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CONTROLLING PREJUDICIAL PUBLICITY BY THE CONTEMPT POWER:
THE BRITISH PRACTICE AND ITS PROSPECT IN AMERICAN LAW

I. Introduction

Recent, sensational criminal cases have engendered publicity so adverse to a criminal defendant's constitutional right to a fair trial that judges have been importuned by members of the bar to restrain newspaper excesses by the use of the contempt power.¹ Whether American courts can constitutionally curb press coverage of pretrial or trial proceedings that may prejudice a defendant's right to a fair trial, and whether it would be desirable for them to do so, are still open questions. In Britain, no such doubt exists, under English law, as to the propriety of using this inherent judicial power to "safeguard the fair administration of criminal justice by jury trial from mutilation or distortion by extraneous influences."²

English courts have protected the integrity of their criminal process from direct interference by parties before the courts through the instrumentality of the contempt power since early common law.³ Until the beginning of this century, it was thought that the exercise of this summary power against constructive contempts⁴ rested on the "same immemorial usage as supports the whole fabric of the common law";⁵ but in fact the practice developed only in the eighteenth century.⁶ Lord Hardwicke, in the 1742 case of *Roach v. Garvan*,⁷ laid the foundation for this practice in committing an editor to the Fleet for impugning the characters of witnesses. While disregarding an objection that these actions were proper matter for a libel suit rather than for the court's summary jurisdiction, he stated that courts must punish publications that result in "prejudicing

1 Though their recommendations for avoiding prejudicial publicity are aimed primarily at stopping dissemination of information by court officers, the ABA Advisory Committee has also recommended that judges make a limited use of the contempt power:

(a) Against a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected for such a trial:

(i) disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, if the statement is reasonably calculated to affect the outcome of the trial and seriously threatens to have such an effect; or

(ii) makes such a statement with the expectation that it will be so disseminated. ABA ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, STANDARDS

RELATING TO FAIR TRIAL AND FREE PRESS 150 (Tent. Draft 1966).

2 *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (opinion of Justice Frankfurter respecting the denial of the petition for writ of certiorari).

3 For a discussion of the early history of the contempt power, see GOLDFARB, *THE CONTEMPT POWER* 9-25 (1963).

4 Constructive contempts are those criminal contempts committed out of the presence of the court which obstruct the administration of justice. See Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885, 886 (1935).

5 Fox, *The King v. Almon*, 24 L.Q. REV. 184, 185 (1908). Until proven historically unsound by Sir John Fox in Fox, *supra* at 184 and 266, this statement from Lord Wilmot's unpublished opinion in *Rex v. Almon*, [1765] WILMOT'S NOTES 243 (1802), was authority in both England and the United States. See GOLDFARB, *op. cit. supra* note 3, at 19-20.

6 English courts had the power to punish interference by strangers out of the presence of the court before that time, but the usual procedure was by indictment, information, or action at law for libel. See Fox, *supra* note 5, at 270.

7 2 Atk. 469, 26 Eng. Rep. 683 (Ch. 1742).

mankind against persons before the case is heard . . . ,"⁸ and that they must do so to "keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."⁹

The power of constructive contempt has been used frequently by modern English courts to preserve the "stream of justice" from pollution by newspaper publications that tend to interfere with the administration of criminal justice.¹⁰ In these cases, an offending newspaper is not punished, as it would first seem to an American familiar with defendant-centered remedies, because its publication has prejudiced the individual criminal defendant.¹¹ Rather, the contempt is that the paper has obstructed the administration of justice and injured the court by depriving it "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."¹²

II. British Contempt Procedure

Although theoretically contempt is an offense against the process of criminal justice, English courts do not proceed against newspapers on their own motion.¹³ The individual defendant in a pending criminal proceeding, who believes his right to a fair trial has been prejudiced by newspaper publicity, initiates prosecution against the offending paper.¹⁴ The aggrieved party applies directly, or requests the Attorney General to apply on his behalf,¹⁵ to a Queen's Bench Divisional Court¹⁶ for a writ of attachment for contempt.¹⁷ Then the court, by a judgment based on all the circumstances at the time of publication, determines whether the newspaper is guilty of contempt.¹⁸ The form and content of the offending article, the circulation of the paper in which it appeared, and the state of the proceedings against the accused at the time of its publication are factors in this judgment.¹⁹ The question of liability is judged by an objective

8 *Id.* at 471, 26 Eng. Rep. at 685.

9 *Ibid.*

10 Though many of the early uses of constructive contempt involved punishing personal attacks on judges, the rationale for punishment was the same: "to prevent undue interference with the administration of justice." *Rex v. Davies*, [1906] 1 K.B. 32, 40 (1905).

11 *E.g.*, *Regina v. Evening Standard Co.*, [1954] 1 Q.B. 578, 583-84; *Rex v. Parke*, [1903] 2 K.B. 432, 436-37; *Regina v. Balfour-Re Stead*, 11 T.L.R. 492, 493 (Q.B.D. 1895).

12 *Rex v. Parke*, *supra* note 11, at 437.

13 See Gillmor, *Free Press and Fair Trial in English Law*, 22 WASH. & LEE L. REV. 17, 18-20 (1965).

14 *Ibid.*

15 *Ibid.* This practice has, in recent cases, been preferred over application by private counsel, see Brief for Attorney General as Amicus Curiae, *Regina v. Duffy*, [1960] 2 Q.B. 188, 192. Proceeding by private counsel has the advantage, however, that as advisers to the defendant in the criminal proceeding, they would be best able to seek the application without prejudicing the defendant's eventual defense. See *Contempt of Court*, 207 L.T. 225, 227 (1949).

16 Gillmor, *supra* note 13, at 19. All branches of the High Court of England have the power to punish contempts against themselves. See Goodhart, *supra* note 4, at 909. Queen's Bench Division Courts, however, have exclusive jurisdiction over constructive contempts arising out of criminal proceedings before those courts and out of those committed during preliminary hearings.

17 An attachment is essentially a committal to prison. See Goodhart, *supra* note 4, at 908.

18 *Regina v. Duffy*, [1960] 2 Q.B. 188, 196-97.

19 *Ibid.*

standard. Therefore, that the publication did not, in fact, interfere with the fair administration of the criminal proceeding is irrelevant.²⁰ Under this rigidly objective standard a paper was held in contempt even though the accused had been acquitted.²¹

If the court finds that the article had a reasonable tendency to interfere with the impartial administration of justice, it will summarily order the editor, reporter, publisher, or any other person responsible for the publication to appear before the court. Unless cause can be shown why such persons or their paper should not be punished — by convincing the court that no contempt was committed — a prison sentence, fine, or both will be imposed. If the damage is slight, the court can nominally tax the paper the costs of the proceedings.²² Thus, the severity of the sentence imposed is entirely within the discretion of the court. Although in early constructive contempt cases, those found guilty of contempt were imprisoned for terms as long as three years,²³ recently, prison sentences have been imposed only in cases of exceptional abuse.²⁴

III. Comment Found to Be Contempt

English law is settled that any newspaper comment calculated to prejudice pending criminal proceedings will be punished as contempt.²⁵ The courts, moreover, have given a broad definition to the type of newspaper "comment" that will be classified as contempt, and to when proceedings are "pending" for contempt purposes.

Reporting information not accepted into evidence at the trial²⁶ and commenting on the personal character and prior criminal record of an accused,²⁷ both recognized as having a dangerous tendency to "try" cases in the newspapers rather than in a court of law, have been punished as contempt. Similarly, expressing an opinion as to the results of a pending trial has been considered by English judges to be "comment" tending to prejudice an accused.²⁸

An extreme example of prejudicial publicity, severely dealt with by an English court, concerned the murder trial of John Haigh in 1949.²⁹ Haigh, who had been charged with the acid-bath murder of an elderly woman, was described by a series of newspaper articles as a human vampire, with lurid reasons

20 See *Rex v. Daily Mirror*, [1927] 1 K.B. 845. In this case a newspaper was punished with contempt for printing a photograph of a person charged with a crime when it was "apparent to a reasonable man that a question of identity," *id.* at 850, might arise. None of the witnesses who identified the accused had, in fact, seen the photograph. Identity, moreover, was not in issue at the trial. *Rex v. Daily Mirror*, *supra*.

21 *Regina v. Evening Standard Co.*, [1954] 1 Q.B. 578.

22 See Goodhart, *supra* note 4, at 909.

23 See *Rex v. White*, 1 Campb. 359, 170 Eng. Rep. 985 (N.P. 1808).

24 See *Rex v. Bolam*, 93 Sol. J. 220 (1949). Until recently, the sentence imposed was final. Parliament now provides a statutory right of appeal in contempt cases. Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 13.

25 Cowen, *Prejudicial Publicity and the Fair Trial: A Comparative Examination of American, English and Commonwealth Law*, 41 IND. L.J. 69, 76 (1965).

26 See *Rex v. Tibbits*, [1902] 1 K.B. 77 (1901).

27 See *Rex v. Davies*, [1906] 1 K.B. 32 (1905).

28 *Rex v. Balfour-Re Stead*, 11 T.L.R. 492 (Q.B.D. 1895).

29 *Rex v. Bolam*, 93 Sol. J. 220 (1949). A full account of the case appears in the appendix to Justice Frankfurter's opinion concerning the denial of certiorari in *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 930-32 (1950).

given for that description. Though Haigh had been charged with only one murder, the articles said he had been charged with several and went on to list the names of his other "victims." Lord Goddard, while denouncing the paper's conduct as pandering to sensationalism, sentenced the editor to three months in prison and fined the newspaper £10,000.³⁰ He concluded with an ominous warning.

If for the purpose of increasing the circulation of their paper they should again venture to publish such matter as this, the directors themselves might find that the arm of the Court was long enough to reach them and to deal with them individually.³¹

To an American press, restricted only by the recently liberalized law of libel³² and by its own sense of responsibility,³³ the English decision of *Rex v. Astor*³⁴ would seem like "draconian control."³⁵ It illustrates how careful English newspapers must be to avoid contempt convictions for comment tending to prejudice a criminal trial. In this case, the court held that the mere arrangement of two news items next to each other was contempt. The first item gave an account of a civil proceeding concerning a share transaction, while the second covered a criminal prosecution relating to this same transaction. The jury in the criminal case, the court reasoned, upon reading the articles in question, might be unduly influenced against the accused.

IV. When a Proceeding Is Pending for Contempt Purposes

English courts have jurisdiction to punish such comments only when they are published during a pending criminal proceeding.³⁶ A proceeding is pending for contempt purposes even though trial has not yet begun. In *Rex v. Parke*,³⁷ Justice Wills, while punishing press comment published during preliminary hearings, reconciled earlier cases that seemed to require that a criminal case be at trial before a court could have jurisdiction to punish for contempt.

It is true that in very nearly all the cases which have arisen there has been a cause actually begun, so that the expression, [that a case is pending] quite

³⁰ *Rex v. Bolam*, *supra* note 29.

³¹ *Id.* at 220. See also *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 932 (1950).

³² *Cf.* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³³ American news media representatives have deplored any direct or indirect restraint on news reporting, stating that any evil that might exist can be curbed by voluntary codes. See comment of CBS President, Dr. Frank Stanton, *Justice and the News Media*, Trial, Dec.-Jan., 1966, p. 40. For a discussion of voluntary codes which have proven unsuccessful, see Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 372 n.138 (1960).

English newspapers, though already policed by the contempt power, have engaged in self-regulation through a voluntary press council. One practice, evidently beyond the attention or reach of the courts, which the council has condemned is "checkbook journalism," which is the practice of making story contracts with witnesses engaged in pending proceedings. See *N.Y. Times*, Nov. 27, 1966, p. 15, col. 1.

³⁴ 30 T.L.R. 10 (K.B.D. 1913).

³⁵ See Goldfarb, *Ensuring Fair Trial: The Impropriety of Publicity*, *The New Republic*, Feb. 29, 1964, p. 12.

³⁶ See Cowen, *supra* note 25, at 76

³⁷ [1903] 2 K.B. 432.

natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow.³⁸

Later cases pushed the time during which a case is pending and thus the period during which a newspaper is subject to contempt back to the time of a suspect's arrest.³⁹ Whether a court can exercise jurisdiction before proceedings can be said to have been initiated by an arrest, as when the suspect's arrest is only imminent, has yet to be decided by an English court.⁴⁰

A criminal case is still pending for contempt purposes until the time for bringing notice of appeal has expired, or until an appeal has been finally heard,⁴¹ because the possibility exists that a new jury, susceptible to prejudicial comments, might be empaneled upon the granting of a new trial.⁴²

On appeal, however, the question of an alleged contempt is only whether the publication tends to prejudice the proceeding *then* pending — the appeal.⁴³ A comment which might prejudice a jurymen likely would not have the same effect upon a judge. The language in a recent case⁴⁴ that refused an attachment for contempt on appeal, moreover, indicates that no comment, short of a "deliberate campaign to influence the decision of the appellate tribunal"⁴⁵ will be considered contempt.

V. Intent Not Required

One of the severest aspects of English constructive contempt law is that a newspaper can be in contempt even though it had no intention to interfere with the administration of justice.⁴⁶ An early English case determined that intent is not a necessary element of the offense. In *Roach v. Garvan*,⁴⁷ Lord Hardwicke answered a defense that a publisher did not know the content of a contemptuous article:

38 *Id.* at 438.

39 *Rex v. Editor*, 40 T.L.R. 833 (K.B.D. 1924); *Rex v. Clarke*, 103 L.T.R. 636 (K.B.D. 1910).

40 Professor Goodhart wrote in 1935 that he thought it "almost certain that the courts would not hesitate to take this step if they felt that the administration of justice had been interfered with." Goodhart, *supra* note 4, at 890-91. The problem is rooted in the rationale for punishing contempts — whether the offense is against the administration of justice generally, or whether it is an interference with a particular proceeding. See Note, *Contempt of Court When Proceedings Imminent*, 80 L.Q. Rev. 166 (1964). Commonwealth courts that have considered the problem are divided. See Cowen, *supra* note 25, at 77.

41 *Rex v. Davies*, [1945] 1 K.B. 435.

42 The awarding of a *de novo* trial on appeal in England is rare. *Regina v. Duffy*, [1960] 2 Q.B. 188, 198.

43 *Id.* at 197.

44 In a recent case Lord Parker questioned how vulnerable English judges might be to such comments. In refusing an attachment for contempt, he said: "A judge is in a very different position to a jurymen. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case." *Id.* at 198.

45 *Id.* at 197.

46 Goodhart, *supra* note 4, at 906-07; Note, *Contempt by Publication: The Limitation on Indirect Contempt of Court*, 48 VA. L. REV. 556, 567 (1962).

47 2 Atk. 469, 26 Eng. Rep. 683 (Ch. 1742).

But though it is true, this is a trade, yet they must take care to do it with prudence and caution; for if they print any thing that is libellous, it is no excuse, to say, that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous⁴⁸

Thus, newspapers are held strictly liable for the content of the articles appearing within their pages. As the scope of newspaper coverage expanded, it became impossible for those in charge to have personal knowledge of the circumstances of each news story.⁴⁹

As a result of this increased coverage, the burden of strict responsibility for the possibly prejudicial nature of articles correspondingly increased, sometimes with harsh results.

In *Regina v. Evening Standard Co.*,⁵⁰ an otherwise reliable reporter left the courtroom to telephone an account of the trial to his paper. In the interim he missed part of a witness' testimony. In the court's judgment, the resulting distorted account tended to prejudice the accused's trial. Though the court accepted the good faith of the reporter and recognized the fact that his editor had no reason to suspect the inaccuracy, the newspaper was nonetheless fined £1,000 for the contempt.⁵¹

Some doubt existed, however, that a newspaper would be punished for contempt, if, without any negligence on its part, it was ignorant of the fact that criminal proceedings were pending.⁵² But in 1956, the case of *Regina v. Odhams Press*⁵³ resolved this question by holding a newspaper liable for publishing articles that the court later found to be a contempt, regardless of what care the paper had exercised in reporting. The test to be applied in newspaper contempt cases, Lord Goddard said, is completely objective, weighing only the article's reasonable tendency to interfere with the administration of justice.⁵⁴ That a reporter and editor were subjectively ignorant of the fact that proceedings were pending, could, therefore, not be a defense.⁵⁵

The following year this strict standard was applied to magazine distributors with even harsher results.⁵⁶ During an internationally sensational murder trial, copies of *Newsweek* magazine carrying comments improper by English standards were circulated in London. When charged with responsibility for the publication,⁵⁷ the distributors pleaded the defamation defense of innocent dissemination⁵⁸ — that they had no reason to suspect the propriety of the publication. The court rejected the analogy between defamation and constructive contempt. The distributors, like newspaper publishers, were held to be absolutely liable for contempt.⁵⁹

48 *Id.* at 472, 26 Eng. Rep. at 685; Ex parte Green, 7 T.L.R. 411 (Q.B. 1891).

49 Note, *supra* note 46, at 567-68.

50 [1954] 1 Q.B. 578.

51 *Ibid.*

52 See Goodhart, *supra* note 4, at 907.

53 [1957] 1 Q.B. 73 (1956).

54 *Id.* at 80.

55 *Ibid.*

56 *Regina v. Griffiths*, [1957] 2 Q.B. 192.

57 *Newsweek's* only representative in England was its chief European correspondent, who, the court felt, could not be held responsible for the contempt. *Id.* at 202.

58 See generally PROSSER, *TORTS* § 108, at 794 (3d ed. 1964).

59 *Regina v. Griffiths*, [1957] 2 Q.B. 192, 203-04.

Reaction to these extensions of contempt control over the news industry, from both the English press⁶⁰ and bar,⁶¹ was vehement. Parliament responded to these protests by passing the Administration of Justice Act of 1960,⁶² which eliminated strict liability as the standard in such contempt cases. The statute provides that it would be a defense if a newspaper's personnel, at the time of publication, "did not know and had no reason to suspect that the proceedings were pending."⁶³ Distributors were similarly relieved of responsibility, if, having exercised reasonable care, they were ignorant of a publication's tendency to prejudice a fair trial.⁶⁴ Although intent is still not a required element for constructive contempt, the new standard requires at least some negligence in not knowing that an action is pending. In that respect it has greatly decreased the newspaper's burden and has kept contempt from seriously inhibiting worthwhile reporting.

VI. Reporting of Preliminary Hearings

Through the vigorous application of contempt, English judges have been successful in curbing the flagrantly prejudicial effects that newspaper comment can have on pending proceedings. The detailed reporting of preliminary hearings, however, a more subtle, but nonetheless damaging source of prejudice to criminal defendants, has remained out of the reach of the contempt power.

Though the legality of reporting the details of preliminary hearings before examining magistrates was doubtful at one time,⁶⁵ the Law of Libel Amendment Act of 1888⁶⁶ made a "fair and accurate" newspaper account privileged. As a result, newspapers can freely publish information under the guise of a report, which, had it been gratuitous comment, might well have supported an attachment for contempt. Since magistrate's courts are not considered "open"⁶⁷ under English law, the public, including the press, has no right to be present. Magistrates theoretically have the power to order hearings held *in camera* when to do so will best serve the ends of justice.⁶⁸ Although this procedure, by itself, would effectively curtail the reporting of preliminary hearings and its attendant abuses, magistrates have rarely exercised this discretion.⁶⁹

The dangers of reporting preliminary hearings lie within the nature of

60 See Inglis, *Contempt of Court*, The Spectator, Jan. 17, 1958, pp. 68-69.

61 See Note, 73 L.Q. REV. 8 (1957); Note, *Innocent Distributors and Contempt of Court*, 73 L.Q. REV. 467 (1957); Note, *Unintentional Contempt of Court*, 20 MODERN L. REV. 275 (1957).

62 8 & 9 Eliz. 2, C. 65.

63 See Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 11(1).

64 See Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 11(2).

65 Until 1848 preliminary hearings in England were viewed as serving inquisitorial functions, rather than acting as protection for an accused. Publication of depositions taken at those hearings, at which the accused had no right to be present, was objected to because it gave the defendant knowledge of the prosecution's evidence. For an excellent discussion of the development of preliminary hearings in England, see Geis, *Preliminary Hearings and the Press*, 8 U.C.L.A.L. REV. 397, 399-401 (1961).

66 51 & 52 Vict., c. 64, §§ 3-4.

67 The Indictable Offenses Act, 1848, 11 & 12 Vict., c. 42, § 19.

68 Magistrate's Court Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 4(2).

69 One English writer suggests that the reason for this reluctance is that the magistrates are generally active in local politics and are "reluctant to renounce the spotlight." Note, *The Aftermath of the Adams Case*, 20 MODERN L. REV. 387, 390 (1957).

the hearings themselves. Preliminary hearings,⁷⁰ theoretically designed to save persons from frivolous prosecution, have become, to the defense, a valuable means of discovering the prosecution's case.⁷¹ While the prosecutor must introduce sufficient evidence to justify committal, the practice of English defense counsel is to reveal as little of its evidence as possible before trial.⁷² Therefore, a detailed report of the hearing necessarily presents to the public a one-sided picture of the case that is slanted against the accused. These accounts, moreover, will often contain evidence that, though unsuccessfully objected to at the hearing, will later be ruled inadmissible by the trial judge.⁷³ Evidence of prior convictions or criminal associations, properly heard by a magistrate on the question of bail, would likewise be excluded under trial standards.

The result of this reporting in sensational cases is that the newspapers report every minute detail of these hearings, spread these details before potential jurors, and effectively prejudice the accused even before he is committed for trial.⁷⁴

A recent controversial trial graphically demonstrates the dangers of prejudice inherent in this type of reporting. At the preliminary hearing in the murder trial of Dr. John Bodkin Adams in 1957,⁷⁵ the prosecution introduced evidence that several of the doctor's patients had died under mysterious circumstances. A defense request for a private hearing on this evidence was denied.⁷⁶ When the doctor was subsequently committed for only one murder, it became certain that evidence of the other deaths would not be admissible at his trial. The widespread detailed reporting of the preliminary hearing had created an atmosphere so grossly prejudicial to the defendant that a fair trial was made impossible.⁷⁷

In response to the abuses exemplified by the *Adams* case, a parliamentary committee, headed by Lord Tucker, was appointed to consider possible remedies. The committee reported that an increased use of *in camera* proceedings would not be satisfactory.⁷⁸ Not only was there a "general distaste for the idea of justice being administered in a court of law behind locked doors,"⁷⁹ but it was also questioned whether the magistrates' demonstrated reluctance to sitting *in camera* could be overcome.⁸⁰ As a solution, the Committee proposed that press reporting of preliminary hearings be restricted in two ways: if an accused were

70 For a thorough discussion of the preliminary hearing in modern English criminal procedure, see DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 106-19 (1958).

71 *Id.* at 112-13.

72 *Id.* at 110.

73 *Id.* at 118.

74 One English writer, in comparing the abuses of American newspaper trial reporting with the evils resulting from English reporting of preliminary hearings, commented: "There is little doubt that in both countries the interests of the individuals have been sacrificed to the public's thirst for sensation and that the freedom of the press has been confused with license." Gower & Price, *The Profession and Practice of the Law in England and America*, 20 *MODERN L. REV.* 317, 341 (1957).

75 Because Dr. Adams was eventually acquitted, his trial was not officially reported. For a full account of the case, see Palmer, *Dr. Adams' Trial for Murder*, 1957 *CRIM. L. REV.* 365.

76 Note, *supra* note 69.

77 See Geis, *supra* note 65, at 402.

78 Departmental Committee on Proceedings Before Examining Justices, CMD. No. 479, at 19 (1958).

79 *Id.* at 9.

80 *Id.* at 19.

discharged at the hearing, an account of the proceedings would remain privileged; if he were committed, only a description of the name, charge, and decision of the court would be permitted until the trial's conclusion.⁸¹ Thus, press reporting of the hearing would not be completely prohibited, only delayed.

After a period of parliamentary inaction on the Tucker Committee's recommendations, new impetus for reform resulted from the prejudicial publicity caused by the reporting of the preliminary hearing in the trial of Dr. Stephen Ward⁸² — an offshoot of the notorious Profumo scandal. A restriction similar to the Committee's recommendation recently was given preliminary approval by the House of Commons.⁸³ If enacted, this legislation would effectively eliminate the one source of prejudicial press publicity not policed by the contempt jurisdiction of English courts. This proposed reform, moreover, will make one criticism of the English approach to the problem of prejudicial publicity in criminal proceedings no longer completely valid. The author of this charge, Australian Zelman Cowen, recently criticized the fact that although English courts, unlike those in America, readily strike at the source of prejudicial publicity after it occurs, they do little to remedy its effects on the individual defendant whose right to a fair trial has been damaged.⁸⁴ In Cowen's words:

The English law is unsatisfactory because it apparently loses interest in the prejudicial effect of what is published by the media once the offending publisher has been punished for contempt. But, like John Brown's body, the prejudice goes marching on, and unlike the American law, the English law gives us no ground to believe that this may lead to the reversal of convictions.⁸⁵

The argument, in American terminology, is that it is a hollow victory⁸⁶ for the criminal defendant that the "poisoner"⁸⁷ of the "stream of justice" is punished, when he is denied his constitutional right to a fair trial.

If the reporting of preliminary hearings is restricted, as appears likely, the only method of reporting, under English law, capable of generating prejudicial publicity that is widespread and comprehensive enough to seriously threaten the impartiality of a defendant's trial will be prohibited. Thus the lack of reversals in English criminal trials will no longer be a serious issue, since publicity that is prejudicial enough to bias a jury will not exist.

Conceivably, newspapers could flout the statutory restriction on the reporting of preliminary hearings, but this seems unlikely given the "elevated" sense of responsibility of the English press.⁸⁸ It is also admitted that individual in-

81 *Id.* at 24.

82 See generally, KENNEDY, *THE TRIAL OF STEPHEN WARD* (1964); Cowen, *Prejudicial Publicity and the Fair Trial: A Comparative Examination of American, English and Commonwealth Law*, 41 *IND. L.J.* 69, 81-82 (1965).

83 Letter from Mr. Anthony Lewis, Chief London Correspondent, New York Times, to the NOTRE DAME LAWYER, March 7, 1967, on file in the office of the NOTRE DAME LAWYER.

84 Cowen, *supra* note 82, at 83.

85 *Ibid.*

86 One American commentator has voiced a criticism similar to Cowen's. See GOLDFARB, *THE CONTEMPT POWER* 88 (1963).

87 See *Irvin v. Dowd*, 366 U.S. 717, 730 (1961) (concurring opinion).

88 See Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 *N.Y.U.L. REV.* 810, 827 (1961).

stances of pretrial and trial comment "calculated to prejudice a fair trial"⁸⁹ may still occur. But these, if English contempt law continues to operate as it has, will be quickly punished. As a result, newspaper publicity will be unable to generate a sustained atmosphere of prejudice likely to influence jurors or potential jurors.

In cases where some prejudicial publicity appears, a *voir dire* can be used to eliminate the potential jurors who are exposed to this publicity. Though use of this procedural safeguard is as rare in England as it is commonplace in the United States,⁹⁰ its use has been strongly recommended by Justice Devlin.⁹¹ By use of the *voir dire*, the comparatively slight risk of harm, from prejudicial publicity, which will be left remaining after the adoption of a restriction on the reporting of preliminary hearings can successfully be eliminated.

VII. The Use of Contempt in the United States

With the exception of the abuses created by the reporting of preliminary hearings, English courts have been successful in combating the effects of prejudicial newspaper publicity upon their criminal process.⁹² The dilemma in American law is to find a workable method of securing criminal trials from prejudicial publicity while at the same time preserving freedom of the press. In this context, one wonders if American courts can pattern their use of the contempt power after the English model to curb press publications that threaten the right of criminal defendants to an impartial trial.

Undoubtedly, the greatest obstacle in American law preventing the use of the contempt power, as employed by judges, is the first amendment. English law has had little difficulty in restricting newspaper coverage of criminal proceedings in the interest of the fair administration of justice.⁹³ The Constitution and the heritage of a completely free and uninhibited press, however, make the prospect of employing similar measures in this country doubtful.

Recent Supreme Court decisions have reaffirmed, more pointedly than ever, a commitment to the principle that the first amendment rights of freedom of speech⁹⁴ and freedom of the press⁹⁵ are "pre-eminent" in American constitutional law. It thus would be within a tenuous framework that *any* restriction upon the freedom of the American press would have to operate.

At the same time, recent gross interferences by the press in the administration of American criminal justice⁹⁶ have threatened to "try" defendants "by

89 *Rex v. Daily Mirror*, [1927] 1 K.B. 845, 850.

90 See DEVLIN, *TRIAL BY JURY* 30-32 (1956).

91 *Id.* at 31.

92 See Harvey, *Fair Trial v. Free Press — A British Lawyer's View*, 42 L.A.B. BULL. 109 (1967).

93 Judge Oliver's comments concluding *Rex v. Davies* [1945] 1 K.B. 435, 446, are blunt, but exemplary:

Much is said to-day about the freedom of the press, and I only wish to point out that our decision in this case comes to no more than this: that everything the public has a right to know about a trial of the kind with which we are here concerned, that is to say, everything that has taken place in open court, may be published, and beyond that there is no need or right to go.

94 See generally *Cox v. Louisiana*, 379 U.S. 536 (1965).

95 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

96 See *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

newspaper" rather than before an impartial jury. At least one writer has called the "preferred status" of the first amendment into question by challenging the press to prove itself of "significant social value"⁹⁷ in its reporting of criminal trials, or else be restricted in the interest of safeguarding rights "equally enshrined in the Constitution."⁹⁸

American courts,⁹⁹ theoretically, can exercise the power of constructive contempt against newspapers in a manner consistent with the first amendment, but only if the conduct punished thereby presents a "clear and present danger" to the administration of justice. This test, laid down as a "minimum compulsion of the bill of rights" on the states by the Supreme Court in *Bridges v. California*,¹⁰⁰ has proven nebulous, defying definition.¹⁰¹ Negatively, it can be said, with some certainty, that newspaper articles criticizing judges,¹⁰² and letters to grand jurors to the same effect,¹⁰³ do not involve a "clear and present danger." The Supreme Court, however, has not, while reviewing state contempt convictions, decided whether prejudicial publicity surrounding a criminal trial presents such an imminent threat. In the one case which presented the question to them, the Court denied certiorari.¹⁰⁴ In this 1949 case, a Baltimore trial court held a local radio station in contempt for broadcasting reports of the capture, confessions, and prior criminal record of a Negro charged with the brutal murder of an eleven-year-old white girl. The broadcasts, which contained a grisly account of the discovery of the butcher-knife murder weapon and also reported the defendant's admission of a prior rape of a white woman, created an atmosphere so hostile to the defendant that his counsel felt compelled to waive a jury trial.¹⁰⁵

Reversing the contempt conviction, the Maryland Court of Appeals held that the broadcasts did not present such a clear and present danger as to meet the first amendment test.¹⁰⁶ When the Supreme Court denied certiorari, Justice Frankfurter wrote an opinion carefully explaining that the denial implied neither approval nor disapproval of the court of appeals' judgment.¹⁰⁷ Thus, whether prejudicial publicity reaching a jury in a criminal trial is a clear and present danger to the administration of justice, which would allow a court to use the contempt power to deal with it, is still an open question.

Though the Court has recently demonstrated an increasing awareness of

97 Will, *Free Press vs. Fair Trial*, 12 DE PAUL L. REV. 197, 200 (1963).

98 *Ibid.*

99 The power to punish constructive contempts has been prohibited in federal courts by statute. 18 U.S.C. 401 (1958). For the early history of that law and its turbulent beginnings, see Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 525 (1928). For a concise treatment of its subsequent history, see Note, *Contempt by Publication: The Limitation on Indirect Contempt of Court*, 48 VA. L. REV. 556, 558-560 (1962).

100 314 U.S. 252, 263 (1941).

101 See Note, *supra* note 99, at 561.

102 *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946).

103 *Wood v. Georgia*, 370 U.S. 375 (1962).

104 *Baltimore Radio Show, Inc. v. State*, 193 Md. 300, 67 A.2d 497, *cert. denied*, 338 U.S. 912, 920 (1950).

105 *Ibid.*

106 *Ibid.*

107 *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950).

the harmful effects of prejudicial publicity on the impartiality of criminal trials,¹⁰⁸ this should not be taken as an indication that a direct restraint on the press would now be favored. The most recent pronouncement of the Supreme Court on this subject, in *Sheppard v. Maxwell*,¹⁰⁹ if it is authority for any one principle, appears as a judgment that the traditional procedural safeguards, which stop short of direct restraints, can guarantee a fair trial.

VIII. Conclusion

The quality of English newspaper reporting has not become "tepid"¹¹⁰ under the restraints imposed by the use of the contempt power. English newspapers must, nevertheless, exercise caution in what they report. In a country noted for the efficiency of its civil servants, the honesty and professionalism of its police and judges,¹¹¹ and its comparative freedom from the evils of organized crime,¹¹² the caution thus imposed has not proven socially harmful.

In America, the idea of punishing newspapers for publications that a judge reflectively considers likely to prejudice a fair trial, would be, if not constitutionally invalid, fatally objectionable on grounds of social policy and tradition. The press, in the United States, plays an important public role as an instrument of social reform. Moreover, it serves a "watchdog" function on corruption in government, police, and the courts. If its reporting is inhibited by the threat of the contempt power imposed at the discretion of judges, newspapers will not properly fulfill this necessary function. Although the English use of contempt is appealing because of its success, it must be rejected in this country as a means guaranteeing the fair criminal trial demanded by the sixth amendment.

John Scripps

¹⁰⁸ See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

¹⁰⁹ See *Sheppard v. Maxwell*, *supra* note 108.

¹¹⁰ See Lewis, *British Verdict on Trial-by-Press*, N.Y. Times, June 20, 1965, § 6 (Magazine), p. 15.

¹¹¹ Jaffe, *Trial by Newspaper*, 40 N.Y.U.L. REV. 504, 512 (1965).

¹¹² DEVLIN, *op. cit. supra* note 70, at 134. But see The South Bend Tribune, Mar. 5, 1967, p. 16, col. 4.