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Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol36/iss3/3
THE FIRST AMENDMENT AND REGULATION
OF PREJUDICIAL PUBLICITY—
AN ANALYSIS

JEFFREY A. BARIST*

I. INTRODUCTION

THE recommendation of the Warren Commission that the experience following President Kennedy's assassination was "a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial..." has produced a continuing debate. The problem, of course, is not the hopefully rare instance of a presidential assassination, but the impact which mass media dissemination of fact and opinion has upon the quality of the justice existing in our criminal courts.

The opposition to any attempt to limit what may be published rests of course upon the claim of first amendment protection and the fear of Government domination of the communications media. Certainly, if it were possible to prevent extra-record utterances from interfering with a criminal trial by means other than direct control of the press, it would be politically desirable, if not constitutionally compelled. However, most students of the problem have concluded that while traditional protective devices such as change of venue, continuance, voir dire, or sequestration are of importance in an overall program of reform, these alone cannot effectively insulate the courtroom or guarantee in all cases the required standard of juror impartiality. The constitutionality of imposing any

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* Member of New York Bar.
2. Reports have been published by the Association of the Bar of the City of New York, the American Bar Association and the American Newspaper Publishers Association. Legislation has been proposed on the federal and state level. See the bill introduced into the Senate by Wayne Morse, S. 290, 89th Cong., 1st Sess. (1966) and the proposal in Massachusetts, discussed in Opinion of the Justices, 349 Mass. 786, 208 N.E.2d 240 (1965).
4. The use of the "less onerous alternative" has played an important role in the area of state regulation of interstate commerce. In problems concerning a regulatory ordinance which incidentally inhibits communication see Schneider v. State, 308 U.S. 147 (1939), where the Court held that the proper method of preventing littering was the punishment of those who litter, not the prohibition of all handbills. See generally Struve, The Less-Restrictive Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967). In Feiner v. New York, 340 U.S. 315 (1951), Mr. Justice Black, dissenting, called for the Court to use this principle to protect speech as well as trade. Id. at 327.
5. See, e.g., Goldfarb, Public Information, Criminal Trials and the Cause Celebre, 36
direct control of the press in its reporting of a criminal trial is disputed. This paper is concerned solely with exploring the first amendment problems involved.

II. Bridges and Its Progeny

Any discussion of this problem inevitably must commence with the contempt cases. In Bridges v. California and its companion case of Times-Mirror Co. v. Superior Court, the Supreme Court drastically limited the common law power of a court to punish out of court publications for contempt. Bridges, while a motion for a new trial was pending, had published in the California newspapers a telegram denouncing the court's decision as "outrageous" and warning that enforcement could result in a tie-up of all Pacific coast ports. The Los Angeles Times, in an editorial denouncing light sentences for "labor goons," had warned a local judge that he would be making a "serious mistake" if he did not severely punish two such defendants awaiting sentence.

In a five to four decision the Court reversed the defendants' conviction for contempt of court. The majority opinion by Mr. Justice Black, noting the absence of any legislative enactment authorizing the use of the contempt power to punish out of court publications, held that the common law standard prohibiting any publication "tending to interfere with the administration of justice" was constitutionally impermissible. The utterance had to present a "clear and present danger," a standard which recognized what the opinion termed the "minimum compulsion" that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

Both publications were found to be protected by the first amendment. In both instances the defendants' ideological positions were such that their reaction was easily predictable. The publications concerned thus threatened criticism or action which in any event would be forthcoming if the decision was unfavorable. The majority concluded that to regard such utterances as possibly having a 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."

Judicial imperturbability to newspaper criticism was the foundation of

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7. 314 U.S. 252 (1941).

8. Id. at 263.

9. Id. at 273.
the Court's decision in the two contempt cases following Bridges. In Pennekamp v. Florida, the Florida Supreme Court had found that an editorial criticizing a local court had presented a clear and present danger. In reversing, the Supreme Court held that as a matter of law defendant's publication, even if a deliberate distortion of the facts, was protected. The publication would not be presumed to affect the judge concerned because it would not disturb a judge of ordinary fortitude, the law not being concerned with idiosyncratic differences in stability or moral courage. The limitation placed upon punishment of judge directed criticism became marked in Craig v. Harney. While a motion for a new trial in a civil case was pending, the newspaper editorially denounced the judge's actions as "arbitrary" and a "travesty upon justice"; deplored the judge being a layman and the lack of any means of appeal; and intimated of the insecure tenure the judge faced if he continued his actions. The Texas court, sustaining the contempt conviction, distinguished Bridges, holding that here the nature of the parties involved gave the judge no warning that the outburst would occur. Mr. Justice Douglas, writing for the five to four majority, evidently found this irrelevant, holding that the publication was protected. The publication could not be deemed as having any potential influence upon the trial judge, for a judge participating in a dramatic episode had to be prepared for unpopularity. He concluded that "the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate."

The analytical basis of the contempt cases is difficult to defend. In Bridges, Mr. Justice Black based his conclusion that the publications could not interfere with the judge's ultimate determination upon two factors: the reaction from Bridges and the Los Angeles Times was entirely predictable; partly because of this predictability but mostly because of the inherent nature of things the Court could not presume that a judge of reasonable fortitude would be affected by such criticism. Both of these assumptions seem uncertain at best.

Mr. Justice Frankfurter, dissenting, effectively rejoined to the predictability argument: "A vague, undetermined possibility that a decision of a court may lead to a serious manifestation of protest is one thing. The

10. 156 Fla. 227, 22 So. 2d 875 (1945).
13. Id. at 371.
14. Id. at 376.
15. 314 U.S. 252, 273, 278 (1941).
16. Id. at 278.
impact of a definite threat of action to prevent a decision is a wholly
different matter.\textsuperscript{17}

The more important assumption was that the publication could not
have affected "a mind of reasonable fortitude" and thus could not have
obstructed the administration of justice.\textsuperscript{18} This assumption would seem to
ignore the potentiality of the influence of a powerful newspaper such as
the \textit{Los Angeles Times}, particularly where judges are elected.\textsuperscript{10} Mr. Justi-
cation Jackson sardonically noted that the "Court appears to sponsor the
myth that judges are not as other men are . . . . And if fame—a good
public name—is, as Milton said, the 'last infirmity of noble mind,' it is
frequently the first infirmity of a mediocre one."\textsuperscript{20} The opposite of judicial
toading to public opinion is another danger the Court seems to ignore:
a judge—subconsciously perhaps—could express his displeasure at the
attempted interference by ruling against the position being urged upon
him.\textsuperscript{21} The likelihood of a judge being influenced cannot be as cavalierly
dismissed as the majority opinions have implied.

A further problem is that in addition to justice being done, justice
must seem to be done. Where powerful forces have urged a course of ac-
tion upon a judge in a pending case any ruling he eventually delivers
is made questionable in the eyes of the community.\textsuperscript{22}

The analysis is further confused by the inappropriate use of the "clear
and present danger" test to determine the constitutionality of the publica-
tion. To its authors "clear and present danger" seemed to represent a
balancing of possible temporal exigencies and the free discussion essential
to the proper functioning of a democratic society.\textsuperscript{23} To apply the clear
and present danger test to out of court influences upon a trial is to ask,
in effect, if the possibility that there is merit in these views outweighs
the harm done by their exposition. The question is irrelevant if indeed a
verdict "must be based upon the evidence developed at the trial."\textsuperscript{24} Mr.

\textsuperscript{17} Id. at 303.
\textsuperscript{18} Id. at 278. Pennekamp v. Florida, 328 U.S. 331, 348 (1946); Craig v. Harney, 331
U.S. 367, 376 (1947).
\textsuperscript{19} See Bridges v. California, 314 U.S. 252, 300, 302 (1941) (Frankfurter, J., dissenting);
pressure upon elected judges is discussed in Application of Stone, 77 Wyo. 1, 30, 305 P.2d
\textsuperscript{20} Craig v. Harney, 331 U.S. 367, 396 (1947) (Jackson, J., dissenting).
\textsuperscript{21} Id. at 396.
\textsuperscript{22} Bridges v. California, 314 U.S. 252, 300 (1941).
\textsuperscript{23} Cf. Mr. Justice Brandeis concurring in Whitney v. California, 274 U.S. 357 (1927):
"If there be time to expose through discussion the falsehood and fallacies, to avert the evil
by the processes of education, the remedy to be applied is more speech, not enforced silence."
Id. at 377.
\textsuperscript{24} Turner v. Louisiana, 379 U.S. 466, 472 (1965).
Justice Frankfurter succinctly stated the essential paradox of the use of clear and present danger in this context:

[I]t would be the grossest perversion of all that Mr. Justice Holmes represents to suggest that it is also true of the thought behind a criminal charge "... that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge.25

Whether the contempt cases are analytically sound or not, however, it has been generally conceded that they have established virtually absolute protection for any judge directed utterance,26 excepting perhaps those advocating an immediate march upon the courthouse27 or being in some way more than pure speech.28 The protection afforded the criticism of judges is seen in Garrison v. Louisiana,29 a case involving a district attorney's conviction for criminal defamation for his comments upon the motives and abilities of the county judges. Criminal defamation in this context would seem to be a blood brother of contempt by publication.30 Although the defendant himself had urged the application of the clear and present danger standard and the contempt cases as the controlling doctrine,31 the Court disregarded "clear and present danger" and held that as speech concerning the performance and qualifications of a public official, under the rule of New York Times Co. v. Sullivan,32 the utterance

26. "[I]n the present state of the law it is not clear that any court, state or federal, has any practically effective means at its disposal for preventing 'trial by newspaper,' . . . ." Geagan v. Gavin, 292 F.2d 244, 246 (1st Cir. 1961), cert. denied, 370 U.S. 903 (1962). "The construction given the 'clear and present danger rule' leads one to believe that the bend (sic) of the Supreme Court's thinking is that both State and Federal Courts be almost entirely precluded from punishing 'by contempt all out of court statements whatsoever,'" Goss v. State, 204 F. Supp. 268, 273 (N.D. Ill. 1962), rev'd on other grounds, 312 F.2d 257 (7th Cir. 1963). See also Craig v. Harney, 331 U.S. 367, 376 (1947). The commentators have often reached a similar conclusion. See Radin, Freedom of Speech and Contempt of Court, 36 Ill. L. Rev. 599, 601 (1942); Comment, Free Speech Versus Fair Trial in the English and American Law of Contempt by Publication, 17 U. Chi. L. Rev. 540, 545 (1945).
32. 376 U.S. 254 (1964). The Court in New York Times held that defamation of a public official was privileged unless it was made with actual malice, defined as knowledge of the falsity or reckless disregard of the falsity of the utterance. Garrison extended the protection to criminal actions.
could not be punished unless it was made with knowledge or reckless disregard of falsity.33 The imposition of the *New York Times* doctrine in this context could be read as affording almost absolute protection to any judge directed statement.

The practice in the state courts since *Bridges* has been almost complete concession of the courts' lack of power to punish such publications. Of the twenty-one reported cases since *Bridges* (excluding the four to go to the Supreme Court), the state courts have ultimately held the publication not to be contemptuous in twenty.34 Of the three convictions upheld, in one the suspended sentence given was quashed on procedural grounds.36 In one of the two cases in which there was punishment the judge directed statement related to a pending murder case and resulted in a mistrial.36 The remaining case concerned a veritable campaign by a disgruntled applicant for the Bar, distinguishable perhaps in that the articles and advertisements ruthlessly attacking the state supreme court were filed with that court.37

The Court, however, at times has seemed to indicate that a narrow, specific statute be used to punish certain judge directed utterances.38 None of the contempt cases presented such a statute for consideration.39 The criminal defamation statute involved in *Garrison* was criticized by the Court for its lack of specificity.40 The use of the common law contempt

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39. In *Bridges v. California*, 314 U.S. 252, 260 n.3 (1941) and Wood v. Georgia, 370 U.S. 375, 385 (1962), the legislature had in fact attempted to limit the court's power to punish contempt by publication only to have the state supreme court hold the limitation unconstitutional under the state constitution.
40. 379 U.S. 64, 70 (1964).
power, however, has both complicated the analysis and insured protection of the publication. The hostility of the Court to the contempt power has been evident, the legitimacy of the power as a means of controlling press comment being called into serious question. The procedural difficulties involved in any use of the contempt power are substantial.

However, despite the never tested possibility of proceeding by statute, the broadness of the Court's language in the contempt cases with respect to the lawfulness of the publications involved makes it extremely doubtful that under the existing analysis judge directed criticism short of intimidation can be punished. Moreover, the protection afforded the defendant's utterances in Garrison seem to indicate that protection of criticism of the judiciary rests upon a pure first amendment analysis and not the vagaries of the contempt procedure. For purposes of analysis this paper will assume that the use of the contempt power in Bridges and its progeny was irrelevant to the Court's protection of the publications involved.

III. THE EFFECT OF THE CONTEMPT CASES ON CASES INVOLVING A JURY

The contempt cases enunciated a constitutional standard which has established virtually absolute protection for judge directed publications. Although these decisions do not deal with the problem of publications influencing a jury in a criminal trial, they have been read by the courts as holding that publications in this context are similarly protected.

Certainly there is little other explanation for the action of the Georgia Supreme Court in Atlanta Newspapers, Inc. v. State. The defendant published articles during the course of a criminal trial discussing the accused's criminal record and other information similarly inadmissible and prejudicial. Copies of the newspaper were delivered to the courthouse where they were read by the jury. The trial judge declared a mistrial. In picking a new jury the judge found many prospective jurors were disqualified because of bias and prejudice based upon reading these articles. Seemingly, the publication had proved itself to be a "clear and present

44. However, it should be noted that the procedure in Garrison did not provide for a jury trial. See Garrison v. Louisiana, 379 U.S. 64, 65 (1964); Brief for Appellant at 34.
danger” to the impartial administration of justice. The Georgia Supreme Court, however, reversed the contempt conviction on the grounds that the defendant could have reasonably assumed from past practice that the jury would either be kept together or, if allowed to disperse, instructed not to read about the case. Thus, the defendant could not have reasonably anticipated that the articles would have come to the attention of the jury or have interfered with the accused’s right to trial by an impartial jury.

Where courts have not automatically assumed that punishment of out of court publications was barred by Bridges, attempts to apply the Court’s articulated reasoning have resulted in confusion and indecision. Where a court has actually attempted to apply the reasoning of the contempt cases, the most grievous interference with the jury has been protected.

In Baltimore Radio Show, Inc. v. State the defendant had been held in contempt by the trial court for broadcasting in the most sensational manner the news of the arrest, confession, and prior criminal record of the Negro slayer of a white girl in a case which had become the focus of considerable public concern. The attorney for the accused had felt compelled by the publicity to waive his client’s right to a jury trial. Nevertheless, the Maryland Supreme Court found the broadcast protected, holding that it did not create the “clear and present danger” required.

Absent proof of actual prejudice in the community stemming directly from the information broadcast, the court said that prejudice would have to be inferred from the broadcasts themselves. This the court would not do, evidently embarrassed at being asked to hold that the broadcast constituted a clear and present danger to the administration of justice when

46. An Illinois television personality used his position to broadcast vitriolic attacks upon the plaintiff and his witness in a divorce action in which he had been named correspondent. The Illinois courts found him to be in contempt of court. People v. Goss, 20 Ill. 2d 224, 170 N.E.2d 113 (1960), cert. denied, 365 U.S. 881 (1961). The defendant then brought an action under the Civil Rights Act, 42 U.S.C. § 1983 (1964), in the federal district court for a declaratory judgment that his constitutional rights had been violated. The district court held the contempt conviction to be unconstitutional and the mittimus with the sheriff to be null and void. Goss v. State, 204 F. Supp. 268 (N.D. Ill. 1962). The court of appeals reversed, finding no jurisdiction in the federal district court under the Civil Rights Act. 312 F.2d 257 (7th Cir. 1963). If nothing else the case illustrated that two different courts can apply Bridges and its progeny to the same case and come up with different results.

47. See Opinion of the Justices, 349 Mass. 786, 208 N.E.2d 240 (1965) discussing a proposed Massachusetts bill regulating press comment on criminal trials. The Massachusetts high court concluded that it could not determine whether the proposed legislation would be constitutional under the federal decisions.


49. See 193 Md. at 308-16, 67 A.2d at 500-04 for the discussion of the facts.
under existing Maryland or federal law the publicity per se was not sufficient to require a new trial after a jury verdict.\(^{50}\)

The Maryland court refused to make any distinction as to whether the publication was directed at judge or jury, rejecting the obvious difference made by the judge’s training and experience in resisting outside influence.\(^{51}\) Both were held to the same standard.\(^{52}\)

The Supreme Court refused to grant certiorari, with Mr. Justice Frankfurter taking the extraordinary step of writing an opinion pointing out that this was not equivalent to an affirmanace.\(^{53}\)

IV. THE INAPPLICABILITY OF THE CONTEMPT CASES TO JURY DIRECTED PUBLICATIONS

The record strongly indicates that the application of Bridges to publications having an influence upon the jury will result, for one reason or another, in protection of the publication. None of the reasons given will be analytically very satisfactory. It is suggested that the first meaningful step in analyzing the problem of controlling extra record influence upon a jury is understanding that the problem is not resolved by application of the Bridges doctrine.

A. Indications from the Supreme Court

The Supreme Court in the contempt cases has given some indication that the constitutional protection afforded publications criticizing a court does not exist for publications which can interfere with the functioning of the jury. In Pennekamp, Mr. Justice Reed took pains to distinguish comments which questioned the attitude of the judges with “comments on evidence or rulings during a jury trial.”\(^{54}\) In Wood v. Georgia,\(^{55}\) the last contempt for publication case to come before the Court, the Court made explicit distinction between judge and jury directed publications. The defendant, a county sheriff, was held in contempt for a publication alleging that a judge’s instructions to a grand jury to investigate what the judge termed irregularities among the county’s Negro electorate was politically motivated. In reversing the defendant’s conviction for contempt, the Court was at pains to distinguish the situation of the petit jury.

\(^{50}\) Id. at 330-31, 67 A.2d at 511.


\(^{53}\) 338 U.S. 912 (1950).

\(^{54}\) 328 U.S. 331, 348 (1946).

prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding. . . . [W]e need not pause here to consider the variant factors that would be present in a case involving a petit jury. Neither Bridges, Pennekamp nor Harney involved a trial by jury. In Bridges it was noted that “trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper,” and of course the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation.66

The dictum in Wood is considerable indication that the Court recognizes the fundamental differences between the effect of judge and jury directed publications.57

Further indications of the limitations of Bridges was given in Cox v. Louisiana,58 where the court upheld a Louisiana statute prohibiting picketing in or near a court house with the intention of impeding the administration of justice or of influencing a jury or court witness. If Cox rests upon the understanding that large throngs gathered in protest about a courthouse present a very real threat of physical intimidation and that this may be constitutionally prohibited,59 the case makes no new point. In Craig, Mr. Justice Douglas used as an example of a punishable publication one that was designed and executed so as “to cause a march on the court house . . . .”60 If Cox merely means that speech plus something else can be constitutionally prohibited it is of little importance where the speech is as pristine as newspaper comment upon a pending case.

However, in the reasoning of the majority opinion by the then Mr. Justice Goldberg, there is a challenge to the articulated reasoning of the contempt cases.

The statute prohibited picketing with the intent to influence a judge, and it was recognized by the majority that this was the purpose of the defendants. Seemingly this could have provided an opportunity for Mr. Justice Goldberg to reiterate the language of the contempt cases with respect to the “fortitude” of judges.61 Instead he wrote:

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56. Id. at 389-90 (citations omitted).
58. 379 U.S. 559 (1965). Although the Court was unanimous in upholding the validity of the statute, the defendants’ conviction was reversed by a five to four opinion which found some type of “entrapment” in their arrest. The importance of the decision rests with the strong language the then Mr. Justice Goldberg used in upholding the constitutionality of the statute and in recognizing the legitimacy of the state’s interest in passing it.
59. Justices Black and Clark evidently felt that the purpose of the statute was to prevent the intimidation of courts by protesting mobs. See 379 U.S. at 583-84 (Black, J., dissenting); 379 U.S. at 585 (Clark, J., dissenting).
60. 331 U.S. 367, 375 (1947).
It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial.62

The recognition that even a judge may be affected by out of court acts is the position of the dissents, not the majorities, in the contempt cases.63 Cox, moreover, is in accord with Mr. Justice Frankfurter's dissent in Bridges that the state has a legitimate interest in assuring that all appearances of doing justice be observed.64

B. The Historical Reasons for Bridges

The historical pressures which led to the Bridges result are further indications of its inapplicability to jury directed publications. The history of contempt by publication in the United States indicates that a purpose of Bridges was to end very real abuses of the contempt power by the judiciary, and that the abuse of the contempt power to punish out of court utterances was not connected with any attempt to insulate jurors. For it has been well concluded by now that the principal use of contempt by publication was to protect a judge from what he regarded as untoward criticism of either his actions or personality.65

In 1907, the Supreme Court held that the use of the contempt power to punish out of court publications did not violate the first amendment, even assuming that it was applied to the states.66 Between 1907 and 1941 when Bridges was decided, contempt by publication occurred in about forty-nine state cases, of which thirty-eight were concerned solely with attacks upon the judiciary.67 The cases punishing criticism of the judiciary indicate

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62. 379 U.S. at 565.
65. This is the conclusion of virtually all studies of the subject. See Nelles & King, Contempt by Publication in the United States, 28 Colum. L. Rev. 401, 525, 548-49 (1928); Forer, A Free Press and a Fair Trial, 39 A.B.A. J. 800, 843 (1953); Note, The Contempt Power in Montana: A Cloud on Freedom of the Press, 18 Mont. L. Rev. 68, 84 (1956).
66. Patterson v. Colorado, 205 U.S. 454 (1907). The first amendment was not held to be binding upon the states by means of the fourteenth amendment until Gitlow v. New York, 268 U.S. 652 (1925).
67. The following cases involved the use of the contempt power to punish publications in instances where there was no jury to be protected: In re Mitchell, 196 Ala. 430, 71 So. 467 (1916); Van Dyke v. Superior Court, 24 Ariz. 508, 211 P. 376 (1922); Freeman v. State, 188 Ark. 1058, 69 S.W. 2d 267 (1934); In re San Francisco Chronicle, 1 Cal. 2d 630, 36 P.2d 369 (1934); Ex parte Shuler, 210 Cal. 377, 292 P. 481 (1930); Sauer v. Andrews, 115 Cal. App. 272, 1 P.2d 997 (1931); Hamma v. People, 42 Colo. 401, 94 P. 326 (1908); Cormack v.
that under the very liberal interpretation of the contempt power, prevalent in most states virtually any criticism of a judge could be punished. The cases also indicate that judges were not above using the contempt power to punish political commentary with which they disagreed. It was held contemptuous for a newspaper to imply that a judge's decision in an election controversy was motivated by his political opinions and connections; for a "progressive" newspaper to argue that a court's decision was wrong and benefitted only economic royalists; or to call for a public investigation of an allegedly corrupt grand jury.

In the federal courts the impeachment trial of Judge Peck for his alleged abuse of the contempt power had resulted in statutory limitation of the contempt power to "misbehavior . . . in its [the court's] presence or so near thereto as to obstruct the administration of justice . . ." For almost a hundred years "so near thereto" was given a spatial not a

Coleman, 120 Fla. 1, 161 So. 844 (1935); Ex parte Biggers, 85 Fla. 322, 95 So. 763 (1923); Carter v. State, 61 Ga. 430, 6 S.E.2d 175 (1939); Townsend v. State, 54 Ga. 627, 188 S.E. 560 (1936); Cobb v. State, 59 Ga. App. 695, 2 S.E.2d 116 (1939); In re Fite, 11 Ga. App. 665, 76 S.E. 397 (1912); McDougall v. Sheridan, 23 Idaho 191, 128 P. 954 (1913); People v. Gilbert, 281 Ill. 619, 118 N.E. 196 (1917); Nixon v. State, 207 Ind. 426, 193 N.E. 591 (1935); Dale v. State, 198 Ind. 110, 150 N.E. 781 (1926); Kilgallen v. State, 192 Ind. 531, 132 N.E. 682 (1921), rehearing denied, 192 Ind. 531, 137 N.E. 178 (1922); Ray v. State, 186 Ind. 396, 114 N.E. 866 (1917); Haines v. District Court, 199 Iowa 476, 202 N.W. 268 (1925); Campbell v. Jeffries, 244 Mich. 165, 221 N.W. 138 (1928); In re Dingley, 182 Mich. 44, 148 N.W. 218 (1914); In re Nelson, 103 Mont. 43, 60 P.2d 365 (1936); State ex rel. Metcalf v. District Court, 52 Mont. 46, 155 P. 278 (1916); State v. Lovell, 117 Neb. 710, 222 N.W. 625 (1929); State v. New Mexican Printing Co., 25 N.M. 102, 177 P. 751 (1918); In re Brown, 168 N.C. 417, 84 S.E. 690 (1915); In re Megill, 114 N.J.Eq. 604, 169 A. 501 (Ch. 1933); People ex rel. Supreme Court v. Albertson, 242 App. Div. 450, 275 N.Y.S. 361 (4th Dep't 1934); In re Providence Journal Co., 28 R.I. 489, 68 A. 428 (1907); State v. American-News Co., 64 S.D. 385, 266 N.W. 827 (1936); State v. Kirby, 36 S.D. 188, 154 N.W. 284 (1915); In re Hickey, 149 Tenn. 344, 258 S.W. 417 (1924); Ex parte Pease, 123 Tex. Crim. 43, 57 S.W.2d 575 (1933); Ex parte West, 60 Tex. Crim. 485, 132 S.W. 359 (1910); Boorde v. Commonwealth, 134 Va. 625, 114 S.E. 731 (1922); State v. Hildreth, 82 W. 382, 74 A. 71 (1909); State v. Angevine, 104 Wash. 679, 177 P. 701 (1919).

68. It was held to be contempt to refer to a judge as a "wet judge," Boorde v. Commonwealth, 134 Va. 625, 114 S.E. 731 (1922); to say that a decision smelled to heaven, Campbell v. Jeffries, 244 Mich. 165, 221 N.W. 138 (1928); or to criticize the procedure used in examining the prosecuting witness in a rape case, State v. Angevine, 104 Wash. 679, 177 P. 701 (1919).

69. McDougall v. Sheridan, 23 Idaho 191, 128 P. 954 (1913); People v. Gilbert, 281 Ill. 619, 118 N.E. 196 (1917).

70. In re Nelson, 103 Mont. 43, 60 P.2d 365 (1936).

71. Kilgallen v. State, 192 Ind. 531, 132 N.E. 682 (1921), rehearing denied, 192 Ind. 531, 137 N.E. 178 (1922).


causal construction, thus precluding the federal courts from punishing a publication which did not either threaten or hold out a corrupt motive to influence a juror, witness or officer of the court.\textsuperscript{74} This construction was reversed in \textit{Toledo Newspaper Co. v. United States},\textsuperscript{75} where the Supreme Court held that "so near thereto" was to be construed causally. This reading lasted until 1941 when in \textit{Nye v. United States}\textsuperscript{76} the Supreme Court overruled \textit{Toledo} and restored the original spatial limitation. In the interregnum between \textit{Toledo} and \textit{Nye} the federal courts gave indication that they would use the contempt power with as little discretion as had prevailed in the state courts.\textsuperscript{77}

Although there is no way of ascertaining the weight that this history had in the formulation of the majority's opinion in \textit{Bridges}, there is evidence of the Court's awareness of and concern for that history. Mr. Justice Black paid considerable attention to the history of contempt by publication, and he relied upon studies hostile to its unchecked use and dubious of the legitimacy of its reception into the common law.\textsuperscript{78} While declining to hold that \textit{Nye} was a constitutional decision, Mr. Justice Black did say that the restriction of the federal statute when "viewed in its historical context, \textsuperscript{79}demonstrates\textsuperscript{79} a respect for the prohibitions of the First Amendment . . . ."\textsuperscript{77} It was in Mr. Justice Holmes' dissent to the expansion of the federal contempt statute that the conception of "judicial fortitude"\textsuperscript{80} seems to have originated. It of course became a significant part of the rationale in \textit{Bridges}.\textsuperscript{81}

If the purpose of \textit{Bridges} is thus to prevent the tyranny of judges,\textsuperscript{82} then the decision is peculiarly inapplicable to jury directed utterances in which there is no personal motive for a judge to punish the speaker. The history of contempt by publication, moreover, demonstrates that rarely

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\item \textsuperscript{74} E.g., Ex parte Poulson, 19 F. Cas. 1205 (No. 11,350) (C.C.E.D. Penn. 1835).
\item \textsuperscript{75} 247 U.S. 402 (1918).
\item \textsuperscript{76} 313 U.S. 33 (1941).
\item \textsuperscript{77} In Craig v. Hecht, 263 U.S. 255 (1923) the Court denied habeas corpus to a member of the New York City Board of Estimate who had been punished for a contempt which consisted of writing a letter to the Public Service Commission criticizing a federal district court judge's action in a receivership case. Mr. Justice Holmes, dissenting, wrote: "Unless a judge while sitting can lay hold of anyone who ventures to publish anything that tends to make him unpopular or to belittle him I cannot see what power Judge Mayer had to touch Mr. Craig." Id. at 281.
\item \textsuperscript{78} 314 U.S. at 266-67. Mr. Justice Black relied heavily upon the considerable scholarship of Nelles and King, supra note 65, who presented a hostile view of the contempt power.
\item \textsuperscript{79} 314 U.S. at 267.
\item \textsuperscript{80} Toledo Newspaper Co. v. United States, 247 U.S. 402, 425 (1918) (Holmes, J., dissenting).
\item \textsuperscript{81} 314 U.S. at 273, 278.
\end{itemize}
has the contempt power been used, and certainly never abused, to punish jury directed statements. It has almost never been invoked to protect the right of the criminal defendant to an impartial trial. The published reports indicate that prior to Bridges there were about fourteen cases (eleven between 1907-1941) in which the contempt power was used to punish utterances which could have affected a jury. Five of these cases represent comment upon a pending civil case.83 In five of the eight cases in which there was a pending criminal trial the publication concerned was held contemptuous for hindering the prosecution.84 In only three cases was there a publication which could have interfered with the criminal defendant’s rights to an impartial jury.86

V. THE RATIONALE OF BRIDGES AND ITS INAPPLICABILITY TO EXTRA-RECORD INFLUENCE UPON THE JURY

Ultimately the decisions in the contempt cases are an attempt by the Court to reach an accommodation between the fundamental tension presented by the ideal of a trial insulated from extra-record influences and what the Court has considered to be the realities of the American judiciary. The reasons which emerge for this accommodation indicate that the standard of protection afforded judge directed utterances is inapplicable to publications affecting the work of the jury.

In none of the opinions in the contempt cases does any judge deny that "a fair trial requires a determination free from extra-record influence . . .."86 But, at the same time, there has been a recognition that there exists some right to comment upon the performance of the judiciary. In Craig Mr. Justice Douglas wrote:

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85. Globe Newspaper Co. v. Commonwealth, 188 Mass. 449, 74 N.E. 682 (1905); In re Lee, 170 Md. 43, 183 A. 560 (1936); Herald-Republican Publishing Co. v. Lewis, 42 Utah 188, 129 P. 624 (1913). See also In re Independent Publishing Co., 240 F. 849 (9th Cir. 1917), the one federal case to use the contempt power to punish a publication whose influence was adverse to the criminal accused’s interest in an impartial jury.

One objection or criticism [by the defendant newspaper] was that a layman rather than a lawyer sat on the bench. That is legitimate comment; and its relevancy could hardly be denied at least where judges are elected. ... Judges who stand for reelection run on their records. Criticism is expected. Discussion of their conduct is appropriate, if not necessary.\textsuperscript{87}

This comment would seem to reflect Mr. Justice Black’s observation in \textit{Bridges} that “it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.”\textsuperscript{88}

It has been suggested that the Court in the contempt cases, and particularly in \textit{Craig}, has rejected the English conception of the judiciary as an institution vigorously protected from public opinion as inapplicable to the politically oriented American judiciary. Criticism of the English judge, originally forbidden as lese majesty, later became unacceptable because of the sanctity investing judges whose sole allegiance was to the law and who were appointed only from lawyers of considerable scholarship and character. This English model stands only in contrast with the American reality where the judge, as in \textit{Craig}, may not even be a lawyer. Whether elected or appointed to the bench it is not unreasonable to assume that “the judge may be in office as a consequence of political forces which have prevailed . . . in an American election.” Accordingly, the danger is always present that these political forces will attempt “to overreach through the processes of the law.” Furthermore, judges’ acceptance or rejection of an “activist” role may force an alignment “with the political forces in the community when [they are] candidates for election or reelection or for appointment.”\textsuperscript{89}

These would be very practical reasons for protecting criticism of the judiciary. A more articulated basis and the constitutional compulsion for the \textit{Bridges} rule emerged in \textit{Garrison v. Louisiana}.\textsuperscript{90} In reversing the defendant’s conviction for the criminal defamation of several county judges, the Court ignored \textit{Bridges} and the clear and present danger test—urged upon it by the defendant\textsuperscript{91}—but instead held that because a judge was a public official within the meaning of \textit{New York Times}\textsuperscript{92} utterances criticizing him could not constitutionally be punished, either civilly or criminally, unless made with actual malice. \textit{Garrison} is the recognition that a judge is open to criticism because he is a public official, and that the right to freely discuss the stewardship of a public official is “a fundamental principal of the American form of

\textsuperscript{87} 331 U.S. at 376-77.

\textsuperscript{88} 314 U.S. at 270 (footnotes omitted).

\textsuperscript{89} Jaffe, supra note 41, at 508-09.

\textsuperscript{90} 379 U.S. 64, 67, 74 (1964).

\textsuperscript{91} Brief for Appellant at 34, Garrison v. Louisiana, 379 U.S. 64 (1964).

At common law, criticism of the actions of a judge was a form of seditious libel. To allow punishment of judge directed criticism thus becomes a punishment analogous to, if not the same, as seditious libel, the prohibition of which *New York Times* held was barred by the first amendment.

*Garrison* protected criticism of a judge in a context where it could not affect a pending case or indeed any litigation. However, the opinion does not even discuss the utterance's lack of effect upon a judicial proceeding or give any intimation that criticism made during a pending case would not be similarly protected. It is the character of the judge's position as a public and political official which affords protection for judge directed statements. To at least some degree the ability of legislative and judicial officials to function in the heat of political life and weather even "vehement, caustic, and sometimes unpleasantly sharp attacks" has been equated. Criticism, semantically analyzed, of course must include its converse, the expression of what the proper action should be.

Thus, the Court would seem to be protecting extra-record influence upon a trial. But "influence" is a relative word. The problem is not a mere opinion about how a pending case should be determined, for otherwise the law review note on a case pending appeal would be improper. No one has suggested that this type of "influence" can or should be prohibited. Influence, with respect to a judge, must then mean to threaten or bribe.

This type of judge directed comment has never been sanctioned. In *Craig* Mr. Justice Douglas was at some pain to indicate that the defendant, while urging a course of action upon the court, made "no demand that the judge reverse his position—or else." In *Times-Mirror Co.*

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93. Id. at 275 (footnotes omitted).
94. Nelles & King, supra note 65, at 406.
95. "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history... [T]he Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (footnotes omitted).
97. See *Craig v. Harney*, 331 U.S. 367, 377 (1947), where the Court rejected the contention that a judge directed utterance in a case involving issues of public concern was directed to a higher standard of protection than one which merely involved matters of private concern.
99. See *In re Sawyer*, 260 F.2d 189, 200 (9th Cir. 1958), rev'd, 360 U.S. 622 (1959), where the majority opinion in the Ninth Circuit acknowledged Professor Rodell's right to say from his vantage point in New Haven what the defendant, the attorney in a pending case, was punished for saying in Hawaii.
100. 331 U.S. 367, 377 (1947).
Mr. Justice Black held that the strongest construction of the editorial warranted finding nothing more intimidating than threats of future criticism.\footnote{101} In \emph{Bridges} the trial court had miraculously found that Bridges had no intention of attempting to influence the court.\footnote{102}

The reasoning which protects judge directed criticism illustrates its inapplicability to publications influencing a jury. Criticism of a judge is not that "influence" which is prohibited. Criticism of a jury for its verdict similarly presents no problem. Nor are we concerned with the bribery or intimidation of jurors, acts that are always criminal. Influencing a jury requires only presenting it with extra-record facts or opinions that go to the guilt or innocence of the accused. This is analogous to the judge directed statement which carries a threat of reprisal, which has not been protected.

Criticism of the judge is protected, moreover, because the public character of the judicial institution is such that punishment of such criticism would be tantamount to seditious libel. Sanctions for criticism of the juror do not present this problem. The juror is a "public official" only in the sense that he is performing a public function and receiving a nominal compensation from the government. But jurors are neither "government employees who have . . . substantial responsibility for or control over the conduct of governmental affairs . . . ." nor do they hold a "position in government . . . [of] such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it . . . ."\footnote{103} A juror, a private citizen participating in the governmental process in the capacity of an amateur,\footnote{104} should not be considered either a "government employee" or having a "position in government." The jury, unlike the court, is not a governmental institution but an ad hoc body having neither a policy making nor an administra-

\footnote{101} 314 U.S. 252, 272-73 (1941).
\footnote{102} Record at 47-48, Bridges v. California, 314 U.S. 252 (1941).
\footnote{103} The quoted words are the tests Mr. Justice Brennan, writing for the majority of the Court, established in \emph{Rosenblatt v. Baer}, 383 U.S. 75, 85-86 (1966). Mr. Justice Douglas, however, argued in a concurring opinion that the question is "whether a public issue not a public official, is involved." Id. at 91 (footnotes omitted) (emphasis omitted). In any event, it is contended that Mr. Justice Douglas' view on the proper scope of privilege in libel actions does not affect the analysis here. The protection afforded judge directed publications stems from the analogy to seditious libel. It is the character of the judge as public official which affords criticism of his actions protection, and the character of the juror's position which allows comment directed at him to be regulated without invoking the specter of seditious libel. If Mr. Justice Douglas' position is that any publication dealing with a "public issue" is entitled to protection, the character of the party which the publication will influence is of course irrelevant. This problem is discussed pp. 444-51 infra.
\footnote{104} Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 926 (1963).
tive function. The juror is not chosen for any special qualification other than being on the jury roll. Finally, a juror is neither directly responsible to the electorate nor are the people who selected him responsible to the electorate for his actions. Accordingly, to prohibit publicity at a time when such comment could influence a jury's actions does not invoke the analogy to seditious libel; it is not the punishment of criticism of the "government."

VI. A SUGGESTED APPROACH

The Bridges line of authority is thus regarded as being without any analytical usefulness in determining the constitutionality of any direct control of publications influencing a jury. A fresh start must be made, focusing on the specific questions which arise from the very nature of the problem: the time period of the publication; the party it is prejudicing; and the nature of its content.

A. The Temporal Framework

The temporal framework of a criminal prosecution allows the imposition of controls at those times when they are most needed, while permitting free discussion during periods when the constitutional and policy reasons for protecting free and unhampered discussion are strong. No prohibitions should be placed on reporting either before an arrest is made or after the trial is concluded. Before arrest a publication may provide a basis on which to build up public pressure against officials who are failing to enforce the law for corrupt or other unworthy reasons. After a verdict is rendered the fear that publicity could affect a future trial if the verdict is reversed would seem too remote to warrant any restrictions on press comment.

The time period that must be safeguarded is the period between arrest and jury verdict. The most critical period occurs during the trial, for it would seem likely that extra-record impressions received while actually a juror would probably be of more significance than the possibly vague recollection of facts received before whole attention was turned to the case. Accordingly, greater restrictions should be placed on what is permissible comment during the period of the trial. However, some control on post-arrest, pre-trial publicity is desirable. Pre-trial publicity of a

105. Jaffe, Trial by Newspaper, 40 N.Y.U.L. Rev. 504, 512 (1965). Professor Jaffe also points out that this seemed to be the purpose of the newspaper reporting in Pennekamp. He also suggests that the long delay in arresting Dr. Sheppard may justify some of the publicity in that case. Sheppard v. Maxwell, 231 F. Supp. 37, 44-54 (S.D. Ohio 1964), rev'd, 346 F.2d 707 (6th Cir. 1965), rev'd, 384 U.S. 333 (1966).

suppressed confession, for example, could tip the balance where the
evidence in court admits of a reasonable doubt. And allowing pre-trial
publicity in a spectacular case necessarily involves the risk of creating
massive community hostility to the accused.107

B. Publicity Adverse to the Prosecution

Respected commentators have asserted the right of the State to a fair
trial and have urged that defense as well as prosecution be barred from
carrying its case to the newspapers.108 There is of course a societal as well
as an individual interest in a fair trial and there is of course a very basic
societal interest in the conviction of those guilty of criminal acts. But
unlike the accused, the prosecution cannot be heard to complain of a
violation of due process if defense-favored publicity were to result in
acquittal.

The constitutionality of suppressing publicity favorable to the accused
and adverse to the prosecution is dubious. In Wood v. Georgia109 the
Court expressed skepticism as to how the accused's publication of his
defense to the first two counts of contempt by publication could in any
way result in a third count for contempt. Moreover, silencing the de-
fendant is in effect preventing criticism of a governmental action or a
public official; the prohibition of such criticism is directly counter to
the protection given such publications by New York Times.110

Prohibition of defense-biased publicity during the trial would seem
to go against one of the basic reasons for the constitutional guarantee of
a public trial. In reversing a conviction resulting from a closed contempt
proceeding, Mr. Justice Black wrote:

Whatever other benefits the guarantee to an accused that his trial be conducted in
public may confer upon our society, the guarantee has always been recognized as a
safeguard against any attempt to employ our courts as instruments of persecution.
The knowledge that every criminal trial is subject to contemporaneous review in the
forum of public opinion is an effective restraint on possible abuse of judicial power.111

It is doubtful, given the limits of appellate review, that the restraint on
judicial oppression that Mr. Justice Black referred to could be secured by
postponing comment upon the innocence of the accused or the im-
partiality of the tribunal until the proceeding in the trial court was
terminated.

107. See Jaffe, supra note 105, at 519.
108. E.g., S. Griswold, Responsibility of the Legal Profession, Harvard Today 9, 10-12
110. 376 U.S. at 268.
C. The Content of the Publication

The most difficult problem raised concerns the content of the offending publication. The mass media has often justified its reporting of criminal news by reference to the public service it performs in discussing matters of vital and legitimate public interest. There would seem to be some merit to this. In terms of the basic interests of society there is need for public information when a crime has genuine political relevance. In the contempt cases the Supreme Court has given some indication that one of the evils feared from the general use of the contempt power was the suppression of comment concerning matters which the Court felt to be of legitimate public interest.

The more fully articulated protection afforded such publications occurred in *New York Times* where the Supreme Court rewrote the common law of libel, holding that a public official could recover damages for a defamatory statement only if the utterance was made with malicious intent. The majority opinion by Mr. Justice Brennan, however, established much more than a new rule for libel actions.

The opinion recognized a special, almost absolute protection for speech deemed to be within the "core" or "center" of the first amendment. Noting with approval Mr. Justice Brandeis' dictum that "public discussion is a political duty ..." it found that there was "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open ..." As Mr. Justice Brennan later explained, in *New York Times* "the Court examined history to discern the central meaning of the first amendment, and concluded that that meaning was revealed in Madison's statement 'that the censorial power is in the people over the Government, and not in the Government over the people.'" Criticism of those responsible for governmental operations had to be protected lest criticism of government, which is "at the very center of the constitutionally protected area of free discussion ..." be penalized.

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115. 376 U.S. at 268.
117. 376 U.S. at 270.
The application of the reasoning of *New York Times* would seemingly protect publicity disseminating information capable of influencing a jury where such publicity was also involved in criticism of the government. A publication which in order to discuss meaningfully the "stewardship" of the government also finds it essential to discuss a pending criminal case has come within the core of the first amendment while endangering the rights of the accused. Examples of such conflict come easily to mind: a public official is indicted for a crime going to his capacity for office and the ability of the party which elected or appointed him—the political situation might necessitate discussing many factors which could be prejudicial to the defendant's right to an impartial jury.

The logical expansion of the *New York Times* philosophy and reasoning would also seem to protect publicity concerned with public issues as well as commentary directly treating the conduct of a public official. In *Garrison*, Mr. Justice Brennan wrote that "speech concerning public affairs is more than self-expression; it is the essence of self-government." Perhaps this phrase is better understood and sheds more light upon the problem when it is recalled that its author has acknowledged that it "echoes Dr. Meiklejohn’s statement, ‘the freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government.’" Dr. Meiklejohn, believing that the principle of freedom of speech was "derived from the necessities of self-government by universal suffrage . . ." concluded that "the guarantee given by the First Amendment . . . is assured only to speech which bears directly or indirectly upon issues with which voters have to deal . . .”

Our society has traditionally dealt with matters of paramount concern to the electorate through the medium of private associations. The logic of protecting free discussion of governmental activities would seem to compel the next necessary step of similarly protecting discussion involving such institutions as labor unions or mammoth corporations, apparatus which while not formally part of the government raise issues of public concern and problems to which public action is directed. This analysis might mean protecting certain publications prejudicial to the accused in

120. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). "The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." Id. at 275 (footnote omitted).
the context of a trial involving labor racketeering or criminal anti-trust activity. The traditional importance of newspaper exposé and analysis of the ramifications of such public but private crimes is self-evident. Yet the damage to the criminal accused may also be irreparable.

Affording some protection to publicity dealing with matters of political—in the broadest sense of that word—importance has considerable merit. A newspaper reporting a criminal case with implications for national security\textsuperscript{125} or exposing graft and corruption\textsuperscript{126} is performing a valid public function. This, then, is the paramount constitutional issue facing any program regulating prejudicial publicity: matters going to the political process—to the fulfillment of self-government—must be protected.

It would be tempting to conclude that what is needed in this instance of crime reporting with political implications is an “accommodation”\textsuperscript{127} which would preserve the right of discussion while at least blunting some of the most dangerous forms of publicity. The difficulty is that in \textit{New York Times} and its subsequent applications, in an area which offered the opportunity for the most careful balancing of the interests involved,\textsuperscript{128} the Court did not proceed according to a balancing analysis.\textsuperscript{129} The Court’s method of reasoning in \textit{New York Times} indicates that when speech involves a matter of public concern it is questionable whether any balance or accommodation which subordinates the “core” speech to another interest is permissible.

The majority opinion in \textit{New York Times}, while not following the “absolute” protection urged by the concurring opinions,\textsuperscript{130} allowed an exception to the privilege only for publications made with actual malice.\textsuperscript{131} Mr. Justice Brennan has written that “the underpinning of that qualification is the ‘redeeming social value’ test.”\textsuperscript{132}

\textsuperscript{125} See Note, Contempt by Publication, 59 Yale L.J. 534 (1950).
\textsuperscript{127} Cf. Emerson, supra note 104, at 925.
\textsuperscript{128} Kalven, supra note 124, has noted that the Court in \textit{New York Times} adopted as its constitutional principle the so-called “minority” rule of Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). The opinion by Justice Burch “may well be the most elaborate, careful, extended act of balancing in the history of American Law. . . . If ever a case was appropriate for the application of the balancing test, the Times case was. But, from the Court, only silence.” Kalven, supra at 215-16.
\textsuperscript{129} Mr. Justice Brennan has written that Professor Kalven, supra note 128, was correct in stating that the Court did not use a balancing idiom in \textit{New York Times}. Brennan, supra note 118, at 14-15.
\textsuperscript{130} Mr. Justices Black, Douglas and Goldberg argued that the majority did not go far enough and that any comment about a public official, even if made with actual malice, was privileged. \textit{New York Times Co. v. Sullivan}, 376 U.S. 254, 293, 297 (1964).
\textsuperscript{131} Id. at 283.
\textsuperscript{132} Brennan, supra note 118, at 18-19.
Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Chaplinsky v. New Hampshire, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.\

If the only exception to the absolute protection of political speech is speech which is of no redeeming social importance then by its very definition the reporting of a "political crime" is not within the exception; it is concerned with an attempt to say something meaningful about public affairs.

The emphasis on the communication of ideas is strengthened by the particular words of the Chaplinsky liturgy chosen by the Court in Garrison to define social importance: "'no essential part of any exposition of ideas; . . . slight social value as a step to truth . . . .'" Chaplinsky had also said: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words." In the obscenity and libel cases in which this refrain figured, it was questionable whether these words were without constitutional protection solely because they communicated no idea but because they historically were without protection. By focusing on the utilitarian, not historical reasoning, the Court would seem to be doubly emphasizing that the only exception to the absolute privilege for discussion of public affairs is for speech which, like the knowing falsehood, is totally without social importance and is in fact a perversion of true communication.

Application of this analysis to the reporting of the "political crime" would deny the state any power to control the media's discussion no matter how grievous an interference it worked with a trial. However, in the seditious libel case, which is the analogical heart of the analysis demanding almost absolute protection for speech concerning public affairs, the impact of the utterance is only upon the government. When the discussion of public affairs must necessarily involve publicity adverse to a criminal defendant the impact of the reporting is not limited solely to the government but also has effect on the accused's right to an impartial trial. The paradox is that a constitutional rule designed to protect the

134. Id.
citizen's ultimate political responsibility has rebounded to deprive the citizen of an impartial trial.

The right to discuss public affairs has been considered as central to the first amendment because such a right is necessary in order to fulfill our commitment to self-government. But the juror is not a government official: he is the citizen participating in government. His right to be a juror is but an aspect of his right to self-government. Thus, a further paradox emerges: to insure the free discussion necessary to self-government we are impeding the citizen-juror's fulfillment of an obligation and privilege of his right to self-government.

Perhaps the answer is that the attempt to find an area of absolute protection has failed. To argue by analogy from the "core" meaning of the first amendment banning seditious libel and protecting criticism of government is one thing. To say that the analogy carries with it in its application in different areas other than pure criticism of government the same standard of protection is to renounce the hard job of attempting to reconcile interests, in this instance both constitutionally compelled, which are in seeming conflict.138 What is needed here is the same weighing of values which takes into account "the relative seriousness of the danger in comparison with the value of the occasion for speech . . ."139 that is needed in all problems of freedom of speech and press.

The meaning of New York Times with respect to the problem of utterances, which in their discussion of "public affairs" also interfere with a trial, is that in effecting the needed accommodation it must be understood that the speech being "weighed" is of the very highest quality and significance. To justify the suppression of such speech requires the clearest evidence of inevitable harm to the accused's right to a fair and impartial trial.140

However, the usual publication presenting a danger to the rights of the criminal accused is rarely engaged in the process of making any contribution to the exchange of ideas that is the heart of our political

140. The problem of what has been termed the "political crime" has assumed that it would occur in a context in which it was impossible to discuss meaningfully a matter of legitimate public concern without disseminating facts and opinions which would interfere with a criminal defendant's right to an impartial jury. The protection accorded speech which takes the facts of a pending criminal case as a mere illustration in a discussion of public affairs should be considerably less. Here, there is no abrogation of the right to discuss a public issue, but a denial of the right to make the discussion more dramatic by pointing to a pending criminal case and simultaneously publicizing information which would endanger the accused's right to an impartial jury.
PREJUDICIAL PUBLICITY

process. Our abilities for self-government might be seriously impaired if a newspaper were prevented from pointing out that the alderman on trial for bribery was but a visible top of an iceberg of corruption. No impairment to the political process results from prohibitions on publicity in the garden variety sex and murder case. The public may enjoy learning that the accused has a criminal record, confessed and had the murder weapon found on his person. However, this information may or may not be admissible into evidence. It is obvious that it is desirable that the jury should not be able to learn from extra-record sources what is scrupulously kept from it at trial. Prohibitions in this context work no harm to any meaningful and legitimate public interest. Certainly there is no suppression of information central to the political process.

There is a basic attraction in so distinguishing meaningful public discussion from matters of lesser public interest. However, the validity of this analysis is arguable after the Supreme Court's decision in *Time, Inc. v. Hill*, where the majority opinion expressly and repeatedly refused to find any difference between political discussion and public entertainment. The Court there said:

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. . . . "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 . . . We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. "The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]." *Winters v. New York*, 333 U.S. 507, 510. Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent . . . "[i]t must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive’. . . ." 142

The distinctions between *Hill* and the problem of prejudicial publicity are obvious. In *Hill*, the competing interest to the claims of free press was not constitutionally protected; the right to a fair trial and an impartial

141. 385 U.S. 374 (1967). The Supreme Court here reversed plaintiff's verdict for damages under §§ 50-51 of the New York Civil Rights Law. Plaintiff and his family had been the subjects of a widely publicized kidnapping. A play dealing with a markedly similar incident had been written. Plaintiff claimed that defendant Life Magazine's story had improperly represented the fictionalized stage play to be an accurate representation of what had happened to plaintiff and his family. The action was not so much for right of privacy—which had been lost when plaintiff became a newsworthy figure—but for Life's commercial exploitation of a "fictionalization." The Supreme Court held that Life would be liable only if it committed the error with knowledge of the falsity or if its conduct was reckless.

142. 385 U.S. at 388.
jury are constitutionally guaranteed. Mr. Justice Brennan in *Hill*, moreover, does not seem to claim intrinsic value for the publication. Rather, the defendant's "entertainment" was protected so as to give "breathing space" to the first amendment's more precious and fragile fruits. Seemingly, the breathing space given to speech that is not within the "core" protection of the first amendment should be narrower when such speech endangers another constitutionally protected right.

When *Hill* is considered in context with its antecedents in *New York Times*, the application of *Hill* to the problem of prejudicial publicity seems particularly inappropriate. *New York Times* gave virtually absolute protection to certain pristine political utterances. *Hill* has seemingly extended this same standard of protection to entertainment. Before continuing this expansion of the *New York Times* doctrine the admonition of its author against its "blind application" and the need to consider "the factors which arise in the particular context" must be heeded.

To read *Hill* as extending the absolute protection of *New York Times* to entertainment which is prejudicial to a defendant's right to a fair trial would seem to be a peculiarly mindless expansion of a doctrine's usefulness. It would, in effect, make a newspaper the final arbiter of what it could print, and thus is a claim not for freedom of speech but for the freedom to speak. Yet even Professor Meiklejohn, not noted for his anti-civil libertarian bias, concluded that there were words which could and should be punished.

The content of a publication—its relevance to the political process in the broadest sense of the words—must determine to constitutional protection it is afforded. Chief Justice Hughes wrote that, in wartime "[n]o one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops." Implicit in this hypothetical dictum would seem to be the recognition that the content's lack of any value to legitimate discussion and the obvious danger presented to legitimate interests of the State makes any "balance" immediate and obvious. It is not meant to be suggested that the greater powers of the government in wartime provide controlling authority here. But let us understand that "freedom of speech" has some relationship to the message conveyed.

To ask what balance must be reached between the public's right to be

145. Meiklejohn, supra note 123, at 21, 79.
entertained and the criminal defendant's right to an impartial jury and a fair trial is to answer the question by stating it. On the one hand is a minimal public interest in the utterance. Opposed to this is the consideration that the publication of facts or opinions which may reach potential or actual jurors subverts the entire law of evidence which is based upon the premise that a fair trial demands that certain matters not come before the jury. The state as sovereign has the right to protect the integrity of its judicial system. A minimal showing of potential harm should be required to prohibit entertainment capable of interfering with the jury.

VII. Conclusion

It is the conclusion of this paper that limited regulation upon publicity affecting the impartiality of a jury in a criminal case can be constitutionally imposed. Bridges and its progeny should be disregarded as shedding no light upon the problems involved with publicity directed to a petit jury. The central doctrine must instead be found in New York Times Co. v. Sullivan—not by rigidly applying the specific rule but by understanding that the primary function of the first amendment is to protect speech concerned with the political process and the exercise of that sovereignty which the Constitution vests in the electorate.

Any program instituting direct control over mass media reporting of criminal cases should receive its authorization from legislative enactment, rather than drawing upon any inherent power of a court. It would seem particularly unwise for control to be exercised by means of a common law contempt power. The rather shabby history of contempt by publication and the open hostility evidenced to its expansion by the Supreme Court indicates that while its continued use may pose an interesting theoretical question, it would adversely affect the constitutionality of any attempt to prohibit extra-record influence.

The statute which is finally adopted should be able to be invoked by either judge, defendant or district attorney. A Pennsylvania statute providing a cause of action for the defendant where he has been prejudiced by publicity has never been invoked, perhaps for obvious reasons. It is suggested that before trial the lesser likelihood of actual prejudice

149. Pa. Stat. Ann. tit. 17, § 2045 (1962), providing for a monetary recovery by a defendant who has been "prejudiced" by publicity, has never seemed to have been enforced. See Note, Controlling Press and Radio Influence on Trials, 63 Harv. L. Rev. 840, 844 (1950); Special Committee on Radio and Television of the Association of the Bar of the City of New York, Radio, Television and the Administration of Justice, 287 (1965).
should bar any control of publicity concerned with a "public issue." Control over utterances having no concern with public issues or matters of political concern should be twofold. First, the publication of certain specific facts or opinions whose dissemination a legislature could legitimately find represented any inherent danger to the impartiality of the tribunal should be prohibited. The publication of a defendant's criminal record or a confession are obvious examples. However, if these specific prohibitions are not to become a guide to the evasion of the statute's purpose, a further prohibition against utterances which the publisher had reason to know would substantially affect the impartiality of the jury should be established.150

The greater danger presented by publicity during the trial demands a maximum standard of protection against publications of fact or opinion not yet admitted into evidence. For this reason the prohibition established for non-public issue publicity during the pre-trial period should now be extended to all utterances, regardless of their content. Although this would admittedly cause a moratorium on public discussion, the period here would normally be a relatively short one and would thus impose a limited burden upon legitimate discussion.151

It is contended that the balance here reached should be constitutional. As with all balances, all attempts to avoid absolutes, it is incapable of mathematical proof and thus is open to question. In this area in particular, consensus is difficult to find. It is generally recognized, however, that the problem here concerns that reconciliation of competing goods which has always been the paramount concern of constitutional law. It is suggested that an acceptable answer can only be reached by an accommodation that preserves the values easily offered and which rubrics too often obscure.

150. See Smith v. California, 361 U.S. 147 (1959). cf. Meyer, Free Press v. Fair Trial: The Judge's View, 41 N.D.L. Rev. 14, 21-22 (1964). Judge Meyer suggests that there be two categories of offenses. The first would consist of matters which as a matter of law can be said to present a serious and imminent danger of substantial prejudice. The second would consist of matters punishable only if the jury found that in the particular case they created a danger of substantial prejudice. Judge Meyer, however, would seem to omit the scienter requirement which should be essential here.

151. But cf. Bridges v. California, 314 U.S. 252, 269 (1941), where the Court expressed concern that under the California definition of a "pending case" the moratoria on public discussion could last for years.