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THE SUPREME COURT ON FREEDOM OF THE PRESS AND CONTEMPT BY PUBLICATION

ELISHA HANSON

On December 8, 1941, by a five to four decision of historic dimension embracing two cases,¹ the Supreme Court of the United States reversed judgments of conviction for contempt of state courts based upon publications in newspapers of comments relating to pending litigation.

The majority opinion is of tremendous importance because it clarifies the proper constitutional limits of the judicial power to punish summarily for contempt by publication in the press of views pertaining to matters which have not been finally adjudicated in the courts.

It is notable in two respects. First, it adopts for the first time in out-of-court contempt by publication cases the "clear and present danger" test, described by the Court as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Counsel for petitioners in the *Times-Mirror* case were thus upheld in their contention that the "clear and present danger" test was the standard best suited to the full preservation of a free press without sacrifice of any part of the equally important right to a fair trial by an independent judiciary. Second, the majority of the Court asserted in unmistakable language that the First Amendment, whose commands are addressed to the states through the Fourteenth Amendment, was intended to give to liberty of the press "the broadest scope that could be countenanced in an orderly society."

In the one case, that of *Bridges v. State of California*,² a telegram addressed

¹*Bridges v. State of California*, *Times-Mirror Co. and L. D. Hotchkiss v. Superior Court of California*, 62 Sup. Ct. 190 (1941).

²*Supra* note 1. For the opinion of the Supreme Court of California, see 14 Cal. (2d) 464, 94 P. (2d) 983 (1939). The text of the *Bridges* telegram was as follows:

"This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3000. International Longshoremen-Warehousemen Union has petitioned the Labor Board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does 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."

by Bridges to the Secretary of Labor, criticizing a judge who had granted an injunction in a labor dispute, was published with his assent in California newspapers while a motion for a new trial was pending in the case. In the other case, that of *Times-Mirror Company and L. D. Hotchkiss v. Superior Court of California*,³ the publication was in the form of three editorials in the Los Angeles *Times* commenting upon pending cases in circumstances hereinafter more fully described.

Mr. Justice Black delivered the opinion for the majority of the Court, in which Justices Reed, Douglas, Murphy, and Jackson joined. The dissenting opinion of Mr. Justice Frankfurter was concurred in by Chief Justice Stone and Justices Roberts and Byrnes. All of the Justices agreed that two of the editorials in the *Times* were not contemptuous.

In both cases petitioners contended in the trial and appellate courts of California that the convictions were in violation of freedom of speech and of the press as guaranteed by the First⁴ and Fourteenth⁵ Amendments to the Constitution of the United States.

Background of the Problem

The proper yardstick for the exercise of the contempt power in a manner consistent with the constitutional guarantee of a free press has long been the subject of controversy.⁶ Although the power itself is now generally recognized,⁷ the law of contempt by publication has had a checkered history in the legislatures and in the courts. State statutes aimed at restrictions of the power were largely nullified by judicial rulings,⁸ and, in the absence of statute, the decisions of the state courts produced a conflict over the nature and scope of the contempt power.⁹ In the federal field the Act of March 2, 1831, regulating the power of federal courts to punish summarily contempts outside the courtroom was recently interpreted by the Supreme Court in

³*Supra* note 1. For opinion of Supreme Court of California, see 15 Cal. (2d) 99, 98 P (2d) 1029 (1940).

⁴"Congress shall make no law . . . abridging the freedom of speech, or of the press."

⁵" . . . Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

⁶See Nelles and King, *Contempt by Publication in the United States* (1928) 28 Col. L. Rev. 401, 525; (1938) 48 YALE L. J. 54; (1938) 7 GEO. WASH. L. REV. 234.

⁷On the origin and development of the power, see SIR JOHN FOX, *THE HISTORY OF CONTEMPT OF COURT* (1927); THOMAS, *PROBLEMS OF CONTEMPT OF COURT* (1934); Nelles and King, *supra* note 6 *passim*. The evolution of the power in the United States is summarized in the majority and dissenting opinions in the instant cases. 62 Sup. Ct. at 195-196, 204-206.

⁸Statutes and cases are collected in Nelles and King, *supra* note 6, at 536-562.

⁹(1938) 7 GEO. WASH. L. REV. 236-237; (1938) 48 YALE L. J. 60-61, 63-65.

*Nye v. United States*¹⁰ so as to narrow the scope of the power, thereby overruling *Toledo Newspaper Company v. United States*,¹¹ which held sway for twenty-three years.

In the present cases the Supreme Court was called upon to consider the power of a state court, in the absence of any specific declaration of legislative policy, to impose penalties for contempt attributable to comments in the public press relating to pending court actions. State power under such circumstances was first tested in the Supreme Court in *Patterson v. Colorado*,¹² but in that case the Court left undecided the question of the relation of the First to the Fourteenth Amendments to the United States Constitution. Since then the Supreme Court has definitely held that the Fourteenth Amendment precludes a state from abridging freedom of speech and of the press as they are guaranteed by the First Amendment.¹³ Consequently, the present cases shed new light on this constitutional phase. By re-examining the whole problem of the judicial power over contempt by publication the Court furnishes guides to both state and federal courts on a momentous issue of national constitutional policy. As Mr. Justice Black said, in deciding whether such exercise of power was forbidden by the "sweeping constitutional mandate" against any law abridging the freedom of the press, the Court was "necessarily measuring a power of all American courts, both state and federal," including the Supreme Court itself.

Genesis of Times-Mirror Case

In this article only the facts of the *Times-Mirror* case will be given extended consideration. The genesis of the contempt proceedings in that case deserves more detailed description than is afforded by the opinions of the Court.

The record shows that on June 3, 1938, upon application supported by an affidavit of a committee of a Los Angeles Bar Association, two citations

¹⁰313 U. S. 33, 61 Sup. Ct. 810 (1941). The Act of March 2, 1831, 4 STAT. 487 (1831), 28 U.S.C. § 385, provided that the power of federal courts to inflict summary punishment for contempt "shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice. . . ."

The Court held in the *Nye* case that it was not sufficient that the misbehavior charged had some direct relation to the work of the court, since the word "near" suggests physical proximity, not relevancy, and the words "so near thereto" have a geographical and not a causal connotation.

¹¹247 U. S. 402, 38 Sup. Ct. 560 (1918). The majority opinion in the *Toledo* case has been criticized in Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts* (1924) 37 HARV. L. REV. 1010, 1029-1038.

¹²205 U. S. 454, 27 Sup. Ct. 556 (1907).

¹³*Gitlow v. New York*, 268 U. S. 652, 45 Sup. Ct. 625 (1925); *Near v. Minnesota*, 283 U. S. 697, 51 Sup. Ct. 625 (1931).

for criminal contempt were issued by the Superior Court for the County of Los Angeles addressed to The Times-Mirror Company, publisher, and L. D. Hotchkiss, managing editor, of the Los Angeles *Times*.¹⁴ No judge or public official was a party to the institution of the proceedings and the court permitted the attorneys of the Bar Association to prosecute the proceedings to judgment over the protests of petitioners. The proceedings were summary.¹⁵

In its affidavit filed with the trial court the Bar Association committee alleged that five editorials published in the *Times* over a period of months were contemptuous. Three of the editorials had been published approximately five months, four months, and two months respectively prior to the filing of the Association's affidavit.¹⁶ It was apparent that the editorials had been selected for a test case against the *Times* after a systematic study of editorial comment in that newspaper over a long period of time. After the first contempt proceeding was instituted, the Bar Association committee instituted a second proceeding by an affidavit alleging that two editorials published by the *Times* since the first proceeding was initiated and in which the *Times* defended its right to comment were also contemptuous.¹⁷

To say the least this action of the Association laid that body open to an inference that it was prompted by a dislike for the editorial policy of the *Times*. Even if it were inferred that the Association had acted out of a desire to protect the judiciary from interference with impartial administration of justice the precedent it attempted to set is a dangerous one. Punishment for contempt by publication is a vindication of a public wrong. A proceeding of that character should be initiated only by the state and in its name or at least by the court itself. There was nothing in the record to show that the editorials had come to the attention of judges before whom the matters were pending or that any judge had directed the Association to make its inquiry because he sensed intimidation. There was no showing that any of the defendants whose activities were commented upon in the *Times* complained of prejudicial effects of the editorials.

No private individual or group of private individuals should be permitted to plant in the mind of a judge interpretations of editorial comment which would not have taken root there but for officious intermeddling. The court,

¹⁴Transcript of Record in Times-Mirror Co. and L. D. Hotchkiss v. Superior Court of California, *supra* note 1 at 9-26.

¹⁵*Id.* at 27, 58-59, 66-86, 89-90. Proposals have been made to eliminate summary punishment in contempt by publication cases and to substitute therefor the usual rules of criminal proceedings. (1938) 7 GEO. WASH. L. REV. 241; (1938) 48 YALE L. J. 66.

¹⁶Transcript of Record, *supra* note 14, at 10, 13, 16.

¹⁷Petitioners' Brief in the Supreme Court of California in Times-Mirror Co. and L. D. Hotchkiss v. Superior Court of California at 3-5.

not a bar association, is empowered to punish for contemptuous publications. If it is appropriate for a bar association committee to become a self-appointed public censor of the press, then the door is opened to other vicarious avengers of real or imagined interferences with the judicial process.

The trial court rendered judgments of conviction on five out of the seven editorials. The Supreme Court of California affirmed the convictions¹⁸ in respect of the three editorials now reversed by the United States Supreme Court.

Each of the editorials was published after a verdict had been rendered by the jury. The first two editorials provoked no difference of opinion among the members of the Supreme Court.¹⁹ The dissenting Justices differed with

¹⁸Transcript of Record, *supra* note 14, at 94-118.

¹⁹The first editorial, "Sit-Strikers Convicted," was published December 21, 1937, the day after the jury had returned a verdict of guilty and the day before the trial judge was to pronounce sentence, hear motions for a new trial and applications for probation. The editorial read as follows:

"The verdict of a jury finding guilty the twenty-two sit-strikers who led the assault on the Douglas plant last February, will have reverberations up and down the Pacific Coast and in points farther east.

"The verdict means that Los Angeles is still Los Angeles, that the city is aroused to the danger of davebeckism, and that no kind of union terrorism will be permitted here.

"The verdict may have a good deal to do with sending Dave Beck back to Seattle. For, while the United Automobile Workers have no connection with Beck, their tactics and his are identical in motive; and if Beck can be convinced that this kind of warfare is not permitted in this area he will necessarily abandon his dreams of conquest.

"Already the united farmers and ranchers have given Beck a severe setback. The Hynes hay market is still free and it has been made plain that interference with milk deliveries to Los Angeles will not be tolerated.

"Dist.-Atty. Fitts pledged his best efforts to prevent and punish union terrorism and racketeering in a strong radio address, and followed it up yesterday with a statement congratulating the jury that convicted the sit-downers and the community on one of the 'most far-reaching verdicts in the history of this country.'

"In this he is correct. It is an important verdict. For the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime.

"The seizure of property by a militant minority, which arrogated to itself the right of dictating not only to employers, but to other workers not in sympathy with it, what should be the terms and conditions of working, has proved to be within the control of local peace officers and authorities.

"Nobody ran off to Washington to get this affair handled. It was attended to right here.

"Government may have broken down in other localities; while States may have yielded to anarchy. But Los Angeles county stands firm; it has officers who can do their duty and courts and juries which can function.

"So long as that is the case, davebeckism cannot and will not get control here; nor johnlewisism either."

The second editorial, "The Fall of an Ex-Queen," was published April 14, 1938, two days after the jury verdict of guilty and before the trial judge had pronounced sentence. The text of the editorial was as follows:

"Politics as we know it is an essentially selfish business, conducted in the main for personal profit of one kind or another. When it is of the boss type, it is apt to be pretty sordid as well. Success in boss-ship, which is a denial of public rights, necessarily implies

the majority only upon the propriety of the third editorial entitled "Probation for Gorillas?"²⁰ This editorial was published about five weeks prior to the date set by the trial judge for sentencing and passing upon an application for probation of two labor leaders. It denounced these defendants for assaulting non-union truck drivers with a deadly weapon, the offense of which they had been found guilty. The editorial concluded with the following comment:

"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."

Approach in the Majority Opinion

The approach of the majority of the Supreme Court to the issue before it must be carefully noted. Mr. Justice Black began his opinion by emphasizing that the Court was passing upon the exercise of power by a judge which had been upheld by the highest court of the state of California—a reviewing function of a delicate nature. But California had not declared a legislative policy to punish contempts of the sort here involved. On the contrary, the only manifestation was a statute which in terms narrowly limited the power and ran afoul the California Constitution.²¹ On the facts of the case, there-

a kind of moral obliquity if not an actually illegal one.

"So that it is something of a contradiction of sense if not of terms to express regret that the political talents of Mrs. Helen Werner were not directed to other objectives than those which, in the twilight of her active life, have brought her and her husband to disgrace. If they had been, she would not have been in politics at all and probably would never have been heard of in a public way. Her natural flair was purely political; she would have been miscast in any other sphere of activity.

"Mrs. Werner's primary mistake seems to have been in failing to recognize that her political day was past. For years she enjoyed the unique distinction of being the country's only woman boss—and did she enjoy it! In her heyday she had a finger in every political pie and many were the plums she was able to extract therefrom for those who played ball with her. From small beginnings she utilized every opportunity to extend her influence and to put officeholders and promising political material under obligations to her. She became a power in the backstage councils of city and county affairs and from that place of strategic advantage reached out to pull the strings on State and legislative offices as well.

"Those were the days when Mrs. Werner was 'Queen Helen' and it is only fair to say that to her the power was much more important than the perquisites. When the inevitable turning of the political wheel brought new figures to the front and new bosses to the back, she found her grip slipping and it was hard to take. The several cases which in recent years have brought her before the courts to defend her activities seem all examples of an energetic effort to regain and reassert her onetime influence in high places. That it should ultimately have landed her behind the bars as a convicted bribe-seeker is not illogical. But if there is logic in it, the money meant less to Mrs. Werner than the name of still being a political power, one who could do things with public officials that others could not do. To herself at least she was still Queen Helen."

²⁰The third editorial in its entirety is set forth *infra* note 65.

²¹*Bridges v. State of California*, 14 Cal. (2d) 464, 94 P. (2d) 983 (1939); *Times-*

fore, the Supreme Court was dealing with convictions for contempt based upon "a common law concept of the most general and undefined nature."

Since the California legislature had not declared that publications in situations like the *Times-Mirror* case create a specific danger sufficiently imminent to justify restraint by judicial decree, the Supreme Court was free to decide as an original question whether the words of the publication were used "in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils" of disrespect for the judiciary and unfair administration of justice. But, said the Court, the evil itself must be substantial and it must be serious; and so

"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."²²

Nothing is more significant in the majority opinion than this recognition of the "clear and present danger" standard as a "minimum compulsion of the Bill of Rights," and not as marking "the furthestmost constitutional boundaries of protected expression." First utilized in cases arising under the federal espionage laws,²³ the "clear and present danger" test was subsequently applied by either a majority or minority of the Supreme Court in cases involving state criminal syndicalism²⁴ and anti-insurrection laws;²⁵ and recently it has been extended by the Court to breaches of peace at common law²⁶ and to picketing in labor disputes.²⁷

So far as contempt by publication is concerned this means that the Court

Mirror Co. and L. D. Hotchkiss v. Superior Court of California, 15 Cal. (2d) 99, 98 P. (2d) 1029 (1940). The California Code of Civil Procedure, CAL. CODE CIV. PROC. (Deering, 1937) § 1209 (13) provides:

" . . . no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings".

Concerning this statute Mr. Justice Black said:

"The California Supreme Court's decision that the statute is invalid under the California constitution is an authoritative determination of that point. But the inferences as to the legislature's appraisal of the danger arise from the enactment, and are therefore unchanged by the subsequent judicial treatment of the statute." (Note 3 in majority opinion, 62 Sup. Ct. at 193.)

²²62 Sup. Ct. at 194.

²³*Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247 (1919); *Abrams v. United States*, 250 U. S. 616, 40 Sup. Ct. 17 (1919).

²⁴*Whitney v. California*, 274 U. S. 357, 47 Sup. Ct. 641 (1927) (concurring opinion of Brandeis, J.)

²⁵*Herdon v. Lowry*, 301 U. S. 242, 57 Sup. Ct. 732 (1937).

²⁶*Cantwell v. Connecticut*, 310 U. S. 296, 60 Sup. Ct. 900 (1940).

²⁷*Thornhill v. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736 (1940); *Carlson v. California*, 310 U. S. 106, 60 Sup. Ct. 746 (1940).

has definitely rejected the doctrine that judicial power in that sphere may be validly exercised merely when the publication is deemed to have a "reasonable tendency" to interfere with the orderly administration of justice in pending controversies. The "reasonable tendency" test was the basis upon which the judgments of conviction were affirmed by the California Supreme Court in the *Times-Mirror* case²⁸ and it was also the ground upon which other state courts have rested convictions.²⁹ Mr. Justice Frankfurter comes to its defense in his dissenting opinion.

Divergent Approach in the Dissenting Opinion

The fundamental divergence in the approach taken by the dissenting members provides a striking contrast. "In law . . . where one ends, depends much on one's starting point." Mr. Justice Frankfurter views the problem from the standpoint of the maintenance of our dual system of government under which the powers of the states must be meticulously respected. In the eyes of the dissenters the decision of the majority is

"a denial to the people of the forty-eight states of a right which they have always regarded as essential for the effective exercise of the judicial process, as well as a denial to the Congress of powers which were exercised from the very beginning even by the framers of the Constitution themselves."³⁰

In strong language the minority of the Court charge the majority opinion with "careful ambiguities and silences," with giving constitutional sanctity to trial by newspapers, with being "devoid of any frank recognition of the right of courts to deal with utterances calculated to intimidate the fair course of justice," with being "strangely silent in failing to avow the specific constitutional provision upon which its decision rests."

These accusations are as startling as they are unfounded. As already shown, the majority opinion does not equivocate. It is forthright in its articulation of every one of the points which the minority complains was left clouded. The reasons for the clash of views within the Court lie deeper than the rhetorical reproaches of the dissenting opinion indicate.

To begin with, the major premise of the minority is based upon the fallacy that the cases before the Court are to be likened to those cases where legislative determinations in the field of competing social policies are to be given the greatest possible weight. As Mr. Justice Black pertinently remarked,

²⁸*Times-Mirror Co. and L. D. Hotchkiss v. Superior Court of California*, 15 Cal. (2d) 99, 98 P. (2d) 1029 (1940).

²⁹*Nelles and King*, *supra* note 6, at 554-562; (1938) 7 *Geo. Wash. L. Rev.* 236-237; (1938) 48 *Yale L. J.* 60-61.

³⁰62 *Sup. Ct.* at 202.

the judgments of the California courts did not come before the Supreme Court "encased in the armor wrought by prior legislative deliberation." The issue, therefore, was not solely that of mediation between claims of sovereign powers of states and nation expressed in legislative policies but rather the issue was what standard of judgment does the Constitution compel as a single measure of the power of all the courts to punish contemptuous publications.

Civil liberties do not stop at state lines. Freedom of the press cannot flourish as a national policy if each state can make it mean different things in different localities. It certainly is a matter of concern to all the people what California does to restrict freedom of expression. Subtle encroachments upon the freedom of publication in one state invite like encroachments in other states. Similarly, as the dissent itself admits, impartial administration of justice is everyone's concern and is not specially entrusted to the courts of California.

The majority find their answer in history. So do the minority, but they read history differently. Whereas the majority believe that the power under review must be judged by American instruments of government forged in the period of the Revolution and adoption of the Bill of Rights out of a pattern that deviated from the English model, Mr. Justice Frankfurter expresses the view that the power exerted by the California courts is deeply rooted in the English common law as it was known at the time of the adoption of the Constitution.

The rationale of the dissenting opinion will be completely misread unless the reader's attention is constantly focused upon its insistence that the power in question has a historic continuity that stems from the English system of administering justice as it evolved from the early eighteenth century and was later absorbed by American state and federal courts into our nineteenth- and twentieth-century institutions. Among the rules of law thus absorbed, says Mr. Justice Frankfurter, was the historic "reasonable tendency" test as applied to exercises of the contempt power in the circumstances of cases such as the present ones.

Mr. Justice Frankfurter's deep reverence for English legal institutions has been too often expressed in his legal writings to occasion surprise at its reflection in the present opinion. What is surprising is that the Chief Justice and Mr. Justice Roberts should have concurred not only in the result but in the reasoning by which that result was reached by the minority. Former opinions in free speech and free press cases in which Chief Justice Stone joined and in which Mr. Justice Roberts wrote the opinion of the Court³¹

³¹Mr. Justice Roberts wrote the opinion for the Court in which Stone, J., joined in

now make strange reading in the light of Mr. Justice Frankfurter's repeated obeisances to the standards of English common law institutions as age-old symbols before which the framers of our Constitution worshipped. Whether the majority turned their backs on history, as Mr. Justice Frankfurter says, is a question which calls for discussion before proceeding to other doctrinal phases.

Historical Background and Interpretation of First Amendment

The correctness of the Court's adoption of the "clear and present danger" test in the cases under discussion can be appreciated only in the light of the historical background of the First Amendment and its interpretation by the Supreme Court.

Mr. Justice Black aptly observes:

" . . . the First Amendment does not speak equivocally. It prohibits 'any law abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."³²

This is undoubtedly the true historic concept of the guarantee. The repudiation in the majority opinion of the dissenting view that the scope and content of the First Amendment are to be measured by the English common law at the time the Constitution was adopted is amply corroborated by statements of the framers of the Constitution and by historical researches of scholars of unquestioned reputation.³³

It is generally known that the United States Constitution as originally drafted did not contain guarantees of certain fundamental liberties. The citizens of the states expressed dissatisfaction particularly with the absence of the guarantee of freedom of the press. James Madison's proposals for a Bill of Rights, as Mr. Justice Black stresses, were presented with a warning that the Magna Charta did not contain any provisions for the security of the great rights of trial by jury, freedom of the press, and liberty of conscience, "respecting which the people of America are most alarmed," and "the freedom

Herndon v. Lowry, *supra*, note 25 (5-4 decision); Schneider v. State (Town of Irvington), 308 U. S. 147, 61 Sup. Ct. 46 (1939) (McReynolds, J., dissenting); Cantwell v. Connecticut, *supra* note 26 (Stone, J., joined a unanimous Court). Stone and Roberts, JJ., joined a unanimous Court in Grosjean v. American Press Co., 297 U. S. 233, 56 Sup. Ct. 444 (1936) and Lovell v. Griffin, 302 U. S. 444, 58 Sup. Ct. 666 (1938), and were with the majority of the Court in Near v. Minnesota, *supra* note 13 (5-4 decision); Thornhill v. Alabama, and Carlson v. California, both *supra* note 27. Mr. Justice Roberts sat on the majority of the Court which decided De Jonge v. Oregon, 299 U. S. 353, 57 Sup. Ct. 255 (1937) (Stone, J., not sitting).

³²62 Sup. Ct. at 194.

³³CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) c. 1 contains full documentation of historical source material on this subject.

of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution."³⁴

In his writings Madison expressly stated that "the state of the press . . . under the common law, cannot . . . be the standard of its freedom in the United States."³⁵ The majority opinion also quotes from Schofield, whose historical research led him to say

"One of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press."³⁶

The historical evidence is overwhelming in support of the Court's conclusion that the purpose of the Bill of Rights was to secure to the people of the United States greater fundamental rights than the people of Great Britain enjoyed, including an enlargement of the concept of freedom of the press. As stated by the majority of the Court:

" . . . 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."³⁷

This can only mean that the power of judges to punish for contempt by publication outside the courtroom must be governed by the same criteria as are applicable by reason of the First Amendment to other types of expression. The editorials in the *Times-Mirror* case cannot be placed in "a special category marked off by history" untouched by the commands of the First Amendment. This is not to deny the existence of the power of the courts to protect the integrity of the judicial process; rather it is to warn that the power must be kept within bounds. In fact popular displeasure over the abuses of the power brought about legislative curbs upon summary punishment for contemptuous publications in the post-ratification period.³⁸ Still later some states by statute specifically proscribed the "reasonable tendency" test as a measure of the power.³⁹

In *Toledo Newspaper Co. v. United States*,⁴⁰ the "reasonable tendency"

³⁴*Annals of Congress 1789-1790* at 434, cited in majority opinion.

³⁵VI WRITINGS OF JAMES MADISON 1790-1802 at 387, cited in majority opinion.

³⁶Schofield, *Freedom of the Press in the United States*, 9 PUB. AMER. SOCIOLOGICAL SOC. 67, 76, cited in the majority opinion. See also CHAFEE, *op. cit. supra* note 33, at 4 *et seq.* and 14 *et seq.*

³⁷62 Sup. Ct. at 195.

³⁸See note 11 in majority opinion, 62 Sup. Ct. at 195, and note 2 in dissenting opinion, 62 Sup. Ct. at 205.

³⁹Nelles and King, *supra* note 6, at 554-562.

⁴⁰247 U. S. 402, 38 Sup. Ct. 560 (1918). The celebrated case of Judge Peck which led

test was applied, over the protest of Mr. Justice Holmes, in interpreting the federal act of 1831 regulating contempts. The Court now specifically states that the *Toledo* case was overruled "in the belief that it improperly enlarged the stated area of summary punishment." The fact that some states by statute or decision have sanctioned the "reasonable tendency" test was not deemed by the Court a reason for ignoring the commands of the First Amendment in the instant cases, notwithstanding the existence of other untested state decisions.

In attributing to the First Amendment the greatest possible scope of operation the majority opinion is consistent with and reaffirms pronouncements of the Court in previous freedom of the press cases. The foundation case of the series is *Near v. Minnesota*,⁴¹ in which the Court declared void a legislative attempt to suppress a newspaper by injunctive process. Mr. Chief Justice Hughes quoted from Madison to the effect that liberty of the press was a grant of immunity from previous executive and legislative restraint or censorship. The *Near* case consigned to oblivion the Blackstonian theory that immunity from restraints prior to publication exhausted the constitutional guarantee.⁴² On the contrary the First Amendment was declared to prohibit any form of abridgement of a free press. The Court held that the rule of subsequent liability to the person injured by publication was the proper one to be applied. Any other smacked of restraint.

Since *Near v. Minnesota* it has been made free from doubt that the First Amendment preserves liberty of distribution as well as liberty to publish. In *Grosjean v. American Press Company*⁴³ a license tax on the advertising revenues of newspapers and magazines with a circulation in excess of 20,000 a week was held invalid because of its direct tendency to restrict circulation. Restraints imposed by an ordinance prohibiting the distribution of literature⁴⁴ without a permit or by similar ordinances in the guise of exercises of the "police power" to prevent the littering or obstruction of streets⁴⁵ have also been adjudged repugnant to liberty of circulation. Likewise, limitations upon

to the passage of the federal Act of March 2, 1831, was recently reviewed in *Nye v. United States*, *supra* note 10.

See also STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833); *Nelles and King*, *supra* note 6, at 423-430; note 3 in dissenting opinion, 62 Sup. Ct. at 205.

⁴¹283 U. S. 697, 51 Sup. Ct. 625 (1931).

⁴²This exploded theory is forcefully criticized by Professor Chafee in his FREE SPEECH IN THE UNITED STATES (1941) at 9-11.

In *Schenck v. United States*, 249 U. S. 47 at 51-52, 39 Sup. Ct. 247, 249 (1919), Mr. Justice Holmes repudiated his adoption of the Blackstone theory in *Patterson v. Colorado*, 205 U. S. 454, 27 Sup. Ct. 556 (1907).

⁴³297 U. S. 233, 56 Sup. Ct. 444 (1936).

⁴⁴*Lovell v. Griffin*, 302 U. S. 444, 58 Sup. Ct. 666.

⁴⁵*Schneider v. State (Town of Irvington)*, 308 U. S. 147, 61 Sup. Ct. 46 (1939); *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 59 Sup. Ct. 954 (1939).

publication incident to peaceful picketing have fallen under the ban.⁴⁶

In the present cases the Court has gone to the furthestmost point in any case to date. Freedom from encroachments by the judicial branch of the government is now made part of the predominant purpose "to preserve an untrammelled press as a vital source of public information." Any other doctrine would exempt the judiciary from the constitutional limitations imposed upon the other branches of government. This would have the anomalous consequence of making judges paramount to the Constitution and to the government of which they are an integral part.

The language of the majority opinion comes as close as it could to a declaration that the grant of immunity in the First Amendment is absolute but without making it literally so. The press, to be sure, is answerable for abuses to which the general laws apply, such as libel, but subsequent punishment for such abuses as may exist must not curtail the right itself. Undoubtedly Mr. Justice Black's words should be so interpreted.

The California Supreme Court declared that: "Liberty of the press is subordinate to the independence of the judiciary."⁴⁷ This evoked from Mr. Justice Black the comment that if these "two of the most cherished policies of our civilization" were really in conflict "it would be a trying task to choose between them."

The truth of the matter is that the Court was confronted with the task of reconciling two rights "in order to prevent either from destroying the other."⁴⁸ One right is freedom of oral and written expression; the other is the right to a fair trial. If the two are in apparent or real conflict, the court is under a duty to make a proper accommodation between them so as to preserve the essentials of both, for obviously one is as fundamental as the other in the American constitutional system.

Underlying the reconciliation of these rights lies a balancing of individual and social interests in keeping open the channels of inquiry and discussion on matters of public importance.⁴⁹ Freedom of the press reflects a general social interest. The functions of the daily press embrace the gathering and dissemination of information in the form of news, editorial comment, and advertising.

News is factual information concerning matters of public importance that

⁴⁶*Thornhill v. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736 (1940); *Carlson v. California*, 310 U. S. 106, 60 Sup. Ct. 746 (1940).

⁴⁷*Times-Mirror Co. and L. D. Hotchkiss v. Superior Court of California*, 15 Cal. (2d) 99 at 118, 98 P. (2d) 1029 at 1040 (1940).

⁴⁸*Cf. Frankfurter, J., in Minersville School District v. Gobitis*, 310 U. S. 586 at 594, 60 Sup. Ct. 1010 at 1012 (1940).

⁴⁹(1925) 20 *ILL. L. REV.* 191 (Comment by Professor Albertsworth); *Chused, Public Comment as Contempt of Court* (1930) 16 *ST. LOUIS L. REV.* 24 at 48.

in the judgment of the editor is of sufficient general interest to warrant publication. Editorial comment is discussion of such matters from the analytical or critical viewpoint. It includes expression of opinion.

Advertising is information concerning the goods, services, or ideas of one who is willing to pay to have that information disseminated through the press. The protection of advertising is essentially important from an historical point of view. To illustrate, if the newspapers of California which printed Mr. Bridges' telegram, in the exercise of their editorial judgment, had considered it of insufficient news value to justify publication, then Mr. Bridges would have had other courses open to him. He might have obtained the publication of his protest in the advertising columns of the newspapers by paying their respective charges therefor or he might have printed it in pamphlet form and distributed it as our forefathers were wont to do with their protests against what they regarded as arbitrary or unreasonable abuses of power by government.

In the performance of its functions the press fulfills a historic objective of the discovery and diffusion of knowledge. Judge Cooley stated that the purpose was

“ . . . to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them.”⁵⁰

This expresses the great truth that freedom of the press is the right of the people and one not lightly to be curtailed.

There are no favorites in the Bill of Rights. All of the liberties embodied therein are reciprocally related to the common end of preserving democratic processes for the whole people. Every right, however, is susceptible of abuse. When one right collides with another by disregard of correlative duties it becomes the task of the courts as the guardians of all our liberties to make the adjustment. This is exactly what the Court has done in the *Times-Mirror* case with due respect for the broad commands of the First Amendment, “the breach of which cannot be tolerated.”

In taking that position the majority do not fail to recognize, as the minority insist, the power of the courts to punish utterances which subvert the fair course of justice. In its eagerness to demonstrate that this lacuna exists, a large part of the dissenting opinion is devoted to elucidation of obvious principles upon which the majority no doubt would readily agree, including the

⁵⁰2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 886.

principle that California has the right to safeguard her system of judicial tribunals against intimidation and coercive interferences. The issue between the majority and the minority thus resolved itself into: What standard shall be employed to determine whether publication of comments on pending cases produces such interferences? The majority opinion resolved this issue by adopting the "clear and present danger" test and by rejecting the "reasonable tendency" test.

Critique of "Reasonable Tendency" Test

The "reasonable tendency" test is so vague in its contours as to spread a "dragnet which may enmesh anyone" who ventures to comment upon pending court proceedings. To sanction such a nebulous standard as a measure of power is to sanction a pervasive threat of censorship which is aggravated by the very nature of summary punishment for contempt. A test that is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" effectively breeds a silence coerced by law. Unless the power is exercised with utmost caution and is scrupulously confined to the clearest cases of abuse of free expression, freedom of the press would become "an empty phrase."

The majority opinion in the *Times-Mirror* case faces realities by weighing the practical effects of the "reasonable tendency" test upon liberty of expression on highly controversial matters which are likely to become the subject of litigation. The press performs its highest function in reporting and analyzing political, economic, and social developments in the disputed field of public policy. But this freedom would be reduced to "a mere intellectual abstraction" if the press were inhibited by a brooding omnipresence of fear engendered by a "threat to censor comments on matters of public concern."⁵¹

The "reasonable tendency" test creates such a threat. As the Court well said, the punishment of utterances made during the pendency of a case produces "restrictive results at the precise time when public interest in the matters discussed would naturally be at its height." The majority opinion also stresses the fact that under the "reasonable tendency" test the ban is likely to fall upon the most important topics of discussion, such as the labor controversies out of which some of the *Times* editorials arose. The indefiniteness of the prohibition against comment on pending causes subjects newspaper publishers to such hazards as to confine editorial discussion substantially to "abstract academic discussion of non-controversial matters or of issues long

⁵¹"It is not merely the sporadic abuse of power by the censor but the *pervasive threat inherent in its very existence* that constitutes the danger to freedom of discussion." (Emphasis supplied.) Per Murphy, J., in *Thornhill v. Alabama*, 310 U. S. 88 at 97, 60 Sup. Ct. 736 at 742 (1940).

dead" and to colorless facts.⁵² In such circumstances the press could not effectively perform its function as "one of the greatest interpreters between the government and the people." On this phase Mr. Justice Black concludes:

"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. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a 'reasonable tendency' to obstruct justice in a pending case."⁵³

In his dissenting opinion Mr. Justice Frankfurter argues that the "reasonable tendency" test is an age-old formulation of a rule of law from which the "clear and present danger" phrase differs only in literary expression—as he says, "an idle play on words." According to the dissent, the phrase "clear and present danger" is "merely a justification for curbing utterances where that is warranted by the substantive evil to be prevented," namely, interference with impartial administration. Both tests, argued the minority, present the same question of proximity and degree in determining what interferences are punishable as contempt; both tests declare a "rule of reason" to be applied to the circumstances of the particular case by an exercise of good judgment.

As already shown, Mr. Justice Frankfurter's appeal to antiquity in support of the "reasonable tendency" test is based upon a misinterpretation of the history of the First Amendment. Moreover, however appropriate a "rule of reason" may be in other spheres of state and federal powers, the dissenting opinion's assimilation of the "clear and present danger" test to the "rule of reason" ignores the persuasive analogy in the espionage, criminal syndicalism, and similar cases of the law of attempts in criminal proceedings.⁵⁴ The "reasonable tendency" test is too subjective in its quality to satisfy this analogy. Time and again, either in majority or dissenting opinions, the Supreme Court has made it clear that it was reaching for some guide, how-

⁵²See criticisms of "reasonable tendency" test in the dissenting opinion of Gibson, J., in *Times-Mirror Co. and L. D. Hotchkiss v. Superior Court of California*, 15 Cal. (2d) 99 at 124-125, 98 P. (2d) 1029 at 1042-1043.

⁵³62 Sup. Ct. at 196-197.

⁵⁴See cases cited *supra* notes 23-25.

ever difficult it has been to formulate, which removes the peril of the generality of "reasonable tendency."⁵⁵ The fact that a few phrases of former opinions seem to sanction the "rule of reason" cannot override the final emergence of the "clear and present danger" standard as portrayed by Mr. Justice Black.

The dissenting opinion merely rationalizes its misinterpretation of history by belittling the distinctions made in an important series of free speech and free press cases. Many grave questions of constitutional rights, and indeed our whole body of legal conceptions, turn upon shades of meaning in words. One has only to examine the daily grist of legal opinions to realize the full force of this assertion.

Permissible Comment and the Pending Case

The peril of censorship is not removed merely because the ban is limited to pending litigation. When is a proceeding "pending"? In the state courts the decisions on this question have long been in conflict.⁵⁶ Some courts have regarded a case as "pending" until every conceivable legal procedure in connection therewith has been exhausted. In the *Times-Mirror* case the editorials were published after rendition of the jury's verdict, a period of "relative finality," as one judge observed.⁵⁷ The Supreme Court did not attempt to delimit the period during which a case may be described as "pending"; but that the Court was fully aware of the "censorial quality" of restraint upon comment during this period, whether it be short or long, is shown by the following quotation from its opinion:

"An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression. And to assume that each would be short is to overlook the fact that the 'pendency' of a case is frequently a matter of months or even years rather than days or weeks."⁵⁸

It is easy to imagine the restraints upon free expression under an elastic definition of a "pending" cause. Should press comments on the celebrated Sacco-Vanzetti case have been proscribed during the more than six years that case was in the courts? Capital cases always present the problem in

⁵⁵*Ibid.*

⁵⁶(1938) 7 GEO. WASH. L. REV. 237; (1938) 48 YALE L. J. 61.

⁵⁷Per Gibson, J., dissenting in *Times-Mirror Co. and L. D. Hotchkiss v. Superior Court of California*, 15 Cal. (2d) 99 at 129, 98 P. (2d) 1029 at 1045. Curiously enough, Mr. Justice Frankfurter in his dissenting opinion (62 Sup. Ct. at 210) referred to the jury verdict discussed in the "Sit-Strikers" editorial as "a completed action of the court."

⁵⁸62 Sup. Ct. at 197.

acute form, since a convicted defendant may resort to various proceedings in the courts after verdict and before sentence and may thereafter seek executive clemency by commutation of the sentence or by pardon. When is his fate finally determined?⁵⁹

No practical guidance in resolving these ambiguities is found in the dissenting opinion. The particular litigation, says Mr. Justice Frankfurter, must be "immediately pending" and this is "to be determined by the substantial realities of the specific situation." What is "the particular litigation" or the particular phase of the proceeding upon which the comment is made? When is the case "actively pending" before a court and before what court? Trial, appellate, or Supreme? To say that this is not "a technical lawyer's problem" is itself an escape from the "substantial realities" of the techniques of legal procedure.

It is apparent that Mr. Justice Frankfurter's criteria are as vague as any that have been suggested. The quandary in which such a doctrine would have placed Justice Frankfurter in March, 1927, when as Professor of Law in Harvard University, he wrote an article on "The Case of Sacco and Vanzetti"⁶⁰ is strikingly shown by the following events.

Sacco and Vanzetti were found guilty of murder in the first degree in a trial lasting nearly seven weeks at Dedham, Massachusetts, before Judge Webster Thayer. Professor Frankfurter in his article analyzed the testimony of the witnesses, particularly as to the vital issue of identification of the defendants and the circumstantial evidence in the record. In its tenor the article purported to demonstrate that Sacco and Vanzetti were convicted not on evidence but as the victims of a hysteria against "Reds" of alien blood and "anarchists."

Professor Frankfurter excoriated Judge Thayer in terms as scathing as any in the annals of criticism of judicial conduct.⁶¹

Whether the condemnation of Judge Thayer was justified may be put to one side. The fact that Professor Frankfurter enjoyed great prestige as a leading personage in the law professoriate and among the bar might have placed him in the same category as "a leader of a large following" or "a powerful metropolitan newspaper," as in the present cases. That, too, may

⁵⁹Another striking illustration is found in the famous Thomas J. Mooney case in the California courts and in the Supreme Court of the United States which has a history extending over two decades.

⁶⁰ATLANTIC MONTHLY, March, 1927, reproduced verbatim in FRANKFURTER, LAW AND POLITICS (OCCASIONAL PAPERS 1913-1938) [Archibald MacLeish and E. F. Prichard, Jr., eds. (1939)] 140-188. In the same month the article was published as a book, FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927).

⁶¹FRANKFURTER, LAW AND POLITICS, *op. cit. supra* note 60, at 164, 167, 186-188.

be put to one side. He, as a private citizen, expressed his opinion based upon what he believed to be the facts. This he had an unquestionable right to do under the shelter of the Constitution. But if the standards of judgment espoused in the dissenting opinion by Justice Frankfurter had been applied to Professor Frankfurter in 1927, he would have been in a perilous position.

What would have created the peril for Professor Frankfurter under Justice Frankfurter's doctrine was the fact that when his article was written various judicial proceedings available to the defendants had not yet been commenced or completed.⁶²

Under those circumstances who would venture to say that the "reasonable tendency" test as Justice Frankfurter would have it applied to "pending" litigation would not have courted a severe penalty for what in the judgment of this writer was clearly within the bounds of permissible comment by Professor Frankfurter on a matter of tremendous public importance—justice under law.

A Glaring Inconsistency in the Dissenting Opinion

By their stress upon the great latitude which should be accorded to the courts of California in exercising historic means adapted to local conditions in coping with the evil of obstructions to fair adjudication, the dissenting members of the Court reasoned themselves into a glaring inconsistency. The California courts, said Mr. Justice Frankfurter, chose to meet local situations in the light of local institutions; the Supreme Court, he continued, "sitting over three thousand miles away from a great state without knowledge of its habits and needs in a matter which does not cut across the affirmative powers

⁶²Subsequent to the publication of Professor Frankfurter's article, *supra* note 60, the following proceedings took place as shown by the record in the case: (1) on April 5, 1927, the Supreme Judicial Court of Massachusetts affirmed the denial of a motion of defendant Madeiros made before Judge Thayer; (2) on April 9, 1927, sentence was imposed on Sacco and Vanzetti; (3) from May 3, 1927, to August 3, 1927, the following occurred: (a) a petition for clemency was addressed to Governor Fuller on May 3, 1927, (b) hearings were held by an Advisory Committee appointed by Governor Fuller from July 11 to July 21, 1927, and (c) a decision denying clemency was announced on August 3, 1927; (4) on August 6, 1927, a motion for revocation of sentence and a petition for writ of error were filed; (5) on August 8, 1927, the motion was denied by Thayer; (6) on August 8, 1927, the petition was denied by Judge Sanderson; (7) petitions for a writ of habeas corpus were denied by Mr. Justice Holmes of the United States Supreme Court and by Judge Sanderson of the United States District Court on August 10, 1927; (8) on August 16, 1927, exceptions to the denial of motion and petition were argued in the Supreme Judicial Court of Massachusetts and overruled on August 19, 1927; (9) petition for writ of habeas corpus was denied by Judge Morton of the United States Circuit Court of Appeals on August 20, 1927, and on the same day a petition for stay and extension of time within which to apply to the United States Supreme Court for writ of certiorari was denied by Mr. Justice Holmes of that Court, and another petition to the same effect was denied by Mr. Justice Stone of the Supreme Court on August 22, 1927. See FRAENKEL, *THE SACCO-VANZETTI CASE* (1931) xv.

of the national government" must take fastidious care not to substitute its judgment for that of the California courts by making its "private views the measure of constitutional authority." In similar vein the dissenting opinion asks:

"How are we to know whether an easy-going or stiffer view of what affects the actual administration of justice is appropriate to local circumstances? How are we to say that California has no right to model its judiciary upon the qualities and standards attained by the English administration of justice, and to use means deemed appropriate to that end by English courts? It is surely an arbitrary judgment to say that the Due Process Clause denies California that right."⁶³

Such espousal of self-restraint in judicial nullification of state action and of the right of California to follow English practices in contempt cases as a model logically and in practical reality compels the conclusion that all three of the *Times* editorials were within the ambit of California's power to adjudge them contemptuous, unfortunate as such result would have been. Instead the dissenting Justices inconsistently declared the first two editorials beyond the reach of the contempt power while the third editorial was deemed to be within its reach. This in itself demonstrates the vagaries of the dissenting doctrine and its subjective character.

The self-contradiction between the theory and practice of the dissenting opinion lays bare the dangers of sanctioning the "reasonable tendency" test as an historic English standard. It is well known, and the dissenting opinion so recognizes, that in England newspaper comment on pending litigation is virtually proscribed by a stringent exercise of the contempt power.⁶⁴ If California can constitutionally copy this English pattern, why can it not be as hard-boiled as it pleases by closing practically "all channels of public expression to all matters which touch upon pending cases"? The answer is that if this can happen in England it can happen here. Fortunately the majority decision precludes such a result.

⁶³62 Sup. Ct. at 209.

⁶⁴Goodhart, *Newspapers and Contempt of Court in English Law* (1935) 48 HARV. L. REV. 885. Goodhart quotes the following passage from Hughes, *Contempt of Court and the Press* (1900) 16 L. Q. REV. 292:

"The Star Chamber and licenser of printing have disappeared, but there still remains over the press of this country one disciplinary jurisdiction almost as stern and far-reaching in its peculiar domain as that of the Star Chamber. It is that of the judge to punish those who print or publish matter declared to be in contempt of the Court."

In quoting the above passage Goodhart says at page 886:

"It is by the doctrine of these criminal contempts committed out of court, sometimes called constructive contempts, that what may, perhaps, be called a censorship of the press has been established in England."

Analysis of Editorial: "Probation for Gorillas?"

Turning to the third editorial, entitled "Probation for Gorillas?,"⁶⁵ on which the majority and the minority differed, it is clear that its language and the circumstances surrounding its publication did not present an extremely serious substantive evil of disrespect for the judiciary and unfair administration of justice of such an extremely high degree as to justify summary punishment.

Mr. Justice Black appraised the editorial as follows:

"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 little doubt of its attitude toward the probation of Shannon and Holmes. In view of the paper's long-continued militancy in this field, 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. Cf. Holmes, J., dissenting in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 424."⁶⁶

The last reference was to the oft-quoted words of Mr. Justice Holmes in his dissenting opinion in the *Toledo* case, in which Mr. Justice Brandeis joined:

⁶⁵The full text of the editorial follows:

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are 'first offenders,' or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. 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."

⁶⁶62 Sup. Ct. at 198-199.

"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 its words."⁶⁷

The editorial "Probation for Gorillas?" must also be considered from the standpoint of the practices prevailing in the Los Angeles criminal courts in probation proceedings.⁶⁸ As set forth in the brief of petitioners, it is a long established practice in California for a probation officer to invite opinions on the advisability of granting a probation. The *Times* was aware of this custom. In fact, in one case in which the *Times* editorially criticized the granting of probation the judge before whom the application was made advised the *Times* that its position should have been made known while the application was pending.⁶⁹ In the field of criminal law, complaints about ill-advised clemency are frequently expressed.⁷⁰

It should be added that "Probation for Gorillas?" made no attack upon the judge's character nor was he charged with prejudice or political bias.

Mr. Justice Frankfurter's interpretation that the editorial made an explicit demand of the judge that the defendants be denied probation and that they be sent to the "jute mill" seems unfounded. The whole tenor of the editorial was to the effect that the good of the community required a denial of probation. But this was expressed as an opinion rather than as a demand and was in keeping with the settled policy of the *Times* in condemning violence in labor disputes.⁷¹

It is an exaggeration to construe the language as a threat to impartial adjudication. The dissenting opinion on this phase of the case was apparently emotionally conditioned by the thought that the *Times* is a powerful metropolitan newspaper. Mr. Justice Frankfurter uses this appellation in at least

⁶⁷Toledo Newspaper Co. v. United States, 247 U. S. 402, 424, 38 Sup. Ct. 560 (1918), quoted by Mr. Justice Black (62 Sup. Ct. at 201) with reference to the alleged tendency of the Bridges telegram, *supra* note 2, to interfere with the course of justice. Mr. Justice Black, "with an eye on the realities of the situation," felt that a judge who was not intimidated by the facts themselves could not have been sidetracked by an explicit statement of them.

Mr. Justice Frankfurter, on the other hand, found it "inadmissible dogmatism" to say that in the context of the immediate ease the publication of the telegram could not have "dominated" the mind of the judge.

⁶⁸Petitioners' Brief on Reargument in United States Supreme Court, Times-Mirror Co. and L. D. Hotchkiss v. Superior Court of California, at 13-14; Transcript of Record, *id.* at 52, 53-57.

⁶⁹Transcript of Record, *id.* at 52.

⁷⁰See Brief of American Newspaper Publishers Association in the Supreme Court of the United States as *Amicus Curiae*, Times-Mirror Co. and L. D. Hotchkiss v. Superior Court of California, at 19-21.

⁷¹See affidavit of Harry Chandler, publisher of the Los Angeles *Times*, Transcript of Record, *supra* note 68, at 42-52.

three places in his opinion. "A powerful newspaper," he says, "admonished a judge, who within a year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be 'a serious mistake.'" ⁷² In his view this amounted to coercive power. But this ascribes to this particular editorial a coercive power that might be ascribed to the other two editorials in the case or to any of the *Times* editorials, if the theory of the dissent is taken seriously. For according to its theory that the views of a powerful newspaper tend to intimidate judges, particularly elected judges, would not such judges be just as sensitive to mildly expressed views as to those clothed in forthright language? Since the long established policy of the *Times* over a period of 50 years on labor issues was publicly known and had been expressed in hundreds of *Times* editorials, no one would be so fatuous as to believe that this one editorial in condemnation of violence against non-union workers and in opposition to a lenient probation policy in such cases would intimidate a judge. "The influential power of the press to startle the judiciary into publicity-coerced decisions has been absurdly magnified by the courts."⁷³

Mr. Justice Frankfurter's argument to the contrary is based upon an unrealistic assumption that in the case of the Gorilla editorial a California judge had shut himself from contacts with newspaper editorial opinion and had received a sudden shock when this particular editorial was called to his attention. The truth of the matter is that no California judge worthy of his office would suppose that he could insulate himself against the impact of well-settled editorial policies of any newspaper, including the *Times*. "If a judge absorbs substantial press influence at all, it is rather from press policy established prior to the case being tried."⁷⁴ This would also be applicable to the editorial "Sit-Strikers Convicted" which, in the words of Mr. Justice Frankfurter, "expressed exulting approval" of the jury's verdict of guilt, or of the editorial "Fall of an Ex-Queen" which "luridly draws a moral from a verdict of guilty in a sordid trial." If stiff sentences were imposed, readers might just as readily assume that the latter editorials influenced the courts as to suppose that the court would deny probation because of the third editorial. It would be equally applicable to all future cases.

Characterizing the issue in the case as trial by newspapers substitutes a rhetorical slogan for calm judgment concerning the vital functions of the press.⁷⁵ Out of the great volume of editorial comment and criticism printed

⁷²62 Sup. Ct. at 211.

⁷³(1938) 48 YALE L. J. 54 at 62.

⁷⁴*Ibid.*

⁷⁵One cannot read Mr. Justice Frankfurter's dissent without recalling how, while a professor of law, he sought to use the press—not only the newspaper but the periodical

in the columns of the newspapers of this country only an insignificant percentage of these publications has been questioned by the courts in contempt proceedings. In this the press may well take pride. Lapses from proper standards of journalism are relatively few and are certainly no greater in proportion than in the professions generally. Trial by newspaper in the epithetical sense of the term is unworthy of mention in an opinion of the Supreme Court.

Freedom of the press is a guarantee for the big and for the little, for the powerful and for the weak. The mere existence of the power of a person with a large following or a newspaper with a large circulation is not determinative of the constitutional issue. What matters is how and to what end the power is wielded. Freedom of expression does not vary inversely to the prestige of the utterer or the power of the medium in which the utterances appear.

It is difficult to reconcile Mr. Justice Frankfurter's version of the effect of the editorial under discussion and his observations in another part of his opinion on the status of judges as persons and courts as institutions. In that connection he said that they are "entitled to no greater immunity from criticism than any other persons or institutions"; that "judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt"; that "courts and judges must take their share of the gains and pains of discussion which is unfettered except by laws of libel, by self-restraint, and by good taste"; that the purpose 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."⁷⁶ In their context these observations may be taken as referring both to completed and pending judicial actions, since Justice Frankfurter states more than once that "the purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal."⁷⁷

All of these observations are of the same import as the following excerpt from Mr. Justice Black's majority opinion:

"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

and pamphlet press—in his campaign to upset the verdict and discredit the judge in the Sacco-Vanzetti case. He even went so far in that campaign as to praise a great metropolitan newspaper for a frank reversal of its editorial position in which it "long held the view that the sentence against these men should be carried out." FRANKFURTER, *LAW AND POLITICS*, *op. cit. supra* note 60 at 186.

⁷⁶62 Sup. Ct. at 206, 207, 208.

⁷⁷*Id.* at 208.

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 bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."⁷⁸

Making every allowance for differences of judgment in the application of a standard, whatever it may be, to the circumstances of a particular case, it is difficult to arrive at any other conclusion than to say that the dissenting Justices allowed an undue range to imaginary fears attributable only to a thin-skinned judge or an insulated court in their appraisal of the effects of the one editorial on which they disagreed with the majority.

In Conclusion

The majority of the Court do more than protect the individual rights of a labor leader and a newspaper. The majority opinion gives unstinted support to a free press as a right of the people throughout the land, fittingly characterized by Professor Chafee as "a declaration of national policy in favor of the public discussion of all public questions."⁷⁹ The Court now reiterates that this policy safeguards the right from erosion by exercise of state power as well as by exercise of federal power. An untrammelled press is an organ of opinion essential to free government. A narrow interpretation of the First Amendment is relegated by the Court to the limbo of historical errors. By its forthright adoption of the "clear and present danger" test the Court has given that vitality to the guarantee of a free press which our forefathers intended. It has even warned that the furthestmost boundaries of protected expression have not yet been marked out. Never before has the First Amendment been given such resplendent armor to make a reality of the memorable language of Mr. Justice Sutherland in *Grosjean v. American Press Company*.⁸⁰

"A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

⁷⁸*Id.* at 197.

⁷⁹CHAFEE, *op. cit. supra* note 33, at 6.

⁸⁰297 U. S. 233, 250, 56 Sup. Ct. 444, 449 (1936).