CONSTITUTIONAL LAW

CONTEMPT BY PUBLICATION

During the pendency of a motion for a new trial in a forcible detainer suit, a newspaper published certain articles and news stories, dealing with the conduct of the trial.[1] Among other things, the paper reported, with obvious approval, the circulation of petitions demanding that the judge grant a motion for a new trial, and that he refuse to preside at it.[2] For the publication of these materials, petitioners, editor, publisher, and a reporter of the paper, were summarily fined and committed to jail for contempt. They alleged that the conviction was a direct violation of the freedom of the press, and applied for a writ of habeas corpus. On certiorari, the Supreme Court held, reversing the decision of the Texas Court of Criminal Appeals,[3] that the conviction for contempt was erroneous, there being no "clear and present danger" of an interference with the administration of justice. *Craig v. Harney,* 331 U.S. 367 (1947). (Frankfurter, J., Vinson, C. J., and Jackson, J., dissenting.)

In cases concerning convictions for contempt by publication, *i.e.,* for the printing and circulation, outside the confines of the court, of materials interfering with the orderly administration of justice in a pending case—so often characterized as "trial by newspaper"—two of the most cherished

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1. The county judge who presided held office under elective tenure, and was not a lawyer. The jury twice refused to follow his directions for a verdict, and upon the third direction, brought in a verdict for the defendant, with the attached notation that they did so under the coercion of the court and against their consciences, counsel for the defendant having informed them that no purpose would be served by their continued recalcitrance. Defendant then moved for a new trial. It was during the pendency of action upon this motion that the allegedly contemptuous publications were made.
2. The following samples of the published material are among those quoted in the opinion of the Court: "Browning's (the judge's) behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such goings on, especially when a man in the service of his country seems to be getting a raw deal. * * *

   "It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury. It's no wonder that the jury balked and public opinion is outraged."

   The reports further characterized the entire conduct of the trial as a "travesty on justice."
3. Ex parte Craig, 193 S.W.2d 178 (Texas, 1946).

concepts of American legal tradition collide head-on.[4] Though the courts are wont to say that the conflict between freedom of the press and the right to an impartial and uninfluenced trial may be resolved without either giving way to the other,[5] it is difficult to see how such a result can be achieved.[6] The problem is rather which is the paramount civil right, not one of reconciliation of the two. In the instant case, the Court re-examined and reaffirmed its ruling in *Bridges v. California*,[7] again refusing to allow summary punishment for contempt by publication in the absence of a showing that the published material presented a "clear and present danger" to the administration of justice.[8]

The problem is quantitative, in two respects. The first quantitative aspect involves the determination of just how far a newspaper can go before a "clear and present danger" to the administration of justice is presented. Certainly the facts of the present case show a clear attempt to influence the outcome of the litigation by thinly-veiled threats of political reprisals against the judge. The majority admits the existence of the power to punish contempts summarily, in the case of a "clear and present danger" or where "the substantive evil is extremely serious and the degree of imminence extremely

4. A second type of contempt by publication involves the printing of material which "scandalizes the court" or offers an affront to its dignity. It will not be treated further in this discussion, since the case does not involve the point.

5. See, e.g., Black, J., in Bridges v. Calif., 314 U.S. 252, 260, holding that that case does not raise a conflict between the two; Frankfurter, J., concurring in Pennekamp v. Florida, 328 U.S. 331, 355: "A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society."

6. But see Note, 37 Minn. L. Rev. 97, 98 (1947), expressing the view that such a result is not only possible, but has been achieved.

7. 314 U.S. 252 (1941), 159 A.L.R. 1346, 1379 (1945). In that case, a labor leader sent a telegram to the Secretary of Labor, stating that a decision in a suit between the AFL and the CIO was "outrageous," and that the CIO did not intend to let the state court override its wishes in the matter. He later caused to be published, or acquiesced in the publication, of a copy of the telegram. He was convicted of contempt. Held, reversed. In the companion case, Times-Mirror Co. v. Calif., the alleged contempt consisted of an editorial entitled "Probation for Gorillas?" which ended "Judge 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."

8. The phrase is derived from the opinion of Mr. Justice Holmes in Schenck v. U.S., 249 U.S. 47 (1919), a case involving a prosecution for seditious writings.

high."[9] The decision, however, seems to leave little room for such a situation to exist. Though this is by no means a necessarily undesirable result, one should not overlook the possibility that the present construction of Justice Holmes' phrase has, for all practical purposes, put an end to punishment for contempt by publication.[10]

Secondly, it is a quantitative problem, in that the policy judgment finally reached must be based upon the relative amounts of evil which one expects from a limitation upon either a free press or an uninfluenced trial. It may be argued that the free press, in publishing blow-by-blow reports of trials, is catering only to idle and gossiping tongues. But to this, one might counter that the effect of publications upon the actual outcome of litigation has been vastly exaggerated, and that the few cases actually influenced are greatly outnumbered by the instances in which the public good demands free expression of opinion regarding matters of widespread interest. It is submitted that the argument based on the public good is a most cogent one, and seems to express the attitude of the majority of the Court today. Still, it is not entirely satisfactory, since the possibility remains that in some few cases it may leave an individual—perhaps in a capital case—to the quicksands of the abhorrent "trial by newspaper."

Blackstone, commenting upon the power to punish for contempt, including contempts by publication, spoke of the "inherence" and "necessity" of the power.[11] His position has been traced to an undelivered opinion in a case which never went to final decision.[12] Though this would not appear

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9. Bridges v. Calif., 314 U.S. 252, 263 (1941).

10. The majority opinion in the instant case does not say that there are no facts which could possibly constitute a "clear and present danger." But in view of the language used by the Court in defining such a danger, it is difficult to imagine a situation involving an out-of-court publication which would meet the standards imposed: "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." 331 U.S. 367.

11. 4 Comm.* 284, et seq.

12. King v. Almon, Wilmot, Notes and Opinions of Judgments, 243 (1765). The case is thoroughly reviewed by Sir John Fox, "The King v. Almon", 24 L. Q. Rev. 184, 266 (1908), in an article refuting the inherence and necessity of the power, as well as Blackstone's notions of ancient usage. The same conclusions were reached by

to be the sturdiest possible foundation for so recurrent a doctrine, the concept found favor in England, and today remains firmly entrenched there.[13] Printed matter which tends to defeat the administration of an impartial justice is speedily punished,[14] and the application of the power has, in England, been found to be both feasible and popular. Complaints of hardship by the press have been few.[15]

In America, a different attitude has prevailed from the beginning. Three major obstacles faced proponents of the power: (1) Establishment of the proposition that the power was an integral part of the common law of England at the time that body of law was adopted in this country. There is little evidence to show that the development of the power had taken place before 1765, the date of the decision in *King v. Almon,* the case upon which Blackstone's opinion of the power is said to be based.[16] (2) Even if the doctrine had been accepted in England at an earlier date, it was argued, one of the basic ends of the Revolution was escape from the onerous English restrictions of freedom of expression, and that consequently it had never been intended that such a power be imputed to the American courts.[17] (3) Statutory restrictions on the power were quickly passed, and the courts were faced with the problem of avoiding the limitations imposed or submitting to them.

Pennsylvania was the first American jurisdiction to encounter the problem. In *Respublica v. Oswald,*[18] an editor was summarily punished for contempt in commenting upon a pending case, and for a time public dissatisfaction with the existence of the power was widespread. An abortive attempt was made to impose a statutory limitation, but after a time, excitement died down. It was not until feelings were once

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Nelles and King, "Contempt by Publication in the United States," 28 Col. L. Rev. 401, 408, 548 (1928).

13. Goodhart, "Newspapers and Contempt of Court in English Law," 48 Harv. L. Rev. 885 (1935).
14. Sullivan, "Contempts by Publication" 5 (1941). The author states that punishment for contempts "scandalizing the courts" by out-of-court publications has been abandoned in England, but that those tending to defeat the administration of an impartial justice are quickly censured.
15. Goodhart, supra n. 13, at 909.
16. Supra n. 12.
17. Black, J., speaking for the Court in Bridges v. Calif., 314 U.S. 252, 264 (1941).
18. 1 Dall. 319 (U.S. 1788).

again aroused by a similar case[19] that a limiting statute was passed, which rigidly circumscribed the extent of the contempt power in that state.[20]

New York met a similar problem a short time after passage of the Pennsylvania act.[21] Legislative action was delayed, however, since public opinion was quieted when DeWitt Clinton,[22] arguing the case for the defendant, secured a reversal of the contempt conviction. It was not until almost twenty years later that a restrictive act was passed, and even then, it was not as confining as the Pennsylvania act.[23] It has been widely copied in other jurisdictions.[24]

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19. Respublica v. Passmore, 3 Yeates 441 (Pa. 1802). The very interesting civil suit in the same matter is Bayard and Petit v. Passmore, 3 Yeates 439 (Pa. 1802).

20. Pa. Acts, 1808-09, c. 78, p. 146. This was a temporary provision, which was renewed from time to time until made permanent by the Act of June 16, 1836, P.L. 784, §§ 23 et seq. It is still law in Pennsylvania today. Pa. Stat. Ann. (Purdon, 1930) tit. 17 §§ 2044, 2045. § 2044 reads, "No publication, out of court, respecting the conduct of the judges, officers of the court, jurors, witnesses, parties or any of them, of, in or concerning any cause depending in such court, shall be construed into a contempt of the said court, so as to render the author, printer, publisher, or either of them, liable to attachment and summary punishment for the same."

§ 2045 reads, "If any such publication shall improperly tend to bias the minds of the public, or of the court, the officers, jurors, witnesses or any of them, on a question depending before the court, it shall be lawful for any person who shall feel himself aggrieved thereby to proceed against the author, printer and publisher thereof, or either of them, by indictment, or he may bring an action at law against them, or either of them, and recover such damages as a jury may think fit to award."

21. Case of J.V.N. Yates, 4 Johns. 316 (N.Y. 1809). The case did not involve contempt by publication, but practice of law by a master in chancery. Nonetheless, it aroused the same animosity toward the contempt power as did the Pennsylvania cases.

22. New York lawyer and statesman, governor of New York 1816 to 1822. For a short biography, see 4 Dict. Am. Biog. 221.

23. N.Y. Rev. Stat. 1829, Pt. iii, c. iii, tit. 2, art. 1, § 10. The provisions relating to contempt by publication are, with minor amendments, found today in N.Y. Judiciary Law § 750; Penal Law § 600. Respectively, the provisions read:

§ 750. "A court of record has power to punish for a criminal contempt, a person guilty of either of the following acts, and no others: * * *

"6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein."

§ 600. "A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor: * * *

"7. Publication of a false or grossly inaccurate report of its proceedings. But no person can be punished as provided in this

The problem did not arise in the federal courts until 1831.[25] An editor published a biased and incorrect statement of a decision of Judge Peck, a federal judge sitting in Missouri. Later, the editor was attached for contempt. Almost immediately, impeachment proceedings were begun against Judge Peck, and his defense was narrowly successful. The day following the termination of the proceedings in impeachment, a bill in Congress was introduced and passed, rewording the provisions of the original Judiciary Act of 1789,[26] and

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section, for publishing a true, full, and fair report of a trial, argument, decision, or other proceeding had in court."

24. According to Nelles and King, supra n. 12, nineteen states have enacted statutes similar to that of New York, ten states follow the type statute passed by Congress in 1831, five others follow the federal statute as enacted in 1789, and the remaining states have no such statutes in effect.

The relevant Indiana statute dates from 1879, and is found today in Ind. Stat. Ann. (Burns, 1933) § 3-905. It provides punishment by contempt for persons who "falsely make, utter or publish any false or grossly inaccurate report of any case, trial, or proceeding" provided such publication is made between the time the proceeding was commenced and its final disposition.

On the general problem, see Comment, "Civil and Criminal Contempts in Indiana," 8 Ind. L. J. 497 (1932). Several important cases have arisen in Indiana, but in none of them was the constitutional issue raised.

The leading case is Kilgallen v. State, 192 Ind. 531, 132 N.E. 682 (1922), which sustained a conviction for contempt by publication for comment upon a pending case. The matter alleged to be contemptuous consisted of an editorial which charged that the grand jury had corruptly allowed a defendant in a criminal case to conduct a "defense" before them during the course of their investigation. Rehearing was denied, 192 Ind. 696, 137 N.E. 178 (1922), on the grounds that the constitutional issue could not be raised for the first time on appeal.

The rule of the Kilgallen case was extended in Shumaker v. State, 200 Ind. 623, 157 N.E. 769 (1928). In that case, it was held that threats of political reprisals against the judges of the Supreme Court because of their previous disposition of a class of cases, *viz.*, prohibition cases, were sufficient to uphold a conviction for contempt when it was shown that the intent was to influence the outcome of all subsequent cases of the class, though there was no reference to a particular case then pending. The case has been subject to the severest criticism in at least ten law review articles, without having once been cited in a subsequent case. See Note, 3 Ind. L. J. 149 (1928). In the light of present constitutional doctrines, it seems apparent that the decision could not stand.

25. Stansbury, "The Trial of James H. Peck" (1833); Nelles and King, supra n. 12, at 423.

26. Act of Sept. 24, 1789, 1 Stat. 73, 83, c. 20. The pertinent section provided that the United States 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."

adding a proviso "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 justice."[27]

In spite of the historical background of the 1831 Act,[28] Chief Justice White found it possible, in *Toledo Newspaper v. United States*,[29] to say that that act "conferred no power not already granted and imposed no limitations not already existing,"[30] but that the statute was merely "declaratory" of existing law. Certainly this construction would have been most astounding to the authors of the bill. The approach illustrates one of the two principal devices which have been used to avoid the effect of restrictive acts in this field. The other method has been the more forthright declaration that the power to punish for contempt—any contempt—is inherent in the courts, or as some have said, "superstatutory" or even "superconstitutional."[31] Further, the Chief Justice found that the "so near thereto" clause required only a "reasonable tendency of the acts done to influence or bring about the baleful result" of interference with the administration of justice.[32] Justice Holmes dissented vigorously, finding nothing in the facts to show that a judge would be influenced by them, and that "a judge of the United States is expected to be a man of ordinary firmness of character."[33]

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27. Act of Mar. 2, 1831, 4 Stat. 487, § 1. Reenacted without change in the Judicial Code as § 268, and now appears in 28 U.S.C. § 385 (1940). Interpretation of the italicized phrase has been the subject of much litigation.
28. Supra n. 27.
29. 247 U.S. 402 (1918). In that case, a daily newspaper was attached by summary proceeding for criminal contempt. The alleged contempt was the publication of matter advocating public refusal to abide by an injunction issued in litigation over street-railway fares, and in reporting the speech of a certain Socialist who had suggested "Impeach Killits" (the judge).
30. Id. at 418.
31. Nelles and King, supra n. 12 at 554. The article contains an appendix giving a comprehensive list of pertinent state statutes, together with reported cases construing them and a statement of the theory underlying the power over contempts, whether through avoidance or lack of statutes. These are given as (1) common law powers, (2) statutory powers, (3) superstatutory and superconstitutional inherent powers, (4) construction of limiting statutes as "declaraory," (5) strict construction of limiting statutes, and (6) avowed adherence to the federal rulings.
32. 247 U.S. 402, 421 (1918).
33. 247 U.S. 402, 424 (1918). It would seem, however, that the main force of the dissent was directed toward the summary nature of the proceedings.

Twenty-three years later, in *Nye v. United States*,[34] the Court overruled the *Toledo* case. Referring to the legislative history of the problem, the majority found that the Act of 1831[35] was obviously intended to impose a limitation on the power to attach for contempt. The problem of whether or not a "reasonable tendency" to produce the substantive evil of interference with the administration of justice was sufficient ground for contempt was settled by construing the "so near thereto" clause to be geographical, involving only physical proximity to the court, rather than a question of causation.[36]

It was not until the case of *Bridges v. California*,[37] in 1941, that the "clear and present danger" requirement replaced the "reasonable tendency" rule of the *Toledo* case, as applied to interference with the administration of justice by offending publications. It was there made clear that only immediate and unmistakable threats to a fair trial could be considered a contempt of court. In a strongly worded dissent, Mr. Justice Frankfurter[38] expressed the opinion that the power to punish for contempt was of the greatest importance, and vital to the very preservation of free speech and a free press, since only by protection of impartial trial could the courts safeguard the other civil rights.[39] The minority also

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34. 313 U.S. 33 (1940). In the Nye case, a suit was instituted against defendants, makers of a headache remedy, for the wrongful death of plaintiff's son. Defendants caused certain letters to be written, requesting the judge and attorneys to dismiss the suit, and procured the plaintiff, an ignorant and illiterate man, to sign them. No payment was made or promised to plaintiff. Defendants were attached for contempt in the lower court. Held, conviction reversed.

35. 28 U.S.C. § 385 (1940).

36. Mr. Justice Stone, in his dissenting opinion, wholly disagreed with this construction. "This court has hitherto, without a dissenting voice, regarded the phrase 'so near thereto' as connoting and including those contempts which are the proximate cause of actual obstruction to the administration of justice, whether because of their physical nearness to the court or because of a chain of causation whose operation in producing the obstruction depends on other than geographical relationships to the court." 313 U.S. 33, 54 (1940).

37. 314 U.S. 252 (1941).

38. Speaking for the four man minority, composed of Stone, C. J., and Frankfurter, Byrnes, and Roberts, JJ.

39. That the courts have no other means to ensure the orderly administration of justice is far from apparent. At least two states are able to maintain a functioning judiciary without recourse to the power. Pa. Stat. Ann. (Purdon, 1930) tit. 17, §2044; Ky. Rev. Stat. (Cullen, 1944), §432.240. The argument of the minority in

defended the "reasonable tendency" position taken in the *Toledo* case, and dismissed the argument over whether "clear and present danger" or "reasonable tendency" should be the test by saying, in effect, that both phrases connoted roughly the same thing, *viz.*, that a "rule of reason" should be applied.[40] But as has been pointed out by subsequent comment, certainly the flavor of the two phrases is different.[41]

In *Pennekamp v. Florida*,[42] the "clear and present danger" test was reaffirmed as the criterion for judging contempt *vel non*. There was no dissent as to the result, but three justices wrote separate concurrences, Mr. Justice Frankfurter finding that the publications did not in fact show a "reasonable tendency" to defeat the orderly administration of justice, especially since it was not clear that the published articles related to a pending action.[43]

Several other factors are important in the field of contempt by publication. Intent of the publisher to commit a contempt has occasionally been held relevant, though more frequently not.[44] Truth of the published matter is never a defense, either in England or America.[45] Nor is knowledge

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the Bridges case, 314 U.S. 252, 284 (1941), is worded in part: "Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights . . . The Bill of Rights is not self-destructive."

40. 314 U.S. 252, 296 (1941). "The phrase itself (i.e., clear and present danger) is an expression of tendency and not of accomplishment, and the literary difference between it and reasonable tendency is not of constitutional dimension." Hanson, "The Supreme Court on Freedom of the Press and Contempt by Publication," 27 Cornell L. Q. 165, 180 (1942), ridicules this statement.

41. Note, 31 Minn. L. Rev. 97, 99 (1946).

42. 328 U.S. 331 (1946), 31 Minn. L. Rev. 97 (1946), 25 Tex. L. Rev. 173 (1946), and 95 U. of Pa. L. Rev. 222 (1946). Mr. Hanson, author of the article cited supra, n. 40, appeared as counsel for the publisher.

43. In the Pennekamp case, supra n. 42, certain indictments were found to be defective, and were dismissed. Though new indictments were filed before the publication of the allegedly offensive materials, the comment was made upon the prior action of the court in dismissing the original indictments, no mention being made of the pending actions.

44. Sullivan, "Contempts by Publication" 38 (1941), and cases there cited.

45. Patterson v. Colorado, 205 U.S. 454 (1907); Skipworth's and Castro's Case, L.R. 9 Q.B. 230 (1873).

by the publisher of the fact of publication,[46] though bona fide ignorance may be given in mitigation of punishment.[47]

It appears immaterial what effect the publication in fact has upon the litigation commented upon. The objective standard of the ordinarily firm judge has been generally accepted without question.[48] This seems to be the only practical approach. To give relevance to the effect on the particular litigation would necessitate, as a condition precedent to contempt proceedings, an admission by the judge that he had allowed himself to be influenced by the published material. Few men are either so brave or so candid, and such a requirement would be futile. Though the point is not clear, the dissenting justices in *Craig v. Harney* appear to disagree with the majority principally as to how much firmness the ordinary judge is expected to exhibit, rather than as to whether the effect on the particular judge should be considered.[49]

The present case seems to be little more than a reinforcement of the previous position of the Court, except insofar as it indicates that in few, if any, cases would the Court consider that an out-of-court publication constituted a "clear and present danger" to the administration of justice by an ordinarily

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46. Killgallen v. State, 192 Ind. 531, 132 N.E. 682 (1922); Roach v. Garvan, 2 Atk. 469 (Ch. 1742); Sullivan, op. cit. supra n. 44, at 39; Goodhart, supra n. 13, at 907.

47. People v. Stapleton, 18 Colo. 568, 33 Pac 167 (1893); Sullivan, op. cit. supra n. 44, at 39; Goodhart, supra n. 13, at 907.

48. But see Mr. Justice Stone, dissenting in Nye v. U.S., 313 U.S. 33, 54 (1940), supra n. 34, which seems to indicate that actual effect upon the litigation has been previously held material.

49. Mr. Justice Jackson, dissenting separately in the instant case, said: "I do not know whether it is the view of the Court that a judge must be thick-skinned or just thick-headed, but nothing in my experience confirms the idea that he is insensitive to publicity."

It is a bit remarkable that most of the writings directed toward a limitation of the power to attach for contempt by publication persist in treating the problem solely as one of effect upon the judge, and exercise of the power as a mere vindication of his position. Those who, like Sullivan, argue in favor of a broad contempt power emphasize rather the influence which contumacious publications may have upon those called for jury service in the trial. The argument is especially strong in criminal cases in which identification is a major issue, as Sullivan points out. The possibility of adverse effect upon jury and witnesses is probably much more likely than any swaying of the judge, yet such effect is so ethereal and difficult to trace that few cases have grounded a contempt upon the former. At any rate, both sides might legitimately be accused of concentrating upon their own positive arguments, and failing to answer the perfectly valid contentions of the other.

firm judge.[50] But though the cases decided would indicate such an attitude, it must be admitted that in no case to date has the Court been faced with a combination of all the possible factors which would indicate that gross and inexcusable influence on the administration of justice was certain to result. It is interesting to speculate as to which if any of the following factors influence the Court in its determination of "clear and present danger": (1) whether the action commented upon is a civil or criminal proceeding, and if criminal, whether the punishment upon conviction is of a severe nature;[51] (2) whether the case is commented upon during the course of the trial itself, or while the case is pending only in a technical sense;[52] (3) whether the subject-matter of the case is of widespread public concern, *e.g.*, a labor dispute, or just run-of-the-mill litigation;[53] (4) whether the publication clearly attempts to influence the outcome of the particular case, or simply purports to offer the publisher's view of it;[54] (5) whether the printed material encourages and incites to extralegal methods[55] or merely seeks to influence through legal channels by shaping public opinion, etc.[56] In each of the cases herein discussed, one or more of these factors was missing or appeared in the aspect least favorable to exercise of the contempt power. It is at least a logical inference that the Court intends that all of these factors—and possibly others, since this short list by no means exhausts the available distinctions—shall be present and clearly indicative that there is an immediate and pressing probability that the life or freedom of a person will be jeopardized, before it will feel free to find a "clear and present danger" to the administration of justice.

Should it be decided, in the light of the foregoing history and rationale, that there is a place in American juris-

50. See supra n. 10.
51. Pennekamp v. Florida, 328 U.S. 331 (1946) and Times-Mirror Co. v. Calif., 314 U.S. 252 (1941), both involved comment upon pending criminal actions.
52. Pennekamp v. Florida, 328 U.S. 331 (1946).
53. In Bridges v. Calif., 314 U.S. 252 (1941), the Court discusses this distinction, but finds little merit in it.
54. Times-Mirror Co. v. Calif., 314 U.S. 252 (1941), supra n. 7. "Judge Scott will make a serious mistake . . . . "
55. Toledo Newspaper v. U.S., 247 U.S. 402 (1918), supra n. 29.
56. Craig v. Harney, 331 U.S. 367 (1947).

prudence for such a contempt power, the objection remains that the power as it has been exercised in the United States is an invitation to a biased trial of the contempt, due to the summary nature of the proceedings. The solution seems to require only that the contempt power be saved from abuse, and not that it be abolished. England, which originally proceeded by way of indictment and jury trial for contempt, abandoned that procedure early in the nineteenth century, in favor of a summary proceeding before a divisional court. The judge who was the object of the publication does not sit. The solution has been agreeable.[57] In some American jurisdictions, provision has been made for the appointment of a special judge or at least a different judge to try the contempt.[58]

Such steps may contain at least a partial answer. If the power to punish for contempt for out-of-court publications is to continue at all, certainly an attempt should be made to guarantee an impartial trial of the contempt proceeding.

The present construction of the phrase "clear and present danger" amounts to a virtual exclusion of contempt by publication from the law, as can be seen from a factual examination of the cases in point which have been decided in the past ten years.[59] If this is a desirable result—and there is very strong argument that it is—still, it has been reached by a somewhat circuitous method. The phrase has been stretched so as to exclude fact-situations which many persons would consider to present a clear and present danger to the administration of unbiased justice. It is submitted that limitations on the contempt power are properly a subject for legislation. Regulatory legislation would in a large measure relieve the courts of the unfortunate task of policing themselves in this aspect of the contempt field. Further, it would solidify and make more certain the ground for future decisions.

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57. Goodhart, supra n. 13, at 909. But see the dictum of Holmes, J., dissenting in Toledo Newspaper v. U.S., 247 U.S. 402, 423 (1918), to the effect that indictment is the usual mode of proceeding in England.

58. Ind. Acts 1931, c. 26, §1, p. 62, Ind. Stat. Ann. (Burns, 1933) §3-911 (appointment of special judge); Mich. Comp. Laws (Mason's Supp., 1940) §13910 (judge of another court of record); Ill. Rev. Stat. 1939, c. 146, § 21a (demand for another judge limited to cases in which judge has been personally attacked as to character or conduct).

59. Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. U.S., 314 U.S. 252 (1941); Nye v. U.S., 313 U.S. 33 (1940).