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# Publish and Perish: The English Law of Contempt

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**PUBLISH AND PERISH:  
THE ENGLISH LAW OF CONTEMPT**

In the recent decision of *Richmond Newspapers, Inc. v. Virginia*,<sup>1</sup> the United States Supreme Court held that a trial judge could not expel two newspaper reporters from the courtroom without a strong factual determination that such expulsion was necessary to insure a fair trial for the accused.<sup>2</sup> In reaching this decision, the court, speaking through the Chief Justice, relied heavily on common-law precedent<sup>3</sup> to support the proposition that all trials<sup>4</sup> are presumptively open to the public. From there, Chief Justice Burger acknowledged certain rights of the mass media because “[i]nstead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people

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1. —U.S.—, 100 S. Ct. 2814 (1980).

2. *Id.* at 2829-30. “Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.” *Id.* at 2830.

3. *Id.* at 2821-2824. (“[the trial is] doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as will or can come so near as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositors and witnesses what is said.’ *Id.* at 100 S. Ct. 2822 citing T. Smith, *De Republica Anglorum* 101 (Alston ed. 1972)” (emphasis added by Burger, C. J.).

4. Although *Richmond Newspapers* involved a criminal trial, the Court, in dicta, expanded this concept to all trials. “[W]e note that historically both civil and criminal trials have been presumptively open.” —U.S.—, 100 S. Ct. at 2829, n. 17.

now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public."<sup>5</sup>

This right to be present, and consequently to print,<sup>6</sup> is in stark contrast to the English law. For over 200 years it was a common-law contempt to publish any information possibly prejudicial to a trial.<sup>7</sup> This has since been codified in the Criminal Justice Act of 1967.<sup>8</sup> Section 3 of this Act prohibits the publication or broadcast of any information about any trial,<sup>9</sup> except for certain sterile facts such as the names of the parties and the issue to be litigated.<sup>10</sup> Violation is summarily punished as contempt.<sup>11</sup> In

5. *Id.* at 2825.

6. *See generally*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (right to publish true accounts of court proceedings).

7. The first case in which a publisher was held guilty of contempt for such an article occurred in 1720. *Pool v. Sacheverel*, (1720) 1 P. Wms. 675. *See* Report of the Committee on Contempt of Court, Cmnd. No. 5794, at 4 (1974) [hereinafter cited as Committee on Contempt].

8. Criminal Justice Act 1967, section 3.

9. That section provides that "it shall not be lawful to publish . . . or to broadcast in Great Britain a report, of any committal proceedings in England and Wales containing any matter other than that permitted . . ." *Id.* at § 3(1).

10. *Id.* at § 3(4).

The following matters may be contained in a report of committal proceedings published or broadcast without an order under subsection (2) of this section before the time authorised by the last foregoing subsection, that is to say,—

- (a) the identity of the court and the names of the examining justices;
- (b) the names, addresses and occupations of the parties and witnesses and ages of the defendant or defendants and witnesses;
- (c) the offence or offences, or a summary of them, with which the defendant or defendants is or are charged;
- (d) the names of counsel and solicitors engaged in the proceedings;
- (e) any decision of the court to commit the defendant or any of the defendants for trial, and any decision of the court on the disposal of the case of any defendants not committed;

England, "there is no such thing as a legal right to a free press."<sup>12</sup> There is no first amendment. The value of free speech is not weighed against the value of a public trial because all conflicts are resolved in favor of the administration of justice.<sup>13</sup>

The practice of strictly limiting the press as a means of avoiding "trial by newspaper" is the major difference between press rights

- (f) where the court commits the defendant or any of the defendants for trial, the charge or charges, or a summary of them, on which he is committed and the court to which he is committed;
- (g) where the committal proceedings are adjourned, the date and place to which they are adjourned;
- (h) any arrangements as to bail on committal or adjournment;
- (i) whether legal aid was granted to the defendant or any of the defendants.

11. The Act further provides:

If a report is published or broadcast in contravention of this section, the following persons, that is to say—

- (a) in the case of a publication of a written report as part of a newspaper or periodical, any proprietor, editor or publisher of the newspaper or periodical;
- (b) in the case of a publication of a written report otherwise than as part of a newspaper or periodical, the person who publishes it;
- (c) in the case of a broadcast of a report, any body corporate which transmits or provides the programme in which the report is broadcast and any person having functions in relation to the programme corresponding to those of the editor of a newspaper or periodical;

shall be liable on summary conviction to a fine not exceeding £500.

*Id.* at § 3 (5).

12. Bloom, *The Sunday Times Case*, 123 New L.J. 799, 800 (1973).

13. "In a legal confrontation [between the administration of justice and the freedom of the press] where one side is backed by legal status and the other [only] by a self-assumed obligation to keep the public informed, the one with firmly established legal recognition is bound to prevail." *Id.* at 800.

in the United States and Britain. It is the object of this paper to discuss the ramifications of this policy.

A famous footnote suggested<sup>14</sup> that American first amendment freedoms are accorded special protection because of the part they play in the governmental process.<sup>15</sup> The English contempt law, however, has a profound chilling effect on the English press<sup>16</sup> and "there is no doubt that a great deal of *reasonable* criticism of the administration of justice is thereby discouraged. . . ."<sup>17</sup> Clearly, then, the shining moment of American journalism—the Watergate investigation—could never have happened in England.<sup>18</sup> An attempt at such crusading journalism led to England's leading precedent on contempt to date, *Attorney-General v. Times Newspapers Ltd.*, [hereinafter cited as the *Sunday Times Case*,]<sup>19</sup> dis-

14. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . [O]n restraints upon the dissemination of information, see *Near v. Minnesota ex rel Olson*, 283 U.S. 697, 713-714, 718-720, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin* [303 U.S. 444]. . . .

*U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938). The footnote is called "famous" in Gunther, *Cases and Materials on Constitutional Law* 541 (10th ed. 1980).

15. See also *Palko v. Connecticut*, 302 U.S. 319, 326-327 (1937) in which Mr. Justice Cardozo said that "freedom of thought, and speech" were "the indispensable condition, of nearly every other form of freedom."

16. "I probably spend more time worrying about the possibility of contempt of court than I do about all other legal restrictions put together" said Charles Wintour, editor of the *Evening Standard*." Bloom, *The Sunday Times Case*, 123 New L.J. 799, 800 (1973).

17. Warren, *The British Are Coming! The British Are Coming! Is the Bicentennial Celebration to Include Imposition of the British Contempt Rule?*, 51 L.A.B.J. 543, 546 [hereinafter cited as Warren], citing Politician and Economic Planning Group, *A Report on the British Press* 212 (1938) (emphasis added).

18. Evans, *British Law of Contempt Thwarts Speech and Justice*, 52 Fla. B. J. 462, 466-67 (1978) [hereinafter cited as Evans].

19. [1973] 3 All E.R. 54 (H.L.).

cussed *infra*.

But any discussion of the English contempt law "generally begin[s]"<sup>20</sup> with the venerable *St. James Evening Post*<sup>21</sup> case. There Lord Hardwicke L.C. pronounced:

Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard . . . There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.<sup>22</sup>

Prejudicing the minds of the public remained a concern of English judges. In the early nineteenth century, the reporting of committal proceedings was forbidden only at the preliminary hearing stage of a criminal trial rather than at the trial itself.<sup>23</sup> Lord Ellenborough explained the difference in the *Case of Fisher*:<sup>24</sup> "The publication of proceedings in courts of justice where both sides are heard, and matters are finally determined, is salutary and therefore it is permitted. The publication of these preliminary examinations has a tendency to pervert the public mind . . . it is therefore illegal."<sup>25</sup>

This view did not prevail, however, and gradually any fair and substantially accurate report of a trial was deemed acceptable.<sup>26</sup> There arose various different tests of contempt before the *Sunday Times Case*, all based on the concept of prejudice or

20. *Id.* at 60.

21. *In re Read and Huggonson*, [1742] 26 E.R. 683, 2 Atk. 469.

22. *Id.* at 469-71.

23. *Miller, Reporting Committal Proceedings—I*, 123 New L.J. 1119, 1119 (1973) [hereinafter cited as *Miller*].

24. [1811] 170 E.R. 1253.

25. *Id.* Certainly the United States Supreme Court was not taking such a paternalistic attitude when it made the same distinction between pre-trial hearings and the actual trial, some 170 years later in *Gannett v. DePasquale*, 443 U.S. 368 (1979) and *Richmond Newspapers v. Virginia*, -U.S.-, 100 S. Ct. 2814, 2821 (1980).

26. *Miller, supra* note 23, at 1119.

improper interference with the legal process.<sup>27</sup> *Robson v. Dodds*<sup>28</sup> forbade comments "which are calculated to impede the course of justice."<sup>29</sup> *R v. Duffy ex parte Nash*<sup>30</sup> held that contempt was possible only if there was "a real risk as opposed to a remote possibility that the article was calculated to prejudice a fair hearing."<sup>31</sup> Finally, the court in *Vine Products v. Mackenzie*<sup>32</sup> declared that the publication must be "likely to prejudice the fair trial of the action."<sup>33</sup> As a result of growing dissatisfaction at the bench and bar with the contempt law, and one particularly notorious case newspaper contempt,<sup>34</sup> the Tucker Committee<sup>35</sup> was established to review the state of the law.<sup>36</sup> Its report and suggested restrictions were eventually incorporated in the Criminal Justice Act of 1967.<sup>37</sup> It was under this Act that the *Times* was prosecuted.

The facts of the *Sunday Times Case* are these: in 1958 the Distillers Company began to manufacture and sell a sedative for pregnant women which contained a drug called thalidomide.<sup>38</sup> The drug had ghastly side effects, causing many<sup>39</sup> of the infants born

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27. Committee on Contempt, *supra* note 7, at 44.

28. [1869] 20 L.T.R. 941.

29. *Id.* at 941. The word "calculated" seems to imply intent, a difficult standard of proof for the prosecution to bear. *R v. Tibbits and Windust*, [1902] 1 K.B. 77, was the most recent successful prosecution for perversion of the course of justice. The newspaper had printed the "full background, including previous convictions of two persons who were awaiting trial on criminal charges." The Court found that the requisite intent could be inferred from the articles themselves. Committee on Contempt, *supra* note 7, at 29.

30. [1960] 2 Q.B. 188.

31. Committee on Contempt, *supra* note 7, at 45.

32. [1965] 3 All E.R. 58 (reported *sub nom. Vine Products v. Mackenzie & Co.*), [1966] 1 Ch. 484. The newspaper article had ventured an opinion on an issue to be litigated: whether the word "sherry" only referred to the product of a certain region in Spain.

33. [1965] 3 All E.R. at 63, [1966] 1 Ch. 484 at 498.

34. One murder trial was accompanied by enough publicity to provoke the comment, "This man . . . is being sent to the gallows on trial by newspaper." However, he was acquitted. Miller, *supra* note 23, at 1119.

35. The Report of the Departmental Committee on Proceeding Before Examining Justices, Cmnd. 479 (1958).

36. Miller, *supra* note 23, at 1119.

37. *Id.*

38. [1973] 3 All E.R. at 58 (H.L.).

39. Some 451 babies were born deformed. Attorney-General v. Times Newspapers Ltd., [1973] 1 All E.R. 815, 818 (C.A.).

to mothers who had used the drug to be deformed.<sup>40</sup> In 1961 the company removed the drug from the market<sup>41</sup> and in 1962 suits were filed against Distillers<sup>42</sup> asking compensation for damages sustained by the children. From November 7, 1962, when the first writs were filed until June 1976 when the last claim was settled, the litigation was pending (*sub judice*) and press coverage was therefore suppressed.<sup>43</sup> In 1968, Distillers agreed to pay claimants forty percent of the damages to which they would be entitled if successful in establishing liability.<sup>44</sup> Accordingly the company paid out about £1 million.<sup>45</sup> Temporarily the issue was no longer *sub judice* and reporting was permitted.

However, the news of this settlement encouraged nearly 400 families who were not covered by this settlement to bring suit.<sup>46</sup> The reopening of the case once again triggered the contempt rule.<sup>47</sup>

In November 1971, Distillers offered £3¼ million in settlement of all outstanding claims on conditions that the offer remain confidential and every family concerned agree to its terms.<sup>48</sup> In effect, these families were being offered half the sum offered to the 1962 claimants.<sup>49</sup> Throughout this period the government did not investigate the affair and the negotiations were unmonitored.<sup>50</sup> The confidentiality requirement, of course, prohibited the parents from talking to the press.<sup>51</sup> The families fought alone.

40. [1973] 3 All E.R. at 58 (H.L.).

41. *Id.*

42. "Sixty-two families had brought their actions within the limitation period." *Teff & Monroe, Thalidomide: The Longest Silence*, 126 New L.J. 1056, 1056 (1976) [hereinafter cited as *Teff & Monroe*]. Both lower court opinions confirm this number as 62. [1973] 1 All E.R. 815, 818 (C.A.), [1972] 3 All E.R. 1136, 1139 (Q.B.). *But see* [1973] 3 All E.R. 54, 58 (H.L.) wherein Lord Reid stated that 70 actions were commenced and 65 of these were settled.

43. *Teff & Monroe, supra* note 42, at 1056.

44. "Two cases were . . . tried by agreement to establish the proper measure of damages . . ." [1973] 3 All E.R. 54, 58 (H.L.). *See S. v. Distillers Co. (Biochemicals)* [1969] 3 All E.R. 1412.

45. [1973] 3 All E.R. 54, 58 (H.L.).

46. *Id.*

47. *See* Criminal Justice Act 1967 § 3.

48. *Teff & Monroe, supra* note 42, at 1056.

49. *Evans, supra* note 18, at 466.

50. *Id.* at 464.

51. *Id.* at 465. One David Mason objected to the settlement offer and in particular [to] the drug companies' [sic] insistence that if any single parent rejected the offer then it would



At this time<sup>52</sup> the *Sunday Times* became interested in the case and decided to object to the treatment the thalidomide babies were receiving.<sup>53</sup> The problem facing the *Times* was that of running the story without instantly being convicted of contempt (with a possible fine or prison sentence) after the first installment.<sup>54</sup> The

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be withdrawn from all of them. David Mason was taken to court by the official solicitor and had his parental rights removed. He won on appeal and the *Daily Mail* began to publish some of his story. No sooner had it done so, and in particular his claim that the compensation was wholly inadequate, then the Attorney General warned the *Daily Mail* it might be committing contempt. The *Daily Mail* stopped its reporting. BBC television cancelled a planned program. Silence descended again.

*Id.* at 466.

52. "It was the turning point in the whole matter. . . . Over ten years had passed since the children were born with these deformities, and still no compensation had been paid by Distillers." [1973] 1 All E.R. 815, 819 (C.A.).

53. Evans, *supra* note 18, at 466.

54. *Id.* Times Editor Harold Evans gives this humorous account of how a newspaper might try to run a story without running afoul of the contempt law:

#### MAN DETAINED

Stout balding Mr. John Jones, cashier to a firm of textile converters, was missing from his home yesterday in Manchester. Round the corner Mr. Henry Brown said he had not seen his blond attractive wife Mamie since the weekend.

A director of the firm which employs Mr. Jones said yesterday that the firm's books would have been due for audit next week. Mr. Jones is also treasurer of the local Working Man's Holiday Fund. Neighbors described Mrs. Brown as a gay girl. It is understood she and Mr. Jones were close friends. At a flat in Southpool stout balding Mr. Arthur Smith said he had never heard of Mr. Jones of Manchester. Blond attractive Mrs. Doris Smith said she had never been known as Mamie Brown.

Earlier today police were seeking to interview a stout bald-headed man whom they believe could be of assistance to them in their inquiries into a case of fraud and conversion. A man accompanied police to Southpool police station. Blows were exchanged in the High Street. After a man ran along High Street at speed,

problem was solved by drawing a distinction between the legal and moral aspects of the case.<sup>55</sup> On September 24, 1972,<sup>56</sup> the *Times* ran a long article about the case arguing two general propositions: that there should be absolute liability for the manufacturer and that the method of assessing damages was inadequate.<sup>57</sup> The main thrust of the editorial was that "the law is not always the same as justice."<sup>58</sup>

Distillers immediately brought this article to the attention of the Attorney-General.<sup>59</sup> In England, the Attorney-General has discretionary powers of prosecution which are based on public interest factors.<sup>60</sup> When he chose not to prosecute,<sup>61</sup> Distillers, who might still have brought an independent action,<sup>62</sup> also took no action.<sup>63</sup> The article also promised that documentary evidence describing the manufacture of the drug would be contained in a future article.<sup>64</sup> The Attorney-General requested and received a copy of this proposed article and issued an injunction restraining publication.<sup>65</sup>

In its consideration of the Attorney-General's application

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police ran at high speed along the street after a man.  
Later a man was detained. A man will appear in court  
today.

*Id.* at 463.

55. *Id.* at 466.

56. Similar articles appeared on October 1, 8, 15, 22 and 29 of 1972. [1972] 3 All E.R. 1136, 1140 (Q.B.).

57. [1973] 3 All E.R. 54, 59 (H.L.).

58. *Id.* at 60.

59. *Id.*

60. *Id.* "In doing so [the Attorney-General] acts in constitutional theory on behalf of the Crown, as do Her Majesty's judges themselves; but he acts on behalf of the Crown as 'the fountain of justice' and not in the exercise of its executive functions." *Id.* at 74 (Diplock, L.J.).

61. *Id.* at 59.

62. *Id.* See also Committee on Contempt, *supra* note 7, at 38, describing "gagging writs."

63. [1973] 3 All E.R. 54, 59 (H.L.).

64. Evans, *supra* note 18, at 466.

65. [1973] 3 All E.R. 54, 59 (H.L.). It may be noted at this point that despite losing the ensuing legal battles to have the injunction lifted, the *Times'* strategy was successful. Distillers ultimately raised the settlement figures to provide £6 million for the outstanding claimants plus a charitable inflation-proofed trust fund of £14 million for all the children, to be paid out over seven years. Teff & Monroe, *supra* note 42, at 1056.

for an injunction of the second *Sunday Times* article, the divisional court<sup>66</sup> enumerated three distinct types of comment on a pending action which might be punishable as contempt: that which influences the mind of the court itself, that which affects witnesses who are to be called, and that which prejudices the free choice and conduct of the parties.<sup>67</sup> Categorizing the case as falling within the third category,<sup>68</sup> the court reviewed the *St. James Evening Post Case*,<sup>69</sup> *Robson v. Dodds*<sup>70</sup> and others.<sup>71</sup> Fearing that the inconsistency of language would cause confusion among laymen seeking to follow the law,<sup>72</sup> the court devised its own formula: "the test of contempt is whether the words complained of create a serious risk that the course of justice may be interfered with."<sup>73</sup> The court granted the injunction upon finding that the *Times* intentionally tried to "influence the settlement of pending proceedings by bringing pressure to bear on one party."<sup>74</sup> The balance-of-competing-interests argument submitted by the *Times* was rejected.<sup>75</sup>

The decision of the divisional court was reversed on appeal.<sup>76</sup> The Court of Appeal unanimously voted to lift the injunction, primarily because the litigation was "dormant."<sup>77</sup> Lord Denning, M.R.,<sup>78</sup> reasoned that only active litigation was protected by the

66. *Attorney-General v. Times Newspapers Ltd.*, [1972] 3 All E.R. 1136 (Q.B.).

67. *Id.* at 1142.

68. *Id.*

69. *In re Read and Huggonson*, (1742) 26 E.R. 683, 2 Atk. 469.

70. [1869] 20 L.T.R. 941.

71. This review included *Re William Thomas Shipping Co.*, [1930] 2 Ch. 368, 373 ("... may cause him [plaintiff] to discontinue the action from fear of public dislike . . .") and *Skipworth's Case*, [1873] 1 L.R. 9, Q.B. 230, 232-33: "More commonly the mode has been that of an attempt to influence the trial by attacking, deterring and frightening witnesses, or by commenting on the case." [1972] 3 All E.R. at 1142.

72. [1972] 3 All E.R. 1136, 1144 (Q.B.).

73. *Id.* at 1145. The Phillimore Committee eliminated this test from serious consideration: "What is 'serious'? What is 'interference'? What degree of probability is implied by 'may'?" Committee on Contempt, *supra* note 7, at 37.

74. [1972] 3 All E.R. 1136, 1146 (Q.B.).

75. *Id.* at 1145.

76. *Attorney-General v. Times Newspapers Ltd.*, [1973] 1 All E.R. 815 (C.A.).

77. *Id.* at 821.

law of contempt<sup>79</sup> and so far as the law was concerned "these 266 actions have gone soundly to sleep and have been asleep for these last three or four years."<sup>80</sup>

The court also acknowledged that the public interest involved outweighed the prejudice which might accrue to Distillers. A balancing test was endorsed.<sup>81</sup>

Finally, since the House of Commons had relaxed its own *sub judice* rule and permitted debate,<sup>82</sup> the court believed that it would be unfair to forbid the *Times* to comment on the case.<sup>83</sup> Lord Phillimore noted, *inter alia*, that since 120 thalidomide claimants were "hopelessly" barred by the statute of limitations, and could not be subject to the *sub judice* rule, their stories could freely be reported.<sup>84</sup> Any distinction between the two groups would be impossible.<sup>85</sup>

The House of Lords unanimously reversed the Court of Appeals,<sup>86</sup> but with five separate opinions.<sup>87</sup> Appropriately, Lord

78. Master of the Rolls.

79. [1973] 1 All E.R. 815, 822 (C.A.).

80. *Id.* at 821. He stated: "I think I can see why. Both sides have been hoping for a settlement." *Id.*

81. *Id.* at 822.

82. "As soon as matters are discussed in Parliament, they can be, and are, reported at large in the newspapers." *Id.* at 823.

83. *Id.* at 822.

84. *Id.* at 825.

85. *Id.* Lord Simon also had trouble with this issue in the House of Lords opinion:

The litigation being concluded, the public interest in freedom of discussion becomes paramount, since there are now unremitted decisions for the public itself to make—especially whether the law and its institutions need modification in the light of what has happened. The only *legal rider* is that the discussion of concluded cases must not be made a pretence for interference with pending cases. *Professional responsibility* may, over and above this *self-impose* some limitation on the discussion of past cases when they may be relevant to pending cases, so as to ensure that individuals are not unfairly prejudiced.

[1973] 3 All E.R. 54, 82 (H.L.) (Simon, L.J.) (emphasis added).

86. *Attorney-General v. Times Newspapers Ltd.*, [1973] 3 All E.R. 54 (H.L.).

87. *Id.* at 55-56. "Such a variety of judicial reasoning is exceptional

Reid declared, "that the main objection to the existing law of contempt is its uncertainty."<sup>88</sup> He further stated that the law is "founded entirely on public policy"<sup>89</sup> and is designed to "prevent interference with the administration of justice and . . . should . . . be limited to what is reasonably necessary for that purpose."<sup>90</sup> Lord Diplock set forth the requirements for the due administration of justice:

first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. *Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.*<sup>91</sup>

Thus it was decided that the proposed *Times* article could amount to contempt of court because there was serious danger that it would produce public prejudgment of the issue before the court—whether or not the company had been negligent.<sup>92</sup> The result of this decision appears to be an absolute rule whereby any

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especially in a matter where penal sanctions are involved." Committee on Contempt, *supra* note 7, at 4. This illustrates the uncertain state of the law. *Id.*

88. [1973] 3 All E.R. 54, 60 (H.L.).

89. *Id.*

90. *Id.*

91. *Id.* at 72. (Diplock, L.J.) (emphasis added).

92. *Id.* at 63-64.

such "public prejudice is regarded as a contempt in all circumstances . . . irrespective of whether or not it is likely to have a direct effect upon the litigation in question."<sup>93</sup> The House of Lords dealt with the reasoning of the Court of Appeals by categorizing "active negotiations" as part of litigation, and not a state of dormancy.<sup>94</sup> The notion of weighing the public interest against the harm to the administration of justice is dispatched in these words: "I do not see why there should be any difference in principle between a case which is thought to have news value and one which is not. Protection of the administration of justice is equally important whether or not the case involves important general issues."<sup>95</sup> The importance of the House of Commons debate on the thalidomide babies was denied because nothing there appeared prejudicial to Lord Reid.<sup>96</sup>

Lord Cross explained his vote in this manner:

But why, it may be said should such a publication be prohibited when there is no such risk [of prejudice to judge or jury]? The reason is that one cannot deal with one particular publication in isolation.<sup>97</sup> A publication prejudging an issue pending in litigation which is itself innocuous enough may provoke replies<sup>98</sup> which are far from innocuous but which, as they are replies, it would seem unfair to restrain. So gradually the public would become habituated to, look forward to<sup>99</sup> and resent the absence of preliminary discussions in the

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93. 37 Mod. L. Rev. 96, 98 (1974).

94. [1973] 3 All E.R. 54, 65 (H.L.).

95. *Id.* at 66. Characterizing "public interest" to mean "news value" appears to be a deliberate misconstruction of the words.

96. *Id.*

97. *But see* [1973] 3 All E.R. at 83 (H.L.), where Lord Simon suggests that scholarly discussion in a legal journal would not be an interference with the due course of law.

98. *But cf.* *Terminiello v. Chicago*, 337 U.S. 1, 4 (1948), where Mr. Justice Douglas wrote: "a function of free speech under our system [of government] is to invite dispute."

99. "[P]ublic inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice." 100 S. Ct. at 2825, *citing* *State v. Schmit*, 273 Minn. 78, 87-88, 139 N.W. 2d 800, 807 (1966).

“media” of any case which aroused widespread interest. An absolute rule—though it may seem unreasonable if one looks only to the particular case—is necessary in order to prevent a gradual slide<sup>100</sup> towards trial by newspaper or television.<sup>101</sup>

Lord Morris of Borth-y-Gest elaborated on why he thought such a rigid posture toward contempt was necessary: “it is because the very structure of ordered life is at risk if the recognized courts of the land are so flouted that their authority wanes and is supplanted.”<sup>102</sup> Lord Simon of Glaisdale admitted, however, that if a public discussion is occurring and a lawsuit arises about that same topic, such publications may continue provided that prejudice to the particular litigation is unintended.<sup>103</sup>

On the topic of public exertion of pressure on a litigant as opposed to private pressure, Lord Cross and Lord Reid believed that fair and temperate criticism,<sup>104</sup> no matter how strong or

100. Slippery slope? Felix Frankfurter had to deal with the same *reductio ad absurdum* argument as a young advocate before the United States Supreme Court in one of the *Lochner*-era cases involving a statute setting a ten-hour limit on the work day.

During the course of the argument [Mr. Justice] McReynolds said to me, “Ten hours! Ten hours! Ten! Why not four?” He was then the youngest member of the Court and was sitting to my extreme right. “If ten, why not four?” in his snarling, sneering way. I paused, synthetically, self-consciously, dramatically, just said nothing. Then I moved down towards him and said, “Your honor, if by chance I may make such a hypothesis, if your physician should find that you’re eating too much meat, it isn’t necessary for him to urge you to become a vegetarian.”

Holmes said, “Good for you!” very embarrassingly right from the bench. He loathed these arguments that if you go this far you must go further. “Good for you!” Loud. Embarrassingly.

Phillips, *Felix Frankfurter Reminisces*, 102.

101. [1973] 3 All E.R. 54, 84 (H.L.) (Cross, L.J.) (footnotes added).

102. *Id.* at 66.

103. *Id.* at 82.

104. *But cf.* *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), where Mr. Justice Brennan declared that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic,

effective,<sup>105</sup> was legal.<sup>106</sup> They believed the initial *Sunday Times* article to be within the law.<sup>107</sup> Lord Diplock and Lord Simon disagreed with this conclusion, believing the first article to be a contempt as well.<sup>108</sup>

The injunction was ultimately discharged in 1976.<sup>109</sup> However, having exhausted all judicial remedies in the United Kingdom, the *Times* appealed to the European Commission on Human Rights, which found merit in the claim and referred the case to the European Court of Human Rights.<sup>110</sup> That court found that Article 10 of the European Convention on Human Rights had been violated.<sup>111</sup> Article 10 has two parts, the first giving the right to freedom of expression and the second qualifying the freedom to restrictions "as are prescribed by law."<sup>112</sup> The court held that the dual re-

and sometimes unpleasantly sharp attacks. . . ."

105. On this basis, and bearing in mind that the legality of public pressure now seems to turn on whether it is characterised as abuse or temperate criticism, it would be irrelevant that litigant A is so thick skinned (or his assets so substantial) as to be immune from the pressures of public invective. Conversely, it would be irrelevant that litigant B is particularly susceptible to pressure which takes the form of fair and temperate criticism of the position he has chosen to adopt.

37 Mod. L. Rev. 96, 101 (1974).

106. *Id.* at 100-01.

107. *Id.* at 101.

108. *Id.*

109. "[T]he possibility of pressure on Distillers has completely evaporated." *Attorney-General v. Times Newspapers Ltd.*, *The Times*, June 24, 1979.

110. Duffy, *The Sunday Times Case: Freedom of Expression, Contempt of Court and the European Convention on Human Rights*, 5 Hum. Rts. Rev. 17, 18 (1980) [hereinafter cited as Duffy].

111. Judgment of the European Court of Human Rights dated April 26, 1979.

112. Article 10 provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.



requirements necessary to be "prescribed by law," accessibility and foreseeability<sup>113</sup> were not present in the English contempt law.

By a vote of 11 to 9, the prejudgment test used by the House of Lords was viewed as overly unpredictable and uncertain.<sup>114</sup> "Since the delivery of the judgment, the United Kingdom government has indicated that it intends to introduce legislation to reform the law on contempt so as to comply with the Court of Human Rights' judgment."<sup>115</sup>

After the *Sunday Times Case*,<sup>116</sup> the Phillimore Committee was commissioned to study the law of contempt and to recommend changes.<sup>117</sup> Suggestions were made in regard to what should constitute contempt,<sup>118</sup> when such a law should be applied,<sup>119</sup> the publications which should be subjected to strict liability,<sup>120</sup> possible

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Reprinted in Duffy, *supra* note 110, 18-19.

113. ¶¶ 47-49 of the Judgment of the European Court of Human Rights dated April 26, 1979.

114. Duffy, *supra* note 110, at 18-20.

115. *Id.* at 18. One commentator called the Judgment of the European Court of Human Rights "the greatest blow to the fabric of English law that has ever occurred. . . ." Mann, *Contempt of Court in the House of Lords and the European Court of Human Rights*, 95 L.Q. Rev. 348, 349 (1979).

Contempt reform legislation was finally introduced in November of 1980. The Times called it "adulterated Phillimore, and the adulteration is mainly in a restrictive direction." "The Bill owes its appearance more to the decision of the European Court of Human Rights in Strasbourg . . . than to any enthusiasm on the part of governments [sic] to liberalize the law." The Times, Nov. 28, 1980, at 15, col. 1. See also The Times, Dec. 9, 1980, at 12, col. 1, for a report on the debate in the House of Lords.

116. [1973] 3 W.L.R. 298 (H.L.).

117. Committee on Contempt, *supra* note 7, at 1.

118. A publication should be "subject to the law of contempt if it creates a risk of serious prejudice" or "[a]ny conduct intended to pervert . . ." *Id.* at 92-93 (emphasis in original).

119. In a criminal trial the law should be effective from the time the accused is charged until the sentence is pronounced. *Id.* at 93.

defenses,<sup>121</sup> penalties,<sup>122</sup> and procedural aspects.<sup>123</sup> The legal community greeted this report with further analysis, criticism and recommendations<sup>124</sup> and eventually wrote another Committee Report.<sup>125</sup> The law remains unchanged.

The First Amendment to the United States Constitution<sup>126</sup> assures that the contempt issues raised above are treated differently in America. When a United States court confronts a clash between the right to a fair trial and the right to a free press, it may not sacrifice one for the other because both sides are backed by legal status.<sup>127</sup> Prior restraint is dead.<sup>128</sup> The judicial gag order was laid to rest in *Nebraska Press Assn. v. Stuart*<sup>129</sup> where, even in the face of massive pretrial publicity resulting from a sensational murder,<sup>130</sup> the United States Supreme Court found there was insufficient cause to silence

120. The communications subject to the law should include only a "speech, writing, broadcast or other communication . . . which is addressed to the public at large." *Id.* at 92.

121. The defenses include: "innocent publication," (that is, if the editor did not know and had no reason to suspect proceedings were pending), "fair and accurate report[ing] of legal proceedings in open court published contemporaneously and in good faith," and "part of a legitimate discussion of matters of general public interest and that it [the publication] only incidentally and unintentionally created a risk of serious prejudice to particular proceedings." But "public benefit" was not recommended as a defense. *Id.* at 93.

122. The Committee recommended that fines be unlimited, but that the maximum term of imprisonment be two years. *Id.* at 95.

123. There should be opportunity for the defendant to explain his conduct, call witnesses and have legal counsel for his defense. *Id.*

124. See, e.g., Lowe, *Freedom of Speech and the Sub Judice Rule*, 127 New L.J. 676 (1977); Whitaker, *Contempt—The Need for Reform* 128 New L.J. 1040 (1978).

125. The Faulks Committee, *Contempt of Court—A Discussion Paper*, Cmnd. 7145 (1978).

126. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. Const. amend. I.

127. The right to a fair trial is guaranteed by the 5th and 6th Amendments. U.S. Const. amends. V and VI. Compare note 13, *supra*.

128. "The [Supreme] Court has interpreted these [First Amendment] guarantees to afford special protection against orders that prohibit the publication or broadcast or particular information or commentary orders that impose a 'previous' or 'prior' restraint on speech." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 556 (1976). "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. *Id.* at 559.

129. 427 U.S. 539 (1976).

130. *Id.* at 541-42.

the press.<sup>131</sup> Citing *Sheppard v. Maxwell*,<sup>132</sup> Chief Justice Burger recommended the use of several alternatives to prior restraint including change of venue, postponement of the trial, searching voir dire, sequestration and emphatic instructions to each juror that he must decide the issues only upon evidence presented in court.<sup>133</sup> The Chief Justice further endorsed having the trial judge limit the outside conversations of the witnesses, police and opposing lawyers.<sup>134</sup> One commentator has written, "[r]ecent cases demonstrate that the most pervasive of publicity *does not* in fact destroy the ability of government to provide a fair trial for an accused."<sup>135</sup>

As to subsequent publications, the doctrine of contempt is not dead, but merely comatose. The clear and present danger test has been set forth as the standard to determine whether an act impermissibly hampers the administration of justice.<sup>136</sup> However, the Supreme Court has indicated that meeting this test will be a formidable task:

In a series of cases raising the question of whether the contempt power could be used to punish out-of-court comments concerning pending cases or grand jury investigations, this Court has consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice. See *Bridges v. California*, *supra*; *Pennekamp v. Florida*, [328 U.S. 331 (1946)]; *Craig v. Harney*, 331 U.S. 367 (1947); *Wood v. Georgia*, 370 U.S. 375 (1962). What emerges from these cases is the "working principle that

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131. "We hold that, with respect to the order . . . prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid." *Id.* at 570.

132. 384 U.S. 333, 357-362 (1966).

133. 427 U.S. 539, 563-64 (1976).

134. *Id.* at 564.

135. Warren, *supra* note 17, at 548 (emphasis added). Warren gives as an example *People v. Sirhan*, 7 Cal. 3d 710, 102 Cal. Rptr. 385, 497 P.2d 1121 (1972), *cert. denied* 410 U.S. 947 (1973). In this case a great deal of publicity was present (from Robert F. Kennedy's assassination), and yet the California Supreme Court affirmed the conviction despite the contention that the trial was tainted by pre-trial publicity.

136. *Bridges v. California*, 314 U.S. 252 (1941).

the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished," *Bridges v. California*, *supra* 263, and that a "solidity of evidence," *Pennekamp v. Florida*, *supra* at 347, is necessary to make the requisite showing of imminence. "The danger must not be remote or even probable; it must immediately imperil." *Craig v. Harney*, *supra*, at 376.<sup>137</sup>

The strong language of this test reflects a policy judgment that the "horror of trial by newspaper"<sup>138</sup> is perhaps not so horrible. It also may show a realization that, in fact, most pre-trial publicity "isn't worth a damn"<sup>139</sup> when the time comes for a lawyer to persuade a fact-finder.<sup>140</sup>

*Michael M. Bast*

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137. *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 844-45 (1978).

138. "The dangers of 'trial by press' . . . are too obvious to require amplification." Committee on Contempt, *supra* note 7, at 47. "The very word horror . . . started as a reference to a tragedy of the children [and] became transferred to 'trial by newspaper' so that several of the judges . . . spoke of the 'horror of trial by newspaper'." Bloom, *The Sunday Times Case*, 123 *New L.J.* 799, 801 (1973).

139. Warren, *supra* note 17, at 548 *citing* Remarks of Thomas B. Rutter, *Advanced Course of the Trial of a Case*, held at the University of Oklahoma, Norman, on November 9, 10, and 11, 1972 (tape recorded by ALI-ABA).

140. *Id.*