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Press and Out-of-Court Contempt

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THE PRESS AND OUT-OF-COURT CONTEMPT

Is the exercise of out-of-court contempt power on the part of the courts a step toward limitation upon freedom of discussion and liberty of the press?

This question is not new; its repercussions hark back to the Star Chamber and the struggle of the English people to establish free exercise of opinion and distribution of news. Clearly the press has rights and privileges, but their exercise must not jeopardise the administration of justice, both press and judiciary agree.

Yet the citations for contempt meted out to the Los Angeles *Times* in 1938 [1] for a series of editorials point out

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1 The Los Angeles *Times* at the instance of the Los Angeles County Bar Association was cited for contempt for the publication on the following editorials appearing on the dates noted:

"Sit-Strikers Convicted"	Dec. 21, 1937.
"The Wright Verdict"	Feb. 13, 1938.
"The Fall of an Ex-Queen"	April 14, 1938.
"Jackie's Millions"	April 16, 1938.
"Probation for Gorillas"	May 5, 1938.
"A Black Committee Here"	June 5, 1938.
"Curious Reasoning"	June 7, 1938.

In the last of these editorials, "Curious Reasoning" The *Times* stated its position in regard to the problem. This editorial was as follows:

"CURIOUS REASONING

"The extraordinary 'contempt of court' action brought in the name of the Los Angeles Bar Association against the *Times* is an attempt to reduce to such narrow limits the right and duty of newspapers to analyze public questions as practically to destroy their usefulness in that respect.

"The theory which the Bar Association's five-man Contempt Committee appears hastily to have embraced is that no case which is before the courts may be so analyzed or commented upon until the courts have said their last word upon it. For example, four of the five *Times* editorials cited by the committee are classified by it as being 'in contempt of court' because, while they were published after jury verdicts had been returned, the publication occurred before the judge's disposition of the cases, which were criminal ones, by sentence or otherwise. The idea seems to be that such comment is calculated to sway the judge one way or the other so that, as a result, the disposition of the case might thereby be made different from that dictated by its own intrinsic merits.

"This notion is itself scarcely complimentary to the courts which are supposed to, and usually do, function on the basis of their own best judgment and knowledge of the law, independent of any extraneous influence. It further fails to take into account the fact that, with few exceptions, the penalties for all classes and

degrees of crime are fixed by law within such limits as to allow judges comparatively small latitude in which such extraneous influence, were it actually effective, could operate.

"In the fifth editorial complained of by the Bar Association's committee, The *Times,* in common with some hundreds of other newspapers over the country, expressed its views on the question raised by the litigation over Jackie Coogan's earnings. In the apparent view of the committee, it was 'contempt' to say that, in this paper's opinion, children ought to have some rights to and share in the products of their own labor. The expression of this opinion, the committee seems to think, should be punished as a wilful effort to influence the court — notwithstanding that the law in the case is perfectly clear and that it presumably will be decided according to what the law says and not according to anyone's opinion as to what it ought to say.

"However, the biggest of the several obvious holes in the committee's contentions is the fact that no legal case is ever finally disposed of until it has been passed upon by the highest court of jurisdiction to which it is permitted to be taken. The process of appeal upon appeal often occupies years; the Tom Mooney case, for example, is not legally settled yet, since the United States Supreme Court has not yet ruled upon it. This case is more than twenty years old, Mooney has grown gray in prison, thousand upon thousands of newspaper editorials, books, pamphlets and argumentative articles have been published for and against his cause. And, according to the logical projection of the Bar Association committee's curious reasoning, every one of them is in contempt of court!

"Nearly every great public question is at some time or other the subject of litigation. Are we to be prohibited from discussing and analyzing such questions until after the Supreme Court has ruled thereon? Millions of words for and against the National Recovery and Agricultural Adjustment acts — the most important statutes in a generation — were published between the time of the first court attacks on them in 1933 and the time the Supreme Court finally invalidated them some two years later. In that interval they were in the status of unadjudicated legal cases and, therefore, in the conception of this committee, published argument regarding them must have been in contempt of court and should have been prevented or punished!

"Realization of the committee's apparent ambition to choke off public discussion of questions which are before the courts would not merely affect newspapers. It would bar such discussion over the radio by everyone from the President down and would eliminate from radio programs some of their most constructive material. Magazine contents would be reduced chiefly to love stories, trade and other publications would be emasculated, political speakers and writers would mostly be in jail.

"Free discussion of public questions is one our greatest safeguards; efforts to suppress it one of our greatest perils. Wise decisions are hammered out on the anvils of debate. Facts are essential, but only thoughtful study and analysis make them useful. The editorial columns of newspapers are natural leaders of public discussion. Though the views they express may at times be biased or erroneous, they are still the stimuli of thought and argument through which just public judgments are finally arrived at. Their privileges can be and sometimes are abused, but the principle for which they stand is not one lightly to be tampered with."

Demurrers on all counts were overruled except as to the counts based on the second and fourth editorials. Fines totaling $1,050. were assessed against the Times-Mirror Company, publisher of the Los Angeles *Times,* and against officers of the corporation. See In the Matter of the Times-Mirror Co. et al., 6 U. S. L. W. 16 (Superior Court Los Angeles County, 1938); 71 EDITOR AND PUBLISHER, 6 (Aug. 27, 1938).

clearly that three is a conflict between the press and the courts which somewhat overshadows the points of agreement. And this conflict persists, though over the country generally the courts have been liberal and tolerant of newspaper coverage of trials, sensing the necessity and the right of liberty of the press. Neither can it be said that judges on the whole have been thin-skinned, nor that courts generally have not been fair-minded and eager to decide the cases before them fairly and objectively. Where, then, does a conflict arise between the press and the courts? Comparatively recent events will serve as an excellent introduction to the problem.

Three years ago the trial of Bruno Richard Hauptmann having come to a bedraggled close at Flemington, New Jersey, the whole question of the press and the administration of justice seemingly was scheduled for public trial by public demand, but today it languishes apparently forgotten. And in the three years since Flemington, wars have raged, nations have tottered, and thrills and anguish have chased each other through the columns of the newspapers and along the radio channels. The past is no match for the living present, but a glance backward reveals the Hauptmann affair standing alone, the last splotch in a series of national sensations. There is no reason to suppose that the series is at an end or that another sensation is not somewhere in the making. But could the courts, the press, and even the public, countenance another farce such as that at Flemington?

It would seem appropriate, then, that in a period of comparative public sanity, the problem of press and the administration of justice be examined anew, beginning at the point to which it last had advanced in the months after the Hauptmann trial, namely the committee for press-bar-radio cooperation.[2]

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2 Full title, "Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings." The report is printed in 62 REPORT OF THE AMERICAN BAR ASSOCIATION, 851-66 (1937).

Composed of members of the bar and representatives of the two dominant publishers' associations,[3] the committee built its report around seven points covering in general court room crowding and disturbances, departure of attorneys from legal ethics in out-of-court statements, and a consideration of limitations which might be imposed in regard to accounts of court room occurrences. As might be expected the committee found itself unable to agree upon a categorical statement covering this last point. The press representatives were firm in their conviction that such a statement, if not impossible, was certainly not necessary. If anything is wrong or whatever is wrong, the press representatives contended, it can be quite easily corrected by the courts and their officials — not by limitations upon reporting but through the insistence upon court room dignity and decorum.[4]

No one doubts that making a vaudeville act or a burlesque out of the orderly administration of justice in the court room, whether by press or by certain over-enthusiastic attorneys, clearly defiles court procedure and makes a mockery of justice. The remedy for such evils lies within the power of the courts themselves, although some elective judges may hestitate to cite for contempt the reporters of newspapers strongly entrenched in the local community. The appearance of the radio as a news agency and the increasing emphasis upon pictorial journalism, however, offer new problems which as yet have not been explored satisfactorily beyond the position that a court may forbid the taking of photographs in the court or so near as to disturb the court or to place a defendant not yet proved guilty in an embarrassing position while yet under the protection of the court.[5] But may this

3 The American Newspaper Publishers Association and the American Society of Newspaper Editors.

4 For a survey of opinions of leading newspapermen, see Reform of Trial Publicity May Result from Bar-Press Cooperation, 69 EDITOR AND PUBLISHER, 3-4. (Feb. 22, 1936.)

5 In Ex parte Sturm, 152 Md. 114, 136 Atl. 312 (1927), Urner, J. stated: "The challenge in this case of the court's right to forbid the use of cameras

not in time place the courts in the position of discriminating against the picture newspapers and journals as compared with the standard newspapers? Conceivably the same problem may be raised by the radio, and certainly with these new agencies of public information the question of out-of-court contempt must necessarily grow in importance.

And there the matter stands, leaving a very real question unanswered — does society require that any further restrictions be imposed to meet these problems?

Moderate opinion, unprejudiced by any new outbreak of sensationalism by a certain element of the press, would seem generally to be satisfied with present arrangements. At least there is no great unrest. "On the whole," says one observer in surveying the relations of bench and press, "newspapers have as much freedom from domination by judicial powers as they need." [6] Taken literally, it may be said that newspapers in general agree with this statement, but they are not unaware of a growing tendency on the part of courts to exercise their contempt power to punish newspapers.

Upon this issue clashes have come with increasing frequency. For more than 100 years in the United States there has been a remarkable assumption of power by the courts to punish summarily for publications out of court.[7] And this has taken place although there is real reason to doubt that there exists an "inherent power" to punish out-of-court pub-

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in the courtroom during the progress of the trial presents an issue of vital importance. If such a right should yield to an asserted privilege of the press, the authority and dignity of the courts would be seriously impaired. It is essential to the integrity and independence of the judicial tribunals that they should have the power to enforce their own judgment as to what conduct is compatible with the proper and orderly course of their procedure. If their discretion should be subordinated to that of a newspaper manager in regard to the use of photographic instruments in the courtroom, it would be difficult to limit the further reduction to which the authority of the courts would be exposed. It would be utterly inconsistent with the position and prerogatives of the judiciary, as a co-ordinate branch of government, to require its submission to the judgment of a non-governmental agency as to a question of proper conduct in the judicial forums."

6 L. N. Flint, THE CONSCIENCE OF THE NEWSPAPER, (1925) p. 110.

7 For a comprehensive survey, see two articles by Walter Nelles and Carol W. King, Contempt by Publication in the United States, 28 COL. L. REV. 401, 525.

lications.[8] True, in the application of this "inherent power" the general rule is to allow almost unlimited newspaper comment when a case is no longer pending, but it must be remembered that the court in a contempt case decides the pendency of the action for the reporting of which the contempt charge was made. Further, the court decides whether the publication, regardless of its truth, has "reasonable tendencies" to prejudice or obstruct the orderly administration of justice.[9] This is rather strong medicine for a free press, so strong that it would scarcely seem that new regulations are needed for curbing the press.

An unchecked judiciary itself might sometime become a threat.[10] At any rate it appears more reasonable to set some bounds beyond which an unscrupulous, or perhaps only a jealous court, might not go in some situation which in truth urgently needed public attention.[11] Strict insistence upon a narrow interpretation of the "pendency" of a cause, under certain conditions, could make the administration of justice a mockery, even as unlimited leniency — some critics suggest connivance.[12] This is not to say that the press has need as

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8 Sir John Fox, HISTORY OF CONTEMPT OF COURT, (1927).

9 See Toledo Newspaper Co., v. U. S., 247 U. S. 402 (1918).

10 "Liberty of the press is subordinate to the independence of the judiciary.." 6 R. C. L. 510. See especially Francis v. People of Virgin Islands, 11 F. (2nd) 860 (1926). Here the publication for which Francis was punished for contempt was a protest, after final judgment, against a conviction for a libel of which Wooley, C. J. on review in reversing the libel action but in affirming the contempt action said: "Clearly the trial judge in reaching his judgment did not confine himself to the defendant's publication . . . but availed himself of the publication to exercise a control over the press in the interest, no doubt, of the public good; yet it is equally clear such is not his function." Thus Francis was in contempt for protesting a wrongful conviction!

11 "It is regarded as an interference with the true work of the courts to publish any matters which their policy requires should be kept private." *Ibid.* p. 514. "That a person may have observed some act done by officials of the law, which he has not sworn to keep secret, does not justify him in publishing it at large. It is the duty of a citizen to assist, and not to frustrate, the work of the administration of justice." U. S. v. Providence Tribune Co., 241 Fed. 524, 528 (1917). See also ex rel Schmidt v. Gehrz, 178 Wis. 130, 189 N. W. 461 (1922).

12 "The plain truth is that if the press is making a scandal out of our treatment of crime. . . it is doing so only to the extent to which our officers of justice are willing, and frequently eager, to have it do so." Paul Hutchinson, Why Blame It on the Papers, SCRIBNERS, Vol. 99, p. 43. (Jan. 1936.)

a news purveyor actually to interfere with the orderly adminstration of justice. But it may well be pointed out, in view of the conflict between the majority and minority rule, that there is a wide and important difference — even vital difference — between "having a tendency to interfere" and "actually interfering" with the orderly adminstration of justice as applied to publications out of court.[13]

Let us suppose, for the moment, that the committee for press, bar and radio cooperation in 1936 had formulated a categorical statement covering the reporting of court cases. What might this statement have included — that reporters of less than five years' experience be forbidden to cover courts, or that any vivid or colorful story shall be contemptuous?[14] Perhaps the newspaper men might have suggested ironically that a description of the antics of some attorneys in the course of the trial of a cause be punished as contempt in that the report lowered the dignity of the court and the respect for the administration of justice. The possibilities are unlimited, and lead to the suspicion that society may stand to lose, rather than gain, by encouragement of limitations upon news writing.[15] Publicity wielded as a weapon in the interest of the public is one safeguard society cannot well afford to lose. It follows then that no further encouragement should be given for the extension of the doctrine of contempt through publications "having a tendency to interfere with

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13 Two cases demonstrating the minority rule, that is that "actual" obstruction must occur before contempt will lie — a view most acceptable to newspapers — are: State v. American News Co., 64 South Dakota 385, 266 N. W. 827 (1936); Herald-Republican Publishing Co., v. Lewis, 42 Utah 188, 129 Pac. 624 (1913).

14 In 1927 a committee of the American Bar Association declared that "too much of the crime and court news, instead of being an accurate and objective report of the outstanding facts, is a highly colored report in which the play of imagination, exaggeration, effusion, distortion, deduction, conjecture, prediction and all the secondary mental processes are often exercised upon primary physical facts by ingenious reporters." Leon R. Yankwich, 19 A. B. A. J., 51 ff.

15 As for the criticism of "colored" news writing, it has often been pointed out that every individual "colors" everything he sees in accordance with his own experiences. See Walter Lippman, PUBLIC OPINION. If the "coloring" should be regarded as a matter of degree, who would measure it and how would this be done?

the administration of justice," and certainly not by suggesting that the doctrine might be extended to actual reporting of trials.[16]

What shall be said of the criticism of courts in the newspaper columns as constituting interference with the orderly administration of justice?

The majority rule has tended steadily to take a more unyielding position against criticism of a court "while a cause is pending." This is to claim for all courts a certain righteousness, a certain negation of error which public opinion is not as yet prepared to recognize. Why, indeed, should all courts be immune?[17] If a court does err in its way and if it does appear that the court has fallen victim to the influences or prejudices which sometimes play upon supposedly less impartial citizens, what agency of public information is better qualified to bring the error to public attention? Closely allied to this are the many suggestions for reform of the whole system of administration of justice.[18] The irony of the situation appears when it is realized that the press is supposed to bear the brunt of the drive for public enlightenment. And in the performance of this service, any newspaper man can draw upon his experiences to show that if public pressure for the improvement of a situation is to be had, academic discussion

16 "The repetition of what had been seen does not jeopardize any right. Let us not pretend that it does, whether our reason be legal snobbery or Fascist tyranny." Col. Robert R. McCormick, speaking to the Chicago Bar Association. See report in *The Chicago Tribune,* Dec. 11, 1938.

17 "Bad courts should not be respected. Good courts, even, should not be respected in their aberrations. Public discussion outside of court rooms, at such times as it is most likely to command attention, is the nearest we have to a practical means of working for consistent judicial respectability." Nelles and King, COL. L. REV., *op. cit.* 7, p. 533.

18 One of the most recent plans for press cooperation to effect judicial reform was revealed by John H. Wigmore, dean emeritus of Northwestern university law school, in an address to the Chicago Bar Association. He would focus public opinion upon the appointment of federal judges. *Chicago Tribune,* Dec. 4, 1938. J. Edgar Hoover has advocated that the press carry educational "crime columns" to give the public preventive information in the manner that medical information is imparted. 70 EDITOR AND PUBLISHER (April 24, 1937). For criticism of slowness of judicial reform, see Dr. Robert E. Cushman, Our Antiquated Judicial System, ANNALS (September, 1935).

of problems isn't likely to be efficacious. Specific situations, while they are situations, must be had. The majority rule, strictly applied, would limit discussions while a cause is pending. In the words of a recent law journal article: "there are no limits to the scope of the summary power in constructive contempt beyond the fertile imagination of the judiciary. . . Under such a rule, practically every law review in the country risks contempt whenever reference is made to a suit in which there may subsequently be an appeal, a rehearing, or any further motions." [19] Reform will indeed be slow in making headway if the admitted sins of the press are permitted to create a screen behind which the sins of the judiciary may perpetuate themselves through a further extension of the majority rule.

And now, since we have referred directly to the *admitted sins* of the press, it might be well to examine these briefly apart from the subject of contempt. The observer who ponders the sudden explosion of a "big story" in the press must sometimes doubt that all that he reads has been revealed "for the public good." [20] He may become critical of the historical explanation of freedom of the press, and eventually conclude that some of the things he reads can find little justification in a constitutional right.[21] He may perceive further that there is not only a sin of commission, but a sin of omission.[22] But upon reflection he is likely to realize that the more serious sins of commission are relatively infrequent and

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19 Recent Limitations on Free Speech and Free Press, 48 YALE LAW JOURNAL, 54 at 65.

20 From the 10 AUSTRALIAN L. J., No. 1 may be cited a common, ill-defined and debatable criticism: "The daily press, in conformity with its policy of giving the public what it wants rather than what it needs, published very full accounts of the trial. . . ."

21 For two interesting discussions see: Helen MacGill Hughes, The Lindbergh Case: a study of Human Interest and Politics, 42 AM. J. OF SOC., 32; and Sidney Kobre, The Newspapers and the Zangara Case, a study of American Crime Reporting, 13 JOURNALISM QUARTERLY, 253.

22 "The newspapers had . . . an extraordinary opportunity to present the important news behind the surface facts — to mold public thought and action in a social, constructive pattern . . . The facts . . . in my opinion, show that they failed." The Newspapers and the Zangara Case, *op. cit.* 21, p. 271.

chargeable to a limited number of newspapers,[23] while the sin of omission is perhaps an every day occurrence. However, no one needs to point out this situation to the press. Newspaper men have been as quick to recognize these weaknesses as any critic, and they feel no more satisfaction than does any one else in an explanation which makes use of the fact that the press is, after all, a business enterprise. But the truth is — only the more uncharitable deny it — that shrinking from public service for business considerations is a relatively rare occurrence.[24] Still another factor is that a newspaper can go no further nor no faster than its readers will permit while maintaining a two-fold standard for the press — speed and entertainment. Speed precludes satisfactory research for interpretative material, no matter how commendable the ideals of a particular newspaper may be,[25] while in the providing of entertainment the press often finds itself accused of two faults — triviality in choice of some material and invasion of an individual's privacy in the disproportionate display of certain stories. The latter is the more serious charge for it portrays the press as an agency of persecution, a picture which is not entirely complete, but, newspapers are not as a rule the instigators of ruthless investigations. They follow the leads of law enforcing agencies.[26]

And yet no one can ignore new problems inherent in the relations between pictorial journalism and the administra-

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23 "If any form of governmental censorship or regulation comes into being, it will be forced into existence by the failure of a few newspapers to comply with the prevailing code of ethics. It would be a very unfortunate thing for all of us if such a condition should come to pass." Radio speech of Gov. Harold G. Hoffman, of New Jersey. 69 EDITOR AND PUBLISHER, 16 (July 4, 1936).

24 L. N. Flint, *op. cit.* 6, p. 98 *et seq.*

25 Progress is being made, however, one indication of which is the widespread use of interpretative columns which are offering background information on national and international developments.

26 The American Society of Newspaper Editors rejected a resolution stating that "we deplore the hounding and persecution by newspapers of persons mentioned in connection with crimes but not formally accused of crimes" on the ground that often the hounding was not an activity of the newspaper. For report of the meeting, see 70 EDITOR AND PUBLISHER, 21. (April 24, 1937.)

tion of justice. The camera in its product as well as in its use tends to excesses. To take photographs of the principals, the court, the attorneys, and the jury during the trial not only disturbs the court but also might easily hamper the orderly processes of justice. There is no obligation upon the newspaper to print all the stories and the pictures submitted and so one particularly human interest photograph prejudicial to the defendants might be used, but another which would be on its face favorable to the defendant left out. The full case as seen by the jury would not necessarily appear in the press, but one damaging photograph could conceivably through the newspaper get back to the jury despite precautions and judicial restriction. The danger of such unfavorable photographing also can be seen in important civil cases in which the jury are allowed to return to their homes every night. Such is the nature of the problems raised by the camera. Must new forms of control be called forth, and perhaps extended to the straight news agencies? Are they really necessary? The press can easily point to the experiences of those peoples who have tampered with their constitutional guarantees of free press and speech.

And now by way of summary let us say that — First, the press does have its ills, but there is no reason to believe that a major operation by an outside agency — legislative [27] or executive — is called for; second, although the press enjoys a workable freedom for reporting proceedings dealing with the administration of justice, there has appeared a dangerous and generally unnecessary extension of judicial power to punish for contempt for publications outside of court

27 After considerable research the authors of this article believe that the judicial authority is generally sufficient to control contemptuous out-of-court publications that actually interfere or tend to interfere with the administration of justice to the point of an effective possibility. It is realized that legislative restrictions for example on the spreading of rumors about financial institutions thereby affecting their credit are representative of sane social legislation; however, this problem is not a question of contempt in relation to newspaper reports and/or comments on pending trials. It would seem likewise that it would be sensible legislation to require that in labor cases before the court contempts for out-of-court indirect violations of judicial orders should be decided by a jury.

on the ground that these "have a tendency to interfere" with the work of the court; third, the press doesn't want actually to interfere with the administration of justice, but on the other hand, the administration of justice needs the disciplinary and reforming influence of the press; and fourth, extension of limitations upon the press, other than by an enlightened judiciary, in either reporting or camera work outside the courtroom, would involve risks too dangerous to be ventured.

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