears to be the law with regard to the exercise of the power of contempt by American courts.

The American Abuse of Freedom of the Press

The Scotsboro Boys,[58] Bruno Richard Hauptmann,[59] Sam Sheppard,[60] and many others have endured a kind of fame by virtue of being tried for

52. 331 U.S. 367 (1947).

53. 338 U.S. 912 (1950).

54. Maryland v. Baltimore Radio Show, 133 Md. 300, 67 A.2d 497 (1949).

55. Maryland v. Baltimore Radio Show, 338 U.S. 912, 920 (1950).

56. *But see,* Sheppard v. Ohio, 352 U.S. 910 (1956).

57. Bridges v. California, 314 U.S. 252, 279 (1941). Justice Frankfurter's concurring opinion in *Pennekamp,* 328 U.S. 331, 350 (1946), sets out at length his views on the constitutional issues presented in the contempt cases.

58. Norris v. Alabama, 294 U.S. 587 (1935); Powell v. Alabama, 287 U.S. 45 (1932). See also HAYS, TRIAL BY PREJUDICE (1935); PATTERSON & CONRAD, SCOTSBORO BOY (1950).

59. Hauptmann v. New Jersey, 296 U.S. 649 (1935). See also the remarks of Florence E. Allen in *Fair Trial and Free Press: No Fundamental Clash Between the Two,* 41 A.B.A.J. 897 (1955).

60. Sheppard v. Ohio, 352 U.S. 910 (1956). See also Brucker, *Journalism by Lawyers,* 29 CONN. B.J. 40, 47 (1955).

obnoxious crimes in the glare of nationwide publicity. These defendants, and many others burdened with a similar fate, came to reside in prison, and thereafter were soon largely forgotten by the press. If in such cases the activities of the free press have been prejudical to the defendant,[61] he has nevertheless been denied legal redress for the free press has been given a preferred position and virtual immunity from the contempt process.[62] It is true that he who is thus convicted does have the right to an appeal on the ground that a fair hearing was denied him.[63] But standing alone, this is a desperate remedy.

In *Shepherd v. Florida*[64] the Supreme Court of the United States reversed the convictions of several Negroes sentenced to death for rape. Newspapers published as fact information that the defendants had confessed. Witnesses and jurors admitted having heard of the confession. No confession was ever introduced during the trial. While the trial was

---

61. There does not seem to be any doubt in the minds of the newspaper people themselves concerning their power and influence in regard to a judge and jury. In Craig v. Harney, 331 U.S. 367 (1947), a local newspaper admitted to having unfairly reported the facts of a civil case and to having castigated the judge, yet the conviction of contempt was reversed by the Court. However, Justice Jackson in his dissent, *supra* at 394, 397, probed the issue and indicated the feelings of the press in this regard:

"From our sheltered position, fortified by life tenure and other defenses to judicial independence, it is easy to say that this local judge ought to have shown more fortitude in the face of criticism. But he had no such protection. He was an elective judge, who held for a short term. I do not take it that an ambition of a judge to remain a judge is either unusual or dishonorable. . . .

"It is doubtful if the press itself regards judges as so insulated from public opinion. In this very case the American Newspaper Publisher Association filed a brief *amicus curiae* on the merits after we granted certiorari. Of course, it does not cite a single authority that was not available to counsel for the publisher involved, and does not tell us a single new fact except this one: 'This membership embraces more than 700 newspaper publishers whose publications represent in excess of eighty percent of the total daily and Sunday circulation of newspapers published in this country. The Association is vitally interested in the issue presented in this case, namely, the right of newspapers to publish news stories and editorials on cases pending in the courts.'

"This might be a good occasion to demonstrate the fortitude of the judiciary."

Such fortitude was not, however, demonstrated.

Judge Learned Hand has grappled with the same problem of newspaper influence, particularly with regard to the jury:

"I do not know how much jurors are influenced by what they read in newspapers. If anyone tells you that he knows, I would cross examine him, for I feel quite sure that he does not. From the little I have gathered out of conversations with jurors after the event, it does not seem to me that their verdicts are determined, as in theory they should be, only by what they hear in court. As you probably know, in France there is little or no effort to select what the jury shall hear; practically everything goes before them. Perhaps that is the better way. What I said to you the other night was based upon what has been our system of law for about 300 years, involving a very strict screening of what shall go before the jury. Whether this has been successful or not would be very difficult to say; and the fact that I agree with it may be no more than an occupational disease." Quoted by Herbert Brucker in *Journalism by Lawyers*, 29 CONN. B.J. 40, 46 (1955).

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

63. Marshall v. United States, 360 U.S. 310 (1959).

64. 341 U.S. 50 (1951).

in progress a mob forced the Negro community to abandon their homes, and the National Guard had to be called in. Inflammatory articles appeared continually in the newspapers chronicling those events. An editorial cartoon was published picturing several electric chairs and carrying the title, "No Compromise — Supreme Penalty." A postponement and a change of venue were denied. The Court reversed the convictions on the ground that a Negro is denied the equal protection of the law when he is indicted by a grand jury from which Negroes as a race have been intentionally excluded. Only two of the Justices, Frankfurter and Jackson,[65] believed that a fair trial was denied because of the publication of the alleged confession and because of the inflammatory articles appearing in the press.

In *Stroble v. California*[66] the defendant was convicted of first degree murder and sentenced to death. Prior to the trial and while the defendant was in the act of making a confession to a stenographer the District Attorney released to the press the details of the confession and also announced his belief that the defendant was guilty and sane. The Court affirmed the conviction on the ground that the confession was voluntary and that there was sufficient other evidence to support a conviction. Frankfurter dissented[67] on the ground that the lower court had affirmatively sanctioned newspaper participation as an inevitable ingredient of American criminal justice.

In *Marshall v. United States*[68] the defendant was convicted of unlawfully dispensing a certain drug. The Supreme Court of the United States reversed the conviction on the ground that newspaper accounts as to the illegal practice of medicine by the defendant had reached the jurors, and that this information was of a character which the trial judge himself had ruled as being so prejudicial that it could not be directly offered as evidence.

Finally, in the more recent case of *Irvin v. Dowd*[69] the Court refused to uphold a murder conviction and a death sentence on the ground that the jury had been prejudicially influenced prior to trial by inflammatory newspaper articles. Initially there was a change of venue to a county adjoining that in which the crime was committed. But newspapers which were delivered regularly to approximately ninety-five per cent of the dwellings in this second county, where the accused was actually tried, carried accounts of the accused's past criminal record and reported that he had confessed to the six murders involved. They reported that the ac-

65. *Id.* at 50 (concurring opinion).
66. 343 U.S. 181 (1952).
67. *Id.* at 198.
68. 360 U.S. 310 (1959).
69. 366 U.S. 717 (1961).

cused had offered to plead guilty if promised a ninety-nine year sentence, but that this offer had been rejected by the prosecutor who was determined to secure the death penalty. One story documented the promise of a sheriff of a neighboring state to devote his life to securing the conviction of the accused, for the murders allegedly committed in his state, if the present trial resulted in acquittal. Another newspaper reported that the only reason that the accused's attorney had agreed to act as counsel in the case was because he would be subject to disbarment if he had refused such representation. Four-hundred and thirty persons were called as prospective jurors; three-hundred and seventy of them, or ninety percent, admitted that they entertained some opinion as to the accused's guilt. More important, however, was the fact that eight out of the twelve persons eventually seated as jurors had admitted during the *voir dire* examination that they actually believed the accused to be guilty of murder. A second change of venue was denied. The Supreme Court of the United States reversed this conviction:

> With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.[70]

So, an accused can be rescued from the newspapers by an American court.[71]

CONCLUSION

Prior to the enactment of the Bill of Rights, James Madison, then preparing a draft of the first amendment, wrote:

> Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience come in question in that body [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. *The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution.*[72] (Emphasis added.)

These "choicest privileges of the people" are guarded in our Constitution and, as Madison later said, "the state of the press . . . under the common law, cannot be the standard of its freedom in the United States."[73] If the historic forces burdening the drafter of the Bill of Rights resulted in a preference, on his part, for the freedom of the press over other great rights, it is not surprising that the preference persists today, and that our free

70. *Id.* at 728.

71. See also Janko v. United States, 366 U.S. 716 (1961).

72. 1 MADISON, ANNALS OF CONGRESS, 1789-1790 434 (1834).

73. 6 MADISON, WRITINGS OF JAMES MADISON, 1790-1802 387 (1910).

press is different from the free press of the British. Madison recognized that although there was no written constitution in Britain, advocates did appear to resist any invasion of fundamental rights. Nor today is the freedom of the British press anywhere denied. Yet an accused in Britain does not have to submit to the scrutiny of untutored publicity. It is not that the British press is so much restricted in this regard; rather it can be considered to have learned the rules of evidence. The American press, on the other hand, has not shown itself willing to accept such an education. And the result is that in America the accused is compelled to suffer the risks of publicity.

Various remedies, aside from the classic exercise of the power of contempt, have occasionally been suggested to thwart this abuse by the press. These include: change of venue, new trial, voluntary action by the press, closer cooperation between bar associations and the press, a more effective Canon 20, and a general restriction on disclosure of information emerging from the various officers and personnel of the courts.[74] For the most part, such remedies have proved to be ineffectual, a fact evidenced by the kind of prejudicial trial reporting appearing daily in the press. They have not mitigated the abuse. Moreover, it would seem that such remedies will continue to be ineffective while the implements of public persuasion constantly gain in power and influence in a crowding and competing world and while judges are compelled to believe that "the specific power of public comment should weigh heavily against a possible tendency to influence pending cases."[75] Yet the exercise of the constructive contempt power in England has cured the abuse in that country. Of all the remedies volunteered, it is the only one that has been proved successful.

The authority of success compels attention. In England an accused is protected from abuses by the press through the power of contempt, because the English courts believe that "the liberty of the press is no greater and no less than the liberty of every subject of the Queen."[76] Yet the English press remains free.

It would seem unrealistic to presume that the constructive contempt power could be readily rehabilitated or sustained in the United States. Yet the power to discover, cite, and uphold a contempt, although dormant, still exists. It can emerge only when a clear and present danger

---

74. See generally, Note, 63 HARV. L. REV. 840 (1949), for an evaluation of these remedies. See also Bell, *A Problem in Legal Ethics: Fair Trial,* 31-32 J.S.B.A. CAL. 212, 222-25 (1956-57), for a good discussion of the weaknesses in Canon 20 of the American Bar Association's Canons of Professional Ethics.

75. Pennekamp v. Florida, 328 U.S. 331, 347 (1946).

76. Regina v. Gray, [1900] 2 Q.B. 56, 40.

is apprehended by a resolute judge.[77] The lower courts, being closer to the abuse, are not always reluctant to find a contempt by the press, yet such findings, presently, become feeble gestures, for the citations are not upheld on appeal to our highest Court.[78] That this has been the fate of the contempt citation is well appreciated and encouraged by the press,[79] and it is thus not surprising that the members of the press believe that the freedom of the press guaranteed by the Constitution is an absolute freedom.[80] Yet the composition of the Supreme Court of the United States changes, and so could that Court's attitude in regard to the exercise of the power of contempt when confronted by an aggravated abuse by the press. If suddenly a citation for contempt were to be upheld by the Court on the ground of a clear and present danger, would not the right of an accused to a fair trial, in this instance at least, become equated with and no longer subordinate to the rights enjoyed by the free press? Would not a new trial become mandatory? Would not all doubt as to the fairness of this particular trial in regard to the prejudice created by newspapers be permanently removed? Would the equation of two great rights necessarily have to be considered as an infringement by the one upon the other?

Justices Holmes and Frankfurter, in particular, have concerned themselves with freedom of speech and freedom of the press.[81] Each has attempted to increase the magnitude of these rights, yet each has comprehended limitations upon them.[82] Holmes, if any one, increased the dimensions of freedom of speech, yet he early indicated the necessity of basic restriction.[83] Frankfurter, following in the areas staked out by Holmes, has made freedom of the press and a fair trial his special concern. He has quipped:

> 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. . . .[84]

And probed:

> If guilt . . . is clear, the dignity of the law would be best enhanced by establishing that guilt wholly through the processes of law unaided by

77. Craig v. Harney, 351 U.S. 367 (1947); Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1940).

78. *Ibid.*

79. See note 61 *supra.*

80. See generally Brucker, *Free Trial v. Free Press,* 20 TEX. B. J. 438 (1957); Smith, *Fair Trial and Free Press: Pressure Exerted on Courts and Jurors,* 42 A.B.A.J. 341 (1956); Brucker, *Journalism by Lawyers,* 29 CONN. B.J. 40 (1955).

81. See Frankfurter's concurring opinion in Kovacs v. Cooper, 336 U.S. 77, 89 (1949).

82. *Ibid.*

83. Abrams v. United States, 250 U.S. 616 (1919); Schenk v. United States, 249 U.S. 47 (1919).

84. Pennekamp v. Florida, 328 U.S. 331, 366 (1946).