SCANDALIZING THE COURT—A COMPARATIVE STUDY

The colourful phrase, "scandalizing the court," is used to refer to any hostile criticism of a judge as a judge. It is one part of the law of criminal contempt, which is that law dealing with acts having the effect of hindering the administration of justice. The case law on this subject is not voluminous in Malaya. It all antedates the Constitution of the independent Federation, and, like much of Malayan law, is generally the same as the law of England. However, unlike England, Malaya now has a constitutional provision purporting to guarantee to every citizen the right to freedom of speech and expression,[1] in an article loosely modeled on the First Amendment to the Constitution of the United States,[2] although the Malayan Constitution permits legislative restrictions of that freedom much more extensive than any that would be acceptable in the United States.[3] The American courts are quite clear that the free speech guarantee permits far greater criticism of judges as judges than would be allowed in England. It can scarcely be doubted that Malayan courts may be called upon to reconsider the law of criminal contempt in light of the constitutional guarantee of free speech and expression; for it could hardly be argued that the Defamation Ordinance, which itself antedates the Constitution, can be conceived of as being able to dispose of all the free speech problems which may arise in these matters. The Ordinance, No. 20, of 1957, protects "A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaya and of the judgment, sentence or finding of any such court . . . and any fair and *bona fide* comment thereon." No Malayan case holds one way or the other on whether this language permits criticism of the judge as judge; but this is what the American courts find free speech also protects. Nor can it be thought that the subject of "scandalizing the court" really falls within the ambit of the Internal Security Act, 1960; for while Chapter III thereof gives the Minister concerned with internal security special powers to prohibit any publication which "counsels disobedience to the law or to any lawful order; or is calculated or likely to lead to a breach of the peace, or to promote feeling of hostility between different races or classes

1. Article 10(1)(a).
2. The more direct model may have been Article 19(1)(a) of the Indian Constitution, which is itself based on the American provision.
3. Article 10(2).

of the population or is prejudicial to the national interest, public order, or security of the Federation," and while these powers are very broad, it is manifest that, even within a framework of total prior censorship, they would not reach all modes of communication in which criticism of a court might be couched.

One of the striking features of the law of criminal contempt in England was the fact that until 1960 no appeal lay from a conviction for this offence.[4] Now in Malaya, even without specific statutory authorization, the Constitution[5] would seem to impose upon appellate courts the obligation of reviewing a conviction for criminal contempt upon a defense claim that the publication was privileged under the guarantee of free speech or expression; such, at least, is the duty of review unless Parliament, under its grant of power, elects to legislate in precise terms upon this subject.

On the substantive issues involved, American courts have felt strongly that the purpose of the constitutional guarantee of free speech was to expand that freedom beyond the scope it had in England. On this point Justice Black has said,

> No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. . . . Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.[6]

Of course, many of the freedoms guaranteed by the First Amendment of the United States Constitution are today more secure in England than they were in 1791. But the restrictions imposed by the law of criminal contempt are still deplored by some in England. In citing the current annual report of the General Council of the Press, *The Times* has recently said, "The fact that newspapers had on occasion shown courage in challenging legal decisions in spite of the threat of contempt proceedings only emphasized the stifling effect of the law ... The hazards of printed comment on the administration of justice in the courts still remained, and much reasonable criticism was discouraged."[7]

4. Administration of Justice Act, 1960.

5. Article 10(1)(a).

6. *Bridges* v. *California,* 86 L. Ed. 192 at 204 (1941)

7. *The Times,* December 14, 1962, p. 6, col. 1.

Article 10(1), freeing Malayan courts from the precedent of cases decided before 1957, gives the judiciary an opportunity to re-examine the function served by contempt convictions for "scandalizing the court." The early Malayan cases, following English precedent but in some cases appearing more restrictive, have variously listed the purposes of this punishment as preventing the undermining of public confidence in the courts, loss of which would tend "to deter members of the public from claiming .... those rights or that redress, to which the law entitles them,"[8] as preserving the minds of the judges of the Court of Appeal from influence,[9] as sustaining the confidence of the community in the judges and the administration of justice by the Courts at the "highest pitch," especially in time of emergency.[10] A more detailed examination of the leading Malayan cases may be appropriate.

In *Public Prosecutor* v. *Palaniappan*[11] the facts which gave rise to the contempt proceedings were the following: In March, 1949, one Ganapathy was found guilty in the High Court in Kuala Lumpur of carrying arms, an offence punishable with death under the Emergency Regulations in force. His appeal to the Court of Appeal was dismissed, and he was executed on May 4, 1949. On March, 3, 1949, one Sambasivam had been tried for the same offence in the High Court in Johore by a Judge with two Assessors. At the conclusion of Sambasivam's trial, the Assessors expressed their opinion that he was not guilty. However, the trial Judge disagreed and ordered a new trial. Sambasivam's retrial was held in Johore Bahru on the 21st and 22nd of March, 1949, before a different Judge and different Assessors. At this trial he was convicted and sentenced to death. An appeal to the Court of Appeal was dismissed whereupon he made application to the Privy Council for special leave to appeal to that body. Leave was granted and his appeal was pending when the respondents in this proceeding, proprietors, editor, printer and publisher of the newspaper *Tamil Nesan,* in its issue of June 9, 1949, published an article referring to the case of Sambasivam in which it was suggested that the Indian Government should take political action in London to prevent Sambasivam's execution without awaiting the result of the appeal to the Privy Council. The article also stated that the Judge had sentenced Sambasivam to death in opposition to the juror's (sic) not guilty verdict. It was further stated that Ganapathy had been hanged because, due to lack of experience of the procedure, it was not possible to intervene and get justice done. Of this publication the Court said,

8. *In re Kingdon* v. *Goho,* (1948) 14 M.L.J. 17 at 19.

9. *Public Prosecutor* v. *The Straits Times Press Ltd.,* (1949) 15 M.L.J. 81 at 83.

10. *Public Prosecutor* v. *Palaniappan,* (1949) 15 M.L.J. 246 at 248.

11. (1949) 15 M.L.J. 246.

> I am quite satisfied that this article must have been read by the ordinary man in this country as an indication that there had been a failure of justice on two occasions and that, in the case of Sambasivam, the Judge who tried the case deliberately condemned him to death in opposition to the verdict of the jury . . . it implies . . . that the administration of justice in this country is such that it is necessary to use political influence in order to set it right . . . at a time of emergency such as the present when, as a result of the continued defiance of the forces of law and order by bands of armed terrorists, stringent emergency measures have had to be enacted and enforced . . . it is more than ever essential that the confidence of the community in the Judges and in the administration of justice by the Courts should be sustained at the highest pitch . . . the article before me, taken as a whole, is a serious and deliberate attack upon the course of justice as administered by the Courts here and it contains a wholly unfounded attack upon the Judge who, in his judicial capacity, sentenced Sambasivam and, therefore, constitutes a serious and punishable contempt of Court.[12]

In *Kingdon* v. *Goho*[13] the offending publication was a letter written to the Honorary Secretary and members of the Bar Committee and to Mr. R. N. Green, an Advocate and Solicitor. The Court, as seems to be common in the Malayan cases, declined to set out the offensive language; but the Judge was clear that the letter would have amounted to contempt if published in a newspaper. The Court found it no less contemptuous although published to a very limited group of professional persons. The letter arose from an appearance of Mr. Goho before the Rent Assessment Board, which was here held to be a court for the purposes of contempt. Judge Brown, in this application for leave to issue a writ of attachment against Mr. Goho for contempt of court, conceded that Mr. Goho had left the Board with the feeling that he had been badly treated and Judge Brown specifically stated, "I am not prepared to say that that feeling was unreasonable or unfounded."[14] But these facts were relevant only on the issue of punishment. The Court said, "The question is whether this letter is *calculated,* by its publication ... to deter the public from coming before the Board to have their matters adjudicated upon, and thereby to cause the obstruction of, and interference with, . .. 'the free, open and unimpaired current' of justice. I have not the slightest doubt that it is so calculated."[15] The Court granted an Order in terms of the Motion.

The publication involved in *Public Prosecutor* v. *The Straits Times Press Ltd.*[16] was held to be in contempt on two grounds, scandalizing the

12. *Id.*, at 248.

13. (1948) 14 M.L.J. 17.

14. *Id.,* at 19.

15. *Ibid.*

16. (1949) 15 M.L.J. 81.

court and tending to prejudice the fair disposal of the case on which it commented. Where a case is *sub judice,* an attack on the court may well be for the purpose of influencing the outcome of that case. The so-called "trial by newspaper" has been rightly condemned;[17] and justice clearly demands rules that will limit the possibility of external pressures influencing the result of cases. But to hold a critical statement to be in contempt because the matter is *sub judice* is to avoid analysis of the function of the contempt power. Is the situation the same whether the case is being tried only before a judge as where there are assessors or a jury? Should it matter whether the offending statement is made at the appellate rather than the trial stage?

In the *Straits Times Case* the scandalizing matter appeared in a letter written to the newspaper and published in its columns. The report does not set out the language of the letter; but the Court found that it amounted to an attack upon the prosecution and that it carried "the necessary implication that the trial Court permitted the Deputy Public Prosecutor before it to adopt a course in respect of the accused which was unfair and resulted in a miscarriage of justice."[18] An appeal was pending — it was later dismissed — and the case was, therefore, *sub judice.*

Malayan courts may not choose to read the free speech provision of the Constitution as requiring any different result in these cases if they were to arise today; but it is almost certain that the facts in none of the cases discussed above would have sustained a contempt conviction in the United States. Justice Black has concluded that, "History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case."[19]

Initially, the United States Supreme Court rejects the premises on which the Malayan convictions have been based. Justice Black has said,

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the

17. *E.g.,* Zeigel, "Some Aspects of the Law of Contempt of Court in Canada, England, and the United States," (1959-60) 6 McGill L.J. 229.

18. *Op. cit., supra,* note 16 at 84.

19. *Bridges* v. *California,* 86 L. Ed. 192 at 206 (1941).

> bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[20]

In the same case, *Bridges* v. *California,* Justice Black, speaking for a majority of the Court, noted that the need for employing the contempt power was not necessarily the same for each stage of the legal proceedings, even where the basis of the claim for the employment of the power is the insurance of orderly and fair administration of justice. He said,

> The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not . . . to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications . . . actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication 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 summary punishment.[21]

The facts of that case are illustrative of the extent of comment which the American Supreme Court tolerates. The Court found as follows: The editorial . . . was entitled 'Probation for Gorillas?'. After vigorously denouncing two members of a labor union who had previously been found guilty of assaulting nonunion truck drivers, it closes with the observation: 'Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill.' Judge Scott had previously set a day (about a month after the publication) for passing upon the application of Shannon and Holmes for probation and for pronouncing sentence."[22] The lower courts had found in this language an "inherent tendency" and a "reasonable tendency" to interfere with the orderly administration of justice. But the Supreme Court held, "neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here.

"From the indications in the record of the position taken by the Los Angeles Times on labor controversies in the past, there could have been

20. *Id.*, at 207.

21. *Id.*, at 207-208.

22. *Id.*, at 208-09.

little doubt of its attitude toward the probation of Shannon and Holmes ... it is inconceivable that any judge in Los Angeles would expect anything but adverse criticism from it in the event probation were granted. Yet such criticism after final disposition of the proceedings would clearly have been privileged. Hence, this editorial, given the most intimidating construction it will bear, did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition of the pending case. To regard it, therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor, which we cannot accept as a major premise."[23]

The second part of the opinion was concerned with a telegram published by Bridges, an officer of the C.I.O. union. While a motion for a new trial was pending in a suit between that union and another, the telegram, sent to the Secretary of Labor was published. The findings of the Court on this point were as follows:

> The telegram referred to the judge's decision as 'outrageous;' said that attempted enforcement of it would tie up the port of Los Angeles and involve the entire Pacific Coast; and concluded with the announcement that the C.I.O. union, representing some twelve thousand members, did 'not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board.'[24]

Of this language the Court said:

> Let us assume that the telegram could be construed as an announcement of Bridges' intention to call a strike, something which, it is admitted, neither the general law of California nor the court's decree prohibited. With an eye on the realities of the situation, we cannot assume that Judge Schmidt was unaware of the possibility of a strike as a consequence of his decision. If he was not intimidated by the facts themselves, we do not believe that the most explicit statement of them could have side-tracked the course of justice. Again, we find exaggeration in the conclusion that the utterance even 'tended' to interfere with justice. If there was electricity in the atmosphere, it was generated by the facts; the charge added by the Bridges telegram can be dismissed as negligible. The words of Mr. Justice Holmes . . . seem entirely applicable here: 'I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words.'[25]

The decision in the *Bridges Case* was by a five to four division of the Court. But the point made by the dissenters was that the matter here was *sub judice* and that it was reasonable to suppose that the result

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23. *Ibid.*

24. *Id.*, at 210.

25. *Id.*, at 211.

in the pending case could have been affected. But for that fact, the dissenting view was not different from the majority on the use of the contempt power. Speaking for the dissenting Justices, Mr. Justice Frankfurter said,

> The purpose . . . [of the contempt power] is not to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal.[26]

Elsewhere in the same opinion Justice Frankfurter also said,

> A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power.[27]

The view that judges must be assumed to be a strong breed is a widely held one in the American law of contempt. In *Craig* v. *Harney*[28] Justice Douglas, for the Court, said,

> . . . the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.[29]

In that case the Court recognized the challenged publications as not only being calculated to affect the views of the judge in a pending case but as having amounted to less than accurate, if not deliberately falsified, reporting.

The case was one of forcible detainer in which one Jackson sought to regain possession of a business building from Mayes, who was at that time in the armed services and whose affairs were being handled by an agent. At the close of testimony on May 26 the Judge instructed the jury to return a verdict for Jackson; but the jury returned a verdict for Mayes. Three times the jury defied the instructions of the judge, finally complying, but saying that it acted under coercion of the court and against its conscience. This final verdict was brought in on May 27, and judgment was given. On May 29 Mayes moved for a new trial, the motion being denied on June 6. Meantime on May 26, 27, 28, 30 and 31 the impugned publications appeared. These were editorials and news stories. In them the judge, a layman whose office was elective, "was criticised for taking the case from the jury. That ruling was called

26. *Id.*, at 219.

27. *Id.*, at 218.

28. 91 L. Ed. 1546 (1947).

29. *Id.*, at 1552.

'arbitrary action' and a 'travesty on justice.' It was deplored that a layman, rather than a lawyer, sat as judge. Groups of local citizens were reported as petitioning the judge to grant Mayes a new trial and it was said that one group had labelled the judge's ruling as a 'gross miscarriage of justice.' It was also said that the judge's behavior had properly brought down 'the wrath of public opinion upon his head,' that the people were aroused because a service man 'seems to be getting a raw deal,' and that there was 'no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated.' And the fact that there could be no appeal from the judge's ruling to a court 'familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel was deplored."[30]

Of these publications the Supreme Court said,

> A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.
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> The articles of May 26, 27, and 28 were partial reports of what transpired at the trial. They did not reflect good reporting, for they failed to reveal the precise issue before the judge. They said that Mayes, the tenant, had tendered a rental check. They did not disclose that the rental check was post-dated and hence, in the opinion of the judge, not a valid tender. In that sense the news articles were by any standard an unfair report of what transpired. But inaccuracies in reporting are commonplace. Certainly 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. Conceivably, a plan of reporting on a case could be so designed and executed as to poison the public mind, to cause a march on the court house, or otherwise so disturb the delicate balance in a highly wrought situation as to imperil the fair and orderly functioning of the judicial process. But it takes more imagination than we possess to find in this rather sketchy and one-sided report of a case any imminent or serious threat to a judge of reasonable fortitude . . .
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> The accounts of May 30 and 31 dealt with the news of what certain groups of citizens proposed to do about the judge's ruling in the case. So far as we are advised, it was a fact that they planned to take the proposed action. The episodes were community events of legitimate interest. Whatever might be the responsibility of the group which took the action, those who reported it stand in a different position. Even if the former were guilty of contempt, freedom of the press may not be denied a newspaper which brings their conduct to the public eye.

30. *Id.*, at 1548.

> The only substantial question raised pertains to the editorial. It called the judge's refusal to hear both sides 'high handed,' a 'travesty on justice,' and the reason that public opinion was 'outraged.' ... It deplored the fact that the judge was a 'layman' and not a 'competent attorney.' . . .
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> This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one 'who ventures to publish anything that tends to make him unpopular or to belittle him . . .' ... 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.
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> The editorial's complaint was two-fold. One objection or criticism was that a layman rather than a lawyer sat on the bench. That is legitimate comment; and its relevancy could hardly be denied at least where judges are elected . . .
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> The other complaint of the editorial was directed at the court's procedure — its failure to hear both sides before the case was decided . . .
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> . . . The editorial challenged the propriety of the court's procedure, not the merits of its ruling. Any such challenge, whether made prior or subsequent to the final disposition of a case, would likely reflect on the competence of the judge in handling cases. But . . . the power to punish for contempt depends on a more substantial showing. 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.[31]

Three members of the Court, including Justice Frankfurter, dissented from the majority opinion on the grounds, as in the *Bridges' Case,* that the matter was *sub judicc* and could reasonably have prejudiced the outcome of the case.

Even where the reporting has been demonstrably false and the attack on the judge defamatory, the American courts feel that justice is best served by requiring the judge to proceed with an action for defamation, if he will, an action as available to him as to any other wrongly abused person. In *Pennekamp* v. *Florida*[32] the editor and the publisher of a newspaper had published both editorials and cartoons critical of the administration of justice in certain criminal cases then pending before the Court. "The cartoon caricatured a court by a robed compliant figure as a judge on the bench tossing aside formal charges to hand a document, marked 'Defendant dismissed,' to a powerful figure close at his left arm and of an intentionally drawn criminal type. At the right of the bench, a futile individual, labeled 'Public Interest' vainly protests."[33] The newspaper was protesting the judges' action in

31. *Id.*, at 1551 - 53.

32. 90 L. Ed. 1295 (1946).

33. *Id.*, at 1298-99.

quashing the indictments in certain rape cases. In point of fact the prosecuting officer had agreed in open court that the indictments were so defective as to make reindictment advisable and reindictments were returned the very next day and before the editorial, which said, *inter alia,* that,

> judicial instance and interpretative procedure . . . even go out to find every possible technicality of the law to protect the defendant . . . and nullify prosecution.[34]

Speaking for a unanimous Court, Justice Reed said,

> ... it is clear that the full truth in regard to the quashing of the indictments was not published. We agree . . . that the Rape Cases were pending at the time of the editorials. We agree that the editorials did not state objectively the attitude of the judges.[35]

But the Supreme Court went on to hold,

> The comments were made about judges of courts of general jurisdiction—judges selected by the people of a populous and educated community. They concerned the attitude of the judges toward those who were charged with crime, not comments on evidence or rulings during a jury trial. Their effect on juries that might eventually try the alleged offenders against the criminal laws of Florida is too remote for discussion. Comment on pending cases may affect judges differently. It may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess any more than it generally can depend on the personal equations or individual idiosyncrasies of the tort-feasor . . . We are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida . . .
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> What is meant by clear and present danger to a fair administration of justice? No definition could give an answer. Certainly this criticism of the judges' inclinations or actions in these pending non-jury proceedings could not directly affect such administration. This criticism of their actions could not affect their ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings. For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants.
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> It is suggested, however, that even though his intellectual processes cannot be affected by reflections on his purposes, a judge may be influenced by a desire to placate the accusing newspaper to retain public esteem and secure re-election presumably at the cost of unfair rulings against an accused. In this case too many fine-drawn assumptions against the independence of judicial action must be made to call such a possibility a clear and present danger to justice. For this to follow, there must be a judge of less than ordinary

34. *Id.*, at 1300.

35. *Id.*, at 1302.

> fortitude without friends or support or a powerful and vindictive newspaper bent upon a rule or ruin policy, and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions . . .
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> . . . We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door on permissible public comment. When that door is closed, it closes all doors behind it.[36]

Justice Frankfurter concurred in the decision of this case. By so doing he should not be thought of as retreating from his position that comment on matters *sub judice* is not authorized by the American Constitution. Here, he found the case "pending" only in a technical and not significant sense. It will be noted that the published criticism came after the reindictments, which would themselves, in the usual American State court, precede the trial by a substantial period of time. On this point Justice Frankfurter said,

> Where the power to punish for contempt is asserted, it is not important that the case is technically in court or that further proceedings, such as the possibility of a rehearing, are available . . . The decisive consideration is whether the judge or the jury is, or presently will be, pondering a decision that comment seeks to affect. Forbidden comment is such as will or may throw psychological weight into scales which the court is immediately balancing . . . In the situation before us, the scales had come to rest. The petitioners offended the trial court by criticizing what the court had already put in the scales, not by attempting themselves to insert weights.[37]

All of the American decisions discussed above have been concerned with cases which were before judges sitting without juries. In the most recent contempt case considered by the United States Supreme Court, a case presenting also certain sensitive issues of race relations in a Southern State, the question of the effect of the alleged contemptuous matter on a grand jury was raised. In that case, *Wood* v. *Georgia,*[38] the issues arose out of a county election. The petitioner there was an elected sheriff of Bibb County. He was a white man and he had been elected apparently with a substantial proportion of the Negro vote of the county.

> On June 6, 1960, a judge of the Bibb Superior Court issued a charge to a regularly impaneled grand jury giving it special instructions to conduct an investigation into a political situation which had allegedly arisen in the county. The jury was advised that there appeared to be 'an inane and inexplicable pattern of Negro bloc voting' in Bibb County, and that 'rumors and accusations' had been made which indicated candidates for public office had paid large sums of money in an effort to gain favor and to obtain the Negro vote . . . The instructions were given in the midst of a local political campaign and the judge, in order to publicize the investigation, requested reporters for all local news media to be present in the courtroom when the charge was delivered.

36. *Id.*, at 1304 - 05.
37. *Id.*, at 1315.
38. 8 L. Ed. (2d) 569 (1962).

The following day, while the grand jury was in session investigating the matters set forth in the instructions delivered by the court, the petitioner issued to the local press a written statement in which he criticized the judges' action and in which he urged the citizenry to take notice when their highest judicial officers threatened political intimidation and persecution of voters in the county under the guise of law enforcement. This news release, which was published and disseminated to the general public, stated:

'Whatever the Judges' intention, the action . . . ordering [the grand jury] . . . to investigate "negro block voting" will be considered one of the most deplorable examples of race agitation to come out of Middle Georgia in recent years.

'At a time when all thinking people want to preserve the good will and co-operation between the races in Bibb County, this action appears either as a crude attempt at judicial intimidation of negro voters and leaders, or, at best, as agitation for a "negro vote" issue in local politics.

'No one would question the duty of a Grand Jury to investigate any and all election law violations. However, simple justice would demand that the Judge not single out the negro people for particular investigation . . .

'It is hoped that the present Grand Jury will not let its high office be a party to any political attempt to intimidate the negro people in this community.

'It seems incredible that all three of our Superior Court Judges, who themselves hold high political office, are so politically nieve [sic-naive?] as to actually believe that the negro voters in Bibb County sell their votes in any fashion, either to candidates for office or to some negro leaders.

'If anyone in the community [should] be free of racial prejudices, it should be our Judges. It is shocking to find a Judge charging a Grand Jury in the style and language of a race baiting candidate for political office . . .

'However politically popular the judges' action may be at this time, they are employing a practice far more dangerous to free elections than anything they want investigated.

'James I. Wood.'

The following day, the petitioner delivered to the bailiff of the court, stationed at the entrance to the grand jury room, 'An open letter to the Bibb County Grand Jury,' which was made available to the grand jury at petitioner's request. This letter, implying that the court's charge was false, asserted that in the petitioner's opinion, the Bibb County Democratic Executive Committee was the organization responsible for corruption in the purchasing of votes, and that the grand jury would be well-advised also to investigate that organization.

. . . the petitioner was cited in two counts of contempt . . . The citation charged that the language used by the petitioner was designed and calculated to ... ridicule the investigation ordered by the charge, and 'to hamper, hinder, interfere with, and obstruct' the grand jury in its investigation . . .[39]

39. *Id.*, at 572 - 75.

> The trial court, without making any findings and without giving any reasons, adjudged petitioner guilty on all counts . . .[40]
>
> The Court of Appeals, which upheld the conviction, "did not indicate in any manner *how* the publications interfered with the grand jury's investigation, or with the administration of justice . . . no showing was made that the members of the grand jury, upon reading the petitioner's comments in the newspapers, felt unable or unwilling to complete their assigned task because petitioner 'interfered' with its completion. There is nothing in the record to indicate that the investigation was not ultimately successful or, if it was not, that the petitioner's conduct was responsible for its failure . . .
>
> Thus we have simply been told, as a matter of law without factual support, that if a State is unable to punish persons for expressing their views on matters of great public importance when those matters are being considered in an investigation by the grand jury, a clear and present danger to the administration of justice will be created. We find no such danger in the record before us. The type of 'danger' evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification . . .
>
> Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression. Under our system of government, counter argument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly.[41]
>
> The administration of the law is not the problem of the judge or prosecuting attorney alone, but necessitates the active co-operation of an enlightened public. Nothing is to be gained by an attitude on the part of the citizenry of civic irresponsibility and apathy in voicing their sentiments on community problems. The petitioner's attack on the charge to the grand jury would have been likely to have an impeding influence on the outcome of the investigation only if the charge was so manifestly unjust that it could not stand inspection. In this sense discussion serves as a corrective force to political, economic and other influences which are inevitably present in matters of grave importance . . .[42]
>
> . . . Consistent suppression of discussion likely to affect pending investigations would mean that some continuing public grievances could never be discussed at all, or at least not at the moment when public discussion is most needed. The conviction here produces its 'restrictive results at the precise time when public interest in the matters discussed would naturally be at its height,' and 'no suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.' . . .
>
> . . . we are told by the respondent that, because the petitioner is sheriff of Bibb County and thereby owes a special duty and responsibility to the court and its judges, his right to freedom of expression must be more severely curtailed than that of an average citizen . . .

40. *Id.*, at 576.

41. *Id.*, at 578 - 79.

42. *Id.*, at 581.

> ... assuming the Court of Appeals did consider to be significant the fact that petitioner was a sheriff, we do not believe this fact provides any basis for curtailing his right of free speech. There is no evidence that the publications interfered with the performance of his duties as sheriff or with his duties, if any he had, in connection with the grand jury's investigation . . . nor, so far as the record shows, did the petitioner do any act which might present a substantive harm to the jury's solution of the problem placed before it.[43]

The Court which decided the *Wood Case* consisted of seven members. Justice Frankfurter was ill; and Justice White, recently appointed, did not participate in the decision. The two dissenting Justices were of the opinion that the statements amounted to contempt for the reason that the matter was *sub judice,* the grand jury being an integral part of the American judicial process, and that the statements were obviously designed to influence the outcome of the investigation. But the majority concluded, as in the cases involving only a judge without a jury, that the mere fact that the matter is pending before a court is not sufficient reason to punish criticism of the judge — as judge.

It should, perhaps be emphasized that the *Wood Case* did not involve a petit jury or a conflict of the rights of litigants. The American Supreme Court decisions do not hold that an attempt to influence petit jurors may not be contempt. In the case of the grand jury the Court recalled that body's function of exploring issues before it from the widest possible approach. It is entirely possible that the United States Supreme Court, in its concern to protect the right of free speech, even speech critical of judges, has blurred the distinction between such speech and that which may influence a pending matter for adjudication. Certainly the distinction between these two principles should be preserved. This is, of course, the point repeatedly made by the dissenting Justices, especially in the decisions of Justice Frankfurter, who, *inter alia,* called for a sharper definition of "pending" than the majority has chosen to make.

But even if the Frankfurter view were adopted, it is perfectly apparent that the contempt power of judges and the rights of free expression will on occasion come into conflict. Since this is so, it becomes imperative that a society dedicated both to individual liberty and the orderly administration of justice examine, or re-examine, the point of conflict; for both concepts, generally phrased, are obviously good; both abused can, just as patently, be bad. Few can be more conscious than judges that the Westminster form of democracy flourishes only in an atmosphere of free speech. There is probably no more fundamental democratic right than that of the opposition to be heard. This is a right of which judges in democracies are called upon to be the jealous guardians. Is not the really relevant question whether or not their

43. *Id.*, at 582 - 83.

guardianship of this great right is enhanced by claiming the arbitrary power to stifle and punish criticism of themselves. The answer possibly cannot be derived solely from the law of either England or America. In the former country free speech is so much a part of each man's heritage that this historical limitation may be no great threat to the freedom in its totality. America has the benefit of nearly two centuries of experience to prove to its satisfaction that the fullest guarantee of free expression is fundamental to the society it desires. Doubtlessly each democratic nation must seek the proper place for these conflicting issues in its own political and social context.

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