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MONTANA LAW REVIEW

THE CONTEMPT POWER IN MONTANA:
A CLOUD ON FREEDOM OF THE PRESS

The problem of contempt by publication, which throws the fundamental rights of freedom of the press and freedom of speech into conflict with such basic concepts as the maintenance of an independent judiciary and an accused’s right to a fair trial, was recently before the Montana Supreme Court in *State ex rel. Young v. Olsen.* The result, however, was inconclusive and left for a future day the question whether Montana will modernize its view of contempt by publication so as to conform with the sweeping changes made in the federal law, or whether, as other states have done, it will leave to the Supreme Court of the United States the task of reversing a Montana conviction for contempt as violative of the Federal Constitution.

Contempt by publication has been the arena of legal controversy for the champions of press freedom and the advocates of judicial power. It touches off such cries as “star chamber” and “trial by newspaper” and involves such volatile elements as editorial policies and ruffled judicial dignity. While, to a great extent, each case must be considered in its own circumstances, the basic issue in every case is how far an editor can go in criticizing a court before he loses the protection of freedom of the press and becomes subject to the court’s contempt power.

This paper will outline the current federal view of contempt by publication and explore the Montana decisions on the subject. Our purpose is to show that the Montana cases, while in harmony with federal law at the time they were rendered, would, if followed today, be struck down as unconstitutional.

THE FEDERAL VIEW

Starting on the Wrong Foot

A study of the federal treatment of contempt by publication properly begins with the impeachment proceedings against Judge Peck and the Act of 1831 which his abuse of the contempt power inspired. The act limited summary punishment of contempts to “Misbehavior of any person or person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice. . . .” (Emphasis added.)

The question whether the phrase “so near thereto” left the door open for punishment of newspaper articles was not resolved until, nearly a century later, the Supreme Court of the United States decided *Toledo Newspaper Co. v. United States.* Federal District Judge Killits had found the

1292 P.2d 348 (Mont. 1956).

2The court refused to issue a writ of attachment or a show-cause order against Olsen and the proceedings were dismissed as lacking in merit.

3Nelles and King, *Contempt by Publication in the United States,* 28 COLUM. L. REV. 401, 423 (1928). James H. Peck, a Federal judge for the District of Missouri held Lawless, an attorney, in contempt and suspended him for 18 months. Lawless had published a letter in a newspaper, violently criticizing the judge’s ruling in a dispute over a land title. Impeachment proceedings were instituted against Judge Peck but he was acquitted by one vote in the Senate trial. The case aroused wide criticism of the abuse of the judicial power to punish critics for contempt and resulted in the Act of 1831, which sought to place limitations on the contempt power.


5*Toledo Newspaper Co. v. United States,* 247 U.S. 402 (1918).
managing editor of the Toledo News-Bee and the publishing company guilty of contempt for the publication of cartoons and editorials (one of which concluded, "Impeach Killits"), criticizing the judge's handling of an injunction proceeding involving fares charged by the Toledo street railway. The judge tried the case summarily and fined both the editor and the publishing company.

The Supreme Court brushed aside the contention that freedom of press protected the publications from such punishment. In construing the phrase "so near thereto" to include statements by newspapers, Chief Justice White laid down the "reasonable tendency" test for determining when such statements were "so near thereto as to obstruct the administration of justice" and thus within a judge's summary power to punish for contempt:

Not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or bring about the baleful result is the test.

The convictions were upheld but Justice Holmes dissented on the ground that the statute was meant to protect the courts only from actual interference and not to permit "postponed retribution for lack of respect for its dignity."

The Toledo News case was decided in 1918 and its rule that acts which have a "reasonable tendency" to obstruct the administration of justice are subject to summary punishment for contempt was not disturbed until Nye v. United States was decided in 1941. There, a federal district judge in North Carolina had summarily punished Nye and another for contempt for using "liquor and persuasion" to induce plaintiff Elmore to drop a suit he had brought against Nye's son-in-law for wrongful death. All of Nye's acts took place more than 100 miles from Durham where the court was located.

The Supreme Court reversed the conviction in a six-three decision and Justice Douglas, in the majority opinion, concluded that "so near thereto" was a geographical term and did not have a causal connotation. He termed the Toledo News case the "first line of fracture... suggesting that the statute [of 1831] authorized summary punishment for publication." The Court refused to give renewed vitality to the Toledo News case and chose to recognize the "substantial legislative limitations on the contempt power which were occasioned by the Judge Peck episode." The Court said that if the "reasonable tendency" rule were applied, the conviction would stand, but the Court overruled the Toledo News case and reversed the conviction. The majority opinion struck at summary punishment with these words:

The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in the conduct of its business... If petitioners can be punished for their misconduct, it must be

*Justice Brandeis concurred in the dissent.

†Justice Holmes declared he could find nothing in the newspaper criticism "that would have affected a mind of reasonable fortitude" or anything "that obstructed the administration of justice in any sense." He said that unless there is a need for summary proceedings contempt should be dealt with like other crimes. "Action like the present... is wholly unwarranted by even color of law."

‡313 U.S. 33 (1941).

§Justice Stone, joined by Chief Justice Hughes and Justice Roberts, dissented.

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under the Criminal Code where they will be afforded the normal safeguards surrounding criminal prosecutions.

The *Nye* case, in rejecting the "reasonable tendency" rule, made it clear that statements uttered or published beyond the presence of the federal courts were not subject to summary punishment for contempt. In effect, it said such contempts cannot be prosecuted by federal judges sitting as prosecutor, judge and jury—they must be prosecuted under the Federal Criminal Code where those accused receive all the rights of defendants in ordinary criminal actions.

**State Contempt Power Curtailed**

The *Nye* case laid down the rule for federal courts, but what of state courts? That question was answered eight months later in *Bridges v. California*.[2] The case involved two summary convictions for contempt by the Superior Court of Los Angeles County against the Times-Mirror Co. and the managing editor of its *Los Angeles Times*, and, in a separate proceeding, Harry Bridges, an officer of the International Longshoremen and Warehousemen's Union of the CIO. In the *Times-Mirror* case, the convictions involved three editorials denouncing persons who had been convicted and were awaiting sentence. One branded two union members convicted of assault as "gorillas, sluggers, men who commit mayhem for wages," and concluded, "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes." The second editorial denounced "union terrorism" and "lawlessness" the day before convicted "sit strikers" were to be sentenced, and the third editorial, entitled "The Fall of an Ex-Queen," reviewed, in a tone of condemnation, the activities of a woman who had "landed . . . behind the bars as a convicted bribe-seeker."

In the *Bridges* proceeding,[3] defendant had sent a telegram to the Secretary of Labor referring to the judge's decision in a labor dispute as "outrageous" and said an attempt to enforce the decision would tie up shipping on the Pacific Coast and that his CIO members would not abide by it.

The Supreme Court of California affirmed the convictions, holding that the publications involved had a "reasonable tendency" to interfere with the orderly administration of justice. Thus, the issue of a state court's use of the reasonable tendency rule was placed squarely before the United States Supreme Court. The rule was rejected again.

Justice Black, who wrote the majority opinion in the five-four reversal of the convictions, first rejected the contention that the common law gives courts the power to override freedom of speech. He then discussed the "clear and present danger" rule, and concluded:

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

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The majority opinion points out that freedom of the press would be seriously affected if courts were able to cut off discussion of controversies while they are pending in court. Justice Black is realistic in noting that public interest is highest while a controversy is before a court and it would be a crippling limitation to require the press to withhold comment until after the issues are fully litigated.

We are convinced that the judgments below result in a curtailment of expression that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert.

Justice Black refuted the argument that one such evil is disrespect for the judiciary, declaring such respect cannot be won "by shielding judges from published criticism." He then turned to the other evil—unfair and disorderly administration of justice—and said the utterances must be viewed in their circumstances "to determine to what extent the substantive evil of unfair administration of justice was a likely consequence and whether the degree of likelihood was sufficient to justify a summary punishment." The Court then reasoned it was an "exaggeration" to say that the editorials had even a "reasonable" or "inherent" tendency to interfere with the orderly administration of justice. It held the "gorilla" editorial did nothing more than threaten future adverse criticism which the judge should have expected from a paper with the anti-labor policies of the Los Angeles Times. The possible influence of the other two editorials on the course of justice was dismissed as negligible.

The Court strongly rejected the "inherent tendency" rule with this language:

In accordance with what we have said on the "clear and present danger" cases, neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression.

The Court then concluded, "The Constitution compels us to set aside the convictions as unpermissible exercises of the state's power."

In reversing the conviction of Bridges, the Court held that he was exercising his right under the first amendment to petition for a redress of grievances. It reasoned that Judge Schmidt undoubtedly was aware of the possibility of a strike as a consequence of his ruling and dismissed the contention that he could have been intimidated by Bridges' threat of such action.

Justice Frankfurter, in a lengthy dissent," agreed that the "sit strikers" and "fall of a queen" editorials were not "close threats" to the judicial function and the convictions as to them should be reversed. But he declared the "gorilla" editorial was a "sustained attack on the defendants with an explicit demand of the judge that they be denied probation" and the state court was "clearly, . . . justified in treating this as a threat to impartial adjudication." He termed Bridges' telegram "a definite threat of action to prevent a decision" and said a state should not be denied "the

"Chief Justice Stone and Justices Roberts and Byrnes joined in the dissent.
power to protect its courts from being bludgeoned by serious threats while a decision is hanging in the judicial balance."

Much of the dissent is devoted to praise of the English concept of the contempt power and a criticism of "trial by newspaper." While Frankfurter has no quarrel with criticism of judges, as such, he is firmly against such criticism when it interferes with the orderly administration of justice and becomes "trial by newspaper." As he states it, "Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials."

**The New Doctrine Gains Weight**

Thus, the *Bridges* case laid down the rule that publications outside the court cannot be summarily punished for contempt, even if made while an action is pending, unless they constitute a "clear and present danger" to the administration of justice. At first the rule stood on the shaky foundation of the five-four decision, but in 1946 it was reinforced by the Court's unanimous opinion in *Pennekamp v. Florida.*

Pennekamp, associate editor of the *Miami Herald,* and the *Miami Herald* Publishing Co. had been summarily convicted of contempt by the same judges who had been criticized by the *Herald* in a cartoon and editorials. The cartoon showed a judge tossing aside formal charges to hand a document marked "defendant dismissed" to a criminal-type figure while a futile figure labeled "public interest" protested vainly. The editorials criticized the handling of several cases still technically pending, generally charging the judges with "stalling" and ruling in favor of defendants in criminal cases on technicalities. The Supreme Court of Florida affirmed the convictions and held that, if the "clear and present danger rule" of the *Bridges* case was the test, the state courts are nevertheless free to apply their own standards.

The United States Supreme Court reversed the convictions, declaring that the *Bridges* case "fixed reasonably well marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation." It held that it was for the federal courts to apply the "clear and present danger" rule to the statements and the circumstances. "We must...weigh the right of free speech...against the danger of the coercion and intimidation of courts..."

Then the Court makes a sweeping statement: "In the borderline instances...we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases."

It then holds that the editorials are not a "clear and present danger to the fair administration of justice in Florida."

""Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. . . . There have sometimes been martinet upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations...by a vigorous stream of criticism expressed with candor however blunt."

"328 U.S. 331 (1946).

"Pennekamp v. State, 156 Fla. 227, 22 So. 2d 875 (1945)."
The "clear and present danger" test was further strengthened a year later in the case of Craig v. Harney."

**Applied to Civil Cases**

The Craig case involved a newspaper editorial and articles reporting a civil case in Texas where the judge had given a directed verdict for the plaintiff in a suit against an absent serviceman. The editorial termed the judge's ruling an "arbitrary action" and a "travesty on justice." The news stories reported that people were aroused because a serviceman "seems to be getting a raw deal." These comments were published while a motion for a new trial was pending. The editorial writer and a reporter were convicted of contempt and sentenced to jail. In denying a writ of habeas corpus, the Texas Court of Criminal Appeals attempted to distinguish the case from the Bridges case on the ground that here a civil action was involved and it was private litigation that was commented upon. The Texas court also held that the facts satisfied the "clear and present danger" rule.

The United States Supreme Court, with dissents by Frankfurter and Jackson, reversed the convictions, holding that the rule of the Bridges and Pennekamp cases applies to all litigation and that "giving the editorial all of the vehemence which the court below found in it we fail to see how it could in any realistic sense create an imminent and serious threat to the ability of the court to give fair consideration to the motion for rehearing."

The Court disposed of the news stories of the trial by declaring that "what transpires in the court room is public property. . . . Those who see and hear what transpired can report with impunity." The Court agreed that the stories were an "unfair report of what transpired" but "inaccuracies in reporting are commonplace" and "a reporter could not be laid by the heels for contempt because he missed the essential point in a trial or failed to summarize the issues to accord with the views of the judge who sat on the case." It went on to say that reporting the citizens' reaction was not contempt because "freedom of the press may not be denied a newspaper which brings their [the citizens'] conduct to the public eye."

The Court then turned to the "only substantial question" of the editorial calling the judge's action a "travesty" and "raw deal." It said:

This was strong language, intemperate language, and, we assume, an unfair criticism. . . . 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.

**Priority for Press Freedom**

The precise issue of press freedom and the contempt power has not come before the United States Supreme Court since the Craig case was decided. In subsequent opinions involving freedom of expression and the application of constitutional rights in other circumstances, the Bridges, Pennekamp cases have been cited with approval.

"331 U.S. 367 (1947).

"Ex parte Craig, 150 Tex. Crim 598, 193 S.W.2d 178 (1946)."
nekamp and Craig decisions have been cited with approval.20 Justice Frankfurter, however, continues to advocate a certain judicial rein on the press.20 The lower federal courts have followed the three decisions21 with one note of

20Stroble v. California, 343 U.S. 181 (1952) (fair trial for murder held not impossible because of allegedly inflammatory newspaper reports); Dennis v. United States, 341 U.S. 494 (1951) (conviction of eleven Communist leaders for violation of Smith Act affirmed); Shepherd v. Florida, 341 U.S. 50 (1951) (conviction of Negro defendants in rape of white girl reversed on ground that selection of grand jury discriminated against Negro race); American Communications Ass'n. v. Doubs, 339 U.S. 382 (1950) (federal statute requiring non-Communist oath for union officers held not a violation of freedom of speech); Shelley v. Kraemer, 334 U.S. 1, 3 A.L.R.2d 441 (1948) (enforcement of restrictive covenants on racial basis held to violate fourteenth amendment). The cases also have been cited in dissenting opinions: Justice Black, with Justice Douglas concurring, in Beauchains v. Illinois, 343 U.S. 250, 267 (1952) (conviction under Illinois statute for distribution of leaflets attacking "mongrelization" of white race by Negroes affirmed); and Justice Douglas, with Justice Black concurring, in Fisher v. Pace, 336 U.S. 155, 163 (1949) (contempt conviction of attorney affirmed).

20Justice Frankfurter has been critical of the Bridges and Craig decisions (he concurred specially in the Pennekamp case) and he has indicated that he feels the "clear and present danger" test strips courts of their authority to deal with press interference. He has stated this position in a separate concurring opinion in Dennis v. United States, 341 U.S. 494, 517 (1951), and in his dissent in Stroble v. California, 343 U.S. 181, 198 (1952). He also joined in the special concurring opinion of Justice Jackson in Shepherd v. Florida, 341 U.S. 50 (1951). In Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950), Justice Frankfurter wrote an opinion to accompany the order denying certiorari to the Court of Appeals of Maryland. The Maryland court had reversed contempt convictions for radio broadcasts concerning the arrest, confession and past record of a murder suspect. It held that the convictions constituted a violation of the freedom of speech and press under the Bridges, Pennekamp and Craig decisions. Justice Frankfurter declared the denial of certiorari did not carry any implication that the Maryland court correctly applied the three decisions to the case at bar. In discussing press freedom and fair trials, he took the view that while the public should know what goes on in the courts, society has set the court and jury apart for the determination of a man's guilt or innocence, and that the issue should be resolved there and not in the public press. He appended a list of thirteen English decisions in which newspapers had been punished for contempt for publicity given to criminal cases. Three cases finding no contempt were added. The limits which the fourteenth amendment will place upon the power of state courts to protect jury trials from "mutilation or distortion by extraneous influences" has not yet been fully adjudicated, Justice Frankfurter declared, and the English decisions indicate "the kind of questions that would have to be faced." This writer agrees with Justice Frankfurter that the Bridges, Pennekamp and Craig decisions did not fully litigate the exact measure of immunity provided newspapermen by freedom of the press in a situation that involves "trial by newspaper." It is submitted that while the Court might find a "clear and present danger" more readily where the rights of an accused to a fair trial and impartial jury are involved, it is that test which the Court would have to apply. The English system, which generally forbids press comment concerning a case from the time a man is accused until his trial starts, is obnoxious to the American concept of freedom of the press.

21Hoffman v. Perrucci, 117 F. Supp. 38 (E. D. Pa. 1953) appeal refused 222 F.2d 709 (3rd Cir. 1955) (publication of magazine advertisements and pamphlets claiming that excessive jury awards were raising the insurance rates and the cost of living held not to constitute contempt); Smotherman v. United States, 156 F.2d 676 (10th Cir. 1950) (telegram imputing partiality to a judge held no contempt); Hurd v. Hodge, 162 F.2d 233 (D.C. Cir. 1947) (judicial action declared not exempt from requirements of due process in case involving restrictive covenant against sale to Negroes); In re Chopak, 160 F.2d 856, (2d Cir. 1947) (case where at attorney was suspended for three years for letter written to one judge about another judge remanded, declaring that the Supreme Court has "safeguarded the right, even the duty, of free general and public criticism of the courts"); United States ex rel. May v. American Machinery Co., 116 F. Supp. 169 (E. D. Wash. 1953) (insurance company advertisements held not liable to summary punishment for contempt).
discontent,\textsuperscript{22} and various state courts have applied the "clear and present danger" test in conformity with the new federal view.\textsuperscript{23}

Thus we find in the \textit{Bridges}, \textit{Pennekamp} and \textit{Craig} decisions a solid triumvirate of authority for the rule that state courts do not have the power to summarily punish editors, reporters and newspapers for published statements, however derogatory, mistaken or unfair, unless those statements constitute a "clear and present danger" to the orderly and impartial administration of justice. It is apparent that the right to freedom of the press, granted by the first amendment and extended to the states by the fourteenth,\textsuperscript{24} will protect newspapermen from arbitrary punishment by judges who have been criticized or even ridiculed in the public press.

Just what would constitute a "clear and present danger" can be gauged from the language in the three decisions. The Court has said that the threat to the administration of justice must be \textit{highly imminent} and must

\textsuperscript{22}Delaney v. United States, 199 F.2d 107 (1st Cir. 1952). The court reversed the conviction of an ex-Collector of Revenue because the lower court had refused the defendant a continuance until nationwide publicity given the case had subsided. After referring to the English courts’ use of the contempt power to curb publicity on criminal cases, the court acknowledged the “important limitations” on that power in the United States. “More fundamentally it has been thought that this modern phenomenon of ‘trial by newspaper’ is protected to a considerable degree by the constitutional right of freedom of the press [citing the \textit{Bridges}, \textit{Pennekamp} and \textit{Craig} cases]. Perhaps the Supreme Court has not spoken its last word upon this vexing subject.”

\textsuperscript{23}Convictions were reversed in the following cases for failure to find a "clear and present danger": Bates v. State, 210 Ark. 652, 197 S.W.2d 45 (1946) (article headlined: “Strikers Sentenced to Pen by Hand-Picked Jury”); People v. American Automobile Insurance Company, 132 Cal. App. 2d 317, 282 P.2d 539 (1955) (advertisements against excessive jury verdicts); Turkington v. Municipal Court, 85 Cal. App. 2d 631, 193 P.2d 795 (1948) (resolution published by a chamber of commerce committee criticizing the judge’s enforcement of traffic regulations); \textit{In re Bozorth}, 118 A.2d 430 (N.J. 1955) (cleric’s letter in newspaper criticizing judge for ruling on referendum for saloon hours). Convictions were also reversed in: McGill v. State, 209 Ga. 500, 74 S.E.2d 78 (1953) (editor cited for articles on disposition of traffic cases, claiming that “motorists who know the ropes” can find “easy ways” around traffic charges); State v. Stanton, 231 Ind. 223, 108 N.E.2d 251 (1952) (prosecuting attorney cited for statements in newspaper attacking judge for “in tolerable attitude” on law enforcement); Baltimore Radio Show v. State, 183 Md. 300, 67 A.2d 497 (1949) (broadcasting of radio reports on a suspect’s arrest, past criminal record, and confession in the murder of a girl); Robinson v. City Court, 112 Utah 36, 185 P.2d 256 (1947) (defendant had remarked that his conviction on disturbance charge was “worst example of a kangaroo court” while riding in elevator; the judge involved overheard the remark and found defendant guilty of contempt; permanent writ of prohibition issued against enforcement of fine and jail sentence); Weston v. Commonwealth, 196 Va. 175, 77 S.E.2d 405 (1953) (minister criticized judge in sermon, claiming judge was dominated by political machine). Convictions were sustained in: State v. Gussman, 34 N.J. Super. 408, 112 A.2d 565 (App. Div. 1955) (defendant sent letter to Judge refusing to appear because he would be victim of a “shake-down,” held contempt; the letter was in the actual “presence” of the court); Fawick Airflex Co. v. Local 735, United Electrical Workers CIO, 92 N.E.2d 446 (Ohio Ct, App. 1950) (several persons had picketed judge’s home and created disturbances there in protest of his ruling on injunction; also upheld convictions for letters charging judge with corruption but reversed conviction of one letter on ground that while it was in “bad taste,” it did not constitute a “clear and present danger”).

\textsuperscript{24}In a series of decisions beginning with \textit{Gitlow v. New York}, 268 U.S. 652 (1925), this Court held that the liberty of speech and of the press which the first amendment guarantees against abridgement by the federal government is within the liberty safeguarded by the due process clause of the fourteenth amendment from invasion by state action. That principle has been followed and reaffirmed to the present day.” Joseph Burstyn Inc. v. Wilson, 343 U.S. 495 (1952).
immediately imperil, and the evil must be serious and substantial. Publications which have only a reasonable tendency or are merely likely to obstruct justice cannot be summarily punished. Thus, it seems plain that the "clear and present danger" rule will protect all statements except those designed actually to interfere with the administration of justice by inciting violence or some type of disturbance in the court's presence.

It must be noted that none of the three decisions dealt with a trial by jury and the Court might find a "clear and present danger" more readily where the right of an accused to a fair trial is involved. The contempt conviction of a Helena newspaper was upheld in a 1915 federal case where a story concerning the defendant's past criminal record was read by several jurors. But this case, like all other decided prior to 1941, must be re-examined under the standards of the new doctrine on contempt by publication. The old view, which allowed nearly full rein to the contempt power, has been reversed and it has been firmly established that freedom of expression has priority and will not be curtailed to protect the courts from criticism.

THE MONTANA VIEW

Potency for the Contempt Power

While Montana has but a handful of decisions on contempt by publication, the opinions go in all directions and both the guardians of judicial dignity and the advocates of press freedom can find language and authority to support their respective causes. No uniform standard has been applied, the holdings appear in conflict, and the rationale of several cases is cloudy—all of which leaves the Montana view entangled in contradiction.

However, it is the application of the contempt power that has caused the divergency of judicial opinion, not the power itself. The power of Montana courts to punish for contempt is expressly set forth in two statutes and various acts have been classified as contempts in sections 93-9801 and 94-3540. Much of the controversy involving contempt by publication has raged around subsection seven of the latter statute which makes punishable "the publication of a false or grossly inaccurate report of the proceedings of any court."

Furthermore, it has been held that the Montana courts have the inherent power to punish for contempt, and that the foregoing statutes do not limit that power but are merely declaratory of the common law.

Thus, the contempt power leans on no slender reed in Montana; it is backed by legislation; it has been cloaked with all the traditional authority

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21 In re Independent Publishing Co., 228 Fed. 787 (1915), aff'd., 240 Fed. 849, L.R.A. 1917E 703 (9th Cir. 1917). The Helena Independent also was involved in Morse v. Montana Ore Purchasing Co., 105 Fed. 337 (C. C. D. Mont. 1900) where the court was "extremely doubtful" that plaintiff had the right to bring the newspaper into court for contempt in the widespread publication of prejudicial articles during the trial. However, a new trial was granted because of the "undue influence" exerted on the jury by the objectionable news articles. The case was involved in the so-called "War of the Copper Kings."

22 Revised Codes of Montana, 1947, §§ 93-1003, 94-108 (hereinafter the Revised Codes of Montana are cited as R.C.M.). Both statutes were enacted in 1895.


25 State ex rel. B. & M. Co. v. Judges, 30 Mont. 193, 76 Pac. 10 (1904).
of the courts under the common law concept of inherent power. Against it stands Article III, section 10 of the Montana Constitution, which declares that "every person shall be free to speak, write, or publish whatever he will on any subject." A review of the Montana decisions will show that this constitutional guarantee of press freedom has often come away second best.

An "Obnoxious Telegram"

Montana's first decision on contempt by publication was Territory v. Murray, decided in 1887. The supreme court found the defendant guilty of contempt and fined him $500 for causing a telegram to be published in the Helena Independent imputing that "owing to the influence of some surface claimants," the supreme court would reverse its position in the "Smoke House Cases" which had been decided in Murray's favor. Labeling the telegram "obnoxious," the court said that in its words "lurks the insinuation that undue influence was being brought to bear upon the court by his [Murray's] adversaries in said suit. . . . There can be no doubt but that his conduct is a contempt of court at common law." The telegram was held to be in violation of a territorial statute (now section 93-9801) specifying "disorderly, contemptuous, or insolent behavior toward the judge." However, the court declared that the statute merely affirmed a pre-existent power of the courts.

Murray was a party to the action commented upon and freedom of the press was not raised as a defense. The Murray case was distinguished on the ground that he was a party when In re McKnight was decided four years later. The court there said a suitor "is held to a stricter accountability for his actions."

Two Rounds for Press Freedom

Freedom of the press was raised in the McKnight case. The defendant, managing editor of the Helena Daily Journal, had been convicted of contempt and sentenced to jail by Judge John J. McHatton of Butte for publishing comments imputing bias, prejudice and following the "Butte view" in the probate of the Andrew J. Davis will, then pending in Judge McHatton's court. The article maintained "Nothing like a fair trial can ever be had in Silver Bow county, as neither a judge nor a jury could be obtained there that would render a decision in accordance with the evidence . . . and unless a change of venue is granted, the jig is up for the contestants of the will."

The court construed the publication under the same statute that was involved in the Murray case, but declared the view expressed by McKnight's article "in no way interrupts the orderly progress of the said court in its adjudications." It held that the power of a court to imprison a citizen summarily for contempt is limited to preserving "proper order within the precincts of the court." It concluded that, since McKnight's article did not interfere with the court's authority, "this character of assertion stands in that broad field covered by constitutional sanction of the freedom of speech and press."

7 Mont. 251, 15 Pac. 145 (1887).
8 Mont. 126, 27 Pac. 336 (1891).
The court bolstered this decision in another 1891 case, *In re Shannon.* It held the defendant had been wrongly jailed for contempt by the Butte Police Magistrate for a letter he had published in the *Butte Miner* criticizing "mercenary purposes" in the lower courts. Justice courts are without the common law contempt power, the court said, and therefore can punish only those acts specified as contempts by statute. "None of these would include power to punish for the expression of sentiments through the medium of the public press..." The court then ruled that a citizen has a constitutional privilege to criticize judicial officers.

*To Arkansas for Authority*

Freedom of the press had won two battles, but not the war. The lofty language of the *McKnight* and *Shannon* opinions was overlooked in *State ex rel. Haskell v. Faulds.* The case was decided in 1895, the same year that the statute making any "false or grossly inaccurate report" of court proceedings punishable as a contempt (now subsection 7 of section 94-3540) was enacted. It also is worth noting that the publication involved in the *Faulds* case was aimed at the supreme court and not a district or justice court.

Faulds, editor-publisher of the *Northwest Tribune* at Stevensville, published an article labeling a supreme court ruling on the larceny convictions of three Ravalli county men a "dirty deal" and declaring, "The Supreme Court of Montana... was the first to throw down the bars and deal out injustice to the people of Ravalli County." The automatic period for issuing a remittitur to the lower court had not elapsed and the court held the cases were still "pending" when the article was published. It ordered the contempt proceeding brought under the "false report" statute.

In discussing Montana's constitutional provision on press freedom the court said, "The liberty of the press is one thing; the 'abuse of that liberty' is quite another." Then it quoted at length from the Arkansas case of *State v. Morrill* to support its position that press freedom, while commendable, should not interfere with the contempt power of the courts. The opinion concluded that the issue was limited to whether the defendant’s article constituted a contempt under the "false report" statute. The defendant was found guilty of contempt but the court, after noting his statement disavowing any intent to insult the tribunal, ordered him discharged and the writ vacated.

The decision was declared in harmony with the *Murray* case and the court distinguished it from the *McKnight* case on the ground that the "false report" statute had not been in effect at the time of that case.

The *Faulds* ruling was followed 13 years later by *State ex rel. Grice v. District Court,* which held that a letter criticizing Judge Bourquin of the Second Judicial District was not contempt because the judge had made his ruling, had been disqualified and was without jurisdiction over the matter when the letter appeared in the *Butte Miner.* While the court termed the

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11 Mont. 67, 27 Pac. 352 (1891).
17 Mont. 140, 42 Pac. 385 (1895).
16 Ark. 384 (1855).
37 Mont. 590, 97 Pac. 1032 (1908).
letter "a vicious attack upon the private character of Judge Bourquin, couched in most unseemly and intemperate language," it did not constitute contempt because the offensive language did not refer to any pending litigation and was therefore just a personal controversy between Grice and the judge.

A Matter of "Necessity"

Montana's stoutest language in favor of freedom of the press came in 1916, when the court, speaking through Justice Holloway, delivered its opinion in *State ex rel. Metcalf v. District Court.* Not only did the court eradicate the ominous shadow that Blackstone and the English view of contempt had cast across freedom of speech and press, it set forth a test of "necessity" that, in language and in reasoning, is strikingly similar to the "clear and present danger" test that the federal courts were to adopt some 25 years later.

Metcalf had been convicted of contempt for publishing in the Hamilton Western News what the court labeled "a tirade of vilification and abuse" directed at the county commissioners, the county attorney, and Judge McCulloch, who had dismissed two removal suits Metcalf had brought against the commissioners. The publication appeared approximately six months after the judge had disposed of the suits.

The court, in ruling that the article did not constitute a contempt, provided a clear and concise review of the history of the contempt power and its application to Montana. Justice Holloway, declaring that the Montana statutes on contempt were not exclusive, turned to the common law and met directly the rule of Blackstone and the English courts that anything which scandalizes the court or prejudices the public against it constitutes contempt. He declared that while the *Faulds* case followed that rule, the common law went further and held a disrespectful publication contemptuous regardless of whether it concerned a pending case. In deciding that the Montana court would not follow that extension of the common law, Justice Holloway laid to rest the doctrines of English law which had bothered the court in previous cases and still have their expression in the Supreme Court of the United States through Justice Frankfurter. Justice Holloway declared that this English view had not been transplanted in the United States: "It is doubtful whether the law of contempt as understood in England at the time of the Revolution was ever in full force and effect in any American state, and certainly it was not in Montana. . . ."

The Justice then laid down his rule of "necessity." Noting that the framers recognized the contempt power in the Montana Constitution, he said they "understood the law of contempt to be a law of necessity, and

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52 Mont. 46, 155 Pac. 278, L.R.A. 1916F 132 (1916).

7See his dissenting opinion in Bridges v. California, 314 U.S. 252, 159 A.L.R. 1346 (1941), in which Justice Frankfurter traces the history of the contempt power and the concept of an independent judiciary from the Magna Charta, as expounded and supported by the "great Commentaries" of Blackstone, Kent and Story. He there quotes the statement (in Gompers v. U.S., 233 U.S. 604 (1914)), that the provisions of the United States Constitution were "transplanted from English soil." See also his opinion and appendix of English cases in Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950).

*Mont. Const.,* art. VIII, § 3, provides a review of contempt proceedings by writ of certiorari.
its exercise in any given instance to be measured and restricted by the necessity which calls it into existence." (Emphasis supplied.)

Justice Holloway conceded that "any publication which tends to interrupt the due course of judicial administration "deserves rebuke," but, pointing to the Montana Constitution's provision on freedom of speech and press, he declared:

It cannot be that liberty of the press means only the right to publish laudatory matter concerning a court or judge, but that as to their shortcomings or demerits there must be profound silence.

Turning then to the "false report" statute, he held that it must be construed with regard to the provisions of the constitution and the court's own decisions. Justice Holloway said:

The most cogent reason exists for restraining a false publication concerning matters pending in court, where the administration of the law may be impeded or justice actually defeated. But we cannot believe that the Legislature ever intended to denounce as a crime every false or grossly inaccurate report concerning causes finally determined, when no public interest can suffer as a consequence of the publication. (Emphasis supplied.)

Discussing the article involved, the Justice said its offense was libelling the judge and scandalizing the court but "the offense of 'scandalizing the court,' as understood at common law, is unknown to our jurisprudence, particularly since the adoption of the constitution." Pointing out that a civil action for libel furnishes an ample remedy for the abuse of press freedom, Justice Holloway concluded:

So long as published criticism does not impede the due administration of the law, it were better that we maintain the guaranty of our Constitution than undertake to compel respect or punish libel by the summary process of attachment for contempt. (Emphasis supplied).

It should be noted that Justice Holloway does not speak in terms of any reasonable tendency to interfere with the administration of justice. He speaks of actually impeding or defeating justice. The thread of "public interest" runs through the opinion and is interwoven with the "necessity" doctrine he formulated—that the exercise of the power to punish for contempt must be measured and restricted by the necessity which calls it into existence.

Another Inning for the Contempt Power

Despite Justice Holloway's forward-looking concept of the limitations on the contempt power, the actual ruling of the Metcalf case was narrow and did not dehorn the "false report" statute. It merely held that the statute could not be invoked if the case commented upon was no longer pending.

This distinction was seized upon twenty years later when the court decided In re Nelson. It involved a newspaper article which strongly criticized a supreme court majority opinion. It was not published until nine
days after the court had decided the case, but the court found a punishable contempt on the ground that the ten-day period allowed by a rule of court for the filing of a petition for rehearing had not elapsed and the case was therefore still "pending."

The four-one majority opinion in the Nelson case shunned the "necessity" doctrine of the Metcalf case and held that any "false or grossly inaccurate" report of a pending court proceeding was punishable under the statute.

The defendants were Nelson, editor and manager of the Western Progressive published at Helena, and the publishing corporation of which he was president. The newspaper article concerned the court’s reversal of a judgment for the plaintiff in a suit against a Helena bank. It was headlined, "Four Supreme Court Justices Uphold Bank's Fraud." The gist of the article was that the four judges of the majority had ruled that bankers who practiced fraud couldn’t be reached and that a customer has no recourse against a banker even if he later finds that the banker lied to him about a transaction and used fraud to complete it. These comments were followed by the text of Chief Justice Sands’ dissenting opinion.

The attorney general filed the affidavit charging Nelson with contempt, there was a hearing before the court (at which two of the justices testified), and the editor was found guilty of contempt, fined $250 and sentenced to one day in jail. To answer Nelson’s defense of freedom of the press, the court referred to the Faulds case with the comment, "We cannot improve upon what was said by this court" in that case. It praised the Arkansas court’s language in the Morrill case, which had been quoted at length in the Faulds decision, to the effect that freedom of the press does not allow a court to be degraded or to have the public confidence in the courts destroyed.

Turning to the "false report" statute, the court said, "The legislature has declared that a false or grossly inaccurate publication of the decision of a court is criminal contempt." It then found that the report in question was "grossly inaccurate" and thus contemptuous.

There is an undercurrent of intra-court controversy in the majority opinion, and it erupted into blunt terms in the dissenting opinion of Chief Justice Sands, who also had dissented in the case commented upon by the Western Progressive. He observed that while he had asked the attorney general to investigate a criticism of that dissent by the Helena Independent, no action was taken.

The chief justice disagreed that the case was "pending," declaring that the time allowed for filing a petition for rehearing was based upon a rule of court and newspapers shouldn’t be charged with knowledge that a case was not "final" until that period had elapsed after a decision. He also held that the report was not false or inaccurate, contending that a layman, reading the majority opinion and his dissent in the bank case, could come to no

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4Nelson petitioned for appeal to the Supreme Court of the United States. Six months later he appeared before the Montana court and informed the justices that his appeal had been abandoned. Following his apology in open court, his request that the jail sentence be stricken from the judgment was granted.
other conclusion than that the judges did uphold the bank's "fraud." Whatever his reasons, Chief Justice Sands had strong feelings about the contempt proceedings and stated them in somewhat less than oblique terms:

Judges should not be too thin-skinned. . . . When we permit a poor working woman with a crippled husband to be legally robbed of her savings on the most technical of technical grounds, then we must expect criticism, indignation, and disrespect of our opinion.

The Nelson case is the last Montana decision directly involving freedom of the press in a contempt proceeding. It was decided in 1936—five years before the Supreme Court of the United States turned the corner in the Bridges case.

The Judge As a Witness

The propriety of a judge's testifying in a contempt proceeding was discussed in two 1944 decisions, State ex rel. Moser v. District Court" and State ex rel. Hall v. Niewoehner. In reversing a contempt conviction in the Moser case, the court disapproved of District Judge Hattersley's testifying at the contempt hearing. It would have been appropriate to call in another judge, the court said, because Judge Hattersley was sitting on a matter in which had a "strong interest."

The court had to qualify some of this language in the Niewoehner case. The defendant, an attorney, was convicted of contempt for mailing to members of the Montana Bar a mimeographed letter criticizing the supreme court's refusal to have a motion filed. Two of the justices were summoned as witnesses for the hearing but the court said that this did not disqualify them from hearing the matter."

Niewoehner raised freedom of speech and press under the Federal and Montana Constitutions but the court held that only his conduct as an attorney and officer of the court was at issue. It relied upon subsection 3 of section 93-9801, which specifically lists misbehavior of an attorney as a contempt.

The "clear and present danger" test had been clearly established by the Bridges, Pennekamp and Craig decisions when the Olsen case came before the Montana Court in January of 1956. Although freedom of speech was inherent in the factual situation, the court dismissed the proceedings without a discussion of it.

In their joint accusatory affidavit, the members of the Montana Railroad and Public Service Commission charged that the attorney general was in contempt of the supreme court when he made a broadcast over a Butte

4116 Mont. 305, 151 P.2d 1002 (1944).
42116 Mont. 437, 155 P.2d 205 (1944).
43Judge Hattersley had been disqualified in the case involved, and the defendant filed a paper in the case alleging that a receipt for $3,000 had been stolen and imputing that the judge was somehow involved. The subsequent contempt conviction was reversed on the ground that the judge had been disqualified and the case was no longer pending before him when the objectionable paper was filed. The supreme court held that the judge had an action for libel but not for contempt.
44Two of the justices who heard and decided the Nelson case, 103 Mont. 43, 60 P.2d 365 (1936), testified at the hearing.
television station regarding utility rate increases and regulations. Litigation on the rates was pending before the court.

The court was unanimous in refusing to issue either a warrant of attachment against Olsen or a show-cause order but three separate opinions were filed. Chief Justice Adair declared the affidavit and petition "fail to show acts or conduct on the part of Olsen constituting contempt of this Court," and ruled that the proceeding was lacking in merit. Justice Bottomly concurred, but Justices Angstman and Anderson concurred in the order only "so far as it dismissed the proceedings." In his special concurring opinion, Justice Davis agreed that the proceeding should be dismissed but "not for the reasons given." He continued:

There is no occasion then for this Court to act summarily that its dignity may be upheld or its honor vindicated; and such a reason or one closely related thereto is the only justification this Court can have . . . for moving here as the relators ask.

This language, implying that the court has the power to punish summarily to uphold its dignity, would be alarming if Justice Davis had not added, "True, we have the power to punish for contempt. But that power should be sparingly exercised and then only in a case which comes close to an emergency."

Justice Davis declared that the broadcast had not "hindered, embarrassed, or obstructed" the court in the discharge of its judicial functions and he cited Justice Holmes' dissent in the now-discredited Toledo News case, saying that the charge in that case was "closely akin" to the charge against Olsen. His "emergency" criterion for invoking the contempt power strikes an attitude similar to Justice Holloway's "necessity" doctrine, but it was not formulated further and the Olsen case left the Montana view on contempt by publication precisely where it was after the Nelson case was decided.

Some Clear Rules Emerge

On the surface, Montana has taken a see-saw approach to the problem. There are the McKnight and Shannon cases upholding press freedom and the right to criticize the courts; there is the Metcalf case which cuts down the common law crime of "scandalizing the court" and sets forth the "necessity" test. Against them stand the Faulds and Nelson decisions which allow the courts almost unbridled power to punish for contempt. There are apparent conflicts in the Murray, Niewoehner, Grice and Moser cases. But once these decisions are analyzed, the contradictions can be reconciled and a definite pattern develops. The McKnight and Shannon cases were decided before the "unfair report" statute was enacted, and they no longer apply in cases under that section. The "necessity test" of the Metcalf case can be brushed away as dictum and the decision can be reduced to the mere limitation that the case commented upon must be pending before the "unfair report" statute can be invoked. Thus, the Faulds and Nelson cases do not conflict, and the Murray and Niewoehner cases can be distinguished on the ground that the conduct of parties to actions and attorneys, as officers of the court, is measured by a stricter standard. The Grice and Moser decisions involve interpretations of when a case is "pending."
From this analysis, these clear rules emerge:

One: Under the statute, the test to be applied is whether the publication is a "false" or "grossly inaccurate" report of a judicial proceeding. Any publication so deemed is punishable as a criminal contempt.

Two: The report or criticism is not punishable if it is published after the case involved has been finally decided and is no longer pending. However, the term "pending" is used in the technical legal sense, and a case is not likely to be considered finally decided until all possibilities of further litigation are exhausted.

Three: Criticism aimed at a judge who has been disqualified apparently is not punishable. Even though the case involved is still pending, it is no longer pending before him.

Four: Attorneys are officers of the court and their conduct will be construed on that basis, apparently without regard to claims of freedom of speech or press. The same applies to a party to an action.

The present status of the Montana law provides little comfort for the newspaperman. He can criticize without fear of the contempt power only when a case is no longer "pending" and he will need legal advice to determine when that time arrives. In the practical sense, he cannot criticize with impunity until the decision has grown stale in the public mind. If he dares to strike out editorially against a freshly decided case, then he gambles with the "unfair report" statute. The wheel is wired against him because the question whether his report is "unfair" or "grossly inaccurate" will be decided by the judge or judges he has criticized.

This writer submits that a judge who has been chastised in the public press cannot take a dispassionate view of that criticism. It is only natural that a judge will think any harsh criticism of him is unfair. He is bound to think it grossly inaccurate. A defendant in a contempt case has little hope that the offended judge will rule in his favor. Appellate courts tend to take a more objective attitude—unless they were the target of the criticism. For instance, the Montana Supreme Court reversed the convictions in all five of the contempt by publication cases that arose in the lower courts. But in four of the five cases where the statements were aimed at the Supreme Court, the defendants were found guilty. This is not to say that those cases were decided on spite or ill feeling, instead of rules of law, but it is evident that human nature can be a key factor in a contempt case.

Under the Montana view, the editor or writer who sees fit to rebuke a judge or court faces the possibility of quick retaliation. Freedom of the press is a fragile shield against the contempt power. It is doubtful that the framers of the state constitution intended it to be that way.

CONCLUSIONS

The new federal view on contempt by publication has given freedom of the press priority over the contempt power. Under the doctrine of the Bridges, Pennekamp and Craig cases, statements criticizing the courts cannot be summarily punished unless there is a "clear and present danger" to the administration of justice.

Montana is out of step. The "unfair report" statute is clearly unconstitutional because the United States Supreme Court has held that even if
the statements are unfair and incorrect, they cannot be punished unless there is a "clear and present danger." A newspaperman will not be "laid by the heels for contempt" because of his inaccuracies. It no longer matters whether the case commented upon is "pending" since the new doctrine has been applied to cases still hanging in the judicial balance.

If the Montana Court follows the Nelson and Faulds cases, its decision will be subject to reversal by the United States Supreme Court. Montana must now apply the "clear and present danger" test in cases of contempt by publication. A foundation for the formulation of that test is available in the "necessity" doctrine formulated by Justice Holloway. However, the question of what constitutes a "clear and present danger" is one for final determination by the United States Supreme Court. Mere application of the test by a state court is not insurance against reversal; the established criteria of "high imminence" and "immediate peril" and "serious and substantial" evil must be followed. It is doubtful that any "clear and present danger" existed in the past cases decided by the Montana Court.

The controversy of "trial by newspaper" is beyond the scope of this paper. It has long been argued that the courts must have the power to cut off sensational press coverage of pending criminal cases. It is conceded that there are abuses of press freedom in many instances, but it should be remembered that an accused's right to a fair trial is protected in several ways. A change of venue can be sought; a continuance can be asked to allow the sensation to wither in the public mind; potential jurors prejudiced by news accounts can be ferreted out by voir dire examination. These remedies may not always guarantee a fair trial but the alternative is to shackle the press and forbid all comment from arrest until the trial, as under the English system. This is too harsh. The public has a high stake in criminal justice and these cases should be open to the freest possible comment.

Whatever doctrine may be formulated in regard to "trial by newspaper," it is now clear that the contempt power cannot be invoked merely to protect a judge from criticism. The press need not fear ruffled judicial dignity under the new federal doctrine. The judge who is abused by newspaper must now seek his remedy in an action for libel, where he will be on equal footing with his critic, instead of in a proceeding for contempt where he is accuser, prosecutor, witness and jury as well as judge. It is good riddance to the traditional concept of the contempt power, which treated the judge as a representative of the king and thus beyond criticism.

The courts are not the private preserve of judges and lawyers. The public pays for the operation of the courts, and it is the public that has the highest stake in how the courts are being conducted. In states such as Montana where the judges are elected, the shortcomings and fallibilities of judges should be open to the widest possible criticism. Decisions and rulings may be misconstrued in the press, and no doubt many judges will be wrongly criticized, but what transpires in the courts is public property and the Supreme Court of the United States has laid down the rule that judges cannot use the contempt power to shield themselves from their critics. Montana is due to follow and thereby remove the cloud which now engulfs freedom of expression in this state.

C. J. HANSEN